THE PROPOSED ILLINOIS JUDICIAL ARTICLE.

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Prior comment has been made concerning the circumstances which motivated bar association committees, now merged in the Joint Committee of the Illinois State and Chicago Bar Associations, to propose a new judicial article intended to replace present Article VI of the 1870 Constitution.1 Following upon a series of conferences sponsored by the law schools located within the state, the draft of that proposal, and its accompanying schedule, has been brought to the stage where it can now be subjected to analysis and can receive the attention of all interested persons.

Before any analysis is made, it would be desirable to set forth the text of the final draft. With modifications made at a meeting of the Joint Committee held on June 20, 1952, too late for inclusion in the prior issue of this journal, the proposed judicial article is to read as follows:

ARTICLE VI.

JUDICIAL DEPARTMENT

Section 1. Courts

The judicial power is vested in a supreme court, an appellate court, and circuit courts.

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1 See note in 30 CHICAGO-KENT LAW REVIEW 252-5.
Section 2. Administration

General administrative authority over all courts in this state, including the temporary assignment of any judge to a court other than that for which he was selected, is vested in the supreme court and, subject to its rules, shall be exercised by the chief justice. He shall appoint an administrative director and staff, who shall serve at the pleasure of the court, to assist him in his administrative duties.

Section 3. Practice and Procedure

The supreme court shall make rules governing practice and procedure in all courts. Subject to such rules, the judges of each district of the appellate court and the circuit judges of each circuit court may make rules governing practice and procedure in their courts.

Section 4. Judicial Districts

The state is divided into three judicial districts. The First Judicial District consists of the county of Cook. The Second Judicial District consists of the counties of Iroquois, Ford, McLean, Tazewell, Fulton, McDonough and Hancock and all counties north thereof with the exception of Cook. The Third Judicial District consists of the counties south of the Second Judicial District.

Not less than two judges of the supreme court shall be selected from each of the Judicial Districts. Until otherwise provided by law, nine judges of the appellate court shall be selected from the First Judicial District and three from each of the other Judicial Districts.

SUPREME COURT

Section 5. Organization

The supreme court shall consist of seven judges, one of whom shall be the chief justice. Five judges shall constitute a quorum, and the concurrence of four shall be necessary to a decision.

Section 6. Jurisdiction

The supreme court may exercise original jurisdiction in cases relating to the revenue, mandamus, prohibition and habeas corpus, such original jurisdiction as may be necessary to the complete determination of any cause on review, and only appellate jurisdiction in all other cases.

Appeals from the final judgments of circuit courts shall lie directly to the supreme court as a matter of right only (a) in cases involving a
question arising under the federal or state constitution, and (b) from sentences in capital cases. The supreme court has exclusive authority to provide by rule for appeal in other cases from the circuit courts directly to the supreme court.

Appeals from the appellate court lie to the supreme court as a matter of right only in cases in which a question under the federal or state constitution arises for the first time in and as a result of the action of the appellate court and, subject to rules, by leave of the supreme court in other cases.

**Appellate Court**

**Section 7. Organization**

The appellate court shall be organized in the three judicial districts. Until otherwise provided by law, the court shall consist of fifteen judges. There shall be such number of divisions, of not less than three judges each, as the supreme court shall prescribe. Assignments to divisions shall be made by the supreme court. The majority of a division shall constitute a quorum and the concurrence of a majority of the division shall be necessary to a decision of the appellate court. Each division shall sit at times and places within its district prescribed by rules of the supreme court.

**Section 8. Jurisdiction**

In all cases other than those appealable directly to the supreme court, appeals from final judgments of a circuit court shall lie as a matter of right to the appellate court in the district in which the circuit court is located. The supreme court shall provide by rule for expeditious and inexpensive appeals, and may provide for review by informal proceedings in designated types of cases. The appellate court may exercise such original jurisdiction as may be necessary to the complete determination of any cause on review. The supreme court has exclusive authority to provide by rule for appeals to the appellate court from other than final judgments of the circuit court.

The appellate court shall have such powers of direct review of administrative action as may be provided by law.

**Circuit Courts**

**Section 9. Judicial Circuits**

The state shall be divided into judicial circuits each consisting of one or more counties. The county of Cook shall constitute a judicial circuit and the other judicial circuits shall be as established from time to time by law. Any judicial circuit composed of more than one county shall be compact and of contiguous counties.
There shall be one circuit court for each judicial circuit which shall have such number of circuit and associate judges as may be prescribed by law, and such number of magistrates as may be prescribed by the supreme court. There shall be at least one associate judge from each county. Any law reducing the number of judges shall be without prejudice to the right, if any, of judges in office at the time of its enactment to seek retention in office as provided in this Article. There shall be no masters in chancery or other fee officers in the judicial system.

The supreme court shall designate one of the circuit judges in each circuit to serve at its pleasure as chief judge. Subject to the authority of the supreme court, the chief judge shall have such administrative authority as may be vested in him by the circuit judges, and the circuit judges may provide for divisions, general or specialized, and for appropriate times and places of holding court. The supreme court by rule may limit or define the matters to be assigned to magistrates.

Upon application of any county, the circuit court may by order designate such number of special magistrates as the court deems necessary in such county, to serve at its pleasure, with power to take such emergency action in civil or criminal cases as the supreme court may by rule prescribe. Special magistrates shall not be subject to the provisions of Section 15, 18, 19 and 20 of this Article. Their compensation, if any, shall be fixed and paid by the county.

Section 10. Jurisdiction

The circuit courts shall have unlimited original jurisdiction of all justiciable matters, and such powers of review of administrative action as may be provided by law.

Selection and Tenure of Judges

Section 11. Vacancy

Whenever a vacancy occurs in the office of a judge, the governor shall fill the vacancy by appointing one of the persons nominated as hereinafter provided. The number of nominees for each such office shall be fixed by law but shall be not less than two nor more than five. If the governor fails to appoint within 90 days after the nominations have been certified to him by the nominating commission, the appointment shall be made by the supreme court from the panel of nominees. Each judge appointed shall hold office for a term ending December thirty-first following the next general election after the expiration of twelve months in office.
Section 12. Judicial Nominating Commissions

Nominations of judges shall be made by nominating commissions. There shall be one commission for the judges of the supreme and appellate courts and one for each circuit court. Each commission shall consist of an equal number of members and nonmembers of the bar of this state. The bar members shall be elected by members of the bar in the appropriate district or circuit pursuant to rules of the supreme court and the other members shall be selected as provided by law. Nominations to fill vacancies in judicial office shall be made only by the concurrence of a majority of the authorized membership of the commission. Members of nominating commissions shall not hold any official position in a political party, nor shall they receive compensation for services, but they shall be entitled to reimbursement for necessary expenses.

The supreme court shall make rules to enforce appropriate action by the nominating commissions.

Section 13. Election

Not less than sixty days prior to the general election next preceding the expiration of his term of office, any judge may file in the office of the secretary of state a declaration of candidacy to succeed himself and the secretary of state, not less than forty-five days prior to the election, shall certify his candidacy to the proper election officials. At the election the name of each judge who has filed such a declaration shall be submitted to the voters, on a special judicial ballot without party designation, on the sole question of whether he shall be retained in office. The elections shall be conducted in the appropriate districts and circuits. If a majority of the electors voting on the question vote to retain the judge in office, he shall thereby be elected for the full term of the office commencing January first after the election. If an incumbent has not filed a declaration or, having filed, fails of election, his office shall become vacant at the expiration of his term.

As used in this Article, the term “general election” means the biennial election at which members of the general assembly are elected.

Section 14. Chief Justice of Supreme Court

The chief justice of the supreme court shall be appointed by the governor for a term of six years from a panel of two judges of the supreme court nominated by the judicial nominating commission for that court. The chief justice shall be eligible for reappointment.
Section 15. Appointment of Magistrates

The circuit judges in each circuit shall appoint magistrates from nominations made by the nominating commission for the circuit. The number of nominees for each such office shall be fixed by rule of the supreme court. Magistrates shall serve at the pleasure of the circuit judges.

Section 16. Referenda

The general assembly may from time to time by law propose changes in or substitutions for any of the provisions of Sections 11, 12, 13, 14 and 15, but no such law or amendment thereof shall go into effect unless approved by a majority of the voters voting upon the question at the general election next following the enactment thereof.

Section 17. Terms of Office

The term of office of judges of the supreme and appellate courts shall be twelve years and of circuit and associate judges of the circuit courts eight years.

Section 18. Eligibility for Office

No person shall be eligible for the office of judge or magistrate unless he shall be a citizen of this state and a member of its bar.

General

Section 19. Prohibited Activities

Judges and magistrates shall devote full time to their judicial duties, shall not engage in the practice of law or hold any other office or position of profit under this state or any office of profit under the United States, and shall not hold office in or directly or indirectly make any financial contribution to any political party, but compensation for service in the state militia or the armed forces of the United States for such periods of time as may be determined by the rules of the supreme court shall not be deemed "profit".

Section 20. Judicial Salaries and Expenses

Judges and magistrates shall receive for their services salaries provided by law. Salaries as to each class of judicial officer shall be uniform within each circuit. The salaries of judges shall not be diminished during their respective terms of office. Each judicial officer shall be paid actual and necessary expenses when performing duties outside the county of his residence. All salaries and expenses shall be paid by the state, except
that circuit or associate judges and magistrates in Cook County shall re-
ceive such additional compensation from the county as may be provided by
law.

Section 21. Retirement, Suspension and Removal

Notwithstanding the provisions of this Article relating to terms of
office,

(a) the general assembly may provide by law for the retirement
of judges automatically at a prescribed age;

(b) subject to rules of procedure to be established by the supreme
court and after notice and hearing, any judge may be retired for dis-
ability or suspended without pay or removed for cause by a commis-
sion composed of one judge of the supreme court selected by that
court, two judges of the appellate court selected by that court, and
two circuit judges selected by the supreme court.

Any retired judge may, with his consent, be assigned by the supreme
court to judicial service, and while so serving shall receive the compensa-
tion applicable to such service in lieu of retirement benefits, if any.

Section 22. Judicial Conference

The supreme court shall provide by rule for an annual judicial con-
ference to consider the business of the several courts and to suggest im-
provements in the administration of justice.

Section 23. Clerks of Courts

The general assembly shall provide by law for the selection, terms of
office, removal for cause and salaries of clerks and other nonjudicial
officers of the various courts.

State’s Attorneys

Section 24. Selection—Salary

There shall be a state’s attorney elected in each county in the year
1956 and every fourth year thereafter for a term of four years from the
first day of January next after his election. No person shall be eligible
for such office unless a citizen of this state and a member of its bar. His
salary shall be prescribed by law.

The general assembly may, in lieu of the foregoing, provide for one
state’s attorney for each judicial circuit, whose selection, qualifications,
duties, tenure of office and salary shall be as provided by law.
Paragraph 1. This Article shall become effective on the first day of July of the second calendar year following its adoption by the people.

Paragraph 2. Except to the extent inconsistent with the provisions of this Article, all provisions of statutes and rules of court in force on the effective date of this Article shall continue in effect until superseded in a manner authorized by this Constitution.

Paragraph 3. Until otherwise provided by rule of the supreme court appeals from decisions of the appellate courts shall lie as a matter of right to the supreme court in all cases in which there is a dissent in the appellate court or a judge participating in the decision certifies that in his opinion the decision is contrary to a prior decision of the supreme court or appellate court.

Paragraph 4. Until changed by law, the existing judicial circuits shall be continued.

Paragraph 5. Each supreme court judge, circuit judge, judge of the Superior Court of Cook County, county judge, probate judge, judge of any city, village or incorporated town court, chief justice or judge of any municipal court, in office on the effective date of this Article, and each justice of the peace and police magistrate elected prior to the adoption of this Article and in office on its effective date shall continue to hold office until the expiration of his existing term, as follows:

(a) Judges of the supreme court shall continue as judges of said court.

(b) Circuit judges shall continue as circuit judges of the several circuit courts.

(c) In Cook county, the judges of the Superior Court, the probate court, the county court, and the chief justice of the Municipal Court of Chicago shall be circuit judges; the judges of the Municipal Court of Chicago, the chief justice and judges of the Municipal Court of Evanston, and the judges of the several city, village and incorporated town courts shall be associate judges of the circuit court; and justices of the peace and police magistrates shall be magistrates of the circuit court.

(d) In counties other than the county of Cook the county judges, probate judges, and the judges of any city, village or incorporated town courts shall be associate judges of the circuit court.

(e) In counties other than the county of Cook the police magistrates and justices of the peace shall be magistrates of the circuit court.

(f) Unless otherwise provided by law the justices of the peace and
police magistrates shall continue to perform their non-judicial functions for the balance of their respective terms.

(g) The provisions of this Article governing eligibility for office shall not affect the right of any incumbent to continue in office for the balance of his existing term pursuant to the provisions of this paragraph. For the balance of such existing term, the provisions of this Article concerning prohibited activities shall not apply to a judge of a county, probate, city, village or incorporated town court, a justice of the peace or police magistrate.

Paragraph 6. Elections on declarations of candidacy of judges of the supreme court in office on the effective date of this Article shall be held in the Judicial Districts established by this Article, as follows:

(a) For incumbents from the existing First, Second and Third Supreme Court Districts, in the Third Judicial District.

(b) For incumbents from the existing Fourth, Fifth and Sixth Supreme Court Districts, in the Second Judicial District.

(c) For the incumbent from the existing Seventh Supreme Court District, in the First Judicial District.

Paragraph 7. Prior to the effective date of this Article appointments of the chief justice of the supreme court and judges of the appellate court shall be made in the manner provided in this Article and Schedule to take office on the effective date of this Article. Except as otherwise provided by law, if as a result of any appointment to the appellate court, a vacancy shall occur in the office of circuit judge, the vacancy shall not be filled unless the number of circuit judges in the circuit would thereby be reduced to less than three.

Paragraph 8. If the general election next preceding the expiration of the term of office of any judge who is in office on the effective date of this Article shall be more than six months prior to such expiration, he shall not be required to file a declaration of candidacy for such election, but shall continue in office until January first after the next general election and may file a declaration of candidacy not less than sixty days prior to that election.

Paragraph 9. On the effective date of this Article,

(a) all justice of the peace courts, police magistrate courts, city, village and incorporated town courts, municipal courts (including the Municipal Court of Chicago), county courts, probate courts and the Criminal and Superior Courts of Cook County are abolished and all their jurisdiction, judicial functions, powers and duties are transferred to the respective circuit courts, and until otherwise provided by law non-judicial
functions vested by law in county courts or the judges thereof are transferred to the circuit courts;

(b) all the jurisdiction, functions, powers and duties of the separate appellate courts shall be transferred to the appellate court provided for in this Article, in the appropriate Judicial District.

Paragraph 10. Each clerk of court in office on the effective date of this Article shall continue to hold office, until the expiration of his existing term as follows:

(a) The clerk of the supreme court shall continue in such office.

(b) The clerks of the several appellate courts shall choose one of their number to be chief clerk of the appellate court and each of the other three shall be clerk of the court in the district in which he resides.

(c) In Cook County, the several clerks of the respective courts of record shall be clerks of the circuit court, and shall perform such services as may be prescribed by rule of the circuit court.

(d) In each judicial circuit outside Cook County the clerks of the circuit courts in their respective counties shall be clerks of the circuit court, and the clerks of the other courts of record shall be associate clerks of the circuit court.

Paragraph 11. On the effective date of this Article, the bailiff of the Municipal Court of Chicago shall continue in office for the balance of his term, and he, his deputies and assistants shall perform such services as may be prescribed by rule of the circuit court.

Paragraph 12. Notwithstanding the provisions of Section 9 of this Article, masters in chancery and referees in office in any court on the effective date of this Article shall be continued as masters in chancery or referees, respectively, until the expiration of their terms.

Paragraph 13. On the effective date of this Article, each court into which jurisdiction of other courts is transferred shall succeed to and assume jurisdiction of all causes, matters and proceedings then pending, with full power and authority to dispose of them and to carry into execution or otherwise to give effect to all orders, judgments and decrees theretofore entered by the predecessor courts.

Paragraph 14. On the effective date of this Article, the files, books, papers, records, documents, moneys, securities, and other property in the possession, custody or under the control of the courts hereby abolished, or any officer thereof, are transferred to the circuit court; and thereafter all proceedings in all courts shall be matters of record.

Paragraph 15. Until otherwise provided by rule of the supreme court the cases assigned to magistrates shall be those within the jurisdiction of
Paragraph 16. Upon the adoption of this Article the general assembly shall enact such laws and make such appropriations and the supreme court shall make such rules as may be necessary or proper to give effect to its provisions.

Comprehension of the changes intended to be wrought through the medium of this proposal can best be gained through the means of a short synopsis of the planned judicial structure. It would then be possible to follow up with a more detailed analysis of specific points and a comparison between the proposed judicial organization and the one which exists at present.

It is evident, at the start, that the drafters have in mind not only a simplification in the form of the organization but also a reduction in the number of judicial tribunals, in order to eliminate that overlapping of jurisdiction which is likely to be present where many trial courts exist. It is also apparent that the plan is designed to remove that lack of efficiency which is likely to attend upon the existence of a machine made up of independent and unintegrated parts. To that end, the planned judicial structure is to be built up of courts existing at only three levels, to-wit: a single supreme court at the head; a single intermediate appellate court, with a necessary number of convenient divisions, beneath; and a series of related and equal circuit courts at the trial level. All other specialized tribunals presently in existence are to be abolished and their functions transferred to the appropriate circuit court. As visualized, the supreme court is to have general administrative authority over all of the courts, is to have wide rule-making powers, is to exercise a limited and permissive, rather than mandatory, original jurisdiction, and is to be concerned with few appeals as of right but is to be able to expand its reviewing power if that should prove to be desirable. The single appellate court, acting through divisions, is generally intended to provide that degree of review which the litigant might feel should be his, as of right, under concepts of due process. The circuit court, wherever located, is to be the trial court with unlimited original jurisdiction over all justiciable matters.
Aside from the detailed changes to be noted hereafter, the proposed draft also initiates a plan for the original selection of judges through judicial nominating commissions rather than by public vote. Judges so appointed are to be retained, if the public should so consider, through the means of non-partisan elections at which the judges run on, or against, their records rather than against opponents seeking to replace them in office. The proposed draft also adds, at the trial level, the unique feature of judges of varying grades within the same tribunal, designating them as judges, associate judges, and magistrates, but it requires that all judicial personnel shall be members of the bar and that all fee judicial offices shall be abolished. These preliminary comments merely highlight the issues in need of attention before one could formulate a judgment on the wisdom of the entire proposal. Turning to a more detailed analysis, the first of the proposed courts to be examined should be the highest of the proposed tribunals.

I. The Proposed Supreme Court.

It is proposed that the supreme court should consist, as at present, of seven judges, one of whom is to be the chief justice, but five judges, hereafter, will constitute a quorum, of whom four must concur in order to produce a decision. The judges are to be selected at the outset, except as to sitting judges who are covered into the new system by an appropriate section of the Schedule, by the governor from a panel of nominees designated by a judicial nominating commission. The persons so appointed

2 Compare Ill. Const. 1870, Art. VI, § 2, with Draft, § 5. The change in the number necessary to form a quorum was probably suggested to avoid the possibility of an even division among the judges, with the attendant automatic affirmance of the lower court decision by reason of a failure to secure the concurrence of a majority of the quorum in favor of a reversal. See, for example, Kerr v. Whiteside, 1 Ill. 390 (1831).

3 See Draft of Schedule, ¶ 5, which provides that a sitting judge shall continue to hold office until the expiration of his term.

4 Draft § 12 provides for a separate nominating commission for judges of the supreme and the appellate court.
are to serve for a limited time\textsuperscript{5} and then, to retain office, must run for election\textsuperscript{6} for a regular term of twelve years.\textsuperscript{7} To be eligible, the supreme court nominee must be a citizen of the state and a member of its bar\textsuperscript{8} and, apparently, must be a resident of the judicial district from which he is selected.\textsuperscript{9} He is expected to be a full-time judicial officer, on a salary to be paid by the state,\textsuperscript{10} for the draft prohibits certain forms of non-judicial activity on his part.\textsuperscript{11} From among the judges so appointed, the governor is to designate one to serve as chief justice for a term of six years, which person is eligible for re-appointment.\textsuperscript{12} The judges are to be subject to automatic retirement at an age to be prescribed by the legislature, but may also be retired for disability, or be suspended or removed for cause, after notice and hearing, in a fashion other than impeachment.\textsuperscript{13}

\textsuperscript{5} Draft \$ 11 fixes the time as "a term ending December thirty-first following the next general election after the expiration of twelve months in office." As the expression "general election" is defined, by Draft \$ 13, to be the biennial election at which members of the general assembly are elected, the appointed judge might serve for as little as fourteen months, approximately, or might be on the bench, without having to seek election, up to as much as thirty-eight months.

\textsuperscript{6} Draft \$ 13.

\textsuperscript{7} Draft \$ 17. The present term for judges of the supreme court is nine years. There is room, under Schedule \$ 8, for a continuance of the present practice of staggered terms to prevent the possibility of the election of an entirely new bench at any one time. See 40 Ill. B. J. 97, and Ill. Rev. Stat. 1951, Vol. 1, Ch. 46, \$ 2–7.

\textsuperscript{8} The 1870 Const., Art. VI, \$ 2, carries the additional qualification that the judge should be at least thirty years of age and should have resided in the state for five years next preceding his election. It is silent on the point of membership at the bar.

\textsuperscript{9} Draft \$ 4 divides the state into three judicial districts and provides that "not less than two judges of the supreme court shall be selected from each" of these judicial districts. The mechanics of selecting the seventh judge is not made readily apparent, but presumably will be determined by the governor at the time of filling a vacancy, pursuant to Draft \$ 11. Paragraph 6 of the Schedule correlates the present seven judicial districts with the three proposed districts to exist hereafter.

\textsuperscript{10} Draft \$ 20 leaves the size of the salary to be determined by law except for the requirement that the salary "shall not be diminished" during the term of office. The 1870 Const., Art. VI, \$ 7, specifies that the salary should not be "increased or diminished" during the term. Elimination of the word "increased" should serve to prevent a recurrence of the deplorable state of affairs which did, at one time, prevail in Illinois: 30 Chicago-Kent Law Review 252-3.

\textsuperscript{11} See Draft \$ 19. In conformity with Canon 28 of the Canons of Judicial Ethics of the American Bar Association, the judge is not to "hold office in or directly or indirectly make any financial contribution to any political party."

\textsuperscript{12} The governor's choice is limited, by Draft \$ 14, to one of two persons selected by the judicial nominating commission of that court. At present, the practice has been to rotate the office of chief justice among the judges: Ill. Rev. Stat. 1951, Vol. 2, Ch. 110, \$ 259.56. That practice is to continue, according to Schedule \$ 7, until the new article becomes effective.

\textsuperscript{13} Compare Draft \$ 21 with Ill. Const. 1870, Art. VI, \$ 30.
The tribunal so composed, with the other courts of the state, is to possess the judicial power of the state;\textsuperscript{14} is given general administrative authority over all other courts and their judges;\textsuperscript{15} and is to be the repository of the rule-making power in matters of practice and procedure for all courts.\textsuperscript{16} In the interest of efficient administration of the judicial power, the proposed supreme court is to be given authority to establish as many divisions of the appellate court, each to consist of not less than three judges, as conditions may require; to make assignment of judges to that court; and to fix the time and place of its sittings.\textsuperscript{17} It is also to be given authority over the circuit courts, at least to the extent of designating the several chief judges thereof, the number of magistrates to serve in each, and to define the jurisdiction and authority of such magistrates.\textsuperscript{18} It may, if the governor fails to act to fill a vacancy within a reasonable time, restore the size of the bench to that originally planned by exercising his authority for him,\textsuperscript{19} and is to have considerable authority over the selection and operations of the judicial nominating commissions.\textsuperscript{20} The court is also directed to provide by rule for the holding of an annual judicial conference, at which the business of the sev-

\textsuperscript{14}Draft §1. It directs that the "judicial power is vested" in a supreme court, an appellate court, and circuit courts. The style of the present provision, Ill. Const. 1870, Art. VI, §1, states: "The judicial powers . . . shall be vested in one supreme court. . . ." Italics added. It is uniform with Art. IV, §1, relating to the legislative power, and Art. V, §1, concerning the executive department. A retention of uniform phraseology would seem desirable.

