NOTES AND COMMENTS

ADMINISTRATIVE LAW

QUESTIONS "MOOT" ON APPEAL

"The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue."[1]

This thrifty principle of judicial administration has bulwarked the judicial refusal to render advisory opinions, thereby complying with the constitutional requirements of "case and controversy." An analysis of the cases involving moot questions discloses that the effect of the decisions are not always consistent with the principles involved. This is especially true in those cases involving the validity of administrative orders. Mootness usually is effected by one of four means.

First. The plaintiff may cause a case to be moot. This the Supreme Court recognized when it said: "if the intervening event is owing to the plaintiff's own act . . . . the court will stay its hand."[2] Not all jurisdictions sanction the unlimited use of this method at the same point in a judicial proceeding. Thus, Indiana gives a plaintiff an almost unlimited right to withdraw his complaint,[3] but in the federal courts this right is restricted.[4]

Second. The parties by their combined action may cause a case to be moot. The usual procedure is by a settlement. The law clearly favors the practice of settlement because it tends to reduce the amount and the cost of litigation. Similarly, in a criminal action, a prosecutor, usually subject to the approval of the court, is permitted to enter a *nolle prosequi.* There is a diversity of opinion relevant to the stage

1. Mills v. Green, 159 U.S. 651, 653 (1895)
2. Id. at 654.
3. "An action may be dismissed without prejudice: first by the plaintiff before the jury retires; or where the trial is by the court, at any time before the finding of the court is announced." Ind. Stat. Ann. (Burns' Repl. 1946) §2-901.
4. After an answer is filed, plaintiff may not withdraw his complaint without approval of the court. Fed. R. Civ. P., 41.
5. Princeton Coal Co. v. Gilmore, 170 Ind. 366, 83 N.E. 500 (1908). compare Cochran v. Rowe, 225 N.C. 645, 36 S.E. (2d) 75 (1945) with Walsh v. Soller, 207 Ind. 82, 190 N.E. 61 (1934).

in judicial proceedings beyond which the courts will not allow the parties to settle the controversy.[6]

Third. A defendant may cause a case to be moot.[7] In reference to *Schechter Poultry Corporation* v. *U.S.*,[8] Mr. Robert L. Stern said: " . . . the Government, merely by using the full twenty days open to it under the rules for responding to the petition, could have prevented the case from reaching the Court before the Act expired. *But that would not have been a seemly course for public officials.*"[9] (Italics added.) Defendants, who are public officials, may moot the case in numerous ways.

Mootness may be created by the defendant where the plaintiff is denied injunctive relief in the lower court and, pending appeal, the defendant performs the acts sought to be enjoined.[10] In *Johnson* v. *Paris*,[11] the lower court denied the plaintiff an injunction restraining the defendant from executing a contract for the construction of a gymnasium. Pending an appeal, the gymnasium was constructed. The appeal was moot. In such situations, there is no great wrong

6. Compare the holding of the majority (no opinion) with the dissent in Garrison v. National Rubber Machinery Co., 64 N.Y.S.(2d) 852 (App. Div., 1st Dept. 1946).

7. Commercial Cable Co. v. Burleson, 250 U.S. 360 (1918); Dakota Coal Co. v. Fraser, 26 Fed. 130 (C.C.A. 8th, 1920); Spreckels Sugar Co. v. Wichard, 131 F.(2d) 12 (App. D.C. 1941); Glass v. Ickes, 107 F. (2d) 259 (App. D.C. 1939); Chesapeake Western R.R. v. Jardine, 8 F.(2d) 794 (App. D.C. 1925); Commercial Motor Freight, Inc. v. Public Utilities Commission, 141 Ohio St. 643, 49 N.E.(2d) 764 (1943). Cf. Pike v. Pike, 24 Wash.(2d) 735, 167 P.(2d) 401 (1946) (though the appeal was not moot, the conduct of the defendant constituted a waiver of the right to appeal).

8. 295 U.S. 495 (1935).

9. Stern, "The Commerce Clause and the National Economy, 1933-1946," (1946) 59 Harv. L. Rev. 646,659. The Schechter case demonstrates the thin margin by which a case escaped being moot. As another example, if the case of Olsen v. Nebraska, 313 U.S. 236 (1941) had been decided three days later, under other judicial precedents, the case would have been moot since the license applied for would have expired before the decision was rendered. Thus, it appears that the time margin between an advisory opinion and a case and controversy may be negligible.

10. Kunze v. Auditorium Co., 52 F.(2d) 444 (C.C.A. 8th, 1931) (moving picture was shown); Katz v. San Antonio, 91 Fed. 566 (C.C.A. 5th, 1899) (fund expended); Dunn v. Dunn, 96 Ind. App. 620, 185 N.E. 334 (1933) (taxes collected); Bloom v. Town of Albion, 96 Ind. App. 229, 183 N.E. 325 (1933) (road constructed and taxes collected); Johnson v. Paris, 78 Ind. App. 110, 134 N.E. 880 (1922) (gymnasium built).

11. 78 Ind. App. 110, 134 N.E. 880 (1922).

done except where there is need for a decision to serve as a guide for the future or where a question of public importance is raised.[12]

The defendant has introduced mootness into a case by the cancellation[13] of a contract. Similarly, in *Spreckels Sugar Co.* v. *Wickard,*[14] the Secretary of Agriculture, acting in an administrative capacity, rescinded an order which the plaintiff was contesting in the courts. The recission was made pending an appeal from a lower court decision; thus, the appeal was dismissed as moot. Conceivably by rescinding and then reissuing similar orders, an administrative agency could stifle any attempt to secure judicial review of its orders.

Where the plaintiff seeks to enjoin the defendant and the defendant agrees to restrain himself, the litigation is moot.[15] In *Rivers* v. *Miller*[16] the Governor of Georgia violated a federal injunction which had enjoined him from violating a state injunction. Pending an appeal from a judgment for civil contempt for violation of the federal injunction, a Georgia state court sustained the validity of the original state injunction. The appeal from the contempt judgment was then dismissed as moot. Clearly, the proposed willingness of Governor Rivers to abide by the state injunction, not the decision of the state court, rendered this appeal moot. This case cannot be justified. Governor Rivers deliberately interfered with the judicial process. Instead of at least a reprimand, he was permitted to benefit by escaping payment of damages for violation of the federal injunction.

The War Department, acting as an administrative agency, has introduced mootness by two dubious methods, into a case initiated by a service man. First, in *Hicks* v. *Hiatt,*[17] the petitioner was released from prison by a War Department order four days prior to the filing of a federal court opinion

12. See n. 39 and n. 40, infra.
13. Oklahoma Natural Gas Corp. v. Municipal Gas Co., 38 F.(2d) 444 (C.C.A. 10th, 1930); McKinley Memorial Baptist Church v. American Workmen, 59 F.(2d) 303 (App. D.C. 1932).
14. 131 F.(2d) 12 (App. D.C. 1941).
15. Rivers v. Miller, 112 F.(2d) 439 (C.C.A. 5th, 1940); Casey v. Civil Liberties Union, 100 F. (2d) 354 (C.C.A. 3d, 1939). Contra: U.S. v. Trans-Missouri Freight Assoc., 166 U.S. 290 (1896); Burkhart Mfg. Co. v. Case, 39 F.(2d) 5 (C.A.A. 8th, 1930).
16. 112 F.(2d) 439 (C.C.A. 5th, 1940).
17. 64 F. Supp. 238 (M.D. Pa. 1946).

granting habeas corpus for violation of the petitioner's constitutional rights in a military trial. Although this order rendered the case moot, the opinion was filed and Circuit Judge Biggs observed that " . . . the errors committed . . . were so numerous and of such an effect as to deprive Hicks of the substance of a fair trial . . . in a fundamentally fair way."[18] Had this opinion not been published, no public record of the illegality of the trial would exist as a vindication of the defendant. Second, in *Lynn* v. *Downer*,[19] a proceeding was dismissed a moot because the complainant had been transferred by the War Department beyond thhe jurisdiction of the original court.[20] The Supreme Court denied certiorari and the complainant, completely subject to the will of the armed forces, was without a remedy because of their power to moot the case and prevent a final judicial determination of the legality of the complainant's induction. These practices of avoiding judicial review evade the responsibility expected of an administrative agency.

Fourth. Mootness may arise because of extrinsic circumstances. This method was recognized by the Supreme Court when it said: "if the intervening event is owing . . . to a power beyond the control of either party, the court will stay its hand."[21] Some of the extrinsic factors which have caused a case to be moot are: destruction of property by fire;[22] war rendering a contract unenforceable;[23] a court decision;[24] an infant at the time of a lower court action becomes an adult by the time an appeal is perfected;[25] death of a party terminating the controversy;[26] statutory change in the law;[27]

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18. Id. at 249.
19. 140 F.(2d) 397 (C.C.A. 2d. 1944), cert. denied, 322 U.S. 756 (1945).
20. For a statement of the facts as to why the case was moot, see Memorandum of the United States in Reply to Petition for Rehearing, pp. 2-4, Lynn v. Downer, 323 U.S. 817 (1945).
21. Mills v. Green, 159 U.S. 651,654 (1895).
22. Wynne v. Pancheri, 54 F.(2d) 73 (C.A.A. 3d, 1941).
23. U.S. v. American-Asiatic S.S. Co., 242 U.S. 537 (1916); U.S. v. Hamburg-American Co., 239 U.S. 466 (1916)
24. The John Cadwalader, 99 F.(2d) 678 (C.C.A. 3d, 1938); Palm v. Weber, 71 Cal. App. (2d) 481, 162 P.(2d) 863 (1945).
25. Otherton Mills v. Johnson, 259 U.S. 13 (1922).
26. Director of Prisons v. Court of First Instance, 239 U.S. 633 (1915) (Court held an appeal was moot where the death sentence imposed by lower court had been executed); Bell v. McCain, 98 Ind. App. 68, 188 N.E. 378 (1934).
27. U.S. v. Alaska S.S. Co., 253 U.S. 113 (1920); Keller v. Powers,

and where a party is enjoined from doing a particular act on a specific date, and pending appeal, the date passes.[28]

Many of these extrinsic factors arise because of the lapse of time between a lower court decision and a reversal or affirmance by an appellate court. If the lower court would grant a stay of execution in many instances of this sort, mootness would be avoided; however, where injunctive relief is sought and denied by the lower court, this remedy is undesirable since allowing a stay of execution would be tantamount to awarding the injunctive relief. This problem is especially acute where the validity of administrative orders is in dispute. In *National Jockey Club* v. *Illinois Racing Commission*,[29] an order was issued alloting the petitioner racing dates for the season. Pending an appeal from this order, the racing season terminated and the order expired. The appeal was dismissed as moot; thus, the question whether the factors considered by the commission in making this allotment were valid was never decided. When the next racing season opened, the litigants had no judicial determination to serve as a guide in making future allotments. If a new controversy arose over these same factors, the possibility of it ending in a moot case is likely. By this delay in the judicial process, kindly called a lapse of time, final judicial review of administrative orders is precluded.

The expiration of a patent,[30] contract,[31] or license[32] is another extrinsic circumstance causing mootness. License cases involving the orders of administrative agencies, have been a prolific source of litigation, repeatedly ending in a

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189 Ind. 339, 127 N.E. 149 (1920); Riley v. Bell, 184 Ind. 110, 109 N.E. 843 (1915); Division of Labor v. Indianapolis News Publishing Co., 109 Ind. App. 88, 32 N.E.(2d) 722 (1941). But see Moore v. Smith, 160 P.(2d) 675,678 (Kan. 1945).

28. Johnson-Kennedy Radio Corp. v. Chicago Bears, 97 F.(2d) 223 (C.C.A. 7th, 1938). But cf. Good v. Burk, 167 Ind, 462, 77 N.E. 1080 (1906).

29. 364 Ill. 630, 5 N.E.(2d) 224 (1936).

30. Chapin v. Friedberger-Aaron Mfg. Co., 158 Fed. 409 (C.C.A. 3d, 1907).

31. State Highway Commission v. Crystal Flash Petroleum Co., 109 Ind. App. 255, 34 N.E.(2d) 148 (1941); Wyss v. Eskay Dairy Co., 99 Ind. App. 620, 192 N.E. 324 (1934); Nusbaum v. Geisinger, 46 Ind. App. 586, 93 N.E. 232 (1910); Dolan v. Richardson, 181 S.W.(2d) 997 (St. Louis Ct. App. 1944).

32. Starr v. Glueck, 186 Ind. 405, 116 N.E. 419 (1917); State v. Noftzger, 174 Ind. 140, 91 N.E. 562 (1910); Hale v. Berg, 41 Ind. App. 48, 83 N.E. 357 (1908).

conclusion that the issue was moot. In *Rayhayel* v. *McCampbell*,[33] an appeal from a decision affirming a denial of the plaintiff's application for a liquor license was dismissed as moot because it appeared that the term for which the license was to be in effect had expired. A decision on the merits in such a case is desirable to serve as a guide for the future, efficient operation of the agency and to reduce repetitious and fruitless litigation.

Some extrinsic circumstances have been held insufficient to cause a case to be moot. Insolvency of one of the parties[34] or inability to grant the total relief prayed[35] do not cause mootness. In an appeal otherwise moot where the only issue remaining is which party shall bear costs, the courts have uniformly held this insufficient to render a decision on the merits.[36] Although a case may be otherwise moot, if leaving the judgment unreversed would prejudice some other right of the appellant, some jurisdictions will render a decision on the merits.[37] In *Barretta v. Cocreham*,[38] a license case, the court denied a motion to dismiss an appeal because of mootness. Although the license which was revoked had expired before the decision, the court said a decision on the merits must be made since a statute precluded granting a new license for a

33. 55 F.(2d) 221 (C.C.A. 2d, 1932).

34. McCluer v. Super-Maid Cook-Ware Corp. 67 F.(2d) 426 (C.A.A. 10th, 1932).

35. Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346 (1922) (damages); U.S. v. Trans-Missouri Freight Assoc., 166 U.S. 290 (1896) (injunction); Burkhart Mfg. Co. v. Case, 39 F.(2d) 5 (C.C.A. 8th, 1930) (relief from liability on a bond); Beard v. Link, 81 Ind. App. 293, 141 N.E. 792 (1923) (damages); Hubrite Informal Frocks v. Kramer, 297 Mass. 530, 9 N.E.(2d) 570 (1937) (damages).

36. Johnson-Kennedy Radio Corp. v. Chicago Bears, 97 F.(2d) 223 (C.C.A. 7th, 1938); Chancellor v. Sweitzer, 329 Ill. 380, 160 N.E. 747 (1928); Riley v. Bell, 184 Ind. 110,109 N.E. 843 (1915) Wyee v. Eskey Dairy Co., 99 Ind. App. 620, 192 N.E. 324 (1934). Where an appeal is made moot by the voluntary conduct of the appellant, it is right that he should bear the costs. Bender v. Donoghue, 70 F.(2d) 723 (C.C.A.5th, 1934). Where an appeal appears to be frivolous, costs will be assessed against the appellant. Palm v. Weber 71 Cal. App.(2d) 481, 162 P.(2d) 863 (1945). If an issue of costs were sufficient to establish a controversy, no appeal would ever be moot. Dolan v. Richardson, 181 S.W. (2d) 997 (St. Louis Ct. App. 1944).