\textsuperscript{15}Draft §2. It would appear to be contemplated that, subject to rules, the administrative authority will be exercised by the chief justice, aided by an appointed administrative director and staff. The functions of the administrative director, presumably, would follow closely along the lines of the present federal officer serving the United States Supreme Court.

\textsuperscript{16}Draft §3. Local rules for lesser tribunals are not to be prohibited provided they are not inconsistent with general rules of the supreme court.

\textsuperscript{17}Draft §7.

\textsuperscript{18}Draft §9. Until the supreme court acts, such magistrates are to exercise the jurisdiction possessed by justices of the peace and police magistrates as the same might exist immediately prior to the effective date of the new article: Schedule §15.

\textsuperscript{19}Draft §11. It is planned, thereby, to avoid a defect in U. S. Const., Art. II, §2, dealing with the presidential power of appointment of judges. That defect has been made apparent, in the recent past, by reason of the squabble over the filling of vacancies existing in the federal courts sitting in Illinois.

\textsuperscript{20}Draft §12. The supreme court is to provide for the manner of electing the bar members of such commissions. To that end, it may find it necessary to organize all lawyers within a given district. If so, the door may thereby be opened to the development of an integrated bar, a point on which not all lawyers in Illinois are in agreement.
eral courts may be considered and recommendations adopted for
the improvement of the administration of justice, and it is en-
joined, by Paragraph 16 of the Schedule, to make all rules neces-
sary or proper to give effect to the provisions of the new article.

Insofar as the judicial work of the proposed supreme court
is concerned, it is expected that the court will exercise a limited
degree of original jurisdiction but, unlike Section 2 of Article
VI of the present constitution, such jurisdiction is permissive,
not mandatory. It is, however, to be given authority to exercise
so much original jurisdiction as may be necessary to the complete
determination of any cause on review, thereby obviating a defect
in the present powers of the court. The great bulk of the work
of the court, it is expected, will arise from the exercise of appel-
late jurisdiction, but again the authority is limited. Direct appeal
to the supreme court, as a matter of right, is to be restricted to
(a) cases involving a question arising under the federal or state
constitution, and (b) from a sentence, presumably of execution,
in capital cases, thereby eliminating the right of direct appeal
in matters affecting franchises, freeholds, revenue, cases in which
the state may be a party, and a host of other statutory proceed-
ings.

It is contemplated that the supreme court, relieved of the
pressure of much of the business presently thrust upon it, will

21 Draft § 6 states the supreme court “may exercise original jurisdiction in cases
relating to the revenue, mandamus, prohibition and habeas corpus. . . .” It con-
shall have original jurisdiction in cases relating to the revenue, in mandamus and
habeas corpus. . . .” Italics added. The addition of prohibition to the list is con-
sonant with the idea that the supreme court is to be more than the titular head
of the judicial organization. It is doubtful if the shift from “shall” to “may”
possesses any real significance in view of the reluctance of the court to exercise its
original jurisdiction. See Stanley and Severns, “The Original Jurisdiction of the
Illinois Supreme Court,” 22 CHICAGO-KENT LAW REVIEW 169 (1944), and note on
People ex rel. Jones v. Robinson, 400 Ill. 553, 101 N. E. (2d) 100 (1951), in 30
CHICAGO-KENT LAW REVIEW 282-5. It should be noted that the proposed original
jurisdiction is not exclusive in character.

22 See note in 21 CHICAGO-KENT LAW REVIEW 244-7, and see also Schmidt v.

23 Draft § 6. Since the death penalty is not the automatic result of a verdict of
guilty of murder, as is true in some states where degrees of murder exist, it is
difficult to see wherein a sentence for a term of years for murder differs from a
similar sentence for other felonies. Compare the proposed provision for direct
appeal to the supreme court with Ill. Rev. Stat. 1951, Vol. 1, Ch. 38, § 780½, and
Vol. 2, Ch. 110, § 199.
then be able to deal with vital issues expeditiously. It has not been denied the right to extend the privilege of further review over other cases, which cases will, as of right, first be reviewed by the appellate court, for it may, pursuant to Paragraph 3 of the Schedule, take cases from that court in which there was a dissent or where one of the participating judges certifies that, in his opinion, the decision is contrary to a prior decision of the supreme court or appellate court. In addition, the supreme court is to have power to review all holdings of the appellate court wherein a question under the state or federal constitution has arisen for the first time in, or as a result of action by, the appellate court.

Without doubt, the court so established will need the services of a clerk to keep its records, files, dockets, and the like. To that end, it has been provided that the existing clerk is to continue in office until the expiration of his term and the general assembly is to provide, by law, for the selection, term of office, removal for cause, and the salary of the clerk thereafter. The present court is also possessed of an Official Reporter, appointed pursuant to the 1870 Constitution, whose duty it is to publish the opinions which the justices are, by law, presently obliged to de-

24 Draft § 8.
25 The section of the Schedule proposes a substitute for the present certificate of importance which requires the concurrence of two of the judges of the appellate court. A certificate of importance, however, is not subject to the limitations mentioned and may, therefore, be used in other situations.
26 Draft § 6. The section also adds that the supreme court may, subject to rules, grant leave to appeal to it "in other cases." In that respect, the current limitations in Ill. Rev. Stat. 1951, Vol. 2, Ch. 110, § 199(2), relating to the minimum jurisdictional amount requisite in certain types of cases, and for issuance of a certificate of importance, will presumably be repealed. Although review before the supreme court itself is apparently intended only where a final judgment exists, and then only in formal fashion, the court is authorized to provide by rule for review before the appellate court by informal proceedings in designated types of cases as well as on other than final judgments: Draft § 8.
27 Schedule § 10(a).
28 At present, the Clerk of the Supreme Court is elected pursuant to Ill. Const. 1870, Art. VI, § 10, and Ill. Rev. Stat. 1951, Vol. 1, Ch. 25, § 1, and Ch. 46, § 2—8. It is not known if the term "selection" was deliberately chosen so as to permit of legislation authorizing the court, and all other courts, to choose its own officials, so as to avoid the necessity for public "election," or whether an oversight occurred at this point.
29 See Draft § 23.
liver in writing and spread upon the records of the court.\textsuperscript{31} It is worthy of note that the proposed draft says nothing about this official, except as the same may be inferred from the presence of language authorizing the general assembly to provide by law for "other non-judicial officers of the various courts,"\textsuperscript{32} so it may be supposed that the framers of the draft are content with the present legislative arrangements.\textsuperscript{33} Some, however, would prefer to have the obligation to prepare and publish written opinions in all cases rest upon a constitutional requirement, particularly if the work of the supreme court is, in the main, to be confined to matters of vital concern.\textsuperscript{34}

There is little that could be said by way of criticism of the supreme court so to be constituted and much to be lauded in the proposal. Some may be inclined to claim that disproportionate representation on the court has been given to the several geographic areas of the state, a claim which might be advanced on the basis that proportional representation in the judicial department is as much to be desired as in the state legislature. It is true that the contemplated division of the state into the three proposed judicial districts\textsuperscript{35} will result in a degree of imbalance


\textsuperscript{32} Draft § 23.

\textsuperscript{33} See, for example, Ill. Rev. Stat. 1951, Vol. 1, Ch. 37, § 16, creating the office of marshal of the supreme court, and Ch. 37, § 23, providing for secretarial assistance for the justices.

\textsuperscript{34} Constitutional mandate for written, public opinions appear in at least twenty-eight state constitutions, of which Ariz. Const. 1912, Art. VI, § 2, is typical. It provides: "... In the determination of causes, all decisions of the court shall be given in writing, and the grounds of the decision shall be stated." The most recent state constitution, that adopted in New Jersey, is silent on the point. It does, however, contain a provision to the effect that the supreme court "shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted." N. J. Const. 1947, Art. VI, § 2(3). The decision in the case of In re Day, 181 Ill. 73, 54 N. E. 646, 50 L. R. A. 519 (1899), would appear to make a constitutional provision on the point unnecessary in this state.

\textsuperscript{35} Draft § 4. In place of the seven present supreme court districts fixed by Ill. Const. 1870, Art. VI, § 5, and re-affirmed in Ill. Rev. Stat. 1851, Vol. 1, Ch. 37, § 1, with modifications made by Ch. 37, §§ 2-4, the state is to be divided into three districts. Cook County is to constitute the First Judicial District: the former area of the Appellate Court for the Second District plus the counties of Ford, McLean, Tazewell, Fulton, McDonough, and Hancock, taken from the present Appellate Court for the Third District, will make up the Second Judicial District; and the balance of the state, consisting of the remainder of the present Appellate Court for the Third District and all of the Fourth District, is to be consolidated into the Third Judicial District.
of population between the districts, but some compensation for this fact would seem possible by selecting the seventh judge, at least occasionally, from the proposed First Judicial District. At least, the prospective arrangement would be better than the present one, for under it the Seventh District, including Cook County, with more than one-half of the state population within its borders, selects but one of the seven judges composing the present court.

Without expressing an opinion on the point of whether or not judges should be selected on a proportionate representation basis, it is possible, however, to point out that the drafters of the 1870 Constitution recognized the possibility of shifts in population for they provided that the judicial districts there fixed should so remain "until otherwise provided by law," whereas the proposed judicial article is inflexible. If population increases occurring hereafter were to be uniform in character, this inflexibility might be a matter of no consequence, but a comparison between the 1940 and the 1950 census totals reveals that the rate of population change is far from uniform. As a matter of fact, while eight counties in the proposed Second Judicial District suffered a decline in population between the two census periods, as many as forty-five counties in the proposed Third Judicial District were adversely affected, leading one writer to comment that the "location of counties gaining and losing confirms the pattern that Southern Illinois generally lost ground while Northern Illinois counties gained during the past decade." In the light thereof,

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36 According to the 1950 census, the First Judicial District (Cook County) will have a population of approximately 4,508,000, or roughly twice the size of the aggregate of the Second (2,162,600) and Third (2,035,500) Judicial Districts. See 39 Ill. B. J. 482.
37 Draft § 4 contemplates that at least two supreme court judges shall be selected from each of the judicial districts.
38 The present Seventh Supreme Court District population is roughly 5,000,000 out of a total of 8,700,000 for the entire state: 39 Ill. B. J. 482.
40 For example, the proposed Second Judicial District, in 1940, would have included a population of 1,860,300, but by 1950 would have increased to 2,162,600. In contrast, the proposed Third Judicial District, totalling 1,967,600 in 1940, had climbed to only 2,035,500 in 1950. See 39 Ill. B. J. 482.
a rigid division of the state into permanent and unchangeable judicial districts is not to be recommended.

A second area of criticism may focus around the proposed jurisdiction of the new supreme court. At present, for example, the state is entitled to have direct review before the supreme court in cases where an order or judgment is entered quashing or setting aside an indictment in a criminal case.\(^4\) That issue is most apt to arise when a defendant has succeeded in his claim that the statute, on which the prosecution has been based, is unconstitutional in character.\(^4\) If so, it is possible that direct review by the supreme court would hereafter be possible under the reserved jurisdiction to deal with cases involving a question arising under the federal or state constitution,\(^4\) but if the holding is based on any other ground, the case would have to proceed by way of the appellate court and might never receive the consideration of the supreme court.

Mention has been made of the fact that all of the supreme court original jurisdiction is to be permissive in character,\(^4\) but the methods proposed by which other cases might eventually reach the supreme court are left entirely too vague. Except for direct appeal to the supreme court as a matter of right in two specified instances, all other cases are to go to the appellate court. That court, in many instances will, and should, be the court of last resort for by far the larger number of appeals turn on questions of fact or involve no more than an application of settled principles of law. It is questionable, however, if the supreme court itself should have the exclusive authority, pursuant to uniform rules to be adopted by it, to determine its own jurisdiction and whether or not it will grant further review. Experience has revealed that the discretionary right to grant certiorari has not always worked favorably in the case of the federal supreme

\(^{42}\) Ill. Rev. Stat. 1951, Vol. 1, Ch. 38, §§ 747 and 780\(\frac{1}{2}\).

\(^{43}\) See, for example, People v. Levin, 412 Ill. 11, 104 N. E. (2d) 814 (1952), noted elsewhere in this issue.

\(^{44}\) Draft § 6.

\(^{45}\) See ante, note 21.
court, and there have been instances where it has been necessary to compel the Illinois supreme court to take jurisdiction by means of the present certificate of importance when other discretionary measures have failed to achieve results.

Any relief purportedly offered by Paragraph 3 of the Schedule, calling for further review where there has been a dissent in the appellate court or a certificate of contrary holding has been obtained, is subject to the limitation that review thereunder is possible until the supreme court shall "otherwise" provide by rule. While it was probably intended that such a rule, when promulgated by the court, should operate to specify the terms upon which further review may be granted, the blanket authorization to adopt rules on the point is broad enough to permit of a rule of negative character under which the supreme court might abrogate the provisions of the schedule itself. If it did, the court would then be able to deny further review in all instances except in the case where a constitutional question has arisen for the first time in and as a result of the action of the appellate court.

Aside from these matters, the gains to be achieved under the proposed judicial article, at least insofar as they relate to the proposed supreme court, are such as to call for every measure of support for the proposal. An efficient court, able to devote the principal measure of its energies to matters which should demand its most thorough attention, could do much to improve both law and the administration of justice. With power to regulate practice and procedure by rule, rather than by legislative fiat; with ability to co-ordinate the work of competent and non-political judges, thereby preventing injustice and delay; with an administrative staff to come to its aid as needed; and with adequate machinery to suspend or remove the occasional incompetent who might, by accident, reach the bench, the supreme court so

46 A decline in the work of the United States Supreme Court, brought about by its refusal to grant certiorari, even in matters which most would agree were of extreme importance, is noted in Rodell, "Our Not So Supreme Supreme Court," Look Magazine, Vol. 15, No. 16, July 31, 1951, pp. 60-4.

47 Consider, for example, the history of Moore v. Moyle, 405 Ill. 555, 92 N. E. (2d) 81 (1950), and related cases.

48 Draft § 6.
envisioned should be able to do much to pull Illinois from the
doldrums into which it has, largely from indifference, been per-
mitted to lapse.49

II. THE PROPOSED APPELLATE COURT

It is envisioned that, in lieu of the four existing Appellate
Courts,50 there shall be but one intermediate reviewing tribunal,51
presumably to be designated as the Appellate Court of Illinois,
but which, for convenience, is to be organized in the three judicial
districts aforementioned52 with such number of internal divisions
as the supreme court shall prescribe. Until otherwise provided,
the new court is to be staffed with fifteen judges53 who are to sit
in panels of three, where a majority will be necessary for a
quorum and the concurrence of a majority will be essential for
a decision.54 While the supreme court is to be vested with the
power to make assignments to these divisions, nine of the judges
are to be selected from the proposed First Judicial District and
three from each of the other two.55

These judges, initially to be selected in much the same manner
as judges of the supreme court,56 are hereafter to be elected as
judges for the proposed appellate court for a twelve-year term57
and not, as at present, to seek office as circuit judges with shorter

49 An indication of what might be accomplished by a revitalized judiciary, based
on the recent experience of New Jersey, is interestingly told by Butterfield, “New
Jersey Puts its Judges to Work,” Saturday Evening Post, May 17, 1952, pp. 30-1 and
143-4.


51 Draft § 7.

52 See ante, note 35.

53 At present, eighteen judges serve in this capacity, nine in the First District
and three in each of the others, but it is understood that the volume of work else-
where than in the present First District is inadequate to require the full-time
services of nine judges, hence the overall reduction. Surplus judges will probably
return to circuit duties: note 57, post. Provision for increase, if later made neces-
ary, is noted in Draft § 7.

54 Draft § 7 calls for a division “of not less than three judges.” It is not as
specific as Ill. Rev. Stat. 1951, Vol. 1, Ch. 37, §§ 29 and 45. The quorum factor has
not been changed.

55 Draft § 4.

56 Draft § 12 calls for one nominating commission for both the supreme and
appellate courts.

57 Draft § 17.
tenure. The same tests of eligibility, etc., are to be applied to these individuals as adhere to other judges, but no provisions have been made for the selection of a presiding judge for each division and some question may arise as to the salary to be paid the incumbent, particularly one sitting in the proposed First Judicial District.

The court so to be organized is, with other courts, to be vested with judicial power, is to enjoy a limited rule-making power, is to exercise such original jurisdiction as may be necessary to a complete determination of any cause pending on review, but generally is to serve as the principal reviewing tribunal of the state to which all appeals from final judgments, save those appealable directly to the supreme court, shall go as a matter of right. As the past has demonstrated the desirability of occasional review of interlocutory orders, provision has been made in the proposed draft to furnish the supreme court with authority to specify by rule for appeal in cases of other than final judg-

58 The present staff of the several Appellate Courts is drawn from the ranks of circuit judges to serve for a three year term therein, pursuant to Ill. Rev. Stat. 1951, Vol. 1, Ch. 37, § 29, as part of the regular six-year term for a circuit judge: Ill. Const. 1870, Art. VI, § 12.

59 Draft § 14 expressly provides for a chief justice of the supreme court, and Draft § 9 permits of the designation of a chief judge in each circuit court. At present, the presiding judge of an Appellate Court is chosen pursuant to Ill. Rev. Stat. 1951, Vol. 1, Ch. 37, § 30.

60 While a judge of the proposed appellate court would be entitled to the protection of Draft § 20, it is to be noted that the differential there permitted for "circuit and associate judges and magistrates in Cook County" would be technically inapplicable to appellate judges sitting in the proposed First Judicial District. Unless the salary level of all appellate judges is fixed by law at a point higher than that set for all circuit judges, including any extra local compensation which may be paid them, it would be possible to find reviewing judges receiving less pay than those whose judgments they review.

61 Draft § 1.

62 Draft § 3. There is opportunity for conflict at this point as the power is given to "the judges of each district of the appellate court." Italics added. If there is to be but one appellate court, some provision should be made for a single system of uniform rules applicable throughout the state.

63 Draft § 8. See also note 22, ante. The court is not, however, to exercise original jurisdiction in the first instance.

64 Draft § 8. Provision is made for the hearing thereof before the division of the court sitting in the district wherein the cause arose.

65 See, for example, Ill. Rev. Stat. 1951, Vol. 2, Ch. 110, § 202, for review of interlocutory orders regarding injunctions and the appointment of receivers.
ments, thereby permitting a degree of flexibility not currently in existence.\textsuperscript{66}

It is likely, however, that the greatest criticism will be directed to the proposed section which would (1) give the appellate court such “powers of direct review of administrative action as may be provided by law;”\textsuperscript{67} (2) authorize the supreme court to provide by rule for “expeditious and inexpensive appeals . . . by informal proceedings” in designated types of cases;\textsuperscript{68} and (3) take from the supreme court its present jurisdiction over direct appeals in freehold cases, felony cases of other than capital character, and many types of statutory proceedings.\textsuperscript{69} Mentioning the last point first, the criticism in general will be based on the fact that, certainly in the present First District, the appellate judges are already overburdened and any addition to the court load would be apt to produce an intolerable condition.\textsuperscript{70} When it is remembered that the recommendation has been made that the case load of reviewing judges should not exceed forty per year as an absolute limit if proper attention is to be given to what may prove to be the only allowable appeal,\textsuperscript{71} the imposition of extra work on men already doing more than they should be asked


\textsuperscript{67}Draft § 8.

\textsuperscript{68}Ibid.

\textsuperscript{69}Draft § 6.

\textsuperscript{70}The Hon. Hugo Friend, Judge of the Appellate Court for the First District, has estimated that of the 200-odd cases decided by the Illinois Supreme Court in 1951, as listed in Vols. 407-9 Illinois Supreme Court reports, approximately three-fourths thereof would have been taken to the appellate court under the proposed draft, leaving only 50 cases for Supreme Court consideration. He has also estimated that about one-half of the remainder would have been added to the load of the nine appellate judges serving in the First District. If, to these cases, there is added approximately 400 new appeals each year wherein trial de novo has hitherto been given at the circuit level, the prospective load would threaten interminable delay. In the federal system, by contrast, the case-load of the several Courts of Appeal averaged 46 cases per judge in 1951, or roughly one new case per week, with a median time between hearing and decision of but 1.5 months. See Stephens, “The Administrative Affairs of the U. S. Courts,” 38 A. B. A. J. 555 (1952), particularly pp. 559 and 621.

\textsuperscript{71}There is, of course, the possibility of further review before the supreme court, but the possibility is a slender one. See notes 25-6, ante.
to do invites criticism. It might be answered that relief could be provided by the creation of additional divisions, staffed with extra judges, within the framework of the proposed court, but the answer is, to some extent, refuted by the proposition that the size of the court is fixed at fifteen judges "until otherwise provided by law," and the legislature has been notoriously reluctant to increase the size of the judiciary.

The other criticisms are not ones to be brushed aside lightly. True it is that a final determination in a matter of administrative cognizance may be delayed as the case proceeds through the agency, then through a circuit court, before ultimately reaching a reviewing tribunal, and the elimination of any stage in the proceedings would unquestionably shorten the time involved. It is likewise true, in the federal system, that the district court is sometimes by-passed, with direct appeal over the agency decision proceeding to an appropriate Court of Appeals. It is generally the case, however, that relief of the type mentioned is limited to those agencies which, in the main, function much like courts, whereas it is a well-known fact that few of the over 170 administrative agencies presently existing in Illinois fit that description. Any opening of the door to wholesale appellate review of administrative decisions would merely aggravate the situation, hence the bar would need to be active in its opposition to pressure groups who might wish to stampede the legislature into such an act.

On the point of expeditious and inexpensive appeals "by informal proceedings," there is no doubt that the cost of presenting a case to a reviewing tribunal, under rules which require the printing of briefs, abstracts, and the like, has increased tremendously with the passage of time, to the point where many a

72 Draft § 7.
73 The procedure generally is delineated in Ill. Rev. Stat. 1951, Vol. 2, Ch. 110, § 264 et seq.
74 See, for example, review of decisions of the Tax Court pursuant to U. S. C., Tit. 26, § 114, or of the Federal Trade Commission: U. S. C., Tit. 15, § 45.
75 The present requirement for direct review by the Supreme Court of decisions in workmen's compensation cases, found in Ill. Rev. Stat. 1951, Vol. 1, Ch. 48, § 138.19(f)(2), is but an illustration of what might occur.
litigant, unable to bear the expense, must have suffered from an erroneous judgment. If it be the purpose of the framers of the proposed draft to permit the supreme court to authorize the use of less expensive methods in cases where an obligation to bear the normal cost of an appeal would lead to a denial of justice, all would applaud their proposal. It is submitted, however, that such a result could be accomplished, even at present, by rule of court, hence the need for constitutional treatment on the point is hardly apparent. If more is intended, the drafters could well stand charged with using ambiguous language in their effort to grant the proposed supreme court authority to specify the manner of "informal proceedings" to be followed in securing review. If one standard of procedure is to be followed in the trial court, it would seem no more than appropriate to use a single and identical standard in appellate procedure.

The only other principal change at the present appellate level has to do with the grant of further review by the supreme court after the proposed appellate court has achieved a decision. There can be little to criticize about the suggested requirement that further review, as a matter of right, should be given (1) in cases where a constitutional question arises for the first time in and as a result of the action of the appellate court, (2) where one appellate judge has dissented, or (3) where a judge thereof certifies that, in his opinion, the decision is contrary to a prior decision of the supreme or appellate court. If the supreme court should take the position that the proposed grant of authority to it operates to supersede the provisions of the present Civil Practice Act, there is the possibility that, absent a rule on the

76 See Report of the Committee on Simplification and Improvement of Appellate Practice to the Section on Judicial Administration, 63 A. B. A. Rep. 602 (1938), particularly pp. 605-7.
77 The idea would be no more than an extension of the relief granted to a poor person to initiate suit in a trial court under Ill. Rev. Stat. 1951, Vol. 1, Ch. 33, § 5, or to conduct a workmen's compensation proceeding, pursuant to ibid., Ch. 48, § 138.20. As to indigent defendants in criminal cases, see ibid., Ch. 38, § 769a.
78 See notes 24-6, ante.
79 Draft § 6.
80 Schedule ¶ 3.
81 Ibid.
subject, a litigant may lose his present right to further review in a case where, after remandment for a new trial, he affirms he has no other evidence to produce and waives a new trial in order to get the benefit of a final determination of the cause. The utility of that practice is too obvious to call for further comment, but it should not be endangered by trusting too much on the discretionary use of the rule-making power.

Except as to matters herein noted, it is unlikely that the shift from the present to the proposed appellate system would cause excessive confusion for the draft of the Schedule appears reasonably adequate to cover the problems involved in a change-over. By Paragraph 9(b) thereof, the jurisdiction, functions, powers and duties of the existing separate appellate courts are to be transferred to the new tribunal, but are to be exercised in an appropriate district, and the new tribunal is to have power to give effect to all orders, judgments or decrees of its predecessors. It is possible, however, that some dispute may arise over the clerkship thereof for while it is contemplated that one of the four present clerks shall be chosen as chief clerk and the other three shall serve, presumably as his deputies, the Schedule directs that each of the other three shall serve "in the district in which he resides." If the present Clerk of the Appellate Court for the First District, on the basis of volume of work handled, is chosen to be chief clerk, there would then be no other clerk residing in the proposed First Judicial District whereas there would be two hold-over clerks, presently residing in and elected for the Appellate Courts for the Third and Fourth Districts, to serve in the proposed Third Judicial District, at least until the legislature


83 This may, for example, require the transfer of a pending appeal originating in Fulton County, within the area of the present Appellate Court for the Third District, to the division to be erected in the proposed Second Judicial District, but any inconvenience caused thereby would be overcome with the passage of time.

84 Schedule ¶ 13.

85 Schedule ¶ 10(b).

86 It will be remembered that, by Draft § 4, the proposed First Judicial District, like the area of the present Appellate Court for the First District, is to consist solely of Cook County. It could not, therefore, include other areas of the state.

made other provision.\textsuperscript{88} There may also be difficulty with respect to handling the books, files, records and other papers of the existing tribunals as no specific provision is made with regard thereto.\textsuperscript{89}

Whether future problems would develop from the existence of a single tribunal possessed of autonomous divisions remains to be seen. In the past, with four independent Appellate Courts in operation, the state has been exposed to a divergence of opinion as to the law on a given subject,\textsuperscript{90} at least until the Supreme Court has acted to clarify the situation,\textsuperscript{91} and the same thing has been true, in the area of the Appellate Court for the First District, where separate divisions of the one court have operated for some time.\textsuperscript{92} One solution might lie in a provision calling for the entire appellate judiciary to sit \textit{en banc} whenever differences appear among the several divisions, or when a dissent is noted,\textsuperscript{93} but the thought has not been expressed without an awareness that, if the size of the appellate judiciary grows, as it must if it is to accomplish the new tasks to be laid on it, sessions \textit{en banc} may become too unwieldy to serve any useful purpose.\textsuperscript{94}

\textsuperscript{88} As the Clerk of the Appellate Court is not a constitutional officer, the legislature could obviate the difficulty by repealing the present statute. It could, thereafter, adopt a new provision, pursuant to Draft § 23, calling for three officials unless it should deem it desirable to have one chief clerk to supervise the acts of the others.

\textsuperscript{89} Schedule \textsuperscript{14} provides that the records of courts “hereby abolished” shall be transferred to “the circuit court.” It is silent as to courts not abolished but whose powers are transferred. If it be argued that, under Schedule \textsuperscript{9}(b), the transfer of records should be made to the new appellate court, it must be noted that such paragraph contains the proviso that it shall be done “in the appropriate Judicial District.” Even the mechanical operation of sorting the records of the downstate Appellate Court areas for redistribution to the new districts would pose problems.


\textsuperscript{91} The problem referred to in note 90, ante, was not resolved until the decision in Moore v. Moyle, 405 Ill. 555, 92 N. E. (2d) 81 (1950). It is not known how many cases may have been disposed of in the trial courts, with conflicting results, in the period between 1942 and 1950, depending upon the location of the particular trial court in a given Appellate Court district.


\textsuperscript{93} See Report of the Committee on Simplification and Improvement of Appellate Practice to the Section on Judicial Administration, 63 A. B. A. Rep. 602 (1938) particularly pp. 611-3.

III. THE PROPOSED CIRCUIT COURT

Perhaps the most startling innovation made in the draft of the proposed judicial article is the one by which a multitude of courts with conflicting and overlapping jurisdictions at the trial level are to be consolidated into a series of convenient circuit courts which are to possess "unlimited original jurisdiction of all justiciable matters." To this end, the state is to be divided into judicial circuits consisting of one or more counties, except that Cook County shall constitute a judicial circuit by itself, which circuits shall be compact and made up of contiguous counties. Each such circuit court is to share the judicial power, is to have limited rule-making power, and may be given "such powers of review of administrative action as may be provided by law."

The circuit bench is to be composed of such number of circuit judges and associate judges as may be prescribed by law and such number of magistrates as may be prescribed by the supreme court, except that there shall be at least one associate judge from each county, and presumably at least one circuit judge in each circuit. The judges and the associate judges are to attain their respective positions by nomination at the outset, a special nominating commission being provided in each circuit, and will thereafter campaign for re-election for a regular term of eight years in the fashion established for other judges. Magistrates, on the

95 The number and diversity of jurisdiction of the Illinois trial courts is noted in 30 CHICAGO-KENT LAW REVIEW 252, particularly pp. 254-5.

96 Draft § 10.

97 Draft § 9. According to Schedule § 4, existing circuits are to be continued until changed by law but some immediate change would be necessary. Logan County, in the present Eleventh Circuit and Third Appellate Court District, would fall in the area of the proposed Third Judicial District, whereas the other counties in the present Eleventh Circuit would fall within the proposed Second Judicial District. Appeals therefrom should properly go to "the appellate court in the district in which the circuit court is located." Draft § 8.

98 Draft § 1.

99 Draft § 3.

1 Draft § 8.

2 Draft § 9.

3 Draft § 12.

4 Draft §§ 13 and 17. The present term for a circuit judge is six years: III Const. 1870, Art. VI, § 12.
other hand, are to be appointed by the circuit judges within the circuit from among those nominated by a commission of the circuit and are to serve "at the pleasure of the circuit judges." The same tests as to eligibility and the same prohibitions as to extra-judicial activity apply to circuit judges, associate judges and magistrates as apply to other judges, and the same constitutional guarantee is made as to salary. Any judge may be temporarily assigned to serve in a court other than the one for which he was selected, but is then entitled to be paid his "actual and necessary expenses" when so acting. Provision has been made for the retirement, suspension, or removal of these judges, and they will, doubtless, while serving, participate in the annual judicial conferences.

From among the circuit judges, one is to be selected by the supreme court, to serve at its pleasure, as chief judge but, subject to the authority of the supreme court, he is to possess only such authority as may be vested in him by the circuit judges, presumably of the particular circuit, who will, also presumably, act by majority vote in this respect as well as in the determination of such matters as the setting up of internal divisions, general and specialized, within the court and the appropriate time and place for the holding of the sessions thereof. Judges of the proposed circuit court will, of course, sit singly but will be empowered to

5 Draft § 15. Provision has been made, in Draft § 9, for the appointment of special magistrates, upon the application of any county, with power to take such emergency action in civil or criminal cases as the supreme court may prescribe by rule.

6 Draft §§ 18 and 19. Special magistrates are expressly exempted: Draft § 9.

7 Draft § 20. The section contemplates that varying rates of compensation should be made for each class of judicial officer, but requires uniform rates of pay for members of a class, at least within each circuit. Special provision is made for additional compensation to circuit judges, associate judges and magistrates in Cook County, payable from county funds, while special magistrates are to be compensated by the county applying for their appointment: Draft § 9.

8 Draft § 2.

9 Draft § 20.

10 Draft § 21.

11 Draft § 22.

12 Draft § 9. It is not known if the present system of terms of court, outside of Cook County, is to be continued: Ill. Rev. Stat. 1951, Vol. 1, Ch. 37, § 72.4 et seq. If not, problems can well arise concerning the calling of grand and petit juries, as well as over other administrative matters: Jackman v. North, 398 Ill. 90, 75 N. E. (2d) 324 (1947).
perform any function vested in the court unless assigned to a
specialized division. For that matter, except for a possible dis-
crimination based on the title to the office and the rate of com-
pensation, associate judges of the circuit court, when not assigned
to specialized divisions, would also appear to be the equivalent
of circuit judges for the proposed draft in no way indicates an
intention to diminish their powers.\textsuperscript{13} The jurisdiction given to
magistrates, however, is subject to the qualification that their
authority may be limited or defined by rule of the supreme
court.\textsuperscript{14}

If there is any justification for this much stratification within
a single tribunal, other than one intended to bring existing nisi
prius judges into the new system without too much protest and
at a level comparable to their present status,\textsuperscript{15} it must be by way
of analogy to the European system under which persons, fre-
quently with special training for judicial service, enter the judi-
 ciary at the lowest level and move upward as they demonstrate
fitness. Such a step may be one along the road toward the formu-
lation of a much-needed state ministry of justice with the proposed
supreme court, through its administrative power, serving as chief
minister. If that step does no more than provide a method by
which merit may be recognized and suitably rewarded, the end
gained would be sufficient justification for what might otherwise
be a cumbersome division of authority within a tribunal.

It would be possible to envision considerable difficulty in the
operation of a circuit court possessed of jurisdiction over "all
justiciable matters" without regard to their character, or to the
amount which may be involved, if all cases were to be thrown into
one category, to be handled in identical fashion at the same
expense for costs. To require the treatment of a case involving

\textsuperscript{13} As judges, they may claim the right to be entitled to vote on such matters as
the adoption of rules and the exercise of other authority vested in the court to
which they are attached. If such is not to be the case, it should be made apparent.

\textsuperscript{14} Draft § 9. See also Schedule ¶ 15.

\textsuperscript{15} The provisions of the Schedule, particularly paragraph 5 thereof, support this
inference, but some aspects thereof may have been dictated by a desire to avoid
any question of unconstitutional deprivation of the terms of office of a judge elected
to a constitutional court.
a small money demand, as on an unpaid note or debt, comparable to that needed for a substantial lawsuit involving the interpretation of a complicated will or trust provision would border on the ridiculous in addition to creating a practical denial of justice to litigants in the first category. Inexpensive simplified procedure and minimal delay, such as is frequently currently provided by existing petty tribunals, must not be abolished merely because the small case would, hereafter, be filed in a state court of substantial dignity. There is provision, under the rule-making power, for courts to obviate some of these difficulties, particularly if appropriate divisions are set up within the circuit court, staffed by associate judges or magistrates, to perform the specialized functions presently afforded by existing petty tribunals. Doubtless such divisions will be established in the interest of efficient operation, but the aid of the legislature may be necessary to lessen the burden of expense which would otherwise attend.

One defect in the present system which can be avoided through the creation of a single tribunal at the trial level has to do with the difficulty sometimes involved in determining whether a given court possesses jurisdiction to hear the type of demand asserted. The history of the case of Werner v. Illinois Central Railroad Company, dealing with limits on the power of city courts, and of the cases which came thereafter, is too recent to have been forgotten by the bar and serves to illustrate how time and money can be wasted when jurisdictional factors are overlooked or not well known. Issues of that character could be avoided under

16 Draft § 3.
17 Compare Ill. Rev. Stat. 1951, Vol. 1, Ch. 53, § 51, as to fees payable in state courts of record, with ibid., Ch. 37, § 416, for costs in civil cases instituted in the Municipal Court of Chicago.
18 379 Ill. 559, 42 N. E. (2d) 82 (1942). Until the holding in Turnbaugh v. Dunlop, 406 Ill. 573, 94 N. E. (2d) 438 (1950), residents of cities where city courts existed were denied the right to use their own tribunals on transitory causes of action arising elsewhere.
19 Even more significant was the labor and expense forced on the parties in the case of Herb v. Pitcairn. After trial, verdict and judgment, the case went to the Appellate Court and was reversed and remanded, 306 Ill. App. 583, 29 N. E. (2d) 543 (1940), with the Supreme Court affirming, 377 Ill. 465, 36 N. E. (2d) 555 (1941). On learning of the holding in the Werner case, new steps were taken in the case after remandment which led to dismissal of the action in the trial court. The Illinois Supreme Court affirmed the dismissal, 384 Ill. 237, 51 N. E. (2d) 277 (1943), but the United States Supreme Court took such action, 324 U. S. 117, 65 S. Ct. 954,
the proposed court organization although territorial limitations will still continue to operate.\textsuperscript{20}

Again, there should be little trouble experienced in effectively transferring the functions of existing trial courts to the proposed circuit court, with ample time permitted for the working out of essential details,\textsuperscript{21} for provision has been made for the abolition of existing trial courts,\textsuperscript{22} for the delivery of all records, funds, and the like to the new circuit court,\textsuperscript{23} and for the assumption of jurisdiction over all causes by the latter.\textsuperscript{24} Existing judges will continue to serve out their terms in the new circuit court, some as circuit judges,\textsuperscript{25} others as associate judges,\textsuperscript{26} and still others as magistrates.\textsuperscript{27}

The new tribunal will not be wanting in administrative assistance as the several clerks of the respective courts of record being abolished will become clerks, or associate clerks, of the proposed circuit court.\textsuperscript{28} The sheriff of the county will, of course, continue

\textsuperscript{20}See Dever v. Bowers, 341 Ill. App. 444, 94 N. E. (2d) 518 (1950), noted in 29 CHICAGO-KENT LAW REVIEW 191, as to causes arising out of collisions occurring on county line roads.

\textsuperscript{21}Schedule \S 1 provides that the article is to become effective on the first day of July of the second calendar year following its adoption. If approved by the legislature at the 1953 session, and submitted to and ratified by the voters in 1954, there would be time, during the 1955 session, to enact necessary laws, or modify existing ones, to permit actual operation under the proposed draft to begin on July 1, 1956.

\textsuperscript{22}Schedule \S 9(a).
\textsuperscript{23}Schedule \S 14.
\textsuperscript{24}Schedule \S 13.

\textsuperscript{25}Present circuit judges retain that rank: Schedule \S 5(b). Judges of the Superior Court of Cook County, the Chief Justice of the Municipal Court of Chicago, and the judges of the Probate Court and the County Court of Cook County are to become circuit judges: Schedule \S 5(c).

\textsuperscript{26}This will be true of associate judges of the Municipal Court of Chicago, of the chief justice and judges of the Municipal Court of Evanston, of the judges of the several city, village and incorporate town courts, and of all county judges and probate judges outside of Cook County: Schedule \S 5(c).

\textsuperscript{27}All existing justices of the peace and police magistrates are so classified: Schedule \S 5(c) and \S 5(d). Lesser judicial officials shall not, during the balance of their terms, be subject to eligibility and other tests, and may continue to perform their non-judicial functions: Schedule \S 5(f) and \S 5(g). Compare with Draft §§ 15-9.

\textsuperscript{28}Schedule \S 10(c) and \S 10(d). Cook County may, for a time, be faced with the possibility of having six office heads, each possessing equal rank, although they are to perform only such services as may be prescribed by rule of the circuit court.
to perform his customary services, but his staff, in Cook County at least, is likely to be augmented by the addition thereto of the Bailiff of the Municipal Court of Chicago, and of his many deputies, who, by Paragraph 11 of the Schedule, are placed under the orders of the new circuit court.\textsuperscript{29} One quasi-judicial official, however, is destined to pass from the scene for the proposed draft declares that there "shall be no masters in chancery or other fee officials in the judicial system,"\textsuperscript{30} a provision designed to bring the state, at last, to the point where the expense of maintaining the judicial department is to be borne by taxpayers generally and not, as has been the case in some instances, by the litigants. Doubtless, the circuit judge serving as chancellor will hereafter enforce his decrees for the sale of property by utilizing the services of the sheriff of the county\textsuperscript{31} and, if in need of other assistance, as in the taking of accounts, will call on a magistrate or an associate judge.

No change can be made without causing some disturbance to the existing order, so there undoubtedly will be a period of time, particularly in Cook County, during which the confusion of relocating the court-rooms, clerk's office, records, and the like, will cause inconvenience. The drafters of the proposed constitutional provision have not urged that any substantial building program be undertaken, probably being of the belief that existing facilities can be adapted for the purpose. There is reason to feel, however, that the judicial system thus envisaged deserves to be housed in a suitable edifice so that courts now sitting at scattered locations may be found at one convenient place.

\textsuperscript{29} Schedule § 11 contemplates that the Bailiff of the Municipal Court of Chicago shall serve out the unexpired balance of his term. The particular paragraph is ambiguous in that it refers to "the circuit court" without further description. Italics added. As there is to be one circuit court in each judicial circuit under Draft § 9, the ambiguity should be removed by specifying "the circuit court of Cook County," or "the circuit court of the First Judicial District." It is also suggested that provision should be made in the draft specifying the precise legal name for each tribunal thereby created, so as not to leave the door open to the adoption of state-wide variants.

\textsuperscript{30} Draft § 9. Present masters in chancery and referees are, by Schedule ¶ 12, authorized to serve until the expiration of their respective terms of office, fixed at two years by Ill. Rev. Stat. 1951, Vol. 2, Ch. 90, § 2. Query: What becomes of public administrators, public conservators and public guardians?

IV. MISCELLANEOUS CONSIDERATIONS

Others have already, and will likely continue to, elaborate upon the provisions in the draft for a new method of selecting judges intended to take politics out of the judiciary and the judiciary out of politics. There is, then, no reason to stress the point but other matters call for attention. The current section of the 1870 Constitution relating to State's Attorneys, with some slight modification, has been retained in the proposed draft\[^{32}\] but the present sections dealing with the Supreme Court Reporter\[^{33}\] and the style to be adopted in connection with all process and in criminal prosecutions\[^{34}\] have been deleted. The omission of the former is, perhaps, obviated by the fact that the general assembly is commanded to provide by law for "other non-judicial officers" for the various courts,\[^{35}\] and a rule of court already deals with forms of civil process.\[^{36}\] There may be some reason to believe, however, that criminal prosecutions hereafter might be endangered for lack of specific provision as to form unless this defect is cured by appropriate legislation or rule of court bearing on the point.

These may be minor matters alongside some other points which do not appear to have been considered. A revamping of one portion of a constitution should not be undertaken without thought of its effect on other parts thereof. The proposed change should cause no difficulty regarding the swearing in of members of the general assembly,\[^{37}\] a possible impeachment of the state governor,\[^{38}\] or a determination of the number of deputies and assistants for various county officials.\[^{39}\] Matters of this nature can be handled under the new provision as under the old, for the phraseology is comparable. It should be noted, however, that

\[^{33}\] Ibid., Art. VI, § 9. See also notes 30-4, ante.
\[^{34}\] Ibid., Art. VI, § 33.
\[^{35}\] Draft § 23.
\[^{37}\] Ill. Const. 1870, Art. IV, § 5.
\[^{38}\] Ibid., Art. IV, § 24.
some sections, in parts not to be amended, will appear strange after certain courts are abolished. Thus, the limitation on the legislature restricting the passage of special legislation affecting the jurisdiction and duties of justices of the peace, police magistrates and constables, or the provision for the election of a county judge in each county, might be productive of mischief after the proposed revision has been accomplished if no other amendment is sought to make the parts of the constitution read in harmony with one another.

Even more deep-seated is the question of the possible conflict between the proposal and the so-called "Home Rule" amendment adopted in 1904 for the benefit of Chicago, under which the Municipal Court of Chicago was created. As it provides that no law, based on that amendment, shall take effect until consented to by a majority of the legal voters of the city voting on the question, it would seem to follow that no act of the legislature could alter or repeal the existence of that court without a similar consent. Could it be said that, in order to be effective, a proposed constitutional amendment abolishing the particular court would also have to receive a majority vote in Chicago as well as the necessary vote throughout the state? The question is merely raised, not answered, as it is unlikely that a proposal receiving less than a majority vote in Chicago would be so overwhelmingly successful in other parts of the state as to achieve the necessary overall plurality. But the question is there, and may be seized upon by those who might wish to voice opposition.

In much the same way, adoption of the proposed judicial article will play hob with the statute book and consume an inordinate amount of legislative time in order to make the latter coincide with the former so as to remove a degree of confusion which could generate hundreds, even thousands, of disputes. No attempt has been made to check every existing statute, but it is evident that at least one-hundred twenty-six sections of the Pro-

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40 Ibid., Art. IV, § 22.
41 Ibid., Art. X, § 8.
42 Ibid., Art. IV, § 34.
bate Act alone would need amendment.\textsuperscript{43} In some instances, the amendment would consist of no more than substituting the words "circuit court" for "probate court" or "county court," so the need for revision would not be urgent.\textsuperscript{44} In others, however, a specific duty is laid upon an officer who would no longer exist, with no provision made for the performance of that duty by a substitute.\textsuperscript{45} It is evident, therefore, that a close inspection of the statute book should be made and the result thereof equated with the proposed judicial article to uncover other, presently unnoticed, defects in the law of the state.

These considerations should not be permitted to outweigh the urgent need for reform of the judicial system, nor militate against the desirable features of the proposal,\textsuperscript{46} but they are mentioned to serve as a warning that blanket approval thereof will not resolve all difficulties. To offer comment on the political wisdom of the suggestion, or to attempt to predict the possibility of its successful adoption, would require one to pass from the realm of law into that of government and practical politics. That privilege should be left to an informed electorate.

\textsuperscript{43} Ill. Rev. Stat. 1951, Vol. 1, Ch. 3, § 151 et seq. Revision thereof would have to begin with § 152(a) and continue through § 521.

\textsuperscript{44} See, for example, Section 4 of the Probate Act and Schedule § 13.

\textsuperscript{45} By Ill. Rev. Stat. 1951, Vol. 1, Ch. 3, § 189, a master in chancery is directed to release an outstanding dower right in an appropriate case. The office of master in chancery is abolished by Draft § 9 and there is no provision in the proposed draft for transfer of his duties to another.

\textsuperscript{46} Not the least of which would be the abolition of the vicious fee system and an end to trials \textit{de novo} in some probate matters, in cases heard by justices of the peace, and on some questions of county court cognizance: see Ill. Rev. Stat. 1951, Vol. 1, Ch. 3, § 484; Ch. 79, § 116; and Ch. 37, § 294.
NOTES AND COMMENTS

RESCINDING MEMORIALIZATION RESOLUTIONS

Progress in the matter of memorializing the United States Congress to call a convention for the purpose of considering and proposing an amendment to the Constitution of the United States limiting federal income tax rates has reached the point where twenty-eight states have now adopted resolutions on the issue. Similar action by four more state legislatures will be necessary in order that there may be an unquestionable demand by thirty-two states, or a number sufficient to meet the requirements of Article V of the Constitution, to put Congress in a position where it would be obliged to act.

The accelerated speed of the movement, developing in the past few years since the matter was first broached by the legislature of the State of Wyoming, seems to have caused some concern on the part of those presently in power in a few state legislatures for they would appear to be attempting to halt the rate of progress by securing the adoption of resolutions intended to rescind the favorable action taken by their states at an earlier date. Four of the twenty-eight state legislatures which had previously memorialized Congress calling for the submission of the amendment in question, to-wit: Alabama, Illinois, Kentucky, and Wisconsin, have since adopted resolutions purporting to rescind their earlier memorialization. The question has thereby been raised as to whether such rescission resolutions are null and void and of no legal effect. It is believed that such is the case for the reasons hereinafter set forth.

It is essential to keep in mind the amendatory process described in Article V of the federal constitution. That article contemplates that the Congress (a) shall, when two-thirds of both houses deem it necessary, "propose amendments" to the constitution; or (b), "on the application of the legislatures of two-thirds of the several states," shall call a convention for proposing amendments. The article further recites that the amendments, "in either case, shall be valid to all intents and purposes . . . when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof."\(^6\)

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1 See Packard, "Legal Facets of the Income Tax Rate Limitation Program," 30 Chicago-Kent Law Review 128 (1952), particularly pp. 137-40, on the point of whether or not the necessary quorum has already been achieved.