37. Fishwick v. U.S. 67 S. Ct. 224 (1947); Kessinger v. Schaal, 200 Ind. 275, 161 N.E. 262 (1928); Moore v. Smith, 160 P.(2d) 675 (Kan. 1945); Barretta v. Cocreham, 210 La. 55, 26 So.(2d) 286 (1946); State v. Romero, 49 N.M. 129, 158 P.(2d) 851 (1944).

38. 210 La. 55, 26 So.(2d) 286 (1946).

period of five years after the revocation of an old license. Clearly a failure to decide the issue on the merits would have prejudiced the plaintiff's right to apply for a license in the future.

In two other situations the courts have decided the issues on the merits even though the case was otherwise moot; first, where a question of public importance was involved;[39] and, second, where it is necessary to provide a guide for the future.[40] Manifestly, where a court may decide an appeal on the merits which appears to be moot either because the court finds a question of public importance or because it is necessary to provide a guide for the future, then rules pertaining to the existence of moot questions become extremely flexible.

Where a decision on the merits is desirable, what alternative solutions are available? There are two opposing policies which must be considered. It is desirable to facilitate the administration of justice by the elimination of noncontroversial litigation and to avoid gratuitous interferences with governmental operations. On the other hand, it is desirable, if not constitutionally required, to provide judicial review of the validity of administrative orders and the conduct of public officials so as to impeach arbitrary conduct and to provide reasonable guides for the future.

A proper disposition of appellate cases which become moot is one solution. There are three possible dispositions of an appeal. First, the procedure adopted by the Supreme Court of the United States is to reverse the lower court, but

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39. No question of public importance found: Dakota Coal Co. v. Fraser, 267 Fed. 130 (C.C.A. 8th, 1920); Keller v. Rewers, 189 Ind. 339, 127 N.E.149 (1920); Riley v. Bell, 184 Ind. 110, 109 N.E. 843 (1915); Dunn v. Dunn, 96 Ind. App 620, 185 N.E. 335 (1933); Fox v. Holman, 95 Ind. App. 598, 184 N.E. 194 (1933); J. B. Lyon Co. v. Morris, 216 N.Y. 497, 185 N.E. 711 (1933). Question of public importance found: Southern Pacific Terminal Co., v. Interstate Commerce Commission, 219 U.S. 498 (1911); Letz Mfg. Co. v. Public Service Commission of Indiana, 210 Ind. 467, 4 N.E.(2d) 194 (1936); Brown v. Baumer, 310 Ky. 315, 191 S.W.(2d) 235 (1946); Glenram Wine and Liquor Corp. v. O'Connell, 295 N.Y. 336, 67 N.E.(2d) 570 (1946); McCanless v. Klein, 182 Tenn. 631, 188 S.W.(2d) 745 (1945). For further information on questions of public importance, see Note (1941) 132 A.L.R. 1185.

40. Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498 (1911); Southern Pacific Co. v. Interstate Commerce Commission, 219 U.S. 433 (1911); Gay Union Corp v. Wallace, 112 F.(2d) 192 (App. D.C. 1940); Technical Radio Laboratory v. Federal Radio Commission, 36 F.(2d) 111 (App. D.C. 1929).

not on the merits, and remand the case with directions to dismiss.[41] Second, the appeal may be dismissed without affirming or reversing the lower court.[42] Third, the lower court may be affirmed, but not on the merits.[43] Manifestly, the first rule is subject to criticism. The decision of the lower court was on the merits. It is only the appeal that was moot. There is no cause for reversing a decision that was on the merits.[44] This procedure destroys what otherwise might serve as a guidepost for the future operation of administrative agencies. The second rule allows this guidepost to remain and is, thus, the best procedure. The third rule serves no useful purpose because it is just as illogical to affirm, but not on the merits, as it is to reverse with directions to dismiss, but not on the merits.

Another possible solution is to use the declaratory judgment procedure. In holding a case to be moot and refusing to render a decision on the merits, courts have frequently stated that even though a judgment was given it could not

41. Norwegian Co. v. Tariff Commission, 274 U.S. 106 (1927); Commercial Cable Co. v. Burleson, 250 U.S. 360 (1918). "To dismiss the writ of error would leave the judgment of the court of appeals . . . in force,—at least, apparently so,—notwithstanding the basis therefor as disappeared. Our action must, therefore, dispose of the case, not merely of the appellate proceeding which brought it here. The practice now established by this court . . . is to reverse the judgment below and remand the case with directions to dismiss . . . ." Brownlee v. Schwartz, 261 U.S. 216, 218 (1923). "Where it appears upon appeal that the controversy has become entirely moot, it is the duty of the appellate court to set aside the decree below and to remand the case with directions to dismiss." Duke Power Co. v. Greenwood County, 299 U.S. 259,267 (1936). The appellate courts below have not always followed this principle. Spreckels v. Wickard, 131 F.(2d) 12 (App. D.C., 1941) (appeals dismissed); Glass v. Ickes, 107 F.(2d) 259 (App. D.C., 1939) (appeal dismissed).

42. Harrison Beverage Co. v. Woodcock, 67 F.(2d) 441 (C.C.A. 3d, 1933); Rayhayel v. McCampbell, 55 F.(2d) 221 (C.C.A. 2d. 1932); Spreckels v. Wickard, 131 F.(2d) 12 (App. D.C. 1941); 107 F.(2d) 259 (App. D.C. 1939); Glass v. Ickes, 107 F.(2d) 259 (App. D.C. 1939); Brockett v. Maxwell, 200 Ga. 38, 35 S.E. (2d) 906 (1945); Division of Labor, Inc. v. Indianapolis News Publishing Co., 109 Ind. App. 88, 32 N.E.(2d) 722 (1941); Cochran v. Rowe, 225 N.C. 645, 36 S.E.(2d) 75 (1945); Austin v. City of Alice, 193 S.W.(2d) 290 (Tex. Civ. App. 1946); Jones v. Byers, 24 Wash.(2d) 730, 167 P.(2d) 464 (1946).

43. Compare Wynne v. Pancheri, 54 F.(2d) 73 (C.C.A. 3d, 1931) (affirmed but not on the merits) with Harrison Beverage Co. v. Woodcock, 67 F.(2d) 441 (C.C.A. 3d, 1933) (appeal dismissed).

44. In all cases cited in footnotes 1-43 inclusive where the appellate court had found the issue to be moot, the lower court decision had been on the merits.

be executed. Using the declaratory judgment procedure in many of these cases would obviate this objection. One difficulty in using this procedure is that no case and controversy exists, but this seems not well-founded. There are two requirements for a case and controversy: adverse parties asserting conflicting claims;[45] and finality short of execution.[46] Both requirements are satisfied in most of these situations. A more serious objection, however, is the necessity of exhausting the statutory remedy providing for an appeal from an order of an administration agency.[47] This objection seems insurmountable. It would be possible to obviate this by enabling legislation authorizing the use of the declaratory judgment procedure prior to exhausting the statutory remedy when proof that the statutory remedy would be unavailing because of anticipated mootness is presented to a court.

The most feasible and immediately available solution is for the courts to recognize more fully their power in those cases where a question of public importance is raised[48] or where a decision on the merits is needed to establish a guide for the future operation of administrative agencies.[49] As already stated, this provides a great degree of flexibility in the determination that a case is moot. By more frequent recognition of these problems and a broader application of these powers, the courts could insure that controversies involving administrative agencies be given proper judicial review and could render decisions on the merits even in moot cases where issues of public importance justify the establishment of standards for future administrative conduct.

BILLS AND NOTES

IN GOOD FAITH AND WITHOUT NOTICE

Plaintiff, an investment broker, purchased a bearer bond from a fly-by-night broker at slightly less than market price. The bond had been stolen from the original purchaser to whom a duplicate was issued. The duplicate was paid. Defendant

45. Nashville, C. & St. L. R.R. v. Wallace, 288 U.S. 249 (1933).
46. Id. at 263; Fidelity National Bank v. Swope, 274 U.S. 123 (1927).
47. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938); Central High School Athletic Assoc. v. Grand Rapids, 274 Mich. 147, 264 N.W. 322 (1936).
48. See cases cited in n. 39, supra.
49. See cases cited in n. 40, supra.

refused payment to the plaintiff. Held: judgment for plaintiff affirmed. The circumstances did not lead directly and irresistibly to the conclusion that plaintiff acted in bad faith. *Chicago District Electric Generating Corp. v. Evans,* 69 N.E. (2d) 627 (Ind. App., 1946).

The result of principal case is in accord with the accepted rule.[1] Purchase at a large discount and lack of inquiry may be considered as evidence tending to show notice;[2] however knowledge that would raise the suspicions of a reasonable man is not sufficient to deprive the purchaser of the status of a holder in due course.[3] In case the face of a note shows that an association's agent executed the note payable

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1. Graham v. White-Phillips Co., 296 U.S. 27 (1935), 102 A.L.R. 24,28 (1936); Fidelity and Deposit Co. v. City of Taunton, 303 Mass. 176, 21 N.E.(2d) 279 (1939); Grunthal v. National Surety Co., 254 N.Y. 468, 173 N.E. 682 (1930); Employers Liability Assurance Co. v. Greenfield, 316 Pa. 477, 175 Atl. 403 (1934); "Merely suspicious circumstances sufficient to put a prudent man on inquiry, or even gross negligence on the part of plaintiff, at the time of acquiring the note, are not sufficient of themselves to prevent recovery unless the jury find from the evidence that plaintiff acted in bad faith." Brannon, "Negotiable Instrument Law" (6th ed. 1938). "Notice is to be determined by the simple test of honesty and good faith, but carelessness or negligence though not a bar to recovery as a matter of law may be submitted to the jury as evidence tending to impeach good faith." Id at 636. For an excellent discussion of a proper instruction on notice and bad faith, see Britton, "Bills and Notes" (1943) 414-415.
2. Woodsmall v. Myers, 87 Ind. App. 69, 158 N.E. 646 (1927).
3. In the first Indiana Supreme Court case after the N.I.L. became effective, First National Bank v. Garner, 187 Ind. 391, 118 N.E. 813 (1918), the court adopted the wording from an earlier Indiana case, Tescher v. Merea, 118 Ind. 586, 20 N.E. 446 (1888), as clearly expressing a fair construction of the N.I.L.: "' . . . . The circumstances . . . . must lead directly and irresistibly to the conclusion that the purchaser had notice before the presumption that he had purchased the note in good faith can be overthrown. Circumstances calculated to awaken suspicions are not sufficient. The ultimate fact to be found is not whether the endorsee might have ascertained or could have known, that the note was fraudulently obtained but whether in fact he knew it, or acted in bad faith in abstaining from inquiry. * * * As has been said, it is a question not of negligence or diligence, but one of honesty and good faith.' " The Appellate Court has followed the Tescher case; however it has utilized only the first part of above quotation and has omitted the last two sentences, see principal case at 631; Colvert v. Harrington, 61 Ind. App. 608, 112 N.E. 249 (1915). It is possible, when these sentences are omitted, to gain the impression that a lower standard of conduct will be permitted than would be applied if the complete quotation from the Garner case were considered. This, of course, is a fine distinction as both possible interpretations of the wording can be regarded as within the standard accepted by the majority of American jurisdictions.

to himself[4] or when the indorsement is without recourse,[5] the indorsee is not necessarily placed on inquiry; and where the cashier of payee bank and the maker engage in a fraudulent scheme, the payee bank may obtain good title enabling its indorsee to recover against the maker.[6]

When it is proved that a prior holder's title was defective, the burden of proof is on the holder to show by a preponderance of evidence that he is a holder in due course.[7] Proof that a bank cashier or one member of a partnership was ignorant of a defect in the instrument does not establish that the other officers of the bank[8] or members of the partnership[9] were unaware of the defect; also knowledge by an indorsee that notes were subject to renewal constitutes notice;[10] and knowledge of fraud by a cashier may be imputed to the bank.[11]

In the determination of what constitutes holding in due course, courts[12] and text book writers[13] have employed "good

4. See Vincennes Savings and Loan Association v. Robinson, 107 Ind. App. 558,565, 23 N.E.(2d) 431,435 (1939).
5. Colvert v. Harrington, 61 Ind. App. 608, 112 N.E. 249 (1915).
6. Jewett v. Herr, 86 Ind. App. 392, 156 N.E. 568 (1927).
7. Ind. Stat. Ann. (Burns, 1933) §19-409, Myers v. Newcomer, 93 Ind. App. 498, 176 N.E. 865 (1931), Commercial Savings Bank v. Raber, 90 Ind. App. 335, 168 N.E. 697 (1929). For similar holdings in other jurisdictions, see First National Bank v. Denn, 124 Ore. 468, 263 Pac. 71, 57 A.L.R. 1077, 1083 (1928). The minority holding is that proof of defective title places on the holder only the burden of evidence. Feigenbaum v. Bockrath, 191 S.W.(2d) 999 (Mo. App., 1946). Lack or want of consideration is not sufficient in Indiana to place on the holder the burden of proving due course holding. In such case, the maker must prove that the holder had notice of the defense of lack or failure of consideration. Wheat v. Goss, 193 Ind. 558, 141 N.E. 311 (1923). See Treanor, "Burden of Proof of Due Course Holding Under Negotiable Instruments Law" (1926) 1 Ind. L.J. 49.
8. Commercial Bank v. Raber, 90 Ind. App. 335, 168 N.E. 697 (1929).
9. Myers v. Newcomer, 93 Ind. App. 498, 176 N.E. 865 (1931).
10. National Bank v. Kirk, 85 Ind. App. 120, 134 N.E. 772 (1926).
11. National Bank v. Parr, 205 Ind. 108, 185 N.E. 904 (1933).
12. "If . . . . it devolved upon plaintiff to prove that he made a good faith purchase of the note, he met the requirement of proof on this issue by uncontradicted evidence that he had no knowledge . . . . ." Appel v. Morford, 62 Cal. App.(2d) 36, 144 P.(2d) 95 (1943).
13. Good faith is the absence of Notice. Norton, "Bills and Notes" (4th ed. 1914) §§125-127a; "A holder in good faith—that is, having taken the paper without notice . . . . " Bigelow, "Bills, Notes and Checks (3rd ed. 1928) §460. See "Relation Between Bad Faith and Notice under the N.I.L." (1933) 81 U. of Pa. L. Rev. 617.

faith"[14] and absence of "notice"[15] to convey a single concept of bona fides. Although this merging of two subsections of the N.I.L. has not led to erroneous decisions, it is believed that analysis of cases is facilitated by considering the component parts of the concept. "Notice"[16] is merely a more detailed statement of one part of the larger abstract idea of good faith.[17] It concerns the knowledge of facts[18] which existed prior to the immediate transaction between the holder and his transferor. Attention is directed to the fact that notice of a defect in title, as this terminology is used in sec. 52-4 N.I.L., is limited to defects in the title of the person who negotiated the paper to the holder. Indeed, knowledge of a defect in a previous holder's title will not prevent a person from being a holder in due course unless there is an absence of good faith. Thus, when there is an infirmity in the instrument, or when the holder's transferor possessed a defective title, notice is the paramount consideration; all other situations raise the question of compliance with requirements of good faith.