3 Ill. Laws 1945, p. 1797.


6 Italics added. Article V contemplates that the mode of ratification shall be determined by Congress.
In view of the constitutional expression that either of these methods is to possess equal effect with the other it should be possible to compare the state memorialization method with the congressional method and thereby reach the result that what is true of the one is equally true of the other. If that comparison is proper, and no reason appears why it is not so, then it follows that what would be true of a congressional attempt to withdraw a proposed amendment which it had once submitted would likewise be true of the attempt by a state to rescind an action it had taken looking toward the same end.

Except as Congress may limit the time within which ratification may be given to one of its proposals, it is clear that Congress is without the power to withdraw a proposed amendment which it has once submitted. Professor Orfield is authority for the proposition that an attempt by Congress to withdraw a proposed amendment, after it had secured the necessary vote of two-thirds of both houses, would be a nullity. In his book on the subject of amending the federal constitution, he noted that the "question was directly raised in 1864 when Senator Anthony proposed to repeal the joint resolution submitting the Corwin amendment," and he declared the practice to be "to regard such a withdrawal as ineffectual," on the theory that each affirmative step taken in the passage of an amendment is irrevocable. If such were not the case, he wrote, "confusion would be introduced if Congress were permitted to retract its action." Much the same view has been shared by Professor Burdick. In his textbook on the American Constitution, he wrote: "It seems safe to assert that Congress, having once submitted a proposed constitutional amendment to the States, cannot thereafter withdraw it from their consideration."

Considering the demonstrated equality between the two methods of procuring a constitutional amendment, it is not illogical to apply the same reasoning to state action intended to rescind an application made by a state legislature for the calling of a convention to consider and propose amendments. As Professor Orfield has said, "the analogy of a state legislature's attempting to withdraw its ratification of an amendment would seem apposite."

Additional proof may be found in the comparison which exists between a purported congressional withdrawal of a proposal on the one hand and a state attempt to withdraw its ratification of a proposed amendment on the other. The United States Supreme Court itself once pointed

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9 Orfield, op. cit., p. 52.
out that "proposal and ratification are not treated as unrelated acts, but
as succeeding steps in a single endeavor."\(^{10}\) In that endeavor, state gov-
ernments do not act on the basis of their sovereign status but under a
special power conferred by the national constitution. As Judge Jameson
wrote, the power to amend the constitution is not a power belonging to the
states "originally by virtue of rights reserved or otherwise." As a con-
sequence, "when exercised, as contemplated by the constitution, by ratify-
ing, it ceases to be a power, and any attempt to exercise it again must be
a nullity . . . [Once] ratified, all power is expended."\(^{11}\)

That view also has the support of the eminent Professor Dodd. He
has stated that the view "is incontrovertible, that a state, once having
ratified, may not withdraw that ratification . . . to construe the Con-
stitution otherwise, would be to permit great confusion in that no state
in ratifying could know what the status of the amendment was if at the
same time other states were permitted to withdraw. Of course, confusion
would occur also in that it would be difficult to know when three-fourths
of the states had ratified . . . The function of ratification seems to be
one which, when once done, is fully completed and leaves no power what-
ever in the hands of the state legislature."\(^{12}\)

The highest courts of two of the American states have achieved the
same conclusion. In \textit{Wise v. Chandler},\(^{13}\) the Court of Appeals of Kentucky
said: "It is the prevailing view of writers on the question that a resolu-
tion of ratification of an amendment to the Federal Constitution, whether
adopted by the Legislature or a convention, is irrevocable. This conclu-
sion seems inescapable as to the action of a convention called for the pur-
pose of acting upon an amendment. When it has acted and adjourned,
its power is exhausted. Since the 'powers and disabilities' of the two
classes of representative assemblies mentioned in Article V are 'precisely
the same,' when a Legislature, sitting, not as a lawmaking body, but as
such an assembly, has acted upon a proposal for an amendment, it like-
wise has exhausted its power in this connection."\(^{14}\) The Supreme Court
of Kansas, about the same time and through the medium of the case of
\textit{Coleman v. Miller},\(^{15}\) declared: "It is generally agreed by lawyers, states-
men and publicists who have debated this question that a . . . ratifi-

\(^{10}\) See \textit{Dillon v. Gloss}, 256 U. S. 368 at 374, 41 S. Ct. 510 at 512, 65 L. Ed. 994 at
997 (1921).

\(^{11}\) Jameson, \textit{A Treatise on Constitutional Conventions: Their History, Powers and
Modes of Proceeding} (Callaghan & Company, Chicago, 1887), §§ 579 and 581.

\(^{12}\) Dodd, "Amending the Federal Constitution," 30 \textit{Yale L. J.} 321 (1921), particu-
larly p. 346.

\(^{13}\) 270 Ky. 1, 108 S. W. (2d) 1024 (1937).

\(^{14}\) 270 Ky. 1 at 8-9, 108 S. W. (2d) 1024 at 1028.

\(^{15}\) 146 Kans. 390, 71 P. (2d) 518 (1937).
cation once given cannot be withdrawn . . . [From] historical precedents, it is . . . true that where a state has once ratified an amendment it has no power thereafter to withdraw such ratification. To hold otherwise would make article 5 of the federal constitution read that the amendment should be valid 'when ratified by three fourths of the states, each adhering to its vote until three fourths of all the legislatures shall have voted to ratify.' . . . [When] a proposed amendment has once been ratified the power to act on the proposed amendment ceases to exist.'

What room is there, then, for supposing that a different view should be applied to the matter of retracting a state resolution calling upon Congress for a convention to consider a proposed amendment? When a state adopts an original resolution memorializing Congress to that end, it is not exercising a sovereign power exclusively its own, nor merely legislating simply on behalf of its own people, but is engaging in a "federal" function. That fact places such activity within the exclusive domain of federal jurisdiction and completely removes the same from the pale of the state province and beyond the power of state withdrawal. The truth of this is manifest since the function of a state legislature, in memorializing Congress to call a convention for the purpose of proposing an amendment, is derived wholly from the federal constitution. It is no different, in source, than the function of Congress in proposing an amendment, or the function of a state legislature voting to ratify the same. Since the latter functions have been judicially identified as "federal functions" totally without state realm, the conclusion would appear inescapable that the purported rescinding resolutions are of no effect whatever. It is submitted, therefore, that Congress should act, at the latest, when four more state legislatures vote in favor of a constitutional convention to consider the proposed income tax rate limitation amendment.

F. E. Packard

16 146 Kans. 390 at 400-3, 71 P. (2d) 518 at 524-6.

17 In Coleman v. Miller, 146 Kans. 390 at 392-3, 71 P. (2d) 518 at 520 (1937), the Supreme Court of Kansas said: "It is settled beyond controversy that the function of a state legislature in ratifying a proposed amendment to the constitution of the United States, like the function of Congress in proposing an amendment, is a federal function derived from the federal constitution; and it transcends any limitation sought to be imposed by the people of a state. The power to legislate in the enactment of the laws of a state is derived from the people of the state, but the power to ratify a proposed amendment to the federal constitution has its source in that instrument. The act of ratification by the state derives its authority from the federal constitution, to which the state and its people alike have assented. . . . If the legislature, in ratifying a proposed amendment, is performing a federal function, it would seem to follow that ratification is not an act of legislation in the proper sense of that term. It has been so held."
NOTES AND COMMENTS

TORTS BETWEEN HUSBAND AND WIFE

Some thirty years ago, one prominent writer in the field of family law stated: "The changes that have been effected among married people in our day . . . have left no mark on our law. The economic, intellectual and political independence of women, the breakdown of religion . . . have definitely altered the marriage relationship of the parties concerned. But the law has not kept apace. Matrimonial jurisprudence is anachronistic." About the same time, another writer, when discussing the subject of tort liability between persons in the domestic relation, pointed out, as if in contrast, that the "great battleground [in law] has been the matter of torts affecting primarily the person" of those related by marriage. From the standpoint of either of these views, it is proper to note that little has occurred in Illinois during the period since these men wrote to indicate the presence of any local battleground on the point. A fairly rapid succession of events within the last year, however, has disclosed that the stage of warfare has been reached here, although the eventual outcome of the struggle is yet uncertain.

What to others may have been a perplexing problem of tort liability as between the spouses seems to have been resolved in this state, for many years, as being no problem at all. The decision of the Illinois Supreme Court in Welch v. Davis, one permitting an administrator, on behalf of a step-daughter, to sue a deceased husband's estate to recover for the wrongful death of his wife, the child's mother, surprised many lawyers and may have served to reopen a door hitherto deemed closed. When that decision led to the result attained in Tallios v. Tallios, to the effect that a wife might be permitted to recover from her husband's employer for a tort committed by the husband in the course of his employment, the door seemed to have swung wide.

It was probably on the basis of the liberal trend disclosed by these

4 See Main v. Main, 46 Ill. App. 106 (1891), and Garlin v. Garlin, 260 Wis. 187, 50 N. W. (2d) 373 (1950), construing the Illinois statute.
6 345 Ill. App. 342, 103 N. E. (2d) 507 (1952), noted in 40 Ill. B. J. 553. See also the later case of Kitch v. Adkins, 346 Ill. App. 342, 105 N. E. (2d) 527 (1952), where the court decided a similar fact situation without discussion of the marital immunity. Leave to appeal therein has been denied.
decisions that the plaintiff, in the most recent case of all, that of Brandt v. Keller,\(^7\) sought to revive interest in the question of whether or not a wife might sue her husband directly to recover damages for a tort inflicted by him on her. The case was one in which the plaintiff sustained personal injuries while a passenger in the automobile being driven by the defendant, husband of the plaintiff, allegedly because of the defendant’s negligence. The trial court decided against the plaintiff and dismissed her suit. The Appellate Court for the First District, on appeal from such judgment, deeming it significant that no previous case had arisen in the seventy-odd years since the adoption of a Married Women’s Act,\(^8\) affirmed the holding, saying that the Illinois statute did not grant to a married woman a cause of action against her husband for a tort committed by him against her person.

The precise question of inter-marital personal tort liability has long been before the courts of this country and has been a source of conflict and confusion. Prior to the advent of legislation on the subject, the common-law rule appears to have been uniformly accepted that neither spouse could sue the other in tort,\(^9\) principally because of procedural difficulties inherent in the conduct of such a case. Laudable attempts by state legislatures to free married women from the yoke of their common law insignificance, generally described as Married Women’s Acts, which in any way deal with this point can be divided into several distinct categories, to-wit: (1) those which expressly exclude or refuse to authorize suits between husband and wife; (2) those which permit suits by and against married women as if they were sole; and (3) those which expressly allow suits in tort between husband and wife.\(^10\) It can readily be ascertained, therefore, that only those statutes which fall into the second group are likely to cause trouble. As these statutes do not demand either of the results attained elsewhere, the end determined turns mainly on the degree to which courts may feel the legislature intended to abrogate the common law.

One of the landmark cases in this field, that of Thompson v. Thompson,\(^11\) a case involving a wife’s suit against her husband for an assault and battery, required the Supreme Court of the United States to

\(^7\) 347 Ill. App. 18, 105 N. E. (2d) 796 (1952).
\(^8\) R. S. 1874, p. 576; Ill. Rev. Stat. 1951, Vol. 1, Ch. 68, § 1 et seq.
interpret a statute of the District of Columbia which gave married women the right to "sue separately for the recovery, security, or protection of their property; and for torts committed against them, as fully and freely as if they were unmarried." The majority of that court, setting a pattern for what was to become the majority view, denied recovery on the basis that the statute, being in derogation of the common law, had to be strictly construed. The majority also set out what were to become the stock arguments used by later courts of similar mind on such matters as public policy and the sufficiency of remedies provided for married women by criminal proceedings and via the divorce court. In case their interpretation was wrong, the majority pointed out that "if the legislature wishes to abrogate [the common law view] it should do so by language so clear and plain as to be unmistakable evidence of the legislative intent.”

The tenor of the minority view, voiced in a dissenting opinion by Justice Harlan which was concurred in by Justices Holmes and Hughes, noted that the majority were creating an exception not called for by the words of the statute but one based upon their own opinion of what public policy and the law should be rather than what the legislature had declared the law to be.

Following the Thompson case, which had spoken only on the point as it related to the domestic law of the District of Columbia, courts which were presented with the problem invariably followed the reasoning of one or the other of these opinions. The results attained, and the logic behind such results, have been viewed with disfavor by most of the eminent authors who have written on the subject as well as by some of the judges who, impelled by stare decisis, have reached the same result as the one they were criticizing. But this criticism has not swayed the courts and recovery has been denied in cases of assault and battery, malicious prosecution, false imprisonment, fraud, slander, libel, and negligence.

12 D. C. Code, § 1155.
13 218 U. S. 611 at 618, 31 S. Ct. 311, 54 L. Ed. 1180 at 1183.
14 The case of Gregg v. Gregg, — Md. —, 87 A. (2d) 581 (1952), provides an example of a court following tradition while at the same time criticizing its own decision. The opinion in Courtney v. Courtney, 184 Okla. 395, 87 P. (2d) 660 (1939), furnishes a comprehensive report on the division of authority.
17 Rogers v. Rogers, 265 Mo. 200, 177 S. W. 382 (1915).
20 Faris v. Hope, 298 F. 727 (1924).
Since the fault is usually said to be the lack of a cause of action, it has been considered immaterial that the spouses were separated,\textsuperscript{22} have since been divorced,\textsuperscript{23} that the marriage was voidable and has been annulled,\textsuperscript{24} or that one of the spouses has died and a personal representative is suing or defending.\textsuperscript{25}

Undoubtedly the common law forbade a cause of action for a personal tort between husband and wife, basically upon the feudalistic concept of the unity between the spouses.\textsuperscript{26} All courts agree that whatever rights a wife have must, therefore, have been given her by statute so, to the extent the Married Women's Act in the particular jurisdiction has operated to destroy this unity, there would or would not seem to be valid legal reason for denying a cause of action. Deny it, however, most courts have done,\textsuperscript{27} some justifiably under the wording of the particular statute, others under an interpretation of wording which would seem to call for a complete emancipation of married women from the bonds of the strict and unjust common-law rule.\textsuperscript{28}

The doctrine most often invoked to aid those courts which deny recovery is the one which provides that, in the construction of a statute, all statutes in derogation of the common law are to be strictly construed.\textsuperscript{29} While this constructional rule is appropriate to the interpretation of statutes like the Married Women's Acts, for such statutes are certainly in derogation of the common law, it must not be forgotten that the cardinal rule in any constructional problem is one calling for a determination of the intent of the legislature,\textsuperscript{30} no matter what type of statute may be involved. There is, however, another rule of construction which would tend to balance the one first mentioned and it requires that statutes which are remedial in character are to be liberally construed.\textsuperscript{31}

\textsuperscript{22}Clark v. Clark, 11 F. (2d) 871 (1925).
\textsuperscript{23}Main v. Main, 46 Ill. App. 106 (1891); Abbott v. Abbott, 67 Me. 304 (1877); Speer v. Sykes, 102 Tex. 451, 119 S. W. 86 (1909).
\textsuperscript{25}In re Dolmage's Estate, 204 Iowa 231, 213 N. W. 380 (1927). But see Welch v. Davis, 410 Ill. 130, 101 N. E. (2d) 547 (1951).
\textsuperscript{26}See authorities cited in note 9, ante.
\textsuperscript{27}Most of the cases are listed in the opinion in Courtney v. Courtney, 184 Okla. 395, 87 P. (2d) 660 (1939).
\textsuperscript{28}Austin v. Austin, 136 Miss. 61, 100 So. 591, 33 A. L. R. 1388 (1924), represents such an example.
\textsuperscript{31}Gray v. Bennett, 44 Mass. 522 (1842); Hasson v. City of Chester, 67 W. Va. 278, 67 S. E. 731 (1910).
NOTES AND COMMENTS

Married Women’s Acts are remedial in scope, some courts have disallowed tort recovery between the spouses by merely looking for the presumed intent of the legislature to the disregard of the other constructional rules. It must be said, in their favor, that in very few instances, following such a construction of a particular statute, has there been any amendment of the statute to authorize the maintenance of an action, so it may be argued that these majority-view decisions represent an accurate interpretation of the intent of the legislature.

Most courts invoking the majority view, however, seem to feel a need to reinforce the construction adopted with other reasons. One purported reason is a stated belief that the allowance of such an action between the spouses would be contrary to public policy as it would, supposedly, tend to disrupt the harmony and peace of the marital relation. Although this concept was invoked quite early in the history of this struggle, as is indicated by the Michigan case of Bandfield v. Bandfield33 where the court said “the result of plaintiff’s contention would be another step to destroy the sacred relationship of man and wife, and, to open the door to lawsuits between them for every real and fancied wrong,” the concept has been severely criticized. The answer of the minority is best expressed in the Oklahoma case of Fiedler v. Fiedler.35 The court there said: “We fail to comprehend wherein public policy sustains a greater injury by allowing a wife compensation for being disabled . . . than it would by allowing her to go into a criminal court and prosecute him . . . Nor are we able to perceive wherein the sensitive nerves of society are worse jarred by such a proceeding than they would be by allowing the parties to go into a divorce court and lay bare every act of their marriage relations in order to get alimony.”36 It might be added that there would seem to be no more of a menace to public policy in a personal tort action between the spouses than there is in a tort suit between them concerning their separate property.37 If newspaper reports from the divorce courts are to be believed, the minority view concerning the effect on public policy would certainly seem to be the more realistic one.

The fear of a flood of litigation “for every real and fancied wrong” may also have been a restraining factor, especially with courts already

32 The change in the law of New York, for example, appears to have been generated more by the holding in Schubert v. August Schubert Wagon Co., 249 N. Y. 253, 164 N. E. 42, 64 A. L. R. 293 (1928), than by the decision in Schultz v. Schultz, 89 N. Y. 644 (1882), and the cases like it. See N. Y. Laws 1937, Ch. 669; Cahill’s Cons. Laws N. Y., 1937 Supp., Ch. 14, § 57.
33 117 Mich. 80, 75 N. W. 287, 40 L. R. A. 757 (1898).
34 117 Mich. 80 at 82, 75 N. W. 287 at 288.
35 42 Okla. 124, 140 P. 1022, 52 L. R. A. (N. S.) 189 (1914).
36 42 Okla. 124 at 126, 140 P. 1022 at 1023-4.
37 Larison v. Larison, 9 Ill. App. 27 (1881).
overburdened with work. Supposing the fear to be one founded in fact, would it afford a valid reason for refusing the remedy? The mere propounding of the question operates to provide the answer, but in actual practice, in those states which have allowed one spouse to sue the other on a personal tort, there has been no report of a deluge of such actions, either real or fancied. Certainly, then, any belief that the permitting of such suits would operate to create an inherent liability for every unwarranted or undesirable touching in the course of normal family life is equally without foundation.

As most suits of this character would be likely to develop from the negligence of one spouse while operating an automobile, some of the majority opinions have also expressed a fear that the treasuries of insurance companies would become subject to constant raiding, particularly from collusive suits. The answer thereto, if not already provided by so-called "guest" statutes, lies in the fact that the law does not presume fraud but it does furnish protection against it. In any event, as the Illinois court in the Brandt case indicated, such an argument "is not relevant." To say that other remedies are available also begs the question. They either fail to provide appropriate compensation or give none at all. Instead of being adequate, as was noted in the Alabama case of Johnson v. Johnson, these remedies appear to be illusory at best.

It has also been urged, as the basis for a denial of recovery, that to construe a married woman's statute so as to permit suit would give rise to the inconsistency that, while a married woman would be able to sue her husband for his torts, he would be denied a reciprocal right. That situation did exist for a while in Wisconsin. The Married Women's Act of that state had been construed to give a wife a cause of action against her husband in the case of Wait v. Pierce, but in Fehr v. General Accident Fire & Life Assurance Corporation, where the plaintiff husband had been injured by reason of the wife's negligence in driving her automobile, the court held that the statute was not designed to give the husband a cause of action, and, as he did not have one at common law, he was without a remedy. The Wisconsin legislature remedied the situation soon afterward by passing a statute giving husbands the same rights as are enjoyed by their wives.

The fear of such a situation has undoubtedly led courts to reach a decision denying the wife a cause of action and at least one Minnesota

38 347 Ill. App. 18 at 30, 105 N. E. (2d) 796 at 802.
39 201 Ala. 41, 77 So. 335, 6 A. L. R. 1081 (1917).
40 Wis. Stats. 1951, § 246.07.
43 Wis. Stats. 1951, § 246.075.
case declares that the statute of that state was intended to do no more than put married women on equal footing with men. It would seem, however, that if the disability against suit lay in the unity of the spouses, and if that unity has been removed, certain legal consequences should follow, among them a cause of action for any invasion of those personal rights which are accorded to every legal being. While this line of thought has been advanced in favor of giving a married woman a cause of action in tort against her husband, it has usually been overlooked in connection with the problem of the husband's equal right to sue his wife.

Although fault has been found with the conclusion and reasoning of the majority of the courts on this point, the principal fault would seem to lie at the doorstep of the legislature. The statutes presented to the judiciary for construction are, in the main, ambiguous in their handling of the particular issue, but there is nothing therein that a few well-chosen words would not correct. By the adoption thereof, the legislature could readily perform its function of declaring the pertinent public policy and could thereby remove a problem from the already overburdened shoulders of the courts.

S. Kirsh

44 Woltman v. Woltman, 153 Minn. 217, 189 N. W. 1022 (1922). The statute concerned stated: "Women shall retain the same legal existence and legal personality after marriage as before, and every married woman shall receive the same protection of all her rights as a woman which her husband does as a man."

45 See dissenting opinion of Ethridge, J., in Austin v. Austin, 136 Miss. 61 at 73, 100 So. 591 at 593, 33 A. L. R. 1388 (1924).
DISCUSSION OF RECENT DECISIONS

Constitutional Law—Equal Protection of Laws—Whether or Not One May Obtain Damages for Breach of a Racial Restrictive Covenant—The Supreme Court of Oklahoma, through the medium of the case of Correll v. Earley,1 was recently faced with the difficult task of determining whether or not one who claimed to have been injured by another with whom he had entered into a racial restrictive covenant relating to land could maintain an action for breach of covenant. The case was one in which the parties had covenanted that neither the owner, nor

1—Okla. —, 237 P. (2d) 1017 (1951).
DISCUSSION OF RECENT DECISIONS

his successors or assigns, should sell, lease, or give away any property in
the restricted area to any person of the Negro or African race, and any con-
veyance so made should be void and be set aside. It was claimed that the
principal defendant, one of the covenanting parties, had conveyed to Ear-
ley, a financially irresponsible person, on the understanding that he was to
convey to certain Negroes, which he subsequently did do. The plaintiff then
brought action against the covenantor, against his grantee Earley, and
the grantees named in the deed executed by Earley, seeking to have the
conveyances set aside and damages assessed for the resulting alleged de-
preciation to the value of plaintiff's property. The plaintiff particularly
relied on the theory that the harm sustained was the direct result of a
conspiracy perpetrated by the defendants. While the suit was pending,
the Supreme Court of the United States handed down its decision in the
case of Shelley v. Kraemer. The defendants thereupon demurred to
plaintiff's entire petition and the trial court sustained such demurrer.
Plaintiff refused to plead further, the suit was dismissed, and plaintiff
then appealed directly to the Supreme Court of Oklahoma. That court,
in an unanimous opinion, overruled the demurrer to the petition although
it agreed that to rule the conveyance void would be a violation of the
equal protection clause of the Fourteenth Amendment. Regardless of
this, the court decided that the covenant, standing alone, did not violate
the federal constitution and, as between the parties, was to be deemed
valid and binding. It treated the action, considered as one for damages,
as being an action not by the state but by an individual, hence not within
the condemnation of the Fourteenth Amendment since that amendment
does not purport to protect a citizen from the effect of discriminatory
action by an individual. There being no rule against a plaintiff's right
to collect damages if he had been injured by reason of a breach of a valid
and binding contract, it was the conclusion of the court that if, as was
here charged, there existed a vicious conspiracy to induce a breach of
covenant, all of the parties participating therein were to be held liable
in damages.