CONSTITUTIONAL LAW

CIVIL SERVANTS AND THE RIGHT TO ENGAGE IN POLITICAL ACTIVITY

Employees in the classified civil service of the United States have for many years been prohibited from engaging

14. Ind. Stat. Ann. (Burns, 1933) §19-402 (3).
15. Ind. Stat. Ann. (Burns, 1933) §19-402 (4).
16. Ind. Stat. Ann. (Burns, 1933) §19-406. There may be actual or constructive notice; the latter is a legal inference from established facts. When an alleged defect appears on the face of the instrument and is a mere matter of inspection, the question becomes one of law for the court. Norton, "Bills and Notes" (4th ed. 1914) 438. Bigelow seems to adopt the doctrine of actual (or subjective test) bad faith but later qualifies this when notice is proved or presumed from disclosures on the instrument. In such cases the statute has not abolished the rule that notice maybe established by circumstantial evidence. Bigelow, "Bills, Notes and Checks" (3rd ed. 1928) §473-476.
17. See notes 12 and 13 supra.
18. 1. The title of the holder's transferor was defective; 2, an infirmity existed in the instrument; or 3. facts so strongly indicated the existence of 1 or 2 that taking the instrument would amount to bad faith. Ind. Stat. Ann. (Burns, 1933) §19-406.
19. "That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it." Ind. Stat. Ann. (Burns, 1933) §19-402 (4).

in certain political activities.[1] In 1939 the Hatch Act brought substantially all employees in the executive branch of the federal government within the purview of similar prohibitions.[2] Dismissal is the penalty prescribed for federal employees engaging in the prohibited activies.[3] State employees whose principal employment is in connection with an activity which is financed in whole or in part from federal funds, were made subject to these prohibitions in 1940.[4] If the Civil Service Commission finds that a state employee has violated the prohibitions against political activity, the state is notified. If it does not choose to dismiss the employee, a sum equal to two years' salary for that employee is withheld from the grant to the state.[5]

The State of Oklahoma and the United Public Works of America (C.I.O.) in separate actions recently challenged the constitutionality of this legislation. In *Oklahoma* v. *United States Civil Service Commission*,[6] a member of the State High-

1. (Civil Service Act of 1883), 22 Stat. 403-04 (1883), 5 U.S.C.A. §633 (1927).
2. 53 Stat. 1147 (1939), as amended, 18 U.S.C.A.§611 (Supp. 1946) hereinafter referred to as the Hatch Act) important policy making officials who change with administrations and dollar a year men are excepted. The specific sentence under fire makes it unlawful for any person employed in the executive branch of the Federal Govrnment with the exceptions before noted, "to take any active part in political management or in political campaigns."
3. Actually the Civil Service Commission's inquiry is limited to those employees in the classified civil service. Other employees are subject to removal by their department heads for violation of the regulations. Actual discharge in all cases is made by the department head concerned, but where the Commission has jurisdiction it can notify the Comptroller to withhold any further compensation from an employee it has determined to be guilty. Dismissal is mandatory if a violation is found by a federal employee; the Commission has discretion to leave a state employee in office if his transgression does not in its opinion justify removal. 40 Op. Atty. Gen. No. 2.
4. Section 12(a) of the Hatch Act applies to employees of any state or local agency financed "in whole or part by federal funds." They are forbidden "to take any active part in political management or in political campaigns."
5. Section 12 of the Hatch Act provides for this penalty unless the employee is dismissed from all state activity, federally financed or not. This would appear to be a violation of the Tenth Amendment. However, since Oklahoma kept the employee on his same position the question did not arise. See n. 6 infra.
6. 67 S.Ct. 544 (1947). There was doubt in this case as to whether a justiciable controversy was presented. The court distinguished Massachusetts v. Mellon, 262 U.S. 447,480 (1923) on its facts. The distinction is tenuous. The "Maternity Act" in the Mellon case authorized appropriations to be made among states accepting its

way Commission, which administered a program financed in part with federal funds, served simultaneously as Chairman of the Democratic Party's State Central Committee. The United States Civil Service Commission held the required hearing and notified the State that there had been a violation of the Hatch Act warranting dismissal of the Highway Commissioner. After thirty days, no action having been taken by the State to dismiss the employee, the Civil Service Commission certified an order to the appropriate federal agency requiring it to withhold two years' salary from further grants to Oklahoma.[7]

Oklahoma contended that the enforcement provisions in the Hatch Act invaded the powers reserved to the states. The Hatch Act, however, is carefully worded so that no order is given to the state. If it decides to resist the suggestion of removal, that is the state's privilege, but federal funds are no longer forthcoming to pay the salary of the employee.[8] The Tenth Amendment in nowise restricts the use of powers granted to the federal government nor means appropriate to their implementation.[9] The power of the federal government to fix the terms and conditions upon which grants to the states shall depend is firmly established.[10] The decision on this point is clearly in accord with past cases.

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provisions, the purpose being to reduce infant mortality. There was to be joint federal and state expenditure with the former having the power to withhold funds if it decided they were not being properly expended. The Supreme Court held there was no invasion of state sovereignty, no required submission. Only an abstract question of political power, the power of Congress to pass such a statute existed, and that was not thought to be a matter for court decision.

7. 53 Stat. 1147 (1939), as amended, 18 U.S.C.A. §611 (Supp. 1946).
8. The following cases illustrate application of the statute in this respect: Ohio v. United States Civil Service Commission, 65 F. Supp. 776,780,781 (1946), is factually about the same as the following case. Stewart v. United States Civil Service Commission, 45 F. Supp. 697,701 (1942), plaintiff was Director of Georgia State Bureau of Unemployment Compensation and while in that position solicited campaign funds from employees. Neustein v. Mitchell, 52 F. Supp. 531 (1943), plaintiff, a member of the New York Unemployment Insurance Appeal Board was removed for actively participating in a political campaign.
9. United States v. Darby, 312 U.S. 100 (1941); Ashwander v. Tennessee Valley Authority, 297 U.S. 288,338 (1935); McCullough v. Maryland, 4 Wheat. 316,405 (U.S. 1819). If Federal and state powers conflict, the latter must yield, Oklahoma v. Atkinson Co., 313 U.S. 508 (1941).
10. Steward Machine Co. v. Davis, 301 U.S. 548,578,595 (1936); United States v. Butler, 297 U.S. 1,73 (1935); Cf. Massachusetts v. Mellon, 262 U.S. 447,482 (1923).

The challenge to the Act by a group of federal employees presented in *United Public Workers of America* v. *Mitchell*[11] involved more serious considerations. In an injunction and declaratory judgment proceeding, the plaintiffs claimed that the provisions of the Hatch Act in question violated their constitutional rights to free speech and to engage in political activity.

In the case of *Ex Parte Curtis*,[12] decided in 1882, the Court permitted a reasonable regulation of civil servants in the interests of efficiency and good government. The statute attacked in that case forbade money contributions by government employees solicited by or made to other officials or employees for political purposes, but did not restrict any other type of contribution. The opinion of the court by Chief Justice Waite emphasized the authority of Congress to pass laws necessary for the proper exercize of delegated powers. He also observed that contributions made under the proscribed conditions were in all likelihood not given to exercise a political privilege, but to escape the displeasure of superiors. The statement was also made, and it seems as pertinent today as then, that " . . . when public employment depends to any considerable extent upon party success, those in office will naturally be desirous of keeping the party to which they belong in power."[13] The majority in *Ex parte Curtis* were necessarily aware of the full implications of their decision for the forceful dissent of Justice Bradley anticipated most of the civil rights objections to the type of legislation under discussion.[14]

Contrasting with the reasonable regulation doctrine of the *Curtis* case, stand the galaxy of civil rights cases which have in late years given the guarantees of the Bill of Rights new stature and increased meaning.[15] In the now famous

11. 67 S.Ct. 556 (1947).
12. 106 U.S. 371 (1882).
13. Today dismissal must be for cause but nevertheless, many subtle ways exist in which superiors could advance the politically partisan for their efforts if the Hatch Act did not outlaw such action. In this sense the Act is felt to be a safeguard against the conceivable development of a one party system.
14. 106 U.S. 371 (1882).
15. E.g. West Virginia Bd. of Education v. Barnette, 319 U.S. 624 1943); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Schneider v. State, 308 U.S. 147 (1939); Lovell v. Griffin, 303 U.S. 44 (1938); DeJonge v. Oregon, 299 U.S. 353 (1937).

footnote four to *United States* v. *Carolene Products Co.*,[16] the late Chief Justice pointed out that the presumption operating in favor of the constitutionality of legislation would be narrower in scope when an area covered by a specific prohibition of the Constitution, particularly the first ten commandments, was invaded. The present Court's policy to strike down legislation restricting civil rights in the absence of a "clear and present danger" is firmly established.[17] The *Public Worker's Case,* then, posed conflicting policies, one the reasonable regulation of the civil service by Congress, the other the high respect due civil rights. The majority does not feel that the requisite protection of civil rights has overridden the reasonable regulation permitted to Congress.

The Court in the *United Public Worker's* case asserts that the act is directed at active participation in political management and political campaigns by government employees. Money contributions are prohibited only when solicited from or made to another employee, so here the contributions of energy prohibited are those to partisan activity. The basic rights to vote and to express opinions outside the actual arena of party strife remain inviolate. The Court seems to assume that the clear and present danger doctrine does not apply to legislation promulgated for the regulation of government employees. Here, perhaps the famous "if reasonable men can differ" doctrine, consistently advanced by Holmes in fields other than civil rights[18] is the proper criterion. Indeed, the Court points out that if the "reasonableness" test is not adopted, Congress would be powerless at this time to cope with threatened evils, particularly one-party perpetuation, regarded by many persons as a material threat to our democratic system of government.

Once it is conceded that the reasonableness test is applicable to this legislation, the dissent of Justice Douglas,[19]

16. 304 U.S. 144,152 (1937).

17. Rosenfeld and Tannen, "Civil Liberties Under the Roosevelt Administration," 5 Law G. Rev. 182 (1945); Louis Luskey, "Minority Rights and Public Interest," 52 Yale L. J. 1 (1942).

18. In fields other than those involving civil liberties, Holmes refused to strike down legislation on the reasons or policy of which reasonable men differ. Adair v. United States, 208 U.S. 161,191 (1907); Lochner v. New York, 198 U.S. 45,76 (1905). This view has now been accepted by the Court, Nebbia v. New York, 291 U.S. 502, 537-39 (1933).

19. 67 S.Ct. 577 (1947).

which is based on the "clear and present danger" test, loses its force. The mere fact that the method of regulation chosen might be greatly improved would not in itself justify the court in striking it down. A roller in a federal mint has little contact with the public, but reasonable men might conclude that political activity on his part would bring him preferment. Injury to the efficiency of the government is easy to conjecture under such circumstances.

Justice Black, in his dissent,[20] contended that the provision attacked is too broad, ambiguous and uncertain in its consequences. However, he seems to overlook the long history of such regulation[21] and its application in the companion field of military personnel.[22] No one denies that the principle of regulation can go too far but Justice Holmes has pointed out that questions of degree are inescapable[23] and not in themselves grounds for alarm. Justice Bradley in 1882[24] foresaw the direst consequences following in the wake of the regulation there advanced. They have yet to materialize.

Strenuous objection to the Act is made by posing hypothetical cases of injustice. In answering a similar argment in *United States v. Wurzcak*,[25] a case involving a statute of the type under discussion, the opinion of Justice Holmes said the question of uncertainty could wait until a case of doubt arose. Much of the alleged vagueness of the rules is imaginary. The Civil Service Commission has conspicuously posted notice of specific unallowable practices.[26] Anyone de-

20. 67 S.Ct. 572 (1947).

21. "The petitioner may have a constitutional right to talk politics but he has no constitutional right to be a policeman." McAuliffe v. New Bedford, 155 Mass. 216,220, 29 N.E. 517 (1892).

22. Army Regulations No. 600-10,1 p. 5 provide substantially the same restriction on military personnel as Sec. 9(a) of the Hatch Act. applies to Federal employees.

23. See dissenting opinion, Haddock v. Haddock, 201 U.S. 562,631 (1906). "I am the last man in the world to quarrel with a distinction simply because it is one of degree. Most distinctions, in my opinion, are of that sort, and are none the worse for it. But the line which is drawn must be justified by the fact that it is a little nearer than the nearest opposing case to one pole of an admitted antithesis."

25. 280 U.S. 396 (1930).

26. E.g. United States Civil Service Commission, Political Activity and Political Assessments, Form 1236, September 1939.

siring to comply with the law can read and obey the instructions on these posters. None of the employees involved in these cases appeared ignorant of the regulations.

Nevertheless the Act could be more explicit.[27] The faults are difficult to remedy because the Act defines active participation in politics as the same activities that the Civil Service Commission had determined to be prohibited when the act took effect in 1940. A new law might well accumulate the experiences of the last seven years into three or four basic regulations which would obviate most of the present uncertainty and doubt.

Many of the English speaking countries have adopted this type of regulation,[28] an indication perhaps that the problem is inescapable in a democratic form of government. The gigantic size of modern civil services and their infinitude of vital contacts with all phases of national life call for serious consideration of the subject and an orientation of our political philosophies in terms of necessities. The decisions discussed appear to reconcile individual freedom with the political facts of life produced by the large scale government of our time.

CONSTITUTIONAL LAW

INDIANA GROSS INCOME TAX AND THE COMMERCE CLAUSE

The Indiana Gross Income Tax Division has set forth the following 'prerequisites' to tax exemption under the Commerce Clause; (1) Income derived from transactions with customers who are non-residents of Indiana, and that (2) by reason of the receipt of a *prior order,* (3) delivery was required and made, and that (4) such delivery across states lines was necessary and *essential* to the consummation of the transaction. *Ind. Gross Income Tax Div., Departmental memorandum,* January 24, 1947.

This ruling was issued as a result of the recent Supreme Court decision in *Freeman v. Hewit,*[1] which held the Ind.

27. E.g. section 15 of the Hatch Act enacts into law all the previous rulings of the Commission which are thus not subject to broad changes.

28. Leonard D. White, "Civil Service in the Modern State" (1930).

1. 67 S. Ct. 274 (1946). Rutledge, J., concurring at 280; Douglas and Murphy, J.J., dissenting at 292; Black, J., dissenting without opinion. The rationale of the majority opinion by Mr. Justice

Gross Income tax[2] invalid as applied to a sale of securities upon the New York Stock Exchange.[3] Although the memorandum is ostensibly addressed to security transactions, the test set forth therein purports to be that previously utilized for tangible transactions. It is, therefore, applicable to all transactions involving an Indiana seller where the sale has extra-state factors. Inasmuch as it represents the Gross Income Tax Division's interpretation of the effect of the Commerce Clause upon such transactions it is proposed to analyze these 'prerequisites' and discuss their applicability in those situations where Indiana is the Seller state.

The ruling limits the *Freeman* case to its holding that, for Commerce Clause purposes, transactions in intangibles and tangibles are to be treated alike. All other points of the ruling are derived from prior cases.[4] It should be noted that

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Frankfurter is that the gross income tax here applied is a tax "on the sale" and as such is invalid. The implications of the Freeman case on the word formula used by the Supreme Court in validating or striking down state regulation is without the scope of this note. This subject has proven a fertile field for constitutional law writers. For analysis of the historical and current formula, see, inter alia; Frankfurter, "The Commerce Clause" (1937); Gavit, "The Commerce Clause" (1932) cc. 5, 6, 13; Willis, "Constitutional Law" (1936) c. 11; Dunham, "Gross Receipts Taxes on Interstate Transactions" (1947) 47 Col. L. Rev. 211; Morrison, "State Taxation of Interstate Commerce" (1942) 36 Ill. L. Rev. 726; Powell, "New Light on Gross Receipts Taxes" (1940) 53 Harv. L. Rev. 909; Dowling, "Interstate Commerce and State Power" (1940) 27 Va. L. Rev. 1; Lockhart, "The Sales Tax in Interstate Commerce" (1939) 52 Harv. L. Rev. 617; Perkins, "The Sales Tax and Transactions in Interstate Commerce" (1934) 12 N.C.L. Rev. 99.

2. Ind. Stat. Ann. (Burns 1943 Repl.) §64-2601 et seq., see Dunham, "Taxation" (1946) 21 Ind. L. J. 113, 137.

3. Appellant, trustee of an estate created by the will of an Indiana resident, sold certain securities of the estate. The securities were offered, at prices specified by the trustee, through an Indiana broker and sold on the New York Stock Exchange. Appellant paid, under protest, the Indiana Gross Income Tax based upon the proceeds of the sale. In this action he sought a refund claiming the transaction was immune from tax under the Commerce Clause. The Supreme Court of Indiana sustained the imposition of the tax [221 Ind. 675, 51 N.E.(2d) 6 (1943)]. Reversed upon appeal to U.S. Supreme Court. (1) Intangibles are to be accorded the same protection under the Commerce Clause as tangibles, and (2) the tax is a direct tax upon an interstate sale and is unconstitutional in its application [67 S.Ct. 274 (1946)].

4. "The Court in its opinion cited with approval previous decisions rendered under the Gross Income Tax Law in the case of Adams Manufacturing Company v. Storen, the International Harvester Company v. Department of Treasury and other cases. The Supreme Court of the United States had also previously affirmed the Allied Mills Company Inc. v. Department of Treasury case. Since the Court in its present decision places the sale of securities

the individual 'prerequisites' are enumerated in the conjunctive and therefore, the absence of any one of these essentials apparently results in no tax immunity. It is doubtful that they have such broad and forceful application as the ruling suggests.[5]

The applicability of these 'prerequisites', in Seller. state transactions can best be approached by an analysis of their possible meanings[6] together with a brief summary of their historical origin. No discussion will be made of the burden of proof imposed upon the taxpayer to prove the purchaser was a non-resident of Indiana.[7]

Prior Order

1. The term "prior order" is a vague one and requires definition. In order to be of value as a test, "prior order" is best defined in terms of sales transactions. A point of time from which the transaction is to be viewed must be taken in order to attach any significance to the word "prior." The "order" referred to, (apparently a request for delivery), may conceivably be given by the buyer at any one of the following times: (a) order before the contract of sale is formed, i.e. an offer or acceptance, (b) order prior to shipment, (c) order prior to delivery to the buyer.

(a) An initial reading of the Gross Income Tax Div. memorandum might connote to the taxpayer that a "prior

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in the same category as the sale of machinery and other tangible personal property in relation to the application of interstate commerce immunity from tax, such securities transactions must therefore fall within and meet the requirements and restrictions of the same court decisions, regulations as are applicable to transactions in machinery and other tangible personal property in interstate commerce." Ind. Gross Income Tax Div., Departmental Memorandum, January 24, 1947.

5. Admittedly no problem will arise where the Gross Income Tax Div. finds all of its 'prerequisites' of tax immuuity are present. The problem arises where one or more of the "prerequisites" are absent. This analysis, therefore, will consider each 'prerequisite' with reference to its individual validity.

6. Each 'prerequisite' used in the memorandum is necessarily vague since no attempt was made to define the terms used. Unfortunately each has varied and well established connotations in contract and sales law.

7. It is sufficient here to comment that where sales are made on large markets and exchanges, the problem of proof of purchase by a non-resident is one of magnitude and great expense. In the Freeman case the purchase by a non-resident was stipulated by the State.

order" meant an offer or acceptance by an out-of-state buyer. Consideration of the cases and fundamental contract principles, however, compels a contrary conclusion. As a matter of contract law, the delivery requirement, whether express or implied, flows from the contract and it is immaterial which contracting party first proposed the delivery term finally agreed upon.[8] The *Freeman* case indicates that the out-of-state buyer need not propose this term to give the seller tax immunity. In that case, the Indiana seller was the offeror. The buyer's acceptance gave rise to the obligation to deliver the securities. The *Freeman* case is also conclusive that there is no requirement of an order previous to the formation of a contract. The mere fact that the securities were offered at a stated price rather than at market price did not result in an offer by the buyer before the contract of sale was consummated. Any concept of an "order" separate and distinct from the contract for sale overlooks basic contract law.[9] The contract of sale must then be the "order" the state has reference to. If this be true, it simply means that goods are shipped 'pursuant to or in consummation of a contract.'

(b) The second possibility, i.e. an order prior to shipment across state lines can have no significance in view of the *Gwin, White & Prince* v. *Henneford*[10] decision. To hold that an order must be in existance prior to shipment would result in taxibility where an Indiana seller ships goods out-of-state, consigned to himself, intending to sell while the goods are in transit or at destination.[11] The *Gwin, White* case, to the contrary, held this type transaction non-taxable.

(c) An order prior to delivery may be a valid requirement. No cases have been found wherein this type transaction has been held tax immune under the Commerce Clause. The dearth of cases of this nature in all probability results

8. As a matter of contract principles, acceptance of an offer automatically results in the formation of a contract.
9. The contract of sale is complete upon acceptance at the Exchange. Restatement, "Contracts" (1932) §64, 66, 74; Meyer, "Law of Stock Brokers and Stock Exchanges" (1931) §28, p. 172.
10. 305 U.S. 434 (1939), (1939) 27 Calif. L. Rev. 336, (1939) 39 Col. L. Rev. 864, (1939) 23 Minn. L. Rev. 969.
11. E.g., Indiana Mining Co. ships carload of coal on consignment to itself in State X. Informs A that coal is available, A refuses. Shipper notifies B in state of Y who accepts. Shipper reroutes from State X or while car enroute, to state Y where B takes delivery.

from the fact that sales by this method are exceedingly rare. Very few concerns ship their product to a prospective customer without negotiation of some sort. Perhaps the most common example of this type transaction would be sales of Christmas cards, ties and magazines by specialty vendors.

2. Thus, the term 'prior order' can only have signifance in those few transactions where an Indiana seller delivers to an out-of-state buyer without prior negotiation of any sort and with the expectation of acceptance or return on the part of the "prospective" buyer. This is clearly a limited field of sales transactions.

3. The cases, historically, do not reveal the existence of a prior order as an element in determining the privilege of a state to tax a transaction with extra-state elements. The concept arose as a result of the dictum of Chief Justice Taft in the case of *Sonneborn* v. *Cureton.*[12] However, in the case of *Wiloil* v. *Pennsylvania*[13] this was rejected and the tax imposed in spite of the clear existence of a prior order. Subsequent cases have been in accord and give no consideration to this as an element of tax immunity.[14] In none of the cases involving Seller state transactions has the prior order concept been relied upon by the court as a significant element in tax determination. The Gross Income Tax Div. apparently obtained this test from *J. D. Adams Mfg. Co.* v. *Storen*[15] where there were prior orders "in fact." However, the Su-

12. 262 U.S. 506 (1923); at 515, "Many of the sales by appellants were made by them before the oil to fulfill the sales was sent to Texas. These were properly treated by the state authorities as exempt from state taxation. They were, in effect, contracts for sale and delivery across state lines."

13. 294 U.S. 169 (1935), (1935) 83 U. of Pa. L. Rev. 795. Taxing state (Buyer & Seller state) placed tax on local seller of fuel oil which had been shipped from out-of-state directly to purchaser. The Supreme Court sustained the tax on the ground that, "These contracts did not require or necessarily involve transportation across the state boundary . . . as interstate transportation was not required or contemplated, it may be deemed incidental."

14. Ford Motor Co. v. Dept. of Treasury, 141 F.(2d) 24 (C.C.A. 7th, 1944), rev'd. other grounds, 323 U.S. 459 (1945); Dept. of Treas. v. International Harvester Co., 322 U.S. 340 (1944) (Class C & E sales); Holland Furnace Co. v. Dept. of Treasury, 133 F.(2d) 212 (C.C.A. 7th, 1943) cert. denied, 320 U.S. 746 (1943); Allied Mills, Inc., v. Dept. of Treasury, 220 Ind. 340, 42 N.E.(2d) 34 (1942), aff'd. per curiam, 318 U.S. 740 (1943); Dept. of Treas. v. Wood Preserving Corp., 313 U.S. 62 (1941); McGoldrick v. Felt and Tarrant Mfg. Co., 309 U.S. 70 (1940).

15. 305 U.S. 307 (1938), 117 A.L.R. 429 (1938), (1939) 4 Mo. L. Rev. 64.

preme Court neither mentioned nor intimated this test in its opinion.

Required Delivery

1. This 'prerequisite' originated in the *Wiloil*[16] case to avoid the "prior order" test stated in the dictum of the *Sonneborn* case. This concept was flatly rejected in the later case of *McGoldrick* v. *Berwind White Coal Mining Co.*[17]

2. It is doubtful that the term has any meaning beyond the subsequent requirement considered, i.e. that delivery across state lines was necessary and essential to the consummation of the transaction.

Essential Delivery

1. In order to clarify and limit the scope of analysis of this 'prerequisite' it should be pointed out that consideration here will not be given to transactions where out-of-state delivery is specified solely for tax avasion purposes.[18]

2. Considering the possible interpretations of this 'prerequisite', a point of reference for the purpose of definition must be established. The use of the term in its context in the memorandum (i.e. delivery is essential to the consummation and completion of the transaction) connotes essentially of delivery pursuant to the contract of sale.[19] If this con-

16. See n. 13 supra.

17. 309 U.S. 33 (1940). The sale of coal which moved from a mine located in Pennsylvania to points of delivery in New York City pursuant to contracts entered into in New York City held subject to a city sales tax. Such tax does not discriminate against interstate commerce. At 53,54, "Respondent . . . insists that a distinction is to be taken between a tax laid on sales made, without previous contract, after the merchandise has crossed the state boundary, and sales, the contracts for which when made contemplate or require the transportation of merchandise interstate to the taxing state. Only the sales in the state of destination in the latter class of cases, it is said, are protected from taxation by the Commerce Clause. . . . But we think this distinction is without the support of reason or authority . . . True, the distinction has has the suppor of a satemen obiter in Sonneborn v. Cureton. . . . "

18. Superior Oil Co. v. Mississippi, 280 U.S. 390 (1930), (1930) 30 Col. L. Rev. 731, (1930) 16 Va.L.Rev. 848. For comment upon the element of tax evasion see Note (1921) 21 Col. L. Rev. 270.

19. No duty to ship across state lines could arise short of contract, i.e. mere offer or acceptance alone would not give rise to a duty to ship. The reference point is then the shipping requirements of the contract.

cept relates to the contract requirements, consideration must be given to the type of contract requirement to which the term is directed. What may be "essential" delivery from a contratual duty to deliver, may not be "essential" in fact or for taxation.[20] What may be "essential" delivery from the buyer's physical necessities, may not be "essential" for the seller.[21] The concluding possibility then is that "essential" refers to 'delivery pursuant to the *place of delivery* requirement of the contract.' Here we reach the anomalous result that the taxability of the seller is being established by the buyer when he requires the seller to deliver at the buyer's place of business.

3. The "essential delivery" prerequisite is apparently a perversion of the "required or contemplated" delivery test of the *Wiloil* case which validated a tax imposed by the Buyer state. Where the tax is levied by the Buyer state on a resident seller who chooses to deliver goods from out-of-state plants rather than in-state plants,[22] the concept might have meaning, if not significance. Consideration of the cases, however, indicates that the significant element is not that of "essential delivery" (i.e. that the seller *could* have shipped from within the taxing state) but is the 'local incident' of delivery within the taxing state. The local incident of delivery seems to have been the favored 'incident' utilized by

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20. E.g. the situation where the seller, due to fire, etc., finds it impossible to complete performance from his X state plant but does so in the same form from his Y state plant. The contract of sale specifically provides for delivery from X state plant. In the event of breach of contract by either party, performance from X state plant would not be "essential" insofar as to relieve either the buyer of his obligation to perform [Restatement, "Contracts" (1932) §§463, 464, 467] or the seller of his obligation to perform. [Booth v. Spuyten Duyvie Rolling Mill Co., 60 N.Y. 487 (1875). Note (1921) 12 A.L.A. 1273,1281]. It is apparent that the term "essential" in the memorandum does not refer to this type situation.

21. Conceivably a hypothetical California buyer of the Freeman securities could have come to Indiana to take delivery. Clearly "essential" in terms of physical ability to perform is not the intended definition of the term in the Gross Income Tax Division memorandum.

22. E.g. the fact situation of the Allied Mills case (n. 14 supra) appellee an Indiana corporation, engaged in the manufacture and sale of live stock and poultry feeds, with factories in Indiana and elsewhere. For business economies and not tax evasion, the appellee divided Indiana into three geographical areas, one served from Indiana Plant, the others from Illinois facilities. Held, appellee liable for tax upon all sales wherever delivery accepted in Indiana regardless of whether delivery was made from Indiana or elsewhere.

the Supreme Court in sustaining taxation of interstate transactions.[23] Needless to say, these cases have no bearing upon the problem here considered. The mere circumstance that

23. The recent cases establishing the states power to tax, under the theory that Interstate Commerce must pay its way, have been confined to those instances where the tax could be levied upon an appropriately 'local incident.' Principal case at 279, " . . . and the tax [Berwind-White] was sustained because it was conditioned upon a local activity delivery of goods. . . . ."; Western Live Stock v. Bureau of Revenue 303 U.S. 250 (1938). The Supreme Court has used delivery [Dept. of Treasury v. International Harvester Co., 322 U.S. 340 (1944) (class D sales)], delivery plus solicitation of contract of sale [Department of Treasury v. International Harvester Co., supra) (class E sales)], and performance of services [Dept. of Treasury v. Ingram-Richardson Mfg. Co., 313 U.S. 252 (1941)]. Unloading and reloading, within the taxing state, for out-of-state transshipment are insufficient contact points to support the imposition of gross receipts tax levied on 'local' business [Joseph v. Carter & Weekes Stevedoring Co., 67 S.Ct. 815 (U.S. 1947)] Cf. Rutledge, J., concurring in principal case, 284-289 at 286: "Selection of a local incident for pegging the tax has two functions relevant to determination of its validity. One is to make plain that the state has sufficient factual connections with the transaction to comply with due process requirements. The other is to act as a safeguard, to some extent, against repetition of the same or a similar tax by another state. . . . But the Freeman case is one of the latte rtype, that is, where, despite these connections (Indiana) there were equally close and important ones in another state, New York; and therefore, as the Adams case declared, the risk of multiple state taxation would be incurred." Compare the use of 'local incident' theory with the "Accumulation of Contracts Points" used in Barber v. Hughes, 63 N.E. (2d) 418 (Ind. 1945) in Conflict of Laws application. Noted in (1946) 22 Ind. L. J. 78.
A further refinement of the 'local incident' and its effect upon interstate sales occurs where an Indiana seller sells his product to an out-of-state buyer f.o.b. seller's point. The validity of the imposition of the Indiana Gross Income Tax upon such a transaction depends upon the extent to which the Supreme Court is willing to press its 'local incident' theory. Delivery within the taxing seller state has been held sufficient for the imposition of the tax (Dept. of Treasury v. International Harvester, supra). However, in the Freeman case the court apparently was unwilling to consider offer alone as a sufficient local incident to support the tax. Where, between the two polar incidents, the passing of title falls as a local incident is problematical. The case of McLeod v. Dilworth, 322 U.S. 327 (1944), would indicate that the passing of title was of sufficient import to support the tax. In contrast, the multiple burden concept of the Adams case would strike down the tax. Since "commerce among the several state is a practical conception not drawn from witty diversities of the law of sales" [Rearick v. Pennsylvania, 203 U.S. 507, 512 (1906)] the fact that title passed prior to delivery should have no more efficacy in imposing taxes than does the retention of title for security purposes in C.O.D. consignments. Norfolk & Western Ry. Co. v. Simms, 191 U.S. 441 (1903); accord, Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921); Lemke v. Farmer's Grain Co., 258 U.S. 50 (1922); Penna. R.R. v. Sonman Shaft Coal Co., 242 U.S. 120 (1916).

delivery was, in fact, taken in the taxing state with consequent tax imposition does not *a fortiori* mean that the tax could be imposed were delivery taken elsewhere, on the theory that such delivery was not "essential." Cases involving delivery in the taxing state, therefore, do not lend validity to the Gross Income Tax Div.'s 'prerequisite' of "essential delivery."