The instant case is one of four on the question of damages in racial
covenant situations which have come before reviewing courts since the

2 334 U. S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1947).
3 U. S. Const., Amend. 14, provides, in part, that no state "shall make or enforce
any law which shall abridge the privileges or immunities of citizens . . . not deny
to any person within its jurisdiction the equal protection of the law."
969 (1926), as well as the view taken in the Kraemer case that the covenant was
not, per se, void for illegality.
5 It was pointed out, in the Civil Rights Cases, 109 U. S. 3 at 8, 3 S. Ct. 18 at 21,
27 L. Ed. 835 at 839 (1883), that an "individual invasion of individual rights is not
the subject matter of the Amendment."
decision in the Kraemer case. The first of these cases, being the case of Weiss v. Leaon, was predicated on substantially the same reasoning as that used in the instant case and led the Supreme Court of Missouri to uphold a complaint designed to recover damages for breach of such a covenant. In the second, that of Roberts v. Curtis, a federal district court in the District of Columbia refused to grant damages on the ground that to do so would violate the spirit of the Kraemer case, but the opinion therein, unfortunately, was extremely brief. Following the instant case, the most recent decision on the subject was rendered by the Supreme Court of Michigan in the case of Phillips v. Naff. That court, flatly rejecting the doctrine that damages might be obtained for breach of a covenant of the type in question, stated that to give relief in the form of damages would be tantamount to an indirect enforcement of the covenant. Imposition of damages, the court indicated, might well prove to be as effective a means of enforcement as would a decree of a court of equity declaring a conveyance void or enjoining a proposed transfer. The practical effect of awarding damages, said the court, would be to impose an unwarranted burden on the power of alienation. Furthermore, a judgment of a court assessing damages would be a form of official state action sufficient to bring it within the prohibition of the Fourteenth Amendment, for the state action there referred to extends to all forms of exercise of state power. This even division in the cases arising since the Kraemer decision invites an inquiry into the fundamental problem.

It is clear that direct restraints upon alienation, being opposed to public policy in general, are to be deemed void and of no effect, and the few cases which have reached a contrary result represent an extreme minority view. Courts did, however, adopt a more lenient attitude toward covenants of a partially restrictive character and, prior

6 In Tovey v. Levy, 401 Ill. 393, 82 N. E. (2d) 441 (1948), noted in 27 CHICAGO-KENT LAW REVIEW 178, the Supreme Court of Illinois, relying on the Kraemer case, held it was proper to refuse equitable enforcement of a racial restrictive covenant but no issue was reached with respect to a right to recover damages for the breach thereof. That issue remains open in Illinois.


10 See, for example, Payne v. Hart, 178 Ark. 100, 9 S. W. (2d) 1059 (1928); Voellinger v. Kirchner, 314 Ill. 398, 145 N. E. 638 (1924); Goldsmith v. Peterson, 159 Iowa 692, 144 N. W. 60 (1913); Minor v. Shipley, 21 Ohio App. 236, 152 N. E. 768 (1923); Cobb v. Moore, 90 W. Va. 63, 110 S. E. 458 (1922).


to the Kraemer case, did generally enforce racial restrictive covenants, treating them as a form of partial restraint only. In fact, money damages have been awarded to a vendee who purchased land relying on the vendor’s fraudulent misrepresentation that the property was protected by a racial restrictive covenant when, in fact, it was not so protected.

It was the contention of the plaintiff in the instant case that, while the Kraemer case prevented equitable enforcement of the covenant, the rule as to recovery of damages for a breach thereof remained the same as it would be for the breach of any other form of restrictive covenant. Even if such was not the case, it was contended that an action would lie, in tort, against one who wilfully induced another to breach a contract. By so contending, the plaintiff propounded questions which reach to the heart of the problem and reveal a hopeless, and yet to be resolved, conflict between two fundamental constitutional ideas, one which guarantees to every citizen a right to secure a remedy for every wrong, the other which forbids any form of discriminatory action by a state government.

Leaving the immediate issue aside for the moment, the weight of authority certainly used to be that, while injunctive relief might be denied as being a matter of equitable grace rather than a matter of right, it was not improper for a court to grant damages for violation of a binding covenant, which damages, in a case like the instant one, would be measured by the difference in value, at the time of breach, between that fixed for property protected by the restriction as against the value of property left without such protection. Absent illegality in the covenant, enforcement thereof by the assessment of damages produced by a breach was deemed a matter of right, provided actual damage could be shown. Many cases of the type here under consideration might well founder over the damage element, for it might not be possible to prove any devaluation in property values by reason of the presence of the excluded group in adja-

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15 On the question of the right to secure an award of damages, see Welitoff v. Kohl, 105 N. J. Eq. 181, 147 A. 390, 66 A. L. R. 1317 (1929), and Womack v. Ward, 186 S. W. (2d) 619 (Tenn. App., 1945), but neither of these cases concerns a racial restrictive covenant. See also 7 R. C. L., Covenants, p. 1165 et seq., and R. C. L. Perm. Supp., p. 2149.

16 11 Am. Jur., Conspiracy, § 48, p. 580. The case of Shaw v. Moon, 117 Ore. 558, 245 P. 318, 45 A. L. R. 600 (1926), indicates that all persons unlawfully conspiring to injure another are to be held liable as joint tortfeasors, at least as to acts done by any one of them within the scope of the joint enterprise.

17 See, for example, Ill. Const. 1870, Art. II, § 19.

cent property. Certainly, that question is too broad in scope to be answered with a word, but, assuming there would be devaluation, it is necessary to return to the fundamental problem.

If the United States Supreme Court, in the Kraemer case, had flatly declared all racial restrictive covenants void on the basis of an opposition to a clear public policy, it would have resolved the basic conflict, provided it possessed the power to fix the policy of the several states, on local questions, as well as that of the United States on federal matters. If such had been the case, no person would be able to claim a right based on such a covenant or be in a position to demand his constitutionally guaranteed remedy for the asserted wrong done for, without a right, there would be no wrong. But the court did not do so, and it is questionable if it could declare a public policy for the several states in relation to local matters. It is, then, necessary to consider the other point, i.e. would state action, by way of assessment of damages, represent a prohibited form of state activity?

It is here, in the final analysis, that restrictive covenants must stand or fall when tested by the federal constitution. True, the prohibitions of the Fourteenth Amendment have reference to state action and not to the acts of private individuals, for the amendment erects no shield against private conduct, however discriminatory. On that basis, it may be said that restrictive covenants, standing alone, do not violate the Fourteenth Amendment so long as the purposes thereof are effectuated by no more than voluntary adherence thereto. Is it not clear, however, that it would be a violation of the Fourteenth Amendment for a state to enforce them by way of judicial action, regardless of the form thereof?

The Supreme Court has said that persons may, if they wish, enter into a contract that is discriminatory in nature. The mere act of entering into such a contract in no way can be said to be the considered action of the state. When voluntary adherence is no longer present, when the agreement has been breached, and one party asks an agency of the state to grant relief against the breach, whether by injunction or in the form of damages, an entirely different situation appears. The state then must, necessarily, act through its agencies, for it is not capable of acting in any other way. Action by a state court and of its judicial officers, serv-

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19 A study of a possible decline in assessed valuations of real property for tax purposes in neighborhoods passing through a change in occupancy might reveal highly informative data on the point.
21 Civil Rights Cases, 109 U. S. 3, 3 S. Ct. 18, 27 L. Ed. 835 (1883).
23 Ex parte Virginia, 100 U. S. 339, 25 L. Ed. 676 (1880).
DISCUSSION OF RECENT DECISIONS

ing in their official capacities, can be regarded as nothing else but state action within the meaning of the Fourteenth Amendment. According to Twining v. New Jersey, the judicial act of the highest court of the state, engaged in construing the state's own law, is an act of the state itself, hence it follows that where a state court, enforcing the state's own common law, reaches a result contrary to rights protected by the Fourteenth Amendment, that result is necessarily unconstitutional.

The Supreme Court of Michigan, in the Phillips case, took cognizance of these concepts when it delivered what is definitely the more reasonable view on the instant problem. If state courts may be used to secure an award of damages for the breach of a racial restrictive covenant, the fear of being penalized by way of damages could prove to be just as great a deterrent against breach as would be a judicial decree enforcing the terms of the covenant. To a great extent, that result would nullify the beneficial effects of the Kraemer case.

It has been five years since the United States Supreme Court there refused to allow equitable enforcement of racial restrictive covenants. The prevailing uncertainty as to the legal liability of parties to pay damages for the breach of such covenants now virtually requires Supreme Court action to lay that uncertainty to rest. Such action should be forthcoming without delay in order to obviate those doubts which may be operating to block the free transfer of much seemingly restricted land.

R. L. GLOBOKAR

Criminal Law—Evidence—Whether or Not Evidence of Incriminating Statements is Admissible When Obtained Through Use of a Microphone Concealed on the Person of an Undercover Agent—In the recent case of On Lee v. United States, the courts were again confronted with an evidentiary problem concerning the admissibility of evidence obtained through the use of concealed scientific apparatus. The petitioner had been convicted under a two-count indictment, one count charging the offence of selling opium, the other with conspiracy to sell. According to the record, petitioner operated a Chinese hand laundry with

living quarters in the rear of the store. A government "undercover" agent had once worked for petitioner and appeared to be an old friend. This agent visited the laundry one day and engaged the petitioner in conversation, at which time petitioner made some incriminating statements. Unknown to petitioner, the agent had been wired for sound, with a small microphone concealed in an inside overcoat pocket and with a small antenna running along the inside of the sleeve. A federal narcotics agent, stationed outside with a receiving set properly tuned to pick up sounds from the microphone, heard the entire conversation. A few days later, another conversation took place, this time on the sidewalk outside the laundry, and the damaging admissions were again "audited." The evidence so obtained was admitted over petitioner's contention that it should have been excluded because the manner by which it was obtained violated both the search and seizure provisions of the Fourth Amendment and Section 605 of the Federal Communications Act.\(^3\) It was further claimed that the proof was inadmissible under the judicial power to require fair play in the enforcement of federal law. The Court of Appeals for the Second Circuit sustained the conviction by a divided court, and the United States Supreme Court granted certiorari.\(^4\) That court, divided five to four, found (1) there had been no trespass, hence no violation of the Fourth Amendments; (2) no violation of the Federal Communications Act, as petitioner had no wireless and no wires; and (3) no abuse of "fair play," as it would be contrary to public policy to deprive the government of the benefit of petitioner's admissions simply because its officers had not played according to the rules. The conviction was, therefore, affirmed.

The conduct of law enforcement officers, when seeking to obtain evidence upon which to base a criminal prosecution, has frequently created problems, thereby forcing courts to weigh the propriety of the means used against the necessity for unhampered police processes. The use of mechanical and scientific devices, not police innovations in themselves, has similarly raised questions. Probably the simplest and oldest medium of detection, utilized without the knowledge of the accused, is that of eavesdropping, such as standing on a public walk outside of a door or window and listening to conversations within. In that situation there is no trespass and no illegal entry so, as a general rule, the conversation overheard may be introduced in evidence, both in federal and state courts, provided the evidence is relevant.\(^5\) Evidence obtained through spies also comes within this rule,\(^6\) but while the means used will not affect admissibility it could

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\(^3\) 47 U. S. C. A. § 605.


\(^5\) Shields v. State, 104 Ala. 35, 16 So. 55 (1894).

\(^6\) Olmstead v. United States, 277 U. S. 438, 48 S. Ct. 564, 72 L. Ed. 944 (1928); Cohn v. State, 120 Tenn. 61, 109 S. W. 1149 (1908).
have bearing on the credibility of such evidence. The admissibility of
that which is overheard by a bystander to one side of a telephone con-
versation has likewise been governed by the rule relating to the admissibility
of oral conversations, provided the person testifying can positively iden-
tify the speaker.

With the advent of the phonograph and other recording devices, the
mechanical reproduction of conversations served to create new evidentiary
problems but state courts have generally admitted evidence procured
through these devices. Thus, in State v. Perkins, the recording of a
confession on a recording machine stationed in a room other than the one
where the conversation occurred, with a microphone hidden in the speaker's
room, was held admissible in evidence. In Kilpatrick v. Kilpatrick, a
'speak-o-phone' was used, with a microphone in the conversant's room
running to an adjoining room where a man was stationed with ear phones
and a recording machine, and the evidence so obtained was admitted.

In much the same way, evidence obtained through the use of a dictograph
has been accepted.

The question of the admissibility of evidence obtained by wire-tapping,
on the other hand, has caused much controversy in the federal courts
although, with the passage of the Federal Communications Act, the
question is now fairly well settled. In 1928, the United States Supreme
Court, faced with the problem of wire-tapping for the first time, took
jurisdiction over the case of Olmstead v. United States. The defendants
there concerned had been convicted for violating the National Prohibition
Act. Federal officers had tapped telephone wires leading from the offices
and residences of the defendants over a period of several months. When
it was made to appear that all tapping had been carried on outside of the
defendants' property, a divided Supreme Court held that, as there had
been no trespass, there was no search and seizure in violation of the Fourth
and Fifth Amendments. Fourteen years later, in Goldman v. United

7 Shields v. State, 104 Ala. 35, 16 So. 85 (1894).
9 Morton v. United States, 60 F. (2d) 696 (1932); People v. Metcoff, 392 Ill. 418,
64 N. E. (2d) 869 (1946); Miles v. Andrews, 153 Ill. 262, 38 N. E. 644 (1894).
10 355 Mo. 851, 198 S. W. (2d) 704 (1948).
11 123 Conn. 218, 193 A. 765 (1937).
13 Schoborg v. United States, 264 F. 9 (1920); Brindley v. State, 193 Ala. 43,
69 So. 536 (1915); State v. Minn. Milk Co., 124 Minn. 34, 144 N. W. 412 (1913).
14 47 U. S. C. A. § 605, in part, states: "... no person not being authorized by the
sender shall intercept any communication and divulge or publish the existence,
content, substance, purport, effect, or meaning of such intercepted communication
to any person."
15 277 U. S. 438, 48 S. Ct. 564, 72 L. Ed. 944 (1928). Justices Brandeis, Holmes,
Butler, and Stone each wrote a dissenting opinion.
States, the issue was again presented but this time in a case where federal officers had placed a detectaphone against the outer wall of defendant's office and had listened to conversations and phone calls carried on therein. Adhering to the Olmstead decision, the court again found no trespass or unlawful entry which could violate the Fourth and Fifth Amendments. By its holding in McGuire v. United States, the court limited the doctrine of trespass ab initio to civil actions, thereby affirming the views of the Olmstead and Goldman decisions, so as to make an actual trespass essential before a basis could be found to exclude evidence surreptitiously obtained.

With the enactment of Section 605 of the Federal Communications Act, Congress displayed an intention to place a limitation upon wire-tapping methods, but it was not until the United States Supreme Court decided the case of Nardone v. United States that the extent of the limitation was made clear. The court there held that the interception of telephone communications by wire-tapping was a violation of Section 605; that the term "persons," as used in the statute, included federal officers; and that the statute applied to both interstate and intrastate communications intercepted by federal officers. The court further declared that a divulgence within the purview of Section 605 would occur whenever the language of the intercepted message was recited in court. At present, however, it would appear that the burden is on the accused to prove that the wire-tapping was unlawfully employed and that a substantial part of the case against him was procured in that fashion.

Although some state courts have followed the federal view on the subject, a majority of the state courts are directly opposed to the federal rule. In People v. Channell, for example, the California Appellate Court held that it was not bound by the federal rule on wire-tapping, and it approved the admission of evidence obtained in that fashion.

An analysis of the decisions of the United States Supreme Court on the question of the admissibility of evidence obtained through the use of scientific devices would reveal a sharp line of conflict between those judges who would encourage the use of such means as an aid to achieving the end and those judges who believe that the end cannot justify the means. While the instant decision conforms to precedent, the strong dissent of

17 273 U. S. 95, 47 S. Ct. 259, 71 L. Ed. 556 (1927).
22 See also People v. Kelly, 22 Cal. (2d) 169, 137 P. (2d) 1 (1943); Hubin v. State, 180 Md. 279, 23 A. (2d) 706 (1942).
Justice Brandeis in the Olmstead case and the dissents of Justices Frankfurter, Burton, Douglas and Black in the instant case would indicate that the question is far from being laid at rest. Under the majority view, the adoption of trickery by federal officers will not, by itself, render evidence inadmissible in the absence of a trespass such as would make the search and seizure illegal. In opposition, the minority view would limit the extent to which federal officers may employ "dirty business" in their efforts to obtain evidence of crime. Viewed in the light of the more recent judicial policy regarding permissible methods for obtaining confessions, as well as the congressional policy relating to wire-tapping, there is fair reason to believe that technical distinctions will not be permitted to prevail but that federal law enforcement officers will eventually have to act fairly even in such matters as the suppression of crime.

M. Michaels

HUSBAND AND WIFE—ABANDONMENT—WHETHER HUSBAND IS JUSTIFIED IN LEAVING HOME WHEN WIFE ABANDONS RELIGIOUS TENETS WHICH HUSBAND AND WIFE ESPoused AT TIME OF THEIR MARRIAGE—In the New York case of Rosner v. Rosner, the nisi prius court was asked to consider whether, upon a wife's abandonment of the religious tenets which she and her husband espoused at the time of their marriage, the husband was justified in leaving the home and entitled to succeed in a suit for separation. The scant facts appearing in the opinion therein would indicate that the petitioner and her husband had, prior to marriage, orally agreed to establish a home in which, rather than other alternatives sometimes selected by Jewish people, the religious observances should be orthodox in character. The parties did so live for a time but petitioner began to substitute charitable and educational activities for home duties and home life, and began to press her husband to finance a medical school education for her to further her plans for social work. She even abandoned "Kashruth," or the serving of foods in non-contaminable dishware only, ceased to serve strictly "Kosher" foods, and refused to participate in other orthodox rites, so that the husband and their daughter could no longer partake of home life like that which originally had been planned. These events caused the husband to leave the home, whereupon the wife sued for a separation decree in her favor. The husband countered with a cross-complaint for separation, basing his action on an alleged constructive abandonment. He appears to have been successful in his request, thereby

1 — Misc. —, 108 N. Y. S. (2d) 196 (1952). It does not appear that any appeal has been taken therein.
posing a problem concerning the extent to which the free exercise of religious worship may run counter to the desire to maintain and preserve the marital status of the parties.

It was President Jefferson, according to a quotation in *Reynolds v. United States*, who said: "... religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; I contemplate with sovereign reverence that act of the American people ... building a wall of separation between church and state." To him, and to others who have made similar utterances, is attributable the noticeable lack of judicial decisions in the United States bearing upon legal problems involving religious aspects. But the courts are beginning to be caught up in a net of problems produced by a rise in the number of inter-faith marriages and are having difficulty therewith by reason of the phenomenon described by sociologists as the "cultural lag." It is not surprising, therefore, that no clear-cut precedent exists by which to settle the instant problem, although it represents a situation which is likely to be forced upon the courts for solution more and more frequently in the future.

Treating the problem simply as one involving desertion, without regard to the religious aspects, it would appear that purported distinctions as to purpose and scope have been made between desertion and abandonment, but such distinctions have not been given credence in statutory enactments nor have they been favored by text writers who have carefully examined the problem. The essence of the offense lies in the separation of the married parties for a length of time, the period being frequently designated by statute, without justification, either in the form of consent or by the wrongful conduct of the complainant, and with the intention of not returning. There is disagreement among the courts and the writers as to whether the marital offense must be the equivalent of a ground for divorce in order to justify the claim of desertion. Illinois has adopted a conservative view on the point, one most often applied else-

2 98 U. S. 145 at 164, 25 L. Ed. 244 at 249 (1878).
5 Schouler, op. cit., § 111, at p. 139.
7 See Keezer and Morland, Marriage and Divorce (Bobbs-Merrill, Inc., Indianapolis, 1946), § 391, at p. 458, and Schouler, op. cit., § 120, at p. 167.
8 Frank v. Frank, 178 Ill. App. 557 (1913).
DISCUSSION OF RECENT DECISIONS

where in the constructive desertion cases, but that view is not universal and a different viewpoint has been taken when the abandoned party is the one seeking the divorce. The general nature of the conduct relied on, however, must be inconsistent with the marital relation or be such that it renders cohabitation unsafe or unbearable, and courts will not sustain the withdrawal except for the gravest and most compelling reasons, reasons which involve the fundamental happiness or self-respect of the withdrawing spouse. Samples of conduct which have been said to be sufficient include the putting of the husband in an asylum without just cause, the abuse and neglect of the wife by the husband, the failure of the husband to support the wife when able, and the refusal of sexual relationships. On the other hand, simple neglect or failure to provide, in the absence of aggravating circumstances, has been deemed insufficient. With particular regard to neglect, the neglect must, under statutory enactments, be gross in character and not mere slovenliness and laziness. In Illinois, for example, it has been held that a showing of uncleanliness and laziness on the part of a wife, both with respect to herself and the children, would be insufficient to justify the husband's withdrawal from the family home.

Applying these standards to controversies involving religious difficulties between the parties, the general rule which has evolved is one that treats mere differences of opinion in matters of religion as being inadequate to constitute a ground for divorce. Thus, a mere neglect

10 Campbell v. Campbell, 110 Conn. 277, 147 A. 800 (1929); Kruse v. Kruse, 179 Md. 297, 22 A. (2d) 475 (1941); Poole v. Poole, 176 Md. 696, 6 A. (2d) 243 (1939); Singewald v. Singewald, 165 Md. 136, 166 A. 441 (1933); Schwartz v. Schwartz, 158 Md. 80, 148 A. 259 (1930).
11 Nelson, op. cit., at p. 102.
13 Higgins v. Higgins, 222 Ala. 44, 130 So. 677 (1930); Jones v. Jones, 95 Ala. 443, 11 So. 11, 18 L. R. A. 95 (1891).
14 Osterhout v. Osterhout, 30 Kans. 746, 2 P. 804 (1883).
17 Leach v. Leach, 46 Kans. 724, 7 P. 131 (1891).
19 Berry v. Berry, 18 Ohio N. P. (N. S.) 521 (1915).
22 Schouler, op. cit., § 120, at p. 168.
arising from participation in religious affairs, unless accompanied by barbarous and cruel treatment will be inadequate. It has, likewise, been found that disagreement as to church affiliations; a change of religious beliefs and an attempt to proselytize the wife; a refusal to allow the spouse and children to attend a certain church; a systematic refusal to permit attendance at a certain Sunday school without a row; a refusal to give up a certain church after a pre-marital promise to do so, resulting in continual bickering between the spouses; or religious differences plus the breach of a pre-marital promise to attend church will be insufficient to serve as grounds for divorce or separation. In contrast thereto, there is a group of cases which hold that refusal by one spouse to cohabit with the other, following a civil ceremony but without the celebration of religious rites, entitles the other to seek relief by way of divorce or separation, particularly so if both parties belong to a sect which prohibits cohabitation without a religious ceremony. The same rule has been applied in New Hampshire and has been enacted into statutory form in Kentucky. However, there are a few decisions to the effect that, in such situations, an annulment should be granted, as for fraud. One writer has well said that the public interest in cases where no cohabitation has taken place is so substantially lessened that simple fraud should be a valid cause for terminating the incomplete marriage, but Illinois has not, as yet, seen fit to recognize this distinction.