4. As was noted above, this concept is historically an adaption of the "required delivery" concept of the *Wiloil* case which was summarily rejected in the *Berwind-White* case. It would appear that the Gross Income Tax Div. finds support for the adaptation of this concept in *Dept. of Treas.* v. *Allied Mills*,[24] where an Indiana seller, because of freight rates and other considerations, delivered goods to Indiana buyers from out-of-state plants although the deliveries could have been made from Indiana plants. It is to be noted that this case was affirmed per curiam on the strength of *McGoldrick* v. *Felt & Tarrant Mfg. Co.*[25] and *Felt & Tarrant Co.* v. *Gallagher*,[26] the former being a companion case to *Berwind-White* which overruled the "required delivery" concept of the *Wiloil* case and the latter a use tax case. All of which would indicate that delivery within the taxing state rather than "essential delivery" was the basis of the court's affirmance. The 'local incident' of delivery as a test of tax immunity is separate and distinct from that considered here and the value of the *Allied Mills* case as support for the 'prerequisite,' as here used, is indeed questionable. In the Seller state cases the 'prerequisite' of "essential delivery" has never been utilized, discussed or intimated by the courts.

Conclusion

The above analysis suggests that the Gross Income Tax Div.'s test adds up to nothing more than this: tax immunity is granted to all transactions in which delivery across state lines occurs in the "ordinary course of business." In making

24. 220 Ind. 340, 42 N.E. (2d) 34 (1942), aff'd per curiam, 318 U.S. 740 (1943) on basis of McGoldrick v. Felt & Tarrant Mfg. Co. 309 U.S. 70 (1940).

25. McGoldrick v. Felt & Tarrant Mfg. Co., id. at 77, "Decision [here] . . . is controlled by our decision in the Berwind-White Coal Mining Co. case."

26. 306 U.S. 62 (1939).

an additional division of factual situations into (1) normal or usual course of business, and (2) isolated transactions, further clarification of the problem may be made. The cases considered above and found in the reports are those where the transaction sought to be taxed was one of the normal business activity of the taxpayer.[27]

The governing policy concerning "normal course of business" transactions was established in 1824[28] on the premise that the free flow of commerce is to be unimpaired by state regulation.[29] On the other hand, in the case of an "isolated" sale which is not in the usual course of business[30] the policy arguments which limit the scope of permitted state regulation are not so persuasive. For in the isolated sale situations, the state action is directed toward a transaction collateral to and not seriously affecting the predominate business of the taxpayer.

Under this classification, the Gross Income Tax Div.'s prerequisites conceivably have application but only in the limited field of isolated sales. Here, too, however, subject to possible exceptions. In the "isolated" transaction, assuming the existence of an equal local market, the sale could be tested by the application of the states 'prerequisites.' The assumption, however, of an equal local market indicates the exception mentioned above. In those cases where the method of marketing goods, through custom or necessity, has resulted in the creation of a special market, interstate in character, com-

27. This, in all probability results from a balancing of economic considerations. If the type transaction sought to be taxed is the taxpayer's normal business it may be economically feasibble to contest the imposition of the tax. However, in the field of isolated transactions it is probably cheaper to pay the tax than contest its applicability.

28. Gibbons v. Ogden, 9 Wheat 1 (U.S. 1824).

29. Gross income taxes by state of seller which do not apportion the assessment in accordance with either, (a) the taxes imposed by the Buyer state [J. D. Adams v. Storen, 304 U.S. 307 (1938). Cf. Aponang Mfg. Co. v Stone, 190 Miss 805, 1 So. (2d) 763 (1941), aff'd per curiam, 314 U.S. 577 (1941)] or (b) with the amount of local activity [e.g. International Harvester Co. v. Evatt, 67 S. Ct. 444 (1947)] results in burden upon Interstate Commerce [Fargo v. Michigan, 121 U.S. 230 (1887); Crew Levick Co. v. Pa. 245 U.S. 292 (1917)] thereby invalidating the tax.

30. E.g. a manufacturing company purchases new machinery for manufacturing purposes and sells the replaced machinery to a used equipment dealer.

posing a "uniform stream of commerce,"[31] the commerce clause here, too, extends its tax immunity. The N.Y. Stock Exchange, Chicago Grain Exchange and Chicago Stock Yards are illustrative of the "stream of commerce" marketing suggested.

In the light of the foregoing it appears that the state's 'prerequisites' are significant and useful only in those few instances where the sale is an *isolated* one and marketing conditions are such that there is no application of the "stream of commerce" theory. The problem of state taxation and the commerce clause remains one for which no test or rule of thumb of uniform application may be evolved. Each situation must be judged upon its own facts and analogies drawn with prior cases.[32] The solution appears to be the adoption by Indiana of a different type of taxation[33] or affirmative federal action in this field.[34]

CONSTITUTIONAL LAW

RIGHT TO COUNSEL IN CRIMINAL CASES

Plaintiff, a nineteen year old, was convicted of murder in the first degree upon a plea of guilty without the advice of counsel. The Supreme Court of Indiana held plaintiff had

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31. Superior Oil Co. v. Mississippi, 280 U.S. 390 (1930); at 396, "Dramatic circumstances, such as a great universal stream of grain from the state of purchase to a market elsewhere, may affect the legal conclusion by showing the manifest certainty of the destination and exhibiting grounds of policy that are absent here." Accord, Stafford v. Wallace, 258 U.S. 495 (1922); N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

32. " . . . The Indiana Gross Income Tax Division does not include in the Regulations any specific rulings on taxability of receipts derived from activities in interstate commerce, because of the number and dissimilarity of situations. Therefore, each case will be considered in the light of the individual circumstances and the Division will determine whether or not immunity exists. . . . " CCH Ind. C. T. ¶ 10-574.

33. Freeman v. Hewit, 67 S. Ct. 274,278 (1946), suggesting the seller state may tax; manufacturing [American Mfg. Co. v. St. Louis, 250 U.S. 459 (1919)], licensing local business [Cheney Bros. Co. v. Mass. 246 U.S. 147 (1918)], net income [U.S. Glue Co. v. Oak Creek, 247 U.S. 321 (1918)], property [Virginia v. Imperial Coal Sales Co., 293 U.S. 15 (1934)].

34. Inter alia; McAllister, "Court, Congress and Trade Barriers" (1940) 16 Ind. L.J. 144; Tax Institute Symposium, "Tax Barriers to Trade" (1940) p. 261; Browne, "Tax Coordination" (1945) 31 Corn. L.Q. 182; Comment, "The Commerce Clause and State Franchise Taxes Affecting Interstate Commerce" (1940) 35 Ill. L. Rev. 441.

waived his constitutional right to counsel.[1] Petition for writ of habeas corpus in federal district court was dismissed. Held: Affirmed. *Hoelscher v. Howard,* 155 F.(2d) 909 (C.C.A. 7th, 1946).

The Sixth Amendment to the United States Constitution[2] withholds from the federal courts[3] in all criminal prosecutions the power to deprive an accused of his life or liberty unless he has or waives the assistance of counsel.[4]

The Indiana Constitution requires that "In all criminal prosecutions, the accused shall have the right . . . to be heard by himself and counsel . . . ."[5] This provision has the same effect as does the Sixth Amendment.[6] It ensures the right to be heard by counsel of one's own choice.[7] It is within the courts' inherent power to make appointment of counsel for indigents at county expense.[8]

The due process clause of the Fourteenth Amendment also guarantees the right to counsel in state courts.[9] The due

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1. Hoelscher v. State, 223 Ind. 62, 57 N.E.(2d) 770 (1944), cert. denied 325 U.S. 854 (1945). Intelligent waiver is primarily a fact for trial court, and unless upon evidence there can be reasonable difference of opinion, the decision must stand. All that is required is that accused be advised of the nature of the charge and his right to have an attorney.
2. "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."
3. The Sixth Amendment applies only to federal trials, Betts v. Brady, 316 U.S. 455,461 (1942).
4. Glasser v. U.S., 315 U.S. 60 (1941); Johnson v. Zerbst, 304 U.S. 458 (1937);Wilfong v. Johnston, 156 F.(2d) 507 (C.C.A. 9th, 1946); U.S. v. Bergamo, 154 F.(2d) 31 (C.C.A. 3rd, 1946). See Holtzoff, "The Right of Counsel Under the Sixth Amendment" (1945) 68 N.J.L. Rev. 1, 29.
5. Art. I, §13.
6. Wilson v. State, 222 Ind. 63,79, 51 N.E. (2d) 848,854 (1943), (1944) 19 Ind. L. J. 274.
7. Wilson v. State, cited supra n. 6; Batchelor v. State, 189 Ind. 69, 125 N.E. 773 (1920).
8. State v. Hilgemann, 218 Ind. 572, 34 N.E. (2d) 129 (1941); Knox County Council v. State, 217 Ind. 493, 29 N.E.(2d) 405 (1940), (1941) 16 Ind. L. J. 406; Webb v. Baird, 6 Ind. 13 (1854). Indiana is not in accord with the general rule that an attorney assigned by the court to defend an indigent cannot recover compensation from the public in absence of a statute. See Notes (1941) 130 A.L.R. 1439, (1943) 144 A.L.R. 847.
9. Simultaneously with the development of an expanding concept of a "fair trial" under the Fourteenth Amendment, the Supreme Court has been developing a series of procedural restrictions which on some occasions and in some states puts the rights granted beyond the practical reach of the victim. Thus, the prisoner claiming the protection of the Fourteenth Amendment must first exhaust all state remedies before applying for consideration of

process clause does not incorporate all the provisions specifically enumerated in the first eight Amendments, nor is it confined to these.[10] Rather it guarantees those immunities "that have been found to be implicit in the concept of ordered liberty."[11] The right to counsel has been found to be

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his claim in a federal court, and the impoverished and unlettered prisoner may have an impossible time finding the right remedy. In Indiana, no man can tell with assurance whether there is a state remedy or not. See Note (1947) 22 Ind. L. J. 189. Prisoner Henry Hawk after sixteen attempts is still unable to discover a state remedy because of Nebraska's mixed up system, Hawk v. Olson, 146 Neb. 875, 22 N.W.(2d) 136 (1946); Hawk v. Olson, 66 F.Supp. 195 (D. Neb. 1946).

The most recent case is DeMeerleer v. Michigan, 67 S. Ct. 596 (1947), in which petitioner, a seventeen year old, was confronted by a serious and complicated criminal charge and was hurried through unfamiliar legal proceedings without a word being said in his defense. Legal assistance never was offered or mentioned to him, and he was not apprised of the consequences of his plea of guilty. Held: He was deprived of rights essential to a fair hearing under the United States Constitution.

In these criminal cases, the Supreme Court obviously has two policies: (a) it wants to improve the administration of criminal justice, raising it to high constitutional standards; (b) it wants to give the state courts prime responsibility to improve the local processes. Both goals can be achieved, e.g. the operation of the New York procedure described in Canizio v. New York, 327 U.S. 82 (1946); but where state procedures are awkward, the Court is hard forced to salvage both objectives; and in Woods v. Neirstheimer, 328 U.S. 211 (1946), when compelled to choose, it sacrificed immediate consideration of petitioner's claim in favor of giving Illinois one more opportunity to correct its own procedures.

For Indiana, Illinois, and Nebraska, at least, one may speculate that failure to provide a state system for testing claimed constitutional rights may rapidly be followed by a decision that there is no practical state remedy, and that hereafter state prisoners may proceed directly to federal court, ignoring the state judiciary. This result is foreshadowed by the last sentence in Woods v. Neirstheimer, supra at p. 217. The 7th Circuit Court of Appeals has already begun to ignore the Indiana Courts, Potter v. Dowd, 146 F.(2d) 244 (1944), and Justice Murphy has recently clearly revolted against state hypertechnicality, Carter v. Illinois, 67 S. Ct. 216 (1946) (dissent). The dissenting opinion of Black, Dougless, and Rutledge, J.J., in the same case is a sign that their patience with ineffective state procedure is running out. Recognizing that a real procedural crisis exists, the Indiana Judicial Council has proposed a series of rules which, if adopted, will put Indiana into position to handle its criminal reviews in its own courts, 1946 Report of the Judicial Council of Indiana 19.

10. See Justice Frankfurter, concurring in Louisiana v. Resweber, 67 S. Ct. 374,378 (1947) and in Malinski v. New York 324 U.S. 401,412 (1945). Justice Black has expressed the opinion that the Bill of Rights is incorporated in the due process clause, Betts v. Brady, 316 U.S. 455,474 (1942). For criticism of the "fair trial" rule, see Green, "Liberty under the Fourteenth Amendment: 1943-1944" (1944) 43 Mich. L. Rev. 437,465.

11. Palko v. Connecticut, 302 U.S. 319,324 (1937).

of this fundamental nature.[12] According to the holding in *Betts v. Brady*,[13] counsel need not be appointed in every case; however since this holding the Supreme Court has found no other situation where counsel is not required.[14] Counsel is

12. Williams v. Kaiser, 323 U.S. 471 (1944); Powell v. Alabama, 287 U.S. 45 (1932). Note how the court carefully limited its holding in the Powell case, p. 71: "All that is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeblemindedness, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process. . . ."

13. 316 U.S. 455 (1942), (1943) 18 Ind. L. J. 135. Petitioner had been indicted for robbery. He was unable to employ counsel and requested that counsel be appointed for him. The trial judge refused on grounds that it was not the practice in the county to appoint counsel for indigents except in prosecution for murder or rape. The Supreme Court affirmed denial of writ of habeas corpus.
The case apparently anewsred in the negative the unanswered question in Powell v. Alabama, 287 U.S. 45 (1932), cited supra n. 12, as to whether in every case one charged with crime must be furnished counsel by the state.

14. Betts v. Brady, 316 U.S. 455 (1942) has been cited in recent Supreme Court cases prefixed by "See" or "Cf." or has been ignored completely. However, the case has been given some efficacy in the lower federal courts: Mayo v. Wade, 158 F.(2d) 614 (C.C.A. 5th, 1946); Flansburg v. Kaiser, 55 F.Supp. 959 (W.D. Mo. 1944); Ex parte Williams, 54 F.Supp. 924 (E.D. Ill. 1943); see U.S. v. Ragen, 60 F.Supp. 821 (E.D. Ill. 1945). Betts v. Brady will continue to exist in our law so long as these federal courts continue to apply it since most petitioners' rights will be determined at this level. These cases and the principal case noted herein, Hoeschler v. Howard, 155 F.(2d) 909 (C.C.A. 7th, 1946), attempt to distinguish such cases as Williams v. Kaiser, 323 U.S. 471 (1944) and Powell v. Alabama, 287 U.S. 45 (1932), on the ground that in Betts v. Brady, Maryland had no statute requiring appointment of counsel, while in the other cases the state law also was violated by the failure to appoint counsel. The majority opinion in Betts v. Brady, pp. 464,465, mentions the fact that in previous cases the state law had required appointment of counsel; however, no emphasis is given to this fact, and main emphasis for tbe decision lies in the difference in the manitude of the charges and that petitioner had here "obviously" committed the crime, see p. 473. It would not seem that an important federal constitutional right should be protected only when the state also recognizes the same right as a state right. It is even more important to guarantee a fair trial under the Fourteenth Amendment where state rights are not adequate. The only possible effect state substantive law should have on a federal right might be the determination by "wager of law" whether or not the particular provision is necessary to fundamental justice so as to be included in the Fourteenth Amendment. But see Appendix to Betts v. Brady, at p. 477, for the various state laws on this subject.

required for crimes less than murder.[15] Even a defendant who pleads guilty is entitled to benefit of counsel.[16] A request for counsel is not necessary.[17] Accused is entitled to a reasonable opportunity to consult with counsel of his own choice,[18] and the duty to appoint counsel is not discharged by an assignment under circumstances that preclude the giving of effective aid in the preparation and trial of the case.[19] Accused is entitled to counsel at all stages of the trial.[20]

Nevertheless, the right to counsel may be waived.[21] It is necessary, however, to determine under the circumstances of each particular case whether the accused was competent to exercise an intelligent judgment.[22] Defendant must of course be aware of his right to counsel before he can effectively waive.[23] Although not conclusive, factors which may be considered in determining waiver are: that accused is himself a lawyer,[24] has had previous experience in the courts,[25] or was advised by counsel to waive.[26] A plea of guilty or the absence of a request for counsel is not an implied waiver of

15. Burglary: Rice v. Olson, 324 U.S. 786 (1945); House v. Mayo, 324 U.S. 42 (1945). Robbery: compare Williams v. Kaiser, 323 U.S. 471 (1945), with Betts v. Brady, 316 U.S. 455 (1942). Obtaining money in a con game: White v. Ragen, 324 U.S. 760 (1945).
16. Rice v. Olson, 324 U.S. 786 (1945); Williams v. Kaiser, 323 U.S. 471 (1945); Tomkins v. Missouri, 323 U.S. 485 (1945).
17. Rice v. Olson, 324 U.S. 786 (1945); Tomkins v. Missouri, 323 U.S. 485 (1945).
18. House v. Mayo, 324 U.S. 42 (1945); Powell v. Alabama, 287 U.S. 45, 53 (1932).
19. White v. Ragen, 324 U.S. 760 (1945) (counsel appointed did not confer with petitioner until they came into court for trial, counsel was too busy to call witnesses); Avery v. Alabama, 308 U.S. 444 (1940) (refusal to grant continuance under the circumstances did not deny to petitioner a fair trial); Powell v. Alabama, 287 U.S. 45 (1932) (all the members of the bar had been appointed to defend and until a few minutes before trial, no specific person was charged with the responsibility).
20. Hawk v. Olsen, 326 U.S. 271 (1945) (between plea of not guilty and calling of jury); Robinson v. Johnston, 50 F.Supp. 774 (N.D. Calif. 1943) (at arraignment).
21. Adams v. U.S. ex rel. McCann, 317 U.S. 269,277 (1942); Johnson v. Zerbst, 304 U.S. 458, 464 (1937). For waiver of jury trial, see Patton v. U.S., 281 U.S. 277 (1930).
22. Johnson v. Zerbst, 304 U.S. 458,464 (1937); Williams v. Huff, 142 F.(2d) 91 (App. D.C. 1944).
23. Walker v. Johnston, 312 U.S. 275 (1941).
24. Glasser v. U.S. 315 U.S. 60 (1941).
25. Adams v. U.S. ex rel. McCann, 317 U.S. 269 (1942).
26. Id. at p. 277.

the right.[27] The fact that the trial judge appointed counsel at the sentencing stage does not show that accused was not competent to waive counsel at other stages of the proceedings.[28]

On appeal, every reasonable presumption should be against waiver of such an important constitutional right.[29] If waiver is to be permitted,[30] it should at least appear affirmatively in the record that accused was informed of his right to counsel and intelligently choose to waive it.[31] This should make trial judges more conscientious in informing accused of their rights.

CONSTITUTIONAL LAW

SUPPRESSION OF COERCED CONFESSIONS

Appellants were arrested by F.B.I. agents for the illegal possession of stolen goods and confessions were obtained. Alleging the confessions to have been illegally obtained,[1] appellants, prior to indictment, petitioned the district court to suppress them and to restrain the United States Attorney from using them as evidence. The district judge, without

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27. Rice v. Olson, 324 U.S. 786 (1945). At least whatever inference can be drawn is answered by allegation of no waiver. Question of fact arises.

28. Carter v. Illinois, 67 S.Ct. 216 (1946).

29. Johnson v. Zerbst, 304 U.S. 458,468 (1937). A conflict of presumptions arises. Which should prevail, every reasonable presumption against waiver of important constitutional rights or presumption of regularity of judgment of a court when collaterally attacked by habeas corpus?

30. See Douglas, Murphy, and Black, J.J. dissenting in Adams v. U.S. ex rel. McCann, 317 U.S. 269,282 (1942). Query under this view if counsel could ever be waived at all.

31. See Justice Murphy dissenting in Carter v. Illinois, 67 S. Ct. 216, 222 (1946). Johnson v. Zerbst, 304 U.S. 458,465 (1937) (though not necessary it would be fitting and proper).
See Rules of the Indiana Supreme Court, Rule 1-11, November 6, 1946. With a plea of guilty in felony cases, the judge shall cause a record to be made of the entire proceedings in connection with arraignment and sentencing.
There is a possibility that the affirmative statement might become a mere formal matter of record.

1. Appellants alleged the confessions were obtained by threats of physical violence and other coercive measures. Appellants also contended that search of a rubber cement plant and seizure of certain documents were conducted under a warrant unlawfully issued. However, the district judge found that the search and seizure was conducted with the written consent of the appellants voluntarily given. This ruling was affirmed in the principal case.

hearing evidence, dismissed the petition on the ground that the court lacked power to suppress the confessions prior to indictment even if they had been illegally obtained. Held: If the confessions were obtained in violation of the Fifth Amendment, they should be suppressed and not admitted in evidence for either indictment or trial. *In re Fried, et al,* —— F.(2d) —— (C.C.A. 2d, 1947).

The effect of the decision is to extend to confessions procured in violation of the Fifth Amendment the benefits of a well settled federal rule permitting the suppression as evidence of articles seized in violation of the Fourth Amendment.[2]

The government argued that an indictment founded upon illegally obtained evidence would do the appellants no harm since the evidence would not be admitted at the trial following indictment. To this argument, Judge Frank replied that wrongful indictment worked an irreparable injury to the person indicted, the stigma of which was not easily erased by a subsequent judgment of not guilty.

Judges Frank and L. Hand disagreed as to how far the innovation announced in the case should be extended. While both agreed it should apply when a constitutional right had been violated, Judge Frank wished to go further and extend it to those cases in which federal officers in obtaining a confession had violated a federal statute governing their authority.

The Indiana courts have followed the federal rule in suppressing as evidence articles illegally seized.[3] There is also

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2. Justice Bradley, speaking for the court in Boyd v. U.S., 116 U.S. 616 (1885), is credited with the original fusion of the Fourth and Fifth Amendments of the federal constitution. It was there held that the production in evidence of the fruits of a search and seizure conducted in violation of the Fourth Amendment would also violate the self-incrimination clause of the Fifth Amendent. The rule laid down in the Boyd case excluding such evidence as being self-incriminating has been followed in subsequent decisions of the federal courts. U.S. v. Lefkowitz, 285 U.S. 452 (1932); Gould v. U.S., 255 U.S. 298 (1920); Harris v. U.S., 151 F.(2d) 837 (C.C.A. 10th, 1945), cert. granted, 66 Sup. Ct. 1360 (1946); U.S. v. Mills, 185 Fed. 318 (C.C. S.D.N.Y. 1911).

3. The Indiana Supreme Court by a synthesis of sections 11 (searches and seizures) and 14 (self-incrimination) of Art. 1 of the Ind. Const. has held that papers and articles obtained by illegal searches and seizures are not admissible in evidence. Flum v. State, 193 Ind. 585, 141 N.E. 353 (1923); Callender v. State, 193 Ind. 91, 138 N.E. 817 (1922); Twomley, "The Indiana Bill of Rights," (1944) 20 Ind. L.J. 211,239.

sufficient constitutional authority in Indiana to permit the extension of the rule announced in the principal case.[4] While such an extension would seem to be a logical corollary consistent with the theory of the rule, at least one Indiana case has refused to extend to confessions, the remedy allowed in the case of unlawful searches and seizures.[5]

DAMAGES

RECOVERY FOR LOSS OF USE OF DESTROYED AUTOMOBILE

Plaintiff's truck was destroyed and due to postwar shortages, he could not obtain another for eight months. In a suit for damages for the negligent destruction of the truck, an additional sum was asked to compensate for lost use. Held: Motion to strike allegation of damages for lost use from the complaint sustained. *Magnolia Petroleum Co. v. Harrell*, 66 F. Supp. 559 (W.D. Okla. 1946).

That damages cannot be recovered for loss of use of a destroyed chattel is clearly the general rule.[1] But the rule is based upon the normal availability of replacements and the plaintiff's duty to replace the property. In 1945, with abnormal conditions prevailing because of the war, the plaintiff was unable to fulfill his duty of replacement.

The court based its decision not only on the rule of damages stated above, but on the further point that defendant's

4. Ind. Const. Art. I, §14: "No person shall be put in jeopardy twice for the same offense. No person, in any criminal prosecution, shall be compelled to testify against himself."

5. "The appellant sought to follow the procedure for quashing a search warrant and suppressing the evidence procured thereunder, which is not an appropriate practice in case of confessions." Kokenes v. State, 213 Ind. 476,481, 13 N.E. (2d) 524,526 (1938).

1. Barnes v. United Rys. and Elec. Co. of Baltimore, 140 Md. 14, 116 Atl. 855 (1922); German v. Centaur Lime Co., 295 S.W. 475 (St. Louis C.A. 1927) (relied on heavily in decision of instant case); Adams v. Bell Motors Inc., 9 La. App. 441, 121 So. 345 (1928); Colonial Motor Coach Corp. v. New York Cent. R.R., 131 Misc. 891, 228 N.Y.S. 508 (S. Ct. 1928); Johnson v. Thompson, 35 Ohio App. 91, 172 N.E. 298 (1929). See 6 Blashfield, "Cyclopedia of Automobile Law and Practice" (Perm. ed. 1945)41: "Where an automobile is practically destroyed, or so completely destroyed as not to be susceptible of repair, the mesure of damages is its reasonable market value immediately before the accident, without any additional allowance for hiring another car." Damages have been disallowed for lost use when the automobile, although it could be partially repaired, could not be restored to as good a condition as before the accident. Helin v. Egger, 121 Neb. 727, 238 N.W. 364 (1931).

negligence was not the proximate cause of this injury.[2] By taking judicial notice of the scarcity of motor vehicles,[3] the court attempted to establish that circumstance as an "intervening cause." To be an intervening cause, the scarcity of trucks would have to arise immediately after the accident and before plaintiff could look for another truck.[4] To carry the court's reasoning to its logical conclusion, the scarcity of repair parts would be an intervening cause in calculating lost use for a damaged chattel.[5] The result would be to compensate a plaintiff only for the time actually spent in repairing the chattel.[6] Such an argument, however, ignores the accepted doctrine that the natural and probable result of a negligent act or omission is in law held to have been contem-

2. See principal case at 561.
3. Judicial notice has recently been taken of various economic phenomena caused by the late war. Bowles v. Munsingwear, Inc., 63 F.Supp. 933 (D. Minn. 1945) (material shortages, increased labor costs, and higher prices predicted in all civilian consumer goods after the outbreak of World War II); Wilkins v. San Bernardino, 162 P.(2d) 711 (Cal. App. 1945) (housing shortage existed in San Bernardino and in many other places in California); In re Beall's Will, 184 Misc. 881, 54 N.Y.S.(2d) 869 (Surr. Ct. 1945) (war-time conditions, non-manufacture of autos for civilian use, and comparatively high prices for used cars.)
4. Cf. Ruffin Coal and Tr. Co. v. Rich, 214 Ala. 633, 108 So. 596 (1926), (D's truck negligently knocked P's auto into path of approaching street car, the resulting collision causing injury. The court rejected defense theory that street car was an intervening cause, reasoning that D's negligence placed P's auto in a position where presence of the street car only aggravated the damage already done by D.) It is submitted that the existence of the truck shortage in the Magnolia case can be likened to the presence of the street car in the Ruffin case, supra, in that they both aggravated the damage caused by the negligence of the respective defendants.
5. Wagon injured in collision, P recovered reasonable cost of repairs, expenses incurred in moving wagon from street and storing it pending repairs, and reasonable value of its use while being repaired. Moore v. Metropolitan St. Ry., 84 App. Div. 613, 82 N.Y.S. 778 (2d Dept. 1903). This rule applies to automobiles, Hawkins v. Garford Trucking Co., Inc., 96 Conn. 337, 114 Atl. 94 (1921); Bergstrom v. Mellen, 57 Utah 42, 192 Pac. 679 (1920); Stubbs v. Molberget, 108 Wash. 89, 182 Pac. 936 (1919); Meyers v. Bradford, 54 Cal. App. 157, 201 Pac. 471 (1921).
6. Contra: Lyle v. Seller, 70 Cal. App. 300, 233 Pac. 345 (1924) P's car, damaged by D's negligence, was fully repaired. The court, in allowing damages for full period during which auto was immobilized, including time lost while necessary parts were being ordered and shipped from distant city, reasoned that just as it was no fault of the P's that the accident occurred, so it was not her fault that parts were not readily available.

plated by the negligent party.[7] It is submitted that if the fact that an auomobile could no be immediaely replaced was of such common knowledge as to be the subject of judicial notice, a person could reasonably anticipate a period of lost use if he negligently destroyed a truck.