It is evident that the American desire for separation between church and state has, for the most part, caused American courts to take an objective view and to apply customary civil law relating to desertion and fraud

27 Lawrence v. Lawrence, 3 Paige 267 (N. Y., 1832).
29 Meffert v. Meffert, 118 Ark. 582, 177 S. W. 1 (1915).
32 Fitts v. Fitts, 46 N. H. 184 (1865).
35 See note in 76 U. of Pa. L. Rev. 1003.
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in these cases. That trend also prevails in a more carefully reasoned group of authorities wherein the gist of the action appears to rest on cruelty alleged to result from the religious practices of one spouse upon the other, or upon the family. In some of these cases objective tests of cruelty, it would seem, have been dangerously disregarded under the guise of protecting the offended spouse from religious persecution by the remedy of divorce or separation. Thus, the New Hampshire case of Robinson v. Robinson\(^37\) held it proper to grant the husband a divorce, even though the wife was recognized to be a peaceful person and a good mother, because her practice of a certain religion, opposed by her husband, caused him to become morose and inattentive to his business, to occasionally suffer from insomnia and loss of appetite, and to become generally despondent and unhappy because of his changed marital status. Admitting that the conduct complained of was, in itself, innocent and even laudable, and was pursued from a sense of duty, the court said it still did not "afford a sufficient reason for requiring the party injured by it to submit to the destruction of health, reason, or life."\(^38\) The Idaho case of DeCloedt v. DeCloedt\(^39\) also held that "religious persecution" by the wife, consisting of a constant, firm pressure to join her church, vilifying the petitioner's church and its leaders, coercion to "pray the beads," and the like, which thoroughly sickened the husband, entitled him to secure a divorce on the ground of cruelty. The court there indicated that the right to practice and hold to that faith and belief which accorded with the judgment of the person must be conceded, as between husband and wife, the same after marriage as before, since that right should exist between all persons. In other cases, cruelty has been considered from an objective standpoint without regard to its basis in religion.\(^40\) It has been said, for example, that if the result of the practice of a certain religion, considered objectively, was of a nature to threaten the defendant's wife and children with extreme poverty and loss of social status, it would constitute a ground for divorce.\(^41\) The Arizona case of Smith v. Smith\(^42\) reached a similar result where the wife's practice of religion, upon becoming a member of the Jehovah's Witnesses, operated to disrupt and destroy her husband's home life and family relationships.\(^43\)

\(^{38}\) 66 N. H. 600 at 610, 23 A. 362 at 365.
\(^{39}\) 24 Ida. 277, 133 P. 664 (1913).
\(^{40}\) Hammond v. Hammond, 74 Tex. 414, 12 S. W. 90 (1889).
\(^{42}\) 61 Ariz. 373, 149 P. (2d) 683 (1944).
\(^{43}\) Two alienation of affections cases might also be noted. In Buckley v. Francs, 78 Utah 606, 6 P. (2d) 188 (1932), it was held that where a church elder kissed plaintiff's spouse as part of a religious rite such fact should have been considered in determining whether a cause of action existed under the facts there appearing.
To generalize from these investigations, it might be said that the holding in the instant case superficially tends to set a precedent for protection of religious liberty through state divorce proceedings, but it represents a potentially unhealthy development when viewed from a constitutional standpoint. True, the wording of the opinion therein emphasizes the objective results likely to flow from a refusal to conform to agreed religious practices. At worst, it is no more than mildly novel in view of the conflict which exists between the authorities generally regarding matters of justification. But if state courts, in divorce or separation matters, may limit the extent of the religious practices permissible within a home, they could, by an easy step, undertake to prescribe the religious rites which are to be practiced, as well as determine the when, where and manner of their exercise. If the decision illustrates anything important, it points to the need for devoting more resource to learning enough about the degree of emotional maturity of persons contemplating marriage to enable a better prediction to be made of the chance of success therein.

W. M. James, Jr.

JURY—RIGHT TO TRIAL BY JURY—WHETHER OR NOT STATE COURTS, IN ACTIONS ARISING UNDER THE FEDERAL EMPLOYERS’ LIABILITY ACT, MUST GRANT JURY TRIAL IN CONFORMITY WITH PRACTICE IN FEDERAL COURTS—The vexing problem of the extent to which state court practice must conform to federal law when actions based on federal legislation are brought in state courts was considered by the Supreme Court of the United States.

In Mohn v. Tigley, 191 Cal. 470, 217 P. (2d) 733 (1923), it was said that the fact of donations by a spouse to a certain religious sect, and the interference of its officials, in propounding its precepts, with plaintiff’s management of her family-home, should have been considered by the jury.

It is doubtful if Illinois would reach a similar result in view of the restrictive statutory definition of desertion to be found in Ill. Rev. Stat. 1951, Vol. 1, Ch. 40, § 1. In that regard, it should be noted the New York proceeding was based on a “separation” law, under which abandonment is the gist of the action. See Clevenger, Practice Manual 1945, §§ 1165a and 1166, and Harvey v. Harvey, 175 N. Y. S. 177 (1919); DeVide v. DeVide, 174 N. Y. S. 774 (1919); Pearson v. Pearson, 173 N. Y. S. 563 (1918). See also Sistare v. Sistare, 218 U. S. 1, 30 S. Ct. 682, 54 L. Ed. 905 (1909).

One opinion, and sadly only one, was found in the course of this investigation wherein the court seemed to expect mature judgment on the part of the complaining spouse. The fact that it was rendered in 1832 may be significant. In Lawrence v. Lawrence, 3 Paige 267 at 271 (N. Y., 1832), the jurist said: “Although it was an act of great unkindness and of unreasonable oppression on the part of the husband to use his marital power in separating his wife from the church of which she was a member, and with which she preferred to worship, I have no hesitation in saying that she mistook her duty in not submitting to the oppressor if she could not win his consent by kindness and condescension. . . . A Christian wife and mother should suffer much and long before she can be justified in resorting to the doubtful and dangerous expedient of a suit for separation.”
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in the recent case of Dice v. Akron, Canton & Youngstown Railroad Company.\^1 One of the issues in that case involved the validity of a release which had been signed by Dice, an injured railroad employee, who had begun his suit in an Ohio common pleas court under the Federal Employers' Liability Act.\^2 The trial jury found for the plaintiff, but the trial judge later entered judgment notwithstanding the verdict because he found the release to be valid. That holding was reversed by the Ohio Court of Appeals, which in turn was reversed by the Ohio Supreme Court with one judge dissenting. The state supreme court held that Ohio, not federal, law governed and under the controlling Ohio law factual issues as to fraud in securing the release were properly to be decided by the judge rather than the jury. The Supreme Court of the United States then granted certiorari and, although divided five to four, it reversed the Supreme Court of Ohio. The essence of the majority holding was that the right to trial by jury on the issue of the validity of the release formed too substantial a part of the rights accorded by the federal statute to permit of its classification as a mere rule of local procedure. The opposing view was to the effect that, despite the origin of the particular claim, a state was under no duty to treat an action of the kind in question any differently than it would adjudicate a similar problem involved in a local action for negligent injury.

A seeming conflict between state and federal procedural law has arisen over many other questions beside the instant jury problem. It may be of interest to note that the federal rules have been held to prevail on such points as (1) the party who must bear the burden of proof as to contributory negligence;\^3 (2) the sufficiency of evidence to establish negligence;\^4 and (3) the amount of evidence necessary to take the case to the jury.\^5 On the other hand, state practice has been held to

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\^1 - U. S. —, 72 S. Ct. 312, 96 L. Ed. (adv.) 285 (1952), reversing 155 Ohio St. 185, 98 N. E. (2d) 301 (1951). Justice Frankfurter, with whom Reed, Burton, and Jackson, J.J., joined, concurred in the reversal but dissented from the reasoning of the majority on the point in question.

\^2 45 U. S. C. A., § 51 et seq.

\^3 Central Vermont R. Co. v. White, 238 U. S. 507, 35 S. Ct. 865, 59 L. Ed. 1433, Ann. Cas. 1916B 252 (1915). The court there said: "... it is a misnomer to say that the question as to the burden of proof as to contributory negligence is a mere matter of state procedure. For, in Vermont, and in a few other states, proof of plaintiff's freedom from fault is a part of the very substance of his case. But the United States courts have uniformly held that, as a matter of general law, the burden of proving contributory negligence is on the defendant.... Congress, in passing the Federal Employers' Liability Act, evidently intended that the Federal statute should be construed in the light of these and other decisions of the Federal courts."


\^5 Lloyd v. Alton R. Co., 348 Mo. 1222, 159 S. W. (2d) 267 (1942), and Weaver v. Mobile & Ohio Railroad Co., 343 Mo. 223, 120 S. W. (2d) 1105 (1938).
control as to the manner of amending pleadings,6 the manner of objecting to the sufficiency of a pleading,7 the right to grant a partial new trial on one issue only,8 as to the admissibility of evidence,9 the time and manner in which a substantive right must be asserted,10 the manner by which persons not sui juris may bring suit,11 the effective operation of the statute of limitations,12 the degree of proof necessary to upset a release,13 and the function to be performed by the trial court in directing the preparation of proper instructions for the jury.14

As to the law which should control the right to trial by jury, the majority opinion in the instant case would appear to be based on two grounds, to-wit: (1) that jury trial is “part and parcel” of the remedy afforded by the Federal Employers’ Liability Act, and (2) it is desirable to have uniform application of the act throughout the country.15 On the first of these points, the leading case on the subject of the right to a jury trial in a state court in a case arising under federal legislation, until the present decision, was that of Minneapolis & St. Louis Railroad Company v. Bombolis.16 The sole question there turned on the applicability, in a state court, of a local statute calling for a less than unanimous verdict to an action under the Federal Employers’ Liability Act. The argument against such a verdict rested on the proposition that, as the right arose under federal law and was federal in character, the defendant was entitled to a jury constituted, and reaching its conclusion, according to the

7 McIntosh v. St. Louis, etc., R. Co., 182 Mo. App. 288, 168 S. W. 821 (1914).
15 It was said that “... a release of rights under the Act is void when the employee is induced to sign it by the deliberately false and material statements of the railroad’s authorized representatives made to deceive the employee as to the contents of the release.” — U. S. — at —, 72 S. Ct. 312 at 314, 96 L. Ed. (adv.) 285 at 287. This would hardly affect the jury issue, however, for a judge could decide the factual situation as well as a jury, if permitted to do so.
course of the common law as guaranteed by the Seventh Amendment. Pointing to the fact that the first ten amendments for the federal constitution dealt only with federal action, the court held it to be a necessary corollary that the Seventh Amendment applied only to proceedings in courts of the United States and did not, in manner whatever, govern or regulate trial by jury in state courts or the standards to be there applied concerning the same.

The Seventh Amendment argument was not mentioned in the majority opinion in the instant case but the Bombolis decision came in for comment when the majority indicated it might have been more in point had Ohio "abolished trial by jury in all negligence cases including those arising under the federal act." That sort of argument would seem to be based on the proposition that it is better to kill a man outright rather than to submit him to the inconvenience of being merely wounded. Instead of following the view of the Bombolis case, the majority appeared to prefer to rest on the holding in Bailey v. Central Vermont Railway, Inc., wherein it was said that the right to trial by jury was a "basic and fundamental feature of our system of federal jurisprudence." A study of the Bailey case, however, reveals that the statement was taken from the opinion in the case of Jacob v. City of New York; a suit

18 See Minneapolis & St. L. R. Co. v. Bambolis, 241 U. S. 211 at 217, 38 S. Ct. 595, 60 L. Ed. 961 at 963 (1916). The court also stated: "... it is conceded that rights conferred by Congress, as in this case, may be enforced in state courts; but it is said this can only be provided such courts, in enforcing the Federal right, are to be treated as Federal courts and must be subjected pro hac vice to the limitations of the Seventh Amendment. And, of course, if this principle were well founded, the converse would also be the case, and both Federal and State courts would, by fluctuating hybridization, be bereft of all real, independent existence. That is to say, whether they would be considered as state or Federal courts would, from day to day, depend not upon the character and source of the authority with which they were endowed by the government creating them, but upon the mere subject matter of the controversy which they were considering." 241 U. S. 211 at 221, 38 S. Ct. 593, 60 L. Ed. 961 at 965.
20 In St. Louis & S. F. R. Co. v. Brown, 45 Okla. 143 at 161, 144 P. 1075 at 1081 (1914), the Supreme Court of Oklahoma said: "We apprehend that the state has the power to abolish a trial by jury altogether; and provide that all questions, both of law and of fact, should be determined by the court. Should this be done, and a suit involving a right under the Federal statute be instituted by a party in the state court, and he be denied a jury trial in accordance with state law, yet if such party, seeking to enforce his right under the Federal statute, were accorded the same mode of procedure that all citizens of the state were entitled in the enforcement of rights under the state law, it could not be successfully urged that such party was entitled to a jury trial on the ground that he was seeking to enforce a right granted to him by a federal statute." The holding therein was affirmed in 241 U. S. 223, 36 S. Ct. 692, 60 L. Ed. 966 (1916), on the strength of the Bombolis decision.
22 318 U. S. 350 at 354, 63 S. Ct. 1062, 87 L. Ed. 1444 at 1448.
brought in a federal district court, where the provisions of the Seventh Amendment regarding jury trial would be in full force and effect, rather than in a state court, as was true of both the Bombolis and Dice cases. It is also important to note that the Jacob case was based on the Jones Act, a statute dealing with injuries inflicted on members of the merchant marine, and thereby brought into play certain special factors to be discussed below. It is true that the Bailey case does state that rights "which the act creates are federal rights protected by federal, rather than local rules of law," but that thought bears more directly on the uniformity argument and scarcely relates to the procedural question.

On the uniformity aspect, the majority opinion in the instant case declares that "only if federal law controls can the federal Act be given that uniform application throughout the country essential to effectuate its purposes." In support of that view, the court cited the case of Garrett v. Moore-McCormack Company, Inc., one dealing with a suit brought in a Pennsylvania court predicated on the Jones Act as well as to secure maintenance and cure pursuant to admiralty law. While the Jones Act incorporates by reference all of the applicable provisions of the Federal Employers' Liability Act, and many of the cases thereunder can properly be used to illustrate principles involved in employment cases, the citation of the Garrett case provides a fine illustration of the danger which can arise from applying Jones Act decisions without thought to employers' liability cases. Speaking of the Jones Act, the court in the last mentioned case stated that the "law is to be liberally construed to carry out its full purpose, which was to enlarge admiralty's protection to its ward . . . Being an integral part of the maritime law, rights fashioned by it are to be implemented by admiralty rules not inconsistent with the Act." It happens to be the admiralty doctrine, in contrast to the Pennsylvania state rule, that the responsibility is on the defendant to sustain an alleged release, rather than on the plaintiff to overcome it. It was, therefore, held that the right of the petitioner to be free from the burden of proof imposed by the Pennsylvania local rule inhered in the cause of action, was a part of the very substance of the claim, and was not to be considered a mere incident to the form of procedure. But it is evident that the special concern of admiralty law for the interests

25 319 U. S. 350 at 352, 63 S. Ct. 1062, 87 L. Ed. 1444 at 1447. Authority for that statement may be found in Seaboard Air Line Ry. v. Horton, 233 U. S. 492, 34 S. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C 1 (1914), but it applies, if at all, to the uniformity argument rather than to the jury trial issue. See also L. R. A. 1915C 47 and 47 L. R. A. (N. S.) 47.
26 — U. S. — at —, 72 S. Ct. 312, 96 L. Ed. (adv.) 285 at 287.
27 317 U. S. 239, 63 S. Ct. 246, 87 L. Ed. 239 (1942).
28 317 U. S. 239 at 248, 63 S. Ct. 246, 87 L. Ed. 239 at 245.
of seamen lies at the very basis of the decision. Railroad workers, on the other hand, have never been protected by any similar solicitous concern on the part of the common law. If admiralty rules are to be used to implement the Jones Act, it may obviously be necessary to require changes in state practice to effectuate the purposes of that statute, but it does not follow that similar changes would be required under the Federal Employers' Liability Act standing alone.

In further development of the uniformity argument, the Dice opinion noted that, as Congress had granted the employee a right to recover against his employer for damages negligently inflicted, state laws should not be controlling in determining what the incidents of the federal right should be. It is clear, ever since the determination laid down in the Second Employers' Liability Cases,29 that state laws, insofar as they cover the same field, have been superseded, but this is true only to the extent such statutes have dealt with the nature of the employer's liability.30 The broad statement that "federal law controls" covers too much ground if the decision therein, and in the cases resting thereon, is to be used as authority. The Federal Employers' Liability Act may operate to supersede a state statute dealing with liability but it does not, by that fact, exclude state statutes or rules dealing with the administration of state courts, provided they do not conflict with specific provisions of the Federal Employers' Liability Act.

In only one case cited by the majority, that of Brown v. Western Railway of Alabama,31 was a rule of local procedure involved. It appeared therein that a Georgia rule of practice, similar to the common law concept, construed all pleadings most strongly against the pleader. The United States Supreme Court there said that if it failed "to protect federally created rights from dismissal because of over-exacting local requirements for meticulous pleadings, desirable uniformity in adjudication of federally created rights could not be achieved."32 But it is a long way from picking on a petty procedural rule to reach the goal that, because a federal right is involved, the litigant is entitled to have a local tribunal operate, in all respects, as would a federal court. In fact, the

30 The effect of federal intervention has, at times, operated to reduce rights previously enjoyed. In Seaboard Air Line Ry. v. Horton, 252 U. S. 492, 34 S. Ct. 635, 58 L. Ed. 1062 (1914), for example, a state statute making a railroad absolutely responsible for the furnishing of safe equipment to its workers had to yield to the liability imposed by the Federal Employers' Liability Act, which conditions recovery upon a showing of the employer's negligence. See also Panhandle & S. F. Ry. Co. v. Brooks, 199 S. W. 665 (Tenn. App., 1917), and New York Cent. R. Co. v. Winfield, 244 U. S. 147, 37 S. Ct. 546, 61 L. Ed. 1045, Ann. Cas. 1917D 1139 (1917).
31 338 U. S. 294, 70 S. Ct. 105, 94 L. Ed. 100 (1950).
32 338 U. S. 294 at 299, 70 S. Ct. 105, 94 L. Ed. 100 at 104.
majority opinion in the instant case hardly appears to have given consider-
ation to the potential damage which could be caused by a literal
extension of that doctrine. A valid question is projected whether na-
tion-wide uniformity in the application of the Federal Employers’ Liability
Act to the extent suggested is worth the resulting confusion likely to
occur in the courts of the forty-eight states.\(^3\) As long as local differences
prevail, it should be remembered that when Congress creates a right and
confers jurisdiction on the courts of the states to enforce the right “it
adopts the prevailing rules of procedure in the state.”\(^4\) If that is not
what is desired, the litigant is free to effectuate his remedy elsewhere for,
as Justice Frankfurter once pointed out, “the Federal courts are always
available.”\(^5\) If, instead, he chooses to use the local tribunal, he should
be governed by the consequences attaching to his choice.

W. F. WALSH

MASTER AND SERVANT—LIABILITY OF MASTER FOR TORTS OF SERVANT—
WHETHER SERVANT, AFTER AN EXTENSIVE FROLIC OF HIS OWN, CAN BE
SAID TO BE ONCE MORE IN THE SCOPE OF HIS EMPLOYMENT MERELY BECAUSE
HE HAS TURNED TOWARD HIS EMPLOYER’S PLACE OF BUSINESS—The recent
case of Parotto v. Standard Paving Company\(^1\) involved the Appellate Court
for the First District with the much litigated problem of determining
whether a servant had merely “detoured” from his route or had instead en-
gaged in a “frolic” of his own. Defendant’s servant was a truck driver who
worked out of a central garage with no fixed hours. Late in the after-
noon on the day of the accident, he had delivered a load of material and
had returned to the very threshold of the employer’s garage when his
passengers, fellow employees, inveigled him into driving them to a nearby
tavern. He did this and then drove to his home. He later returned,
picked up the passengers and drove with them to another more distant
tavern where they stayed until the early morning hours. He was en route

\(^3\) In 21 C. J. S., Courts, § 526, the point is made that state courts are directed
to enforce the following present or former federal statutes, to-wit: National Indus-
trial Recovery Act, National Prohibition Act, laws relating to public lands, the
Safety Appliance Act, Sherman Anti-Trust Act, Clayton Act, Trading With The
Enemy Act, War Risk Insurance Act, Emergency Price Control Act, Housing and
Rent Act of 1947, Soldiers and Sailors Civil Relief Act, and the Fair Labor Stan-
ards Act, in addition to the Federal Employers’ Liability Act. The volume of
litigation arising under these statutes is an indication of the degree of confusion
which could be caused.

v. Meadows, 119 Va. 33, 89 S. E. 244 (1916).

\(^5\) See dissenting opinion of Frankfurter, J., in Brown v. Western Railway of
Alabama, 338 U. S. 294 at 300, 70 S. Ct. 105, 94 L. Ed. 100 at 104.

\(^1\) 345 Ill. App. 486, 104 N. E. (2d) 102 (1952). Leave to appeal has been denied.
from this tavern to the employer's garage when the accident in suit occurred, causing severe injury to a third person, plaintiff herein. The trial jury returned a verdict in favor of the plaintiff upon which judgment was entered. The employer-defendant, who had offered no evidence, appealed and contended the trial court should have directed a verdict in its favor. The Appellate Court, however, refusing to upset the verdict, affirmed the judgment of the trial court.

While the doctrine of respondeat superior may have been applied from as early as Roman civil law,\(^2\) it was not until 1834 that Baron Parke originated the nebulous concept of "frolic" and "detour" through the medium of the case of Joel v. Morison.\(^3\) The application of these concepts to a myriad of factual situations since then has produced a decided lack of uniformity in result in this country. It is clear, however, that the proposition that the master is responsible solely because he has entrusted a vehicle to a servant, advanced in Sleath v. Wilson\(^4\) but expressly overruled by Mitchell v. Crassweller,\(^5\) has not been adopted in the United States.\(^6\) In fact, in several jurisdictions, including the better reasoned Illinois cases,\(^7\) proof by the plaintiff that the vehicle belonged to the defendant and that it was being driven by the defendant's servant at the time of the accident raises no more than a rebuttable presumption that the servant was acting within the scope of his employment.\(^8\) Even when evidence has been offered to overcome that presumption, the court may, in cases where the deviation is slight and not unusual, determine as a

\(^2\) Radin, Handbook of Roman Law, Ch. 5, § 53.

\(^3\) 6 C. & P. 501, 172 Eng. Rep. 1338 (1834). Baron Parke there indicated that a master is not responsible for injuries caused to others by his servant's unauthorized negligence while the servant was on a "frolic of his own," but "if the servants, being on their master's business, took a detour to call upon a friend, the master will be responsible."


\(^7\) Lohr v. Barkman Cartage Co., 335 Ill. 335, 167 N. E. 35 (1929) ; Kavale v. Morton Salt Co., 326 Ill. 445, 160 N. E. 752 (1928) ; Howard v. Amerson, 236 Ill. App. 557 (1925). But see Craig v. Tucker, 264 Ill. App. 521 (1932), and Cohen v. Fayette, 233 Ill. App. 458 at 462 (1924), to the effect that plaintiff must show, by a preponderance of the evidence, that the servant was not only employed but was also, at the time, acting within the scope of the employment.

matter of law that the servant was still executing his master's business. Conversely, where the deviation is marked and unusual, the court may determine that the servant was not on his master's business at all, but on his own. Cases falling between these extremes are said to involve a question of fact which must be left to the jury.

The greatest conflict in the decisions seems to arise in those cases where the servant, engaged in business for the master, has temporarily abandoned that business and subsequently has resumed, or is about to resume, his master's activities when the accident occurs. Clearly, when the servant leaves the premises on the way out to attend to some purely personal errand, as to eat supper, to return home because his work is finished, or because he has become ill, and irrespective of whether or not he is, at the time of the accident, using a vehicle belonging to the master, the decisions all indicate that the master cannot be held liable. Merely because the servant is disobeying the master's express instructions, however, is not sufficient to take the servant out of the scope of his employment and if the employee's deviation consists solely in giving aid to distressed fellow travellers of the road, or is undertaken at a time when the servant can be said to be engaged jointly in the business of his

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16 Keedy v. Howe, 72 Ill. 133 (1874), bartender selling liquor contrary to instructions; Toledo, Wabash & Western Ry. Co. v. Harmon, 47 Ill. 298 (1868), railroad engineer blowing whistle and frightening horses; Swancutt v. W. M. Trout Auto Livery Co., 176 Ill. App. 606 (1913), hotel cab driver picking up private passengers. See also Spice v. Autry, 184 Ind. 1. 110 N. E. 261 (1915); Whiteacre v. Chicago, R. I. & P. R. R. Co., 252 Mo. 438, 60 S. W. 1009 (1913), affirmed in 239 U. S. 421, 36 S. Ct. 152, 60 L. Ed. 360 (1915).
master as well as his own, there has been no complete turning away, so the master-servant relationship will be considered as having continued.

Assuming that a deviation has occurred, so as to put the servant on his own responsibility, the English cases indicate that the employee remains outside his employment until he returns to the point of departure. While this rule may be theoretically sound and easy to apply, it could produce unfortunate results for it is possible that the servant may have once again devoted himself exclusively to the business of the master without returning to the point of departure. While some jurisdictions in this country follow the English cases, most others, including Illinois, are in conflict over the point as to whether the employee returns to the master’s business as soon as he has accomplished his personal objective and starts to return or at some mid-point between the return and the point of departure.

The Appellate Court in the instant case preferred to follow the holding in Kavale v. Morton Salt Company, a case which supports the proposition that once a return has been made, so that the servant is once more acting in the scope of his employment, liability can attach to the employer. The facts in the two cases are similar except that, in the instant case, the driver was several miles from the garage and some seven hours overdue when the accident occurred whereas, in the Kavale case, the servant was in the immediate vicinity and only three hours overdue. Neither the exact mileage of deviation nor the amount of time overdue seems to

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have influenced the determinations concerning the scope of employment\textsuperscript{24} and, where considered, other factors have shown the issue not really one in point.\textsuperscript{25} The only Illinois case directly contrary to the Kavale case is that of \textit{Public Service Company of Northern Illinois} v. \textit{Industrial Commission},\textsuperscript{26} but that case may be distinguished on the ground the proceeding was one to secure workmen's compensation and the deviating employee was suing rather than some third person injured by his acts. It is possible the court therein may have felt it had to be stricter in determining the question of whether or not the employee had returned to the zone of employment. If so, this admittedly new approach may offer an ingenious explanation of the cleavage to be found in the Illinois cases.\textsuperscript{27}

To test the validity of this approach, it becomes necessary to go back and examine the basic reasons for the \textit{respondeat superior} doctrine as well as the principles underlying workmen's compensation statutes. Baty, after an exhaustive study to determine the reason behind the doctrine of \textit{respondeat superior}, finally stated that, in his opinion, the real reason for the employer's liability is that "the damages are taken from a deep pocket."\textsuperscript{28} By contrast, Seager indicates that the policy supporting workmen's compensation acts is one by which "the loss to wage earners resulting from the accidents of industry should be regarded as an expense of production which the employer should bear as he bears the other expenses of production and which, since the burden falls on all employers alike, he will be able to recover normally in the somewhat higher prices he will obtain for his goods."\textsuperscript{29} Both doctrines appear to be the result of a practical attempt to place the loss on those who can best bear the same rather than the outcome of any philosophical or theoretical reasoning applied to the problem. Such being the case, rules founded on practicality should certainly be subject to practical distinctions. Employers should

\textsuperscript{24} The only case in which the decision could be said to be based on either of these factors is that of \textit{Cannon} v. \textit{Goodyear Tire & Rubber Co.}, 60 Utah 346, 208 P. 519 (1922), which case indicated that if the accident occurred after the employee had been away from his employer's business for more than five hours, even though he was returning thereto, he could not, as a matter of law, be said to be in the scope of employment.

\textsuperscript{25} The case of \textit{Nelson} v. \textit{Stutz Chicago Factory Branch}, 341 Ill. 387, 173 N. E. 394 (1930), involved a servant who had no right to use the vehicle at all. In \textit{Lohr} v. \textit{Barkman Cartage Co.}, 335 Ill. 335, 167 N. E. 35 (1929), the servant was still on a "frolic" of his own and had made no attempt to return to his master's business. See further on this latter point: \textit{Central Garage of LaSalle} v. \textit{Industrial Commission}, 286 Ill. 291, 121 N. E. 337 (1919); \textit{Boehmer} v. \textit{Norton}, 328 Ill. App. 17, 65 N. E. (2d) 212 (1946); \textit{Craig} v. \textit{Tucker}, 264 Ill. App. 521 (1932).

\textsuperscript{26} 395 Ill. 238, 69 N. E. (2d) 875 (1946).

\textsuperscript{27} The explanation is, however, one which corresponds with the facts. The Illinois cases listed in note 22, ante, are all Industrial Commission cases with one exception.

\textsuperscript{28} Baty, \textit{Vicarious Liability}, Ch. VIII.

\textsuperscript{29} Seager, \textit{Principles of Economics}, p. 601.
be expected to owe greater responsibilities to third persons who have been injured by their deviating servants than to such servants themselves.

Nevertheless, there remains the possibility that some new concept might be adopted which could afford a more equitable solution. If it is too harsh to hold the employer responsible because of a mere turning by the deviating employee in the direction of the employer's place of business, a more reasonable solution would be to adopt the foreseeability test now applied in many tort negligence cases. Under it, an employer could be held liable whenever the employee has entered the foreseeable zone, that is the area within which an employer could reasonably expect his employees to deviate during the course of their employment. Applying such a standard to the instant case, the driver might well have been considered outside the zone of reasonable deviation for it could be said, as a matter of law, that no employer would foresee that an employee would still be acting within the scope of his employment when he was miles from his place of work and more than seven hours overdue.

W. J. Moore

WORKMEN'S COMPENSATION—EFFECT OF ACT ON OTHER STATUTORY OR COMMON-LAW RIGHTS AND DEFENSES—WHETHER THE ILLINOIS WORKMEN'S COMPENSATION ACT UNCONSTITUTIONALLY DEPRIVES COVERED EMPLOYEE OF HIS RIGHT OF ACTION AGAINST COVERED THIRD PARTIES WHO CAUSE EMPLOYEE'S INJURY OR DEATH—As a result of a motor vehicle collision caused by the alleged negligence of one of defendant's employees, the plaintiff and his employer, in the recent case of Grasse v. Dealer's Transport Company, instituted proceedings to recover damages. The first count of the complaint, which was in two counts, presented an ordinary common-law negligence claim on behalf of the injured employee. The second count, offered by the employer, presented a reimbursement claim covering items paid to the injured employee by way of workmen's compensation. The defendant's answer to the first count, relying upon the first paragraph of Section 29 of the Illinois Workmen's Compensation Act, asserted that the injured employee was without legal capacity to bring such an action. A motion by the employee-plaintiff to strike the answer, on the ground that the provision in question, when construed with Section 3 of the same statute, was contrary to both the federal and

30 The solution is partly suggested in a note in 23 Col. L. Rev. 444 (1923).
1 412 Ill. 179, 106 N. E. (2d) 124 (1962).
2 Although the defense relied particularly on Ill. Rev. Stat. 1949, Vol. 1, Ch. 48, § 166, the text thereof was incorporated in the 1951 revision of the Workmen's Compensation Act: Ill. Rev. Stat. 1951, Vol. 1, Ch. 48, § 138.5(b).
3 Same as Ill. Rev. Stat. 1951, Vol. 1, Ch. 48, § 138.3.
the state constitutions, was denied in the trial court and the first count of the complaint was dismissed without prejudice to the pending cause of action of the employer. On direct appeal to the Illinois Supreme Court, that judgment was reversed, and the cause was remanded with directions to reinstate the first count, when the high court concluded that the particular provision, as applied to the situation before it, was unconstitutional by reason of being an arbitrary and capricious attempt to create classifications not warranted in law.

The phraseology of the questioned portion of the statute purported to declare that, when an employee under the act had been injured in the course of his employment through the negligence of a third-party tort-feasor also under the act, the employee was to be denied his common-law right of action against such person and was limited to the recovery of compensation only, and then solely from his employer. The injured employee's common-law rights against the tort-feasor were said to be transferred to his employer but in an altered form, the employer being authorized to sue the covered third-party tort-feasor, as if by way of subrogation, for the amount of compensation paid or due to the injured employee. The substitute proceeding would, however, be successful only if all the elements of a common-law negligence action were proved. Naturally, the employer was to be barred from bringing the derivative action until the amount of compensation to be paid to the injured employee had been fixed, so it might sometime result in an employer being barred from obtaining reimbursement if he should be forced to litigate with his injured employee for a period longer than that permitted for the institution of a personal injury action.

In contrast thereto, under the second and third paragraphs of Section 29, a covered employee may sue a non-covered third-party tort-feasor for appropriate damages in an ordinary common-law negligence action, which right of action is not transferred to the employer even though he remains liable to pay compensation to his injured employee. The employer in this instance, however, is granted a lien, for reimbursement purposes, on the

4 Direct appeal is authorized by Ill. Rev. Stat. 1951, Vol. 2, Ch. 110, § 199(1).
5 The court carefully noted that its holding was limited to the issue before it and did not operate to render unconstitutional the general scheme for workmen's compensation: 412 Ill. 179 at 202, 106 N. E. (2d) 124 at 135 et seq. See also Ill. Rev. Stat. 1951, Vol. 1, Ch. 48, § 138.25, which contains the customary clause as to partial invalidity, and Baim v. Fleck, 406 Ill. 193, 92 N. E. (2d) 770 (1950).
6 City of Taylorville v. Central Illinois Public Service Co., 301 Ill. 157, 133 N. E. 270 (1922).
7 Schlitz Brewing Co. v. Chicago Railways Co., 307 Ill. 322, 138 N. E. 668 (1923).
8 Under Ill. Rev. Stat. 1951, Vol. 2, Ch. 83, § 15, a personal injury action must be begun within two years; a wrongful death suit, by ibid., Vol. 1, Ch. 70, § 2, must be instituted within one year from the date of death. The injured employee, however, has one year in which to institute compensation proceedings: Ill. Rev. Stat. 1951, Vol. 1, Ch. 48, § 138.6.
amount of damages recovered by his employee up to the extent of the amount of compensation he has been required to pay the employee. If the employee should fail to institute suit against the third-party tort-feasor within a specified time, the employer is expressly granted the right to do so for the benefit of both the employer and the employee.\footnote{9}

These two schemes, when construed with Section 3 of the Illinois Workmen’s Compensation Act, one which automatically imposes the provisions thereof on all employers and employees engaged, as here, in hazardous occupations, serve to create a series of compulsory classifications which turn on the circumstance of whether or not the third-party tort-feasor is also covered by the statute. For example, the arrangement (1) distinguishes covered third-party tort-feasors from all other tort-feasors by limiting their liability for injuries to covered employees; (2) separates covered employees injured by covered third-party tort-feasors from covered employees injured by third-party tort-feasors not bound by the act, limiting the recovery of the former to the fixed amount of compensation while allowing the latter the full remedy of the common-law negligence action; and (3) segregates covered employers whose employees are injured by covered third-party tort-feasors from covered employers whose employees are injured by third-party tort-feasors not bound by the act, limiting the remedy of the former while granting a full and complete remedy to the latter.

In the course of its opinion, the court compellingly demonstrated that classifications of the character in question were arbitrary as the purported bases of the several distinctions were in no way related to the nature of the tort-feasor’s act nor turned on any legal relationship between the tort-feasor and the injured employee. It therefore necessarily found that the first paragraph of Section 29, when construed with Section 3 of the act, violated federal guarantees of due process of law and equal protection of the laws as well as state constitutional provisions intended to prevent the passage of special laws granting special privileges and designed to insure that each individual should find a remedy in law for all injuries and wrongs.\footnote{10}

By its decision, however, the court has exposed a number of other problems which must be resolved. When the specific provision was first enacted, in 1913, its validity was then sustained on the basis it was part of an entirely elective act. Certainly, no employee could claim an un-
constitutional deprivation of his rights if he made a voluntary waiver thereof at the time he entered into a contractual relationship with his employer.\textsuperscript{11} While most employers and employees are now under the act by compulsion, there remain circumstances under which they may come in by election.\textsuperscript{12} It is not clear, from the decision in the instant case, whether the nullified portion of the statute is to remain in effect as to these parties since the decision deals solely with the question of the combined effect of Sections 3 and 29. There would be fair reason to suppose that the law has not been changed in this respect, but that remains to be seen.

It may be that the limited liability heretofore afforded covered third-party tort-feasors may have operated to win the support of employers for the act as a whole, but it is more likely that the subrogation features of the paragraph in question, features designed to aid in the reimbursement of any employer for compensation he may have paid to his injured employee, had even greater bearing. The invalidation of the first paragraph of Section 29 has now undermined that support for it leaves the employer of an employee injured by a covered third-party tort-feasor without any statutory guarantee of reimbursement. At best, he is left with the possible remedy of subrogation, but it may or may not prove adequate as the right to determine whether to sue the third person rests in the employee's hands and he, satisfied with the receipt of workmen's compensation, may elect not to sue.\textsuperscript{13} The second and third paragraphs of Section 29 specifically provide only for the circumstance of the uncovered third-party tort-feasor and in no way could be interpreted to support suit by employer against the covered third-party. In effect, the law, as it now stands, distinguishes covered employers whose employees are injured by covered third-party tort-feasors from those whose employees are injured by third-party tort-feasors not bound by the act, affording a more adequate remedy to the latter by express statutory mandate than is given to the former.

These problems, and related issues, would indicate the need for action by the Illinois legislature to dispel the confusion and injustice that can follow in the wake of the instant decision. One possible solution is suggested by the history of a similar portion of the Alabama workmen's compensation statute. In 1947, that portion of the Alabama act referring to

\textsuperscript{11} Keeran v. Peoria, Bloomington & Champaign Traction Co., 277 Ill. 413, 115 N. E. 636 (1917).

\textsuperscript{12} Ill. Rev. Stat. 1951, Vol. 1, Ch. 48, § 138.2.

\textsuperscript{13} It may be significant that there is no recorded case in Illinois where an employer has maintained a subrogation action on facts like those in the instant case. The holding in Weaver v. Hodge, 406 Ill. 537, 94 N. E. (2d) 297 (1950), noted in 29 \textit{Chicago-Kent Law Review} 284-5, may illustrate some of the attendant difficulties.
DISCUSSION OF RECENT DECISIONS

covered third-party tort-feasors was repealed\(^\text{14}\) and the segment of the act of that state dealing with uncovered third-party tort-feasors was modified to apply to all tort-feasors who harmed employees.\(^\text{15}\) A similar revision of the second and third paragraphs of Section 29 of the Illinois Workmen's Compensation Act would assure equal treatment to all employers forced to pay compensation without depriving the covered employees of their right to pursue common-law actions for negligence against those who harm them. After such an amendment, Illinois would stand with the majority of states, none of whom distinguish between covered and uncovered third-party tort-feasors.

P. Pavalon


\(^{15}\) Ala. Code 1951, Tit. 26, § 312.
RECENT ILLINOIS DECISIONS

ADOPTION--NOTICE--WHETHER GODMOTHER, IN CASE OF LACK OF PARENTS, GUARDIAN, OR NEXT OF KIN, IS ENTITLED TO NOTICE OF PROCEEDINGS TO ADOPT A MINOR CHILD—Few cases have yet arisen to elaborate upon the provisions of the revised Adoption Act enacted in Illinois in 1945,1 but the holding in People ex rel. Smilga v. Hoyer2 throws light on the parties who are entitled to notice, pursuant to the statute, of the pendency of proceedings to adopt. The case was one in which it appeared that a war-time waif, born in Latvia and placed in a state foundling home at an early age, eventually was brought to this country, after many hazardous evacuations, and finally was adopted under a decree of an Illinois court entered in 1951. Shortly thereafter, the petitioner, who had served as a nurse’s aide at the foundling home, had accompanied the child in its war-time journeyings, had saved its life on at least two occasions, and had caused the child to be baptized while acting as godmother at that ceremony, instituted habeas corpus proceedings to secure custody of the child and also sought to vacate the adoption decree. Her proceedings were based on the claim that the adoption decree was void for failure to furnish her with statutory notice.3 Relief was denied in the trial court when it was made to appear, by motion to strike the petition, that petitioner had, at no time, been financially responsible for the care of the adopted child,4 although she had physically cared for it, hence was not entitled to notice. The Appellate Court for the First District, on appeal by petitioner, while recognizing the deep religious significance of the relationship of godmother and godchild existing between petitioner and the child, affirmed the decision.

Under the Illinois statute, the adoption petition must, among other things, contain (1) the name of the person or organization having legal custody; (2) the names of the parents, or that of the surviving parent, if any; or (3) in default thereof, the name of the guardian if one has

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3 Ill. Rev. Stat. 1951, Vol. 1, Ch. 4, § 2—1, specifies the parties to the adoption proceedings and requires service of summons on all who are residents and who have not given written consent in the form designated by Section 3—6.

4 It was alleged therein that, from the time the child left the foundling home until placed with respondents, the financial obligation for its care had been met by military or charitable organizations. See 345 Ill. App. 365 at 371, 103 N. E. (2d) 378 at 381.
been appointed or, if not, that of a near relative.\textsuperscript{5} It is clear that
the statute does not expressly refer to godparents, just as it is clear that
the petitioner did not fall into any of the categories mentioned. Reliance
was placed by petitioner on a claim that she had acted \textit{in loco parentis}
and, for that reason, was entitled to be treated as a party to the proceed-
ing. Being unable to find that the petitioner had assumed the financial
burden of the parental relationship,\textsuperscript{6} the court refused to countenance
that claim. There has, however, been a tendency, at least in connection
with war risk insurance matters, to break away from the technical elements
of the \textit{in loco parentis} relationship,\textsuperscript{7} so the court, had it seen fit to do so,
could have achieved a different result with some justification for the
holding.

\textbf{Death—Damages, Forfeiture or Fine—Whether or Not a Widow
May Secure Reimbursement for Medical and Funeral Expenses of
Her Husband from the Tort-feasor Who Caused the Injury and
Subsequent Death of the Spouse}—A novel fact situation was presented
in the case of \textit{Thompson v. City of Bushnell,}\textsuperscript{1} one wherein the plaintiff,
in her capacity as widow and not as administratrix of her deceased
husband's estate, sued a municipal corporation to recover for medical,
hospital, nursing and funeral expenses furnished her husband as a result
of injuries caused by the negligence of the defendant. On motion of the
defendant, the trial court ordered the complaint dismissed on the apparent
belief it failed to state a cause of action.\textsuperscript{2} On appeal to the Appellate
Court for the Third District, that court reversed and remanded the cause
for further proceedings noting, as it did so, that the precise question had
never before been presented to an Illinois reviewing tribunal.

The argument in the case was confined to the question of whether or
not the plaintiff, in her capacity as widow, had the right to bring the
instant action for the particular type of damages claimed. Referring to
an earlier Illinois case which had upheld the right of a husband to re-
cover from a tort-feasor who had fatally injured the wife for losses in-
curred by reason of being put to expense for medical treatment and the

\textsuperscript{5} Ill. Rev. Stat. 1951, Vol. 1, Ch. 4, § 1—2.
\textsuperscript{6} In 46 C. J., Parent and Child, § 174, p. 1334, the phrase \textit{in loco parentis} is
defined to indicate one "who has put himself in the situation of a lawful parent by
assuming the obligations incident to the parental relationship, without going
through the formalities necessary to a legal adoption."
\textsuperscript{7} See, for example, Zazove \textit{v. United States}, 156 F. (2d) 24 (1946), noted in 25
\textit{Chicago-Kent Law Review} 150, to the effect that the relationship may arise
between adult persons.
\textsuperscript{1} 346 Ill. App. 352, 105 N. E. (2d) 311 (1952).
\textsuperscript{2} Ill. Rev. Stat. 1951, Vol. 2, Ch. 110, § 169, authorizes dismissal if the complaint
fails to state a cause of action.
eventual funeral of his spouse, and adopting the reasoning of the Supreme Court of Oregon in *Hansen v. Hayes*, the Appellate Court decided that, where a "family expense" statute, as in Illinois, imposes the burden of family expenses on the husband and the wife, or either of them, the liability imposed upon the wife for medical care and funeral expense of her husband is not a consequential but a direct result of the tort-feasor's act, entitling the widow to a parallel recovery with that which would be granted to the husband under the converse of the situation presented.

In matters of this nature, the action is more typically brought by the surviving spouse in his or her capacity as legal representative of the decedent's estate and the suit is generally predicated upon the "wrongful death" statute. In that form of action, the plaintiff is limited to damages arising from the pecuniary loss sustained by reason of the death and is precluded from collecting any of the nursing and medical expenses which have been incurred in the treatment of the deceased. The present decision indicates a possible basis for recovering these losses also in a proper suit but it does not indicate the effect a verdict or judgment therein would have upon an action for wrongful death if, and when, brought by the legal representative.

Where a subsequent action is brought between the same parties as those involved in a prior action, based upon the same transaction but asserting a different cause of action, claim, or demand, it is well-settled law that the judgment in the first suit operates as an estoppel as to any point or question actually litigated and determined in that suit. This principle, sometimes called estoppel by verdict, is equally available to either party as the circumstances may warrant. It is apparent, then, that a court could well listen to an argument in favor of an estoppel on such matters as relate to the question of negligence or other material facts in a later wrongful death action if a valid and subsisting judgment has previously been obtained in a suit to recover medical and funeral expenses. The converse should also be true for, of necessity, the earlier decision would have involved a determination of the fundamental question relating to the existence of negligence and other material facts.

Whether or not such an argument would be favorably received is still a matter of some conjecture, but the reasoning in its support is persuasive. As a matter of tactics, therefore, a plaintiff's bargaining power in the

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4 175 Ore. 358, 154 P. (2d) 202 (1944).
6 Ibid., Ch. 70, §§ 1-2.
7 *Holton v. Daly*, 106 Ill. 131 (1882).
settlement of a wrongful death claim might be endangered by a judgment against him in a suit to recover the medical and funeral expenses, or could be enhanced by an earlier judgment in his favor in such a suit. The defendant should likewise be conscious of this fact, and not treat the suit of a spouse to recover medical and funeral expenses with light regard as being relatively unimportant, because of the effect such a suit might have on the more substantial claim apt to arise from the alleged wrongful death.

DISMISSAL AND NONSUIT—INVOLUNTARY DISMISSAL—WHETHER STATUTE PRESCRIBING TERMS UNDER WHICH COURT MAY DISMISS PROCEEDING FOR WANT OF PROSECUTION IS CONSTITUTIONAL—There is occasion to believe, from the holding in the recent case of *Agran v. Checker Taxi Company*,¹ that the Illinois Supreme Court is reviving interest in its rule-making powers, at least to the extent of preventing the legislature from exercising those powers for it. The case was one for personal injury allegedly suffered at the hands of the defendant. The trial court, without observing the provisions of the recently enacted statute purporting to prevent dismissal for want of prosecution without warning,² ordered the suit dismissed when plaintiff failed to respond at the trial call. Plaintiff seasonably moved to reinstate the case, urging a misprison of the clerk in failing to give the notice required by statute, but was met by defendant’s claim that the statute was unconstitutional. The trial court, agreeing with defendant, declared the statute invalid and refused to reinstate the case. On direct appeal to the Supreme Court because of the constitutional issue,³ that court affirmed the holding on the ground the statute represented a direct legislative usurpation of the judicial power.⁴

Inasmuch as the legislative addition to the Civil Practice Act under consideration did regulate, in intimate detail, the procedure to be followed in the execution of judicial business, the provision in question⁵ did represent an attempt by the legislature to control the work done by the judicial department. It could be said, in that regard, that every legislative en-

¹ 412 Ill. 145, 105 N. E. (2d) 713 (1952).
⁴ Separation of the powers of government among the three departments is directed by Ill. Const. 1870, Art. III, with the added injunction that “no . . . one of these departments, shall exercise any power properly belonging” to either of the others.
⁵ The case specifically concerned Section 50a of the Civil Practice Act, Ill. Rev. Stat. 1951, Vol. 2, Ch. 110, § 174a, but the court noted that the amendments made to Sections 48 and 50 by the same statute were subject to the same criticism: 412 Ill. 145 at 150-1, 105 N. E. (2d) 713 at 716.
actment prescribing procedural methods would be open to the same objection except for the fact that the court purported to see a difference in those situations where the laws enacted do “not unduly infringe” upon the inherent judicial power. As the court said nothing on the point of the inherent justice or injustice in the purpose underlying the statute so stricken down, and there should be a measure of relief against the unexpected and unanticipated default judgment for failure to respond after the case has reached the trial calendar, there is reason to believe that the court ought, under its acknowledged rule-making power, revive the idea by embodying it in an appropriate rule.