EVIDENCE

RELEVANCY OF PLAINTIFF'S WAR RECORD IN PERSONAL INJURY ACTION

In a personal injury action, plaintiff was permitted to testify, over objection, that he was in battle three times; handled heavy projectiles; and although wounded once he had fully recovered before the automobile accident. Held: Admissible to show the strength and health of the plaintiff at the time of the accident, and to meet any possible contention that his condition afterward was the result of his military service. *In re New England Transp. Co. et al.*, 69 N.E.(2d) 479 (Mass. 1946).

The principal case can be defended under the general proposition that the question of relevancy of testimony is largely within the discretion of the trial judge.[1] Ordinarily, on the question of damages, the plaintiff in a personal injury suit may show the state of his health prior to the injury.[2] However, evidence of prior military service, in the absence of any contention that it contributed to P's injuries, or that he was already disabled at that time seems unjustifiable.[3]

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7. Teis v. Smuggler Min. Co. 158 Fed. 260 (C.C.A. 8th, 1907); Benedict Pineapple Co. v. Atlantic C.L.R.R., 55 Fla. 514, 46 So. 732 (1908).

1. Western Produce Co., Inc. v. Folliard, 93 F.(2d) 588 (C.C.A. 5th, 1937); New England Trust Co. v. Farr, 57 F.(2d) 103 (C.C.A. 1932), cert. denied, 287 U.S. 612 (1932); Pacific S.S. Co. v. Holt, 77 F.(2d) 192 (C.C.A. 9th, 1935); Feichter v. Swift, 77 Ind. App. 427,430, 132 N.E. 662,663 (1921) (by implication).

2. Davis v. Smitherman, 209 Ala. 244, 96 So. 208 (1923); Louisville, N.A. & C. Ry. v. Wood, 113 Ind. 544,551, 14 N.E. 572,577 (1887) (by implication); Bush v. Kansas City Public Service Co., 350 Mo. 876, 169 S.W.(2d) 331 (1943); Shackleford v. Commercial Motor Freight, Inc. 65 N.E.(2d) 879 (Ohio 1945).

3. Where such charges are made, of course, the question properly is placed in issue, and the material may be introduced in rebuttal. E.G., Western Produce Co., Inc. v. Folliard, 93 F.(2d) 588 (C.C.A. 5th, 1937).
For other cases holding comparable evidence to be objectionable see Vicksburg, S. & P. Ry. v. Godwin, 14 F.(2d) 114 (C.C.A. 5th, 1926) (plaintiff's honorable discharge held improper to show

Evidence of honorable military service, particularly during a war period, is analogous to that produced by information that a defendant is protected by liability insurance.[4] The first operates for the plaintiff, and the second operates against the defendant. The latter is generally conceded to be prejudicial,[5] and often held reversible error,[6] particularly when made in bad faith, and not cured by instruction.[7] Also comparable, and recognized as injurious, are appeals to passion and prejudice in general,[8] appeals to prejudice against corporations,[9] and references to wealth or poverty,[10] or to the helpless condition of the parties.[11]

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prior physical condition); Paolini v. San Francisco, 72 Cal. App. 2d) 579, 164 P.(2d) 916 (1946) (personal injury action where mention by counsel of plaintiff's sons being army officers held not justified, but not so prejudicial as to preclude a fair trial); Falzone v. Gruner, 45 A.(2d) 153 (Conn. 1945) (death action where plaintiff's counsel referred to probable effect of decedent's death on feelings of wounded son returned from military service); Childs v. Neal, 138 Ark. 578, 211 S.W. 660 (1919) (in closing argument, attorney stated to jury that "defendant, a banker, within the draft age, who, while evading the military service of his country, was trying to cheat the plaintiff, who was offering his life in his country's cause"); cf. Glass v. Metropolitan Life Ins. Co., 258 Mass. 127, 154 N.E. 563 (1927).

4. However, the plaintiff can, in a personal injury action, bring in by inference the fact that the defendant is insured by asking prospective jurors on the voir dire examination if they are interested in any liability-insurer company.

5. " . . . the strict exclusion of this fact by most courts is due, not merely to its lack of logic under the present principle, but chiefly to the assumption that a knowledge of the fact of insurance against liability will motivate the jury to be reckless in awarding damages to be paid, not by the defendant, but by a supposedly well-pursed and heartless insurance company that has already been paid for taking the risk." 2 Wigmore, "Evidence" §282a; for the state of the law in the various jurisdictions, id. at p. 137, n. 3.

6. Brown v. Walter, 62 F.(2d) 798 (C.C.A. 2d, 1933); Taggart v. Keebler, 198 Ind. 633, 154 N.E. 485 (1926); Martin v. Lilly, 188 Ind. 139, 121 N.E. 443 (1919); Beasley, "Some Problems Confronting Counsel in Defense of Automobile Negligence Cases" (1941) 16 Ind. L.J. 303; cf. Hazaltine v. Johnson, 92 F.(2d) 866 (C.C.A. 9th, 1937); Kelley v. Dickerson, 213 Ind. 624, 13 N.E.(2d) 535 (1938).

7. Note (1936) 11 Ind. L.J. 298.

8. Tashjian v. Boston & Maine Ry., 80 F.(2d) 320 (C.C.A. 1st, 1935); Peck v. Bez, 40 S.E.(2d) 1 (W. Va. 1946); Note (1946) 22 Ind. L.J. 83.

9. New York Cent. Ry. v. Johnson, 279 U.S. 310 (1929); Consolidated Coach Corp. v. Garmon, 233 Ky. 464, 26 S.W.(2d) 20 (1930).

10. Kokomo Steel & Wire Co. v. Ramseyer, 190 Ind .192, 128 N.E. 844 (1921); U.S. Cement Co. v. Cooper, 172 Ind. 599, 88 N.E. 69 (1909).

11. Deel v. Heiligenstein, 244 Ill. 239, 91 N.E. 429 (1910).

Every precaution should be taken to prevent the original introduction of such material. And where its use has been permitted, the results should be carefully examined upon appeal, to ensure that the judgment has not been influenced thereby.

MASTER AND SERVANT

EFFECT OF "NO RIDER'S" INSTRUCTIONS

Plaintiff's intestate was killed while riding in defendant's truck as a guest of defendant's servant. Defendant company had promulgated rules prohibiting riders. Judgment for plaintiff on finding an implied waiver of rules and that death resulted from servant's gross negligence and unlawful acts while operating the truck within the scope of employment. Held: Reversed. The evidence was insufficient to support finding of an implied waiver. *Monroe Motor Express* v. *Jackson*, 38 S.E. (2d) 863 (Ga. App. 1946).

The principal case presents the question of whether a master owes a legal duty to the unauthorized invitees of a servant truck driver. No duty is created where the servant's act of driving is not in furtherance of the master's business. And this is true, regardless of the presence or absence of authority to invite third persons.[1] But a master does owe a duty where scope of employment and authority to invite third persons are co-existent.[2] In the principal case, the servant's tortious driving was in furtherance of the master's ends, but authority to invite third persons to ride was

1. See Craig v. Tucker, 264 Ill. App. 521 (1932) where principal was held not liable for injuries sustained by authorized guest when agent drove vehicle in pursuit of personal pleasure. A different result might obtain in jurisdictions having an "imputed negligence" statute. In this respect, see Goodwin v. Goodwin, 5 Cal. App.(2d) 644, 43 P.(2d) 223 (1935), construing the "guest" statute with a statute imputing negligence of drive to owner of vehicle.

   To complete the picture of the interplay of authority and scope of employment, see Robertson v. Armour Co., 129 Me. 501, 152 Atl. 407 (1930), holding master not liable to unauthorized guest of servant for servant's negligence while driving truck for personal ends.

2. Bummer v. Liberty Laundry Co., 48 Cal. App. 648, 120 P.(2d) 672 (1941); Radutz v. Tribune Co., 293 Ill. App. 315, 12 N.E. (2d) 224 (1938); Petit v. Swift and Co., 203 Minn. 270, 281 N.W. 44 (1938); Krull v. Triangle Dairy, 59 Ohio App. 107, 17 N.E.(2d) 291 (1935); Eisenhower v. Hall Motor Transit Co., 351 Pa. 200, 40 A.(2d) 458 (1945).

absent. It is frankly conceded by the Georgia court that the operation of the vehicle was within the scope of employment. The implication of the court's holding is that therefore the master owes no duty, conditional or absolute, to the servant's guest. This seems clearly erroneous. The reasoning is violative of the fundamental concept that a master is liable for the torts of his servant committed within the scope of employment. Generally, the courts that have found an absence of duty on the part of the master have held that the rider has no right to infer that the servant may transport guests.[3] They conclude that with respect to the rider, the servant never returns to the scope of employment after extending the unauthorized invitation.[4] As a basis for denying liability the logic seems fallacious. When the driver resumes his journey after the invitation, he is again in his master's employment, doing his master's business.[5] He cannot be consistently within and without his employment at one and the same time.[6] Similarly, it is difficult to see that the absence of a right to infer authority should completely negate the master's duty to the servant's guest. A more logical approach is to reason that the legal relationship cre-

3. For example, it is said that the rider "should know of this obvious lack of authority from the position the man holds and the character of his employment," Reis v. Mosebach, 33 Pa. 412, 12 A.(2d) 37,39. In Dempsey v. Test, 98 Ind. App. 533, 184 N.E. 909 (1934), the appellate court cited with approval, p. 541,542, the language of the Massachusetts court in O'Leary v. Fash, 245 Mass. 123, 140 N.E. 282,283,284 (1934) as follows: "It is an obvious consequence of the principal's conduct in hiring a man to drive a truck in the delivery of freight that the public have no right to infer and do not understand the principal to confer upon such a driver the authority to transport guests. . . . So far as concerns the plaintiff and her presence in his truck it is in law a matter of indifference to the defendant whether the driver of the truck exercised due care or was grossly negligent or was guilty of wanton or reckless conduct." See also Thomas v. Magnolia Petroleum Co., 177 Ark. 963, 9 S.W.(2d) 1 (1928) and Greerson v. Bailey, 167 Ga. 638, 146 S.E. 490 (1929). In the latter case, the court pointed out that in allowing the rider to remain, the servant was acting without the scope of his employment. This reasoning, it is submitted, overlooks the factor which proximately causes the injury—that being the act of driving which is in furtherance of the object of employment.

4. See n. 3, supra.

5. Kuharski v. Somers Motor Lines, Inc., 43 A.(2d) 777 (Conn. 1945).

6. This is not a case involving the question of incidental negligence such as a servant smoking in non-hazardous surroundings. Here the very act complained of was the one for which the servant was hired, that is, the driving of the vehicle.

ated between the master and the servant's unauthorized guest is that of chattel owner-trespasser. The duty then arising in the master through his servant, is to refrain from recklessly or wantonly injuring the trespasser.[7]

The effect of "guest" statutes in determining the extent of the master's duty remains to be considered. Where the servant's invitation is authorized, the nature of the master's duty is conditioned by the statute. This is dependent, however, upon a determination of the rider's status.[8] Where the master receives some material benefit from the rider's presence on the vehicle, the rider's status is not that of a guest.[9] Where, as in the principal case, the invitation is unauthorized, the "guest" statute should have no direct effect on the nature

7. Jewell Tea Co., Inc. v. Sklivis, 231 Ala. 490, 165 So. 824 (1936); Kuharski v. Somers Motor Lines, Inc., 43 A.(2d) 777 (Conn. 1945); Bobos v. Krey Packing Co., 217 Mo. 108, 296 S.W. 157; Barall Food Stores v. Bennett, 194 Okla. 508, 153 P.(2d) 106 (1944).

8. As to what constitutes a guest under the Indiana "Guest" state, See Liberty Mut. Ins. Co. v. Stitzer, 220 Ind. 180, 41 N.E.(2d) 133 (1942); Albert McGann Securities Co., Inc. v. Coen, 114 Ind. App. 60, 48 N.E. (2d) 58 (1943); Swinney v. Roler, 113 Ind. App. 367, 47 N.E.(2d) 846 (1943); Lee Bros., Inc. v. Jones, 114 Ind. App. 688, 54 N.E.(2d) 108 (1944). It is to be noted that throughout these cases runs the concept of present material gain to the host as the determinative factor of whether the invitee becomes a passenger to whom a higher duty is owed rather than a guest under the statute.

At common law the duty owed the guest was that of reasonable care. See Munson v. Rupker, 96 Ind. App. 15, 148 N.E. 169 (1925) decided prior to the passage of the "guest" statute. See also Deskins v. Warden, 122 W. Va. 644, 12 S.E.(2d) 47 (1940). As for the application of respondeat superior to the guest situation prior to the "Guest" statute, see Willi v. Shaefer Hitchcock, 53 Idaho 367, 25 P. (2d) 167 (1933).

Subsequent to the enactment of the "Guest" statute, the duty owed by a principal to his guest riding with the principal's agent was dependent on more culpabble conduct on the part of the servant. Brummer v. Libert Laundry Co., 48 Cal. App. 648, 120 P.(2d) 672 (1941); Denton v. Midwest Dairy Products Corporation, 284 Ill. 279, 1 N.E.(2d) 807 (1936); Jay v. Holman, 106 Ind. App. 413, 20 N.E.(2d) 656 (1939). For the same result where the effect of the guest statute has been reached through judicial decision, see Wilder v. Steel Products Co., 57 Ga. App. 255, 195 S.E. 226 (1938).

9. See Krull v. Triangle Dairy, 59 Ohio App. 107, 17 N.E.(2d) 291 (1935) and Radutz v. Tribune Co., 293 Ill. App. 315, 12 N.E. (2d) 224 (1938), where the rider was aboard the vehicle to render assistance to the driver and the effect of the "guest" statute on his right to recover was not considered. It would seem, in such instances, that the master is receiving "consideration" from the rider's presence on the vehicle and the rider has the status of passenger rather than of guest.

of the master's duty. The resultant legal relationship created between the master and rider is not that of host-guest.[10] In some instances, the degree of the servant's tort necessary to make the master liable would be the same regardless of whether there was authority to extend the invitation.[11]

PATENTS

CONSENT DECREES AND RES JUDICATA

In a suit for infringement of a patent, the defendants raised the issue of patent validity. An earlier suit between the same parties for infringement of the same patent resulted in a consent decree in plaintiff's favor. Held: The consent decree did not estop defendants from questioning the validity of the patent in this suit. The patent is invalid.[1] *Addressograph-Multigraph Corp. v. Cooper et al.*, 156 F.(2d) 483 (C.C.A. 2nd, 1946).[2]

Although a consent decree has been interpreted to be but a contract between the parties,[3] the federal rule now

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10. Thomas v. Southern Lumber Co., 181 S.W.(2d) 111 (Tex. Civ. App. 1944); Lassiter v. Shell Oil Co., 188 Wash. 371, 62 P. (2d) 1096 (1944).

11. In Thomas v. Southern Lumber Co., supra n.10, the court said, p. 115: " . . . the legal duty which the owner or operator owes a gratuitous guest is practically the same as that which the owner of real property used for private purposes owes to a mere licensee. Hence it appears immaterial in this case from the standpoint of Hammon's (the employer's) liability for the torts of Frederick (the driver) whether Nolan Thomas (the rider) be regarded as a trespasser, licensee, or guest in the truck because the test of liability would be practically the same in either of these contingencies."