Release—Construction and Operation—Whether a Release to One Joint Tort-feasor in a Pending Statutory Action Operates as Satisfaction of a Common-law Judgment Against Another Joint Tort-feasor—Recently, in the case of Zboinsky v. Wjocik, plaintiffs alleged that the lessor of a certain dram shop and his son, having become intoxicated as patrons, did, as a result of such intoxication, commit an assault upon the plaintiff husband, thereby causing permanent disability to the husband and a loss of support to the wife. The complaint, in three counts, asserted two statutory causes of action under the Dram Shop Act against the dram shop operator, the lessor, and his son as joint tort-feasors, and a third based on a common-law cause of action for assault against the lessor and his son. Severance of the common-law action was granted and a trial thereon resulted in a verdict for the plaintiffs against the son but an acquittal of the lessor. Subsequent to judgment on that verdict, but prior to trial of the statutory actions, plaintiffs executed and delivered to the lessor and operator a general release of all claims growing out of the assault. In his petition in the nature of a writ audita querela to quash a capias ad satisfaciendum which issued against him, the judgment debtor contended that the release given to one joint tort-feasor operated as a release of all joint tort-feasors. He therefore prayed that the judgment entered against him be ordered satisfied of record. The trial court granted this petition and the judgment creditor appealed. The Appellate Court for the First District reversed on the ground that,

6 Apparently, any statute designed to relieve the court of hampering influences growing out of earlier practice and procedure would receive approval if not unconstitutional for other reasons. See, for example, the provisions regulating voluntary nonsuit: Ill. Rev. Stat. 1951, Vol. 2, Ch. 110, § 176, which have received approval and application in many instances, of which Gilbert v. Langbein, 343 Ill. App. 132, 98 N. E. (2d) 140 (1951), is but one illustration.


2 Ill. Rev. Stat. 1951, Vol. 1, Ch. 43, § 94 et seq.
at the time of the release, the judgment debtor was no longer a joint tort-feasor, hence the rule in question did not apply.

Where there is no question as to the nature of the joint liability, it is generally well settled in Illinois that a release of one joint tort-feasor does operate as a release of all and, for this purpose, it is immaterial that the joint liability is based in part on statutory law and in part on common law. In the instant case, one involving multiple causes of action for a single indivisible injury, the court seems not to have rejected the general doctrine but to have arrived at a conclusion of its non-applicability on the ground that at the time the release was executed and delivered the respondent was no longer a joint tort-feasor, at least as to the cause of action upon which judgment was rendered, but was rather a judgment debtor of record, any prior cause of action having become merged in the judgment from the date thereof. The case of Leslie v. Bonte, on which the court relied, did hold that the note there concerned, which was the basis on which a judgment had been rendered, had become merged in the judgment so that a subsequent suit on the same note would be improper as, in essence, the note no longer existed. The court therein cited Wayman v. Cochrane which had declared that it was the general rule, in law or equity, that a contract or instrument upon which the proceeding was based became entirely merged in the judgment. In the instant case, however, the court, in the light of the authorities relied upon, failed to distinguish sharply between the cause of action and that which is the basis of the cause of action.

Dicta in Boynton v. Ball intimates that every cause of action will, if recovered upon, merge into the judgment or decree but it was there held that a debt which existed prior to proceedings in bankruptcy, but which proceeded to judgment subsequent to bankruptcy, was not removed by the bankruptcy decree since, having become merged in the judgment, it represented a new debt created subsequent to bankruptcy. The Supreme Court of the United States reversed that holding on the ground that, notwithstanding the change in form by merger, the claim still remained the same debt for which action had been brought in the state court. That holding has not been altered. There is no Illinois case in

5 49 C. J. S., Judgments, § 6, p. 30.
6 130 Ill. 498, 22 N. E. 594, 6 L. R. A. 62 (1887).
7 35 Ill. 152 (1864).
9 105 Ill. 627 (1883), reversed in 121 U. S. 457, 7 S. Ct. 981, 30 L. Ed. 985 (1887).
point involving the view to be taken as to an antecedent tort liability but, as the court in the instant case relies entirely on assumpsit cases to support its view, it is reasonable to conclude that the decision stands on tenuous grounds.

SOCIAL SECURITY AND PUBLIC WELFARE—UNEMPLOYMENT COMPENSATION—WHETHER OR NOT THE TERM "AVAILABLE FOR WORK", AS USED IN THE ILLINOIS UNEMPLOYMENT COMPENSATION ACT, INCLUDES CERTAIN "RETIRED" EMPLOYEES—In the recent case of Fleiszig v. Board of Review of Division of Unemployment Compensation of Department of Labor,\(^1\) the Illinois Supreme Court was faced with the problem of determining whether or not a "retired" employee could be deemed entitled to benefits under the Illinois Unemployment Compensation Act.\(^2\) The plaintiff therein and three other former employees of a mining company had there filed claims for unemployment benefits. The evidence showed that the claimants were sixty-five years of age or older; had ceased working when the mine had been closed for lack of work; had been receiving a pension under a plan set up by their union;\(^3\) and had collected social security payments under the federal Social Security Act. Upon the basis of these facts, the claims were denied by the claims deputy and, after claimants had exhausted administrative remedies, the matter reached the circuit court which affirmed the denial. On direct appeal to the Illinois Supreme Court,\(^4\) that court also affirmed the denial of benefits on the ground the claimants had made an inadequate canvass of the labor market\(^5\) and, in addition, were not "available for work" within the terms of the statute.\(^6\)

There appears to be a unanimity of opinion among the various state courts as to the definition of the term "available for work" as used in state unemployment laws. Generally, the definition calls for a genuine attachment to the labor market plus being ready, willing and able to

\(^1\) 412 Ill. 49, 104 N. E. (2d) 818 (1952).
\(^2\) Ill. Rev. Stat. 1951, Vol. 1, Ch. 48, § 300 et seq. Section 420(c) thereof, similar to Ill. Rev. Stat. 1947, Ch. 48, § 222(c), under which the case arose, defines the unemployed individual who is entitled to benefits.
\(^3\) The pension plan provided that the proposed pensioner had to "actually retire" to be eligible for the benefits thereof.
\(^5\) Ibid., § 433. The evidence showed meager attempts by claimants to find light janitorial work in one or two instances but not until after each had filed a claim for benefits. On the subject of attachment to the labor market, see Mohler v. Department of Labor, 409 Ill. 79, 97 N. E. (2d) 762 (1951).
\(^6\) Ibid., § 420(c). The court stated that an application for "retirement benefits and old-age assistance" is "evidence of an intention to retire from gainful labor. . . . The acceptance and retention of a pension, conditioned on the fact of retirement . . . is sufficient in itself to bar a claimant from recovering unemployment compensation." 412 Ill. 49 at 52-3, 104 N. E. (2d) 818 at 820.
accept suitable work, which the claimant does not have good cause to refuse. The problem, however, is not so much in definition as it is in application of the definition. Concededly, the facts and circumstances must control in each case, but enough instances are developing to give content to the definition. In Mohler v. Department of Labor, for example, the Illinois Supreme Court decided that a mere willingness to work was not sufficient but that an actual ability to work at a point where an available labor market existed was required. Under the instant decision, it appears that retirement affords another instance of non-availability provided such retirement conclusively shows an intention to actually withdraw from the labor market. The court did refer to a Pennsylvania decision, that of Keystone Mining Company v. Unemployment Compensation Board of Review, wherein it was held that the receipt of pension payments does not necessarily bar a claim for unemployment compensation benefits, provided other requirements of the law are met. In the Pennsylvania case, however, the pension plan did not, as in the instant case, demand an actual retirement from the labor market in order to entitle the employee to the benefits thereof. These seemingly inconsistent decisions should, therefore, be viewed with care before too much reliance is placed on either holding.

**Statutes—Subjects and Titles of Acts—Whether or Not a Penal Provision in the Illinois Act to Make Uniform the Law Relating to Trust Receipts Is Void for Failure to Express the Subject Matter Thereof in the Title—** In the recent case of People v. Levin the defendant was indicted for failure to pay over the amount collected under a trust receipt in violation of a provision of the Illinois statute dealing therewith. The defendant was a used car dealer and the subject of the trust receipt was an automobile which the dealer sold to a third party in exchange for money and personal property but which proceeds the defendant failed to turn over to the entruster. A motion to quash the indictment was filed based on the claim that the statute in question was unconstitutional and was, therefore, inadequate to support a charge of crime. Constitutionality of the statute was questioned on two grounds,

7 Reger v. Administrator, 132 Conn. 647, 46 A. (2d) 844 (1946); Mohler v. Dept. of Labor, 409 Ill. 79, 97 N. E. (2d) 762 (1951); Leonard v. Unemployment Compensation Board, 148 Ohio St. 419, 75 N. E. (2d) 762 (1947).
8 Fleiszig v. Board of Review, 412 Ill. 49, 104 N. E. (2d) 818 (1952); Mohler v. Dept. of Labor, 409 Ill. 79, 97 N. E. (2d) 762 (1951); Leonard v. Unemployment Compensation Board, 148 Ohio St. 419, 75 N. E. (2d) 762 (1947).
9 409 Ill. 79, 97 N. E. (2d) 762 (1951).
11 412 Ill. 11, 104 N. E. (2d) 814 (1952).
to-wit: (1) it provided for imprisonment for debt, and (2) the title of the act, designed to make uniform the law relating to trust receipts, failed to refer to any criminal penalty, in violation of the Illinois Constitution. The motion to quash was sustained and the defendant was discharged. On writ of error issued on behalf of the state, taken directly to the Illinois Supreme Court both because the constitutionality of a statute and a charge of felony was involved, that court upheld the ruling of the trial judge and declared the section of the statute in question to be unconstitutional on the second of the grounds mentioned.

It is evident that the purpose expressed in the title of the statute under consideration was to make uniform the substantive law relating to trust receipts and there is nothing in the title to fairly inform the reader of an intention to set forth a penalty for a violation of the terms of the act. It is also evident that Illinois is the only state which has fixed upon a policy of including a penal section in its enactment of the uniform statute on the subject. As it is the ostensible purpose of the pertinent section of the 1870 Constitution to prevent just such an inclusion, the reasoning and conclusion attained by the court in the instant case is both clear and easily substantiated, following a comprehensive line of cases on the point.

Since the decision operates to remove a strong deterrent to the conversion of trust receipt funds and weakens the security of the lender, except as that security is sustained by an appropriate civil action, an important question is raised as to whether the entruster has any equivalent protection under some other penal act. The basic relationship of the parties to a trust receipt transaction being that of debtor and creditor, it is from this fundamental concept that any alternative must be viewed. The trust receipt statute itself declares the relationship is not one of bailment, which fact tends to eliminate the possibility of a charge of larceny by bailee. It is doubtful if there is a sufficient fiduciary or other

5 The case illustrates one of the few instances under which the prosecution may secure review of a decision favoring the accused. See Ill. Rev. Stat. 1951, Vol. 1, Ch. 38, § 747.
7 Although the title deviates from the one used in the Uniform Trust Receipts Act, set out in 9A U. L. A. 284, the text is generally modelled on the uniform statute.
9 See, for example, People v. Clark, 301 Ill. 428, 134 N. E. 95 (1922), where a penal provision in a statute regulating the registration and operation of motor vehicles was held void as not being within the scope of the title.
necessary relationship to sustain an indictment for embezzlement\textsuperscript{11} and, in the absence of a written false statement there would be little chance to maintain a prosecution for obtaining credit by false pretense.\textsuperscript{12} Other possible offenses would also seem to be negatived by their very definition.

There would, then, appear to be occasion for the legislature to consider the passage of an amendment to the title of the act in question or else to consider the enactment of an equivalent penal section as a part of the criminal code itself. Inasmuch as all questions of policy appear to have been resolved in favor of protecting the entruster, the point is one which could be easily remedied.

\textsuperscript{11}The holding in Davis v. Aetna Acceptance Co., 293 U. S. 328, 55 S. Ct. 151, 79 L. Ed. 393 (1934), would indicate the necessary fiduciary relationship would be wanting.

BOOK REVIEWS


The development and wide-spread use of the automobile and of other more rapid forms of transportation, together with an increasing mobility on the part of the American population, have combined to produce an impact on law in the United States far more intense that a mere expansion in the volume of negligence cases mounting ever upward as people hurtle more and more rapidly toward death or injury. One aspect thereof is reflected in the increase of problems flowing from the tendency to acquire property, movable and immovable, in many scattered jurisdictions without much regard for the legal doctrines regulating ownership, at the time of acquisition or thereafter, as the property, or its owners, move about the country. When, to these complications, is added the factor that a great majority of the owners concerned are married and, in some states at least, form a marital community to which principles different than those applicable to single persons will adhere, the opportunity for a rising flood of conflict of law disputes is made that much the more certain. It is, therefore, no longer possible for courts and lawyers in jurisdictions where the legal system rests on a common law foundation to be disinclined to apply unfamiliar foreign law which, by reason of that very unfamiliarity is difficult to understand, hence frequently misapplied, for problems must be solved, not avoided.

Through the medium of this doctoral dissertation on the subject, a most comprehensive analysis has been made of the choice-of-law questions apt to grow from the acquisition of marital property in community states with the possibility of transfer into non-community areas or the converse of the problem as it relates to the separate estates of spouses acquired in common law areas who later move, or whose property is afterwards located in, those states following community property views. For the benefit of the uninitiated, the author has provided a survey, approximately one-fourth the length of the book, dealing with the marital property laws of all of the states along with a discussion of the basic differences between the community and the traditional Anglo-American systems of ownership. From that introduction, he progresses to a critical evaluation of the choice-of-law problem by illustrating its three-fold aspects of characterization, selection, and application. These are here considered from the theoretical point of view first to reveal the purposes and policies which should underlie the rules to be applied and to point out the confusion
which could attend upon indifferent analysis or misconception. The work closes with three chapters, fully the length of one-half the book, which discuss the existing judicial decisions wherein issues of marital property involving a conflict of law have been considered. They disclose the significance of accurate characterization of the issue, the criteria to be used in making a selection of appropriate law, and the consequences flowing from a correct, or incorrect, application thereof.

The book is not confined simply to problems of the spouses themselves during the existence of the marital community. It reaches into the rights of the parties upon the dissolution thereof by death or divorce; deals with the rights of creditors; discusses transfer of property; considers the application of income; and the liability to third persons for torts committed. Necessarily, it considers property rights at all stages; those arising in acquisitions made prior to marriage as well as those obtained during wedlock, whether viewed from the standpoint of the law of place of acquisition or from that of the point to which subsequent removal occurs. The completeness of the discussion alone serves as an attestation of the worth of the book. The pointed style of the author, refreshing in its comment on the validity or correctness of many of the decisions cited, adds to its attractiveness. Its principal value, however, lies in the degree of clarification it offers for an area of law marked with confusion and not a little local prejudice.


Although the great Wigmore captured, and has retained, pre-eminence in the field of Evidence, his encyclopedia is, to a great extent, beyond the comprehension of a student in a law school. Dean Wigmore’s student edition, and other one-volume works at the student level, are not very happy publications and few, if any, of them respond to the quick search of the practicing attorney. Professor Tracy’s handbook appears to solve, to a limited measure, the student’s problem of finding a readable yet sufficiently comprehensive text on this subject. The volume is not exhaustive nor does the author claim it so to be. Nonetheless, a review of the table of contents will disclose that the coverage is sufficient for a student who desires a quick reference into cases before proceeding to more important works in this field.

It is impossible to speak of any text on Evidence without realizing that perhaps the more solid and searching inquiries have been published, as separate articles under various topics, in legal periodicals and law reviews. Despite this, the arrangement of material, the simplicity of
statement, and the justification for stated propositions to be found in this book are of definite value. The index is complete enough to serve the purpose of locating information rapidly.

Each person interested in the law of Evidence will have what might be referred to as his "pet area" and he will always find that every author has given more than necessary coverage to most topics but less than sufficient coverage to his particular favorite. Self-incrimination, for example, seems to be a very important area for the moment, but it is rather sketchily treated here. Because of the variance existing among the states by reason of statutory modifications, it would be impossible to quarrel very much with the author's treatment of problems arising from the husband and wife relationship, but again this reviewer feels the treatment to be abruptly shortened. It is clear, therefore, that the student should not be led to believe that this handbook will give him simple, direct, and complete answers to all questions, but he should be encouraged to proceed from such volumes as the instant one to more intensive studies dealing with specific questions falling in this field.


Familiarity with the provisions and interpretations of the Fair Labor Standards Act, a statute which regulates the wages and working hours of millions of employees engaged in commerce or in the production of goods for commerce, has become a matter of primary importance for practically every lawyer engaged in general practice. Unfortunately, many such lawyers have failed to acquire the necessary knowledge to deal with even the basic problems arising under, or by reason of, the application of the Act. The prior lack of a handy, easily-understandable and readily-usable book dealing with the subject matter may have been a contributing factor to this unfamiliarity. Mr. Wecht's book is designed to remedy this situation, particularly as it concerns the most important aspect of the statute, to-wit: coverage of employees. Which employees are affected by the law; which partially so; which totally exempted? These are questions confronting almost every employer and he is likely to seek answers on the point from his lawyer. The book, therefore, has been designed to help the lawyer find such answers. Prefaced by an extensive table of contents, which serves at the same time as an outline of the material treated, the book deals in a simple yet accurate manner with the provisions and interpretations of the Act and provides digests and evaluation of all the important decisions. Wherever conflicting views or theories have resulted from divergent decisions, all views are discussed and adequately and
impartially presented. The value of the book is, moreover, greatly enhanced by an excellent index. The work deserves wide circulation and should prove to be a handy tool for lawyers faced with primary problems relating to employee-coverage under the Fair Labor Standards Act.


Professor Brenner, opening this comprehensive analysis of the why and wherefore of bar examinations and other requirements for admission to practice, notes that there is as much variation in the requirements of the different states on the point as there is in the divorce laws thereof. He could have added that the differences possess just about as much rhyme and reason, for all would agree that the profession is in need of, and should be open to, all well-educated, conscientious and ethically-inclined recruits. As these traits should be standard everywhere, any deviations intended to do no more than protect local lawyers from competition, rather than to preserve the public from the ministrations of incompetents, would be wholly without justification. The difficulty, however, lies in the fact that while the qualities which mark a good lawyer are well understood, it is not entirely possible to ascertain that the tyro possesses them when he seeks admission, for educational backgrounds vary almost as widely as environmental conditions. The best that may be done, therefore, is to fix minimal criteria at a uniform level no lower than it ought to be and to hope that some, at least, will exceed the minimum and provide the bar with an impetus toward higher and ever higher standards.

In the interest of ascertaining what that minimum standard should be, the several members of the Advisory and Editorial Committee of this division of the important Survey of the Legal Profession have each written extensive and well-documented reports. These, to some slight extent, have been epitomized by the Consultant who has projected therefrom the centers for attack where pressure must be applied if the tone of the legal profession is to be improved. Many of these reports are factual in character, reporting conditions as they did, or do now, exist. This is as it should be for, without a complete knowledge of the battlefield, no wise general would move unless he wished to invite disaster. Through them, a vast array of data, not previously or conveniently available, is assembled in one place. Here one can learn of such scattered, yet related, things as the age, experience and education of bar examination
board members, the extent of the diploma privilege, the work of the Council of the Section on Legal Education, and the pro and con on the issue of labelling bar examination questions, to mention only a small sampling of their contents.

Others of these reports deal with matters concerning which law school deans and their faculties are thoroughly familiar but which could well make significant reading for examiners and practitioners of ten or more years standing who, at times, have displayed a degree of ignorance on changes which have been made in the field of legal education. Still others should concern law students, particularly those who have expressed a sense of mystification about bar examinations, their preparation and grading, or the student's own chance of success in overcoming the dreaded, but generally inevitable, hurdle. The work of the National Conference of Bar Examiners, especially as it relates to character investigation, is also ably explained by its efficient Executive Secretary.

Areas of controversy have not been ignored, nor should they be. Three chapters, those dealing with the scope and content of bar examinations, with bar examinations as testing devices, and on improvement of bar examinations, are particularly worthy of mention for that reason. It is likely, however, that the contents thereof will be overlooked in the debate which could well rage over the report on the subject of a national bar examination, that is to say one to be administered on a national basis, for it is unlikely that state's rights in law practice will yield to national domination short of a civil war among the lawyers and the examining boards.

Naturally, with many persons writing on aspects of the same common ground, there is a fair amount of duplication, of frequent re-quotiation from the same sources, within the covers of this volume. To condemn it for that reason would be hypercritical. It would be more proper to say that the legal profession should be congratulated on the fact that it has so many able workers willing to devote energy to such a project and to find law book publishers generous enough to put their product into print as a public service.


The first edition of this little handbook on the law of real property was so favorably received when it appeared in 1946 that it ran through eight printings,¹ sufficient to warrant its revision in order to make it a more up-to-date publication. As was then noted, the book contains a

¹ The first edition was reviewed in 24 CHICAGO-KENT LAW REVIEW 299 (1946).
well-executed summary of many important facts about real estate law which the average land owner, or contemplating owner, ought to be more informed for his own protection. While not a text-book in the usual sense of that term, it does provide a sufficiently comprehensive explanation to make it a useful volume for the desk of the law student, one which should help him gain an overall picture of the subject before he delves too deeply therein. Although the second edition is over one hundred pages longer than the first, and even larger in content than that figure would seem to indicate because of a reduction in the size of the type used, it is still inclined to be sketchy in some respects. For that reason, the author is inclined to stray into the error of misleading the reader because brevity of treatment often forces a disregard of conflicting views. In the main, however, the new edition merits attention for it is replete with many new decisions, particularly from Illinois, and represents far more than a rehash of old materials. One must express the regretful note that, in the resetting of type, the publisher's staff appears to have failed to live up to usual standards for typographical errors of obvious character are scattered through the new volume, a fault not noted in the original edition.


A composite review of these two works is dictated not so much by the presence of a common identity in the case of one of the authors as by the

2 For example, fee simple title is explained in less than one page; determinable fees in four lines; and the law as to lateral support is covered in a ten-line paragraph.

3 In Section 92, dealing with the effect of a habendum clause in a deed, Mr. Kratovil states: "... any attempt by means of the habendum to limit the grantee to a lessor [lesser?] title, such as a life estate, is ineffective and void." The statement is true as to Illinois, Roof v. Rule, 348 Ill. 370, 180 N. E. 807, 84 A. L. R. 1047 (1932), but not universally so: McCullock v. Holmes, 111 Mo. 445, 19 S. W. 1096 (1892).

4 Attention might be called to such cases as Wagner v. Kepler, 411 Ill. 388, 104 N. E. (2d) 231 (1952), cited at p. 412, dealing with the landlord's liability for injury by reason of a defect in premises rented on a month-to-month basis: to Favata v. Mercer, 409 Ill. 271, 99 N. E. (2d) 116 (1951), noted at p. 153, discussing the obligation of a seller to convey to one who concealed his identity under an assumed name for devious purposes; to Madia v. Collins, 408 Ill. 358, 97 N. E. (2d) 313, 154 A. L. R. 778 (1951), discussed at p. 137, on the effect to be given to the signature of but one of several tenants in common to a contract for the sale of land; and Welsh v. James, 408 Ill. 260, 95 N. E. (2d) 572 (1951), noted in 29 CHICAGO-KENT LAW REVIEW 260 and mentioned on p. 300, which settled the law of this state on the question of whether a joint tenant who murders his co-owner is thereby deprived of the right of survivorship.
fact that each deals with a part of one generic problem, that of the manner
by which a litigated civil case proceeds through a trial court, either state
or federal, up to the point where the case may be tried. To that study is
necessarily added the related topic of the finality and binding effect of the
judgment which may be obtained in that case, for the full impact of the
first stages will not be observed until the end product thereof is exposed
to constitutional and other tests.

Designed for use in law schools, the two books cover approximately
one-half of the material needed to provide instruction in that area,
roughly described as procedure, in which all men who would call them-
selves lawyers should be trained, whether they intend to engage in active
practice or not. Naturally, with pressure constantly being brought to
bear to reduce the time allotment allowed older courses in the curriculum
in the interest of making room for innovations, large segments of material
formerly taught must either be omitted or compressed. It is to the credit
of these authors that, except as to ancient materials more of value for
their historical content than their present significance, the prime effort
has been directed toward compression rather than deletion.

There is, too, a certain novelty in the approach to the subject, as well
as a timeliness in the materials, which should arouse student interest in
admittedly strange concepts where technical language often tends to befog
the view. The comparison and contrast here provided between federal
courts, operating under a uniform system of procedure, and state courts,
frequently beset by local oddities in matters of jurisdiction and method,
should also arouse interest in the matter of securing improvement in the
operations of the latter. The student will, through these books at least,
have an opportunity to formulate his own conclusions as to the need for
further reform, while he gains the knowledge he some day will be expected
to possess.
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