A problem of privilege might arise in those jurisdictions where the duty owed to a gratuitous guest by the driver differs from that owed to a trespasser by the master. If the duty owed by the driver to his guest were less than that owed to a trespasser by the master, would the driver's non-liability under the statute cloak the master with immunity? O'Leary v. Fash, 245 Mass. 123, 140 N.E. 282 (1923), in observing that the rights of the trespasser-guest to recover against the master should be no higher than his rights against the host-driver would seem to answer the question in the affirmative. Richard's v. Parker, 19 Tenn. App 645, 93 S.W.(2d 639 (1935), indicates that the guest of the principal is entitled to no greater rights against the agent than against the principal under the "guest" statute. It would seem logical that the converse should be true.

1. Clark, J., dissenting. Majority opinion by Woodbury, Swan, J.J.
2. This is in affirmance of the district court. Addressograph-Multigraph Corp. v. Cooper et al., 60 F. Supp. 697 (S.D.N.Y. 1946).
3. Hodgson v. Vroom, 266 Fed. 267 (C.C.A. 2nd, 1920); 3 Freeman, Judgments (5th Ed. 1925) §1350.

established holds a consent decree to be a judicial act[4] and conclusive in the absence of fraud and mistake.[5]

In the instant case, the consent decree was held to be invalid for want of an adjudication of infringement.[6] The court stated that on grounds of public policy, a decree entered by consent did not estop,[7] nor was it res judicata as to validity without an adjudication of infringement or a grant of some relief from which infringement could be inferred.[8]

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4. U.S. v. Swift and Co., 286 U.S. 106 (1932); Coca-Cola Co. v. Standard Bottling Co., 138 F.(2d) 788 (C.C.A. 10th, 1943); O'Cedar Corp. v. F. W. Woolworth Co., 66 F.(2d) 363 (C.C.A. 7th, 1933); U.S. v. Radio Corp. of America, 46 F. Supp. 654 (D. Del., 1942).
5. O'Cedar Corp. v. F. W. Woolworth Co., 66 F.(2d) 363 (C.C.A. 7th, 1933); Utah Power and Light Co. v. U.S., 42 F.(2d) 304 (Ct. Cl. 1930).
6. The consent decree held that patent was good and valid and that the plaintiff was possessed of title, and continued: "Whereas defendants . . . have merely furnished to others . . . but have not made or sold the aforesaid printing plates and have no intention of making, using or selling . . . plaintiff has waived the issuance of an injunction against, and an accounting by, the defendants . . ."
7. To bolster its holding, the majority opinion elaborates on several decisions, not too pertinent except as indicative of a public interest in patents which of course was early recognized in Kendall v. Winsor, 21 How. 322 (U.S. 1858), and Dinsmore v. Schofield, 102 U.S. 375,378 (1880). Of the cases cited Pope Mfg. Co. v. Gormully, 144 U.S. 224 (1892) denied specific performance of an inequitable contract but refused to hold it unenforcible at law; Electrical Fittings Corp. v. Thomas & Betts Co., 307 U.S. 241 (1939) allowed a defendant to appeal (not to attack collaterally) a decree of valid and not infringed; Cover v. Schwartz, 133 F.(2d) 541 (C.C.A. 2nd, 1942) surprisingly restricted procedural freedom by inequitably denying to an appellant patentee relief analogous to that granted to the defendant in the Electrical Fittings Case, supra; Altvater v. Freeman, 319 U.S. 359 (1943) merely permitted a defendant to countorclaim patent invalidity, a situation quite remote from a collateral attack; Mercoid v. Mid-Continent Investment Co., 320 U.S. 661 (1943) held that a contributory infringer was not estopped in a later suit from setting up as a counterclaim a statutory cause of action. Sinclair & Carroll Co. v. Interchemical Corp., 325 U.S. 327 (1945) stressed the desirability of determining the validity of the patent as well as the question of infringement; Grant Paper Box Co. v. Russell Box Co., 151 F.(2d) 886,890 (C.C.A. 1st, 1945) followed the recommendation of the Sinclair case but discussed the logical difficulties encountered, and on rehearing held the patent valid, 154 F.(2d) 729 (C.C.A. 1st, 1946).
8. Then follows this statement, "In other words, we think the public interest in a judicial determination of the invalidity of a worthless patent is great enough to warrant the conclusion that a defendant is not estopped by a decree of validity at least when the decree was by consent, unless it is clear that in the litigation resulting in the decree the issue of validity was genuine." This

However, bearing in mind that the patentee has the right to exclude others from making, using or selling his invention, the consent decree despite its informal provisions[9] did adjudicate infringement. The decree recited that defendants had furnished but had not made or sold the patented plate to others.[10] Under prior decisions, the defendants' actions would constitute an infringing use.[11] Further, the decree recited that it was only because the defendants represented that they had no intention of making, using or selling the plate that the plaintiff waived an injunction. This recitation of waiver necessarily implies the relinquishing of a right which in this instance could arise only by virtue of infringement.[12]

The public interest heavily relied upon by the majority opinion, has long been recognized[13] and recently has been

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statement is not merely an alternative expression, but it calls for an alternative procedure, i.e., an actual litigation of validity. Such procedure would annihilate the effectiveness of consent decrees even though infringement was admitted and formally recited.

9. Customarily a consent decree recites patent validity, title and infringement, a grant of injunction, and perhaps further relief such as an accounting.

10. The court had before it a deposition of one of the defendants and testimony which admitted furnishing the patented plates to another.

11. The furnishing of a patented tube to others through the mail or by salesmen merely as advertising and not for monetary compensation constituted infringement, Patent Tube Corp. v. Bristol-Myers Co., 25 F. Supp. 776 (S.D.N.Y., 1938); the operative demonstration of an alleged infringing machine to prosepective buyers constituted a use, Scott and Williams, Inc. v. Hemphill Co., 14 F. Supp. 621 (S.D.N.Y., 1931); personal use of a water well driven by a patented process was a forbidden use, Beedle v. Bennett, 122 U.S. 71 (1887); to employ a patented article in any manner for beneficial uses of a pecuniary character is an invasion of the privileges of the patentee, 3 Robinson, "Patents" (1890), p. 62. But, a use solely for gratifying a philosophical taste or curiosity or for instruction and amusement is not an infringing use, Poppenhausen v. Falke, 4 Blatchf. 493, Fed. Cas. No. 11,279 (C.C.S.D.N.Y., 1861).

12. The majority opinion overlooked the fact that the recitation in the decree of both a "furnishing" of the patented item and a "waiver" expressed alternatively, nonetheless adjudicated infringement. Nor was it material that defendants were unwilling to have the decree state baldly that they infringed, so that alternative language was employed.

13. Sinclair and Carroll Corp. v. Interchemical Corp., 325 U.S. 327 (1945); U.S. v. Univis Lens Co., 316 U.S. 241 (1942); Morton Salt v. G. S. Suppiger Co., 314 U.S. 488 (1942); Aero Spark Plug Corp. v. B. G. Corp., 130 F.(2d) 290,293 (C.C.A. 2nd, 1942); Booth Fisheries Corp. v. General Foods Corp., 48 F. Supp. 313 Del., 1942).

used as a justification for deciding invalidity even when not raised in the pleadings.[14] But, at least in the absence of illegality[15] the rule has been to deny a collateral attack upon a final decree in which both plaintiff and defendant participated.[16]

A consent decree regardless of subject matter is as much a final decree and as conclusive upon the parties as a decree rendered after a trial on the merits.[17] As such, it is impregnable to collateral attack[18] and is finally decisive not only as to those matters actually raised but also as to those which

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14. Mr. Justice Black, dissenting in Exhibit Supply Co. v. Ace Corp., 315 U.S. 126,138 (1942) argues that a patent should be declared invalid even though validity was not raised by appeal. Criddlebaugh v. Rudolph, 131 F.(2d) 795,800 (C.C.A. 3rd, 1942) holds public interest great enough for the court by itself to raise the issue of invalidity even when that issue was specifically avoided in the pleadings.

15. Mercoid v. Mid-Continent Investment Co., 320 U.S. 661 (1944), which permitted a contributory infringer to counterclaim a statutory defense in a second suit, involved a misuse of a patent which was not shown in the instant case.

16. A consent decree estopped defendant from denying infringement of another similar machine, Roberts Cone Mfg. Co. v. Bruckman, 266 Fed. 986 (C.C.A. 8th, 1920) cert. denied 254 U.S. 649 (1920); accord, Charles Fischer Spring Co. v. Motion Picture Screen and Accessions Co., 36 F. Supp. 227 (S.D.N.Y., 1940); defendant estopped to deny patentability after a consent decree had been entered, Illinois Watch Case Co. v. Hingeco Mfg. Co., Inc., 81 F.(2d) 41 (C.CA. 1st, 1936); defendant estopped from defending a contempt charge even though the claims had been adjudicated invalid as to another, E. Ingraham Co. v. Germanow, 4 F.(2d) 1002 (C.C.A. 2nd, 1925); the same defendant was likewise estopped from aiding another to make the patented item even though the claims were invalid as to that other person, E. Ingraham Co. v. Germanow, 9 F.(2d) 912 (C.C.A. 2nd, 1925); consent decree in earlier suit held conclusive, General Electric Co. v. Hygrade Sylvania Corp., 61 F.Supp. 476 (S.D.N.Y., 1944); consent decree binding on all the parties and their privies, Warner v. Tennessee Products Corp., 57 F.(2d) 642 (C.C.A. 6th, 1932). Contra: American Radium Co. v. Hipp. Didisheim Co. Inc. 279 Fed. 601 (S.D.N.Y., 1921) aff'd per curiam 279 Fed. 1016 (C.C.A. 2nd, 1922). But a consent decree of validity against one defendant is not entitled to much weight in a suit against another defendant, Weisbaum v. Gerlach, 33 F. Supp. 783 (S.D. Ohio, 1940).

17. McGowan v. Parish, 237 U.S. 285 (1915); U.S. v. Babbitt, 104 U.S. 767 (1881); Pick Mfg. Co v. General Motors Corp., 80 F.(2d) 639 (C.C.A. 7th, 1935); O'Cedar Corp. v. F. W. Woolworth Co., 66 F.(2d) 363 (C.C.A. 7th, 1933); Rector v. Suncrest Lumber Co., 52 F.(2d) 946 (C.C.A. 4th, 1931; Utah Power and Light Co. v. U.S., 42 F.(2d) 304 (Ct. Cl. 1930).

18. Pacific Railway Co. v. Ketcham, 101 U.S. 289 (1879); City of Helena v. U.S., 104 Fed. 113 (C.C.A. 9th, 1900); Steingruber v. Johnson, 35 F.Supp. 662 (M.D.Tenn., 1940); Watts v. Alexander, Morrison and Co., 34 F.(2d) 66 (E.D.N.Y., 1929)

could have been raised.[19] Despite a decree's inadequacy[20] or its grant of relief without adequate foundation,[21] it is conclusive upon the parties if entered by consent. Thus, in the instant case, even had the decree been defective for want of an adjudication of infringement, it had been entered with defendants' consent and therefore should have been binding.

PROCEDURE

PRE-TRIAL PROCEDURE IN INDIANA

The Indiana Supreme Court in 1940 adopted in substance the federal rule providing for pre-trial conference procedure.[1] The 1940 rule was retained verbatim in the 1943 revision of the Supreme Court Rules.[2]

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19. Nashville, Chattanooga and St. Louis R.R. v. U.S., 113 U.S. 261 (1885).
20. U.S. v. Radio Corp. of America, 46 F.Supp,. 654 (D.Del., 1942).
21. Cushman and Dennison Mfg. Co. v. Grammes, 234 Fed. 952 (E.D.Pa., 1916). Even if a decree is entered without support of facts, it is not void, U.S. v. Swift and Co., 286 U.S. 106 (1932); consent cannot give juridiction, but it may bind the parties and waive previous errors if, when the court acts, jurisdiction has been obtained, Pacific Railroad v. Ketchum, 101 U.S. 289 (1879).
1. Fed. R. Civ. P., 16.
2. Rules of the Indiana Supreme Court, Rule 1-4:
"In any action except criminal cases, the court may in its discretion and shall upon motion of any party, direct the attorneys for the parties to appear before it for a conference to consider:
(a) The simplification and closing of the issues;
(b) The necessity or desirability of amendments to the pleadings;
(c) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof or the introduction of unnecessary evidence;
(d) The limitation of the number of expert witnesses;
(e) Such other matters as may expedite the determination of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered which limit the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered shall control the subsequent course of the action, unless modified thereafter to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided, and may either confine the calendar to jury actions or non-jury actions or extend it to all actions."

In comparing the Indiana and Federal Rules, it should be noted that the following portions of the Indiana Rule are omitted in the Federal Rule: " . . . and shall upon the motion of any party, . . . " (first paragraph), " . . . and closing of the issues;" (clause (a)), " . . . or the introduction of unnecessary evidence;"

The pre-trial conference is of recent origin in the United States.[3] "Its underlying philosophy is that litigants, their attorneys, and the trial court should, in an informal manner, approach each other and seek by fair and open methods the grounds upon which they differ."[4] While first used in the larger American cities to relieve the congested condition of trial calendars,[5] another avowed purpose of the procedure is to take the trials of cases out of the "realm of surprise and maneuvering."[6]

Under the Indiana rule the trial courts have power to make pre-trial procedure mandatory[7] in all civil actions

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(clause (c)). The Indiana Rule, however, omits clause 5 of the Federal Rule whhich provides for reference of the issues to a master for findings to be used as evidence in the case of jury trials.

3. In the United States the procedure originated in 1932 in the Circuit Court of Wayne County in Detroit, Michigan. In 1935 similar procedure based on a study of the Detroit system was adopted in the Superior Court for Suffolk County in the City of Boston. The Common Pleas Court of Cleveland, Ohio adopted the procedure in 1939. By 1941 the procedure was operating in the courts of some 14 states. Simes, "A Survey of the Administration of Justice in New England" (1943) 23 B.U.L.Rev. 28. Chicago is the latest large city to adopt the procedure. Fisher, "Judicial Mediation: How It Works Through Pre-Trial Conference" (1943) 10 U. Chi. L. Rev. 453. The history and theory of the procedure are traced in Dobie, "Use of Pre-trial Practice in Rural Districts," 1 F.R.D. 371 (1940), and Sunderland, "The Theory and Practice of Pre-Trial Procedure" (1937) 36 Mich. L. Rev. 215.
4. Crawford, "Problems of the Pre-Trial Conference" (1946) 31 Corn. L. Q. 285, 289; Brown v. Christman, 126 F(2d) 625 (App. D.C. 1942); LeConin v. Automobile Ins. Co. of Hartford et al., 41 F. Supp. 1021 (E.D. N.Y. 1941). Where in a personal injury suit both parties introduced much photographic evidence to show the extent to which a train protruded into a safety zone while rounding a curve the court said: "Doubtless the show was highly entertaining to the jury, but entertainment of the jury is no function of a trial. And why all this fuss to prove a fact susceptible of easy, exact and indisputable demonstration by actual measurement? The court might well have required that the parties stipulate as to the extent of the invasion of the zone by the turning train. Here would have been an excellent opportunity for settling an indisputable fact in a pre-trial conference such as sec. 269. 65 Stats. contemplates." Hadrian et al. v. Milwaukee Electric Ry. and Transport Co., 241 Wis. 122, 1 N.W. (2d) 755 (1942).
5. Pre-trial procedure was adopted by the Wayne Co., Mich. Circuit Court to alleviate a calendar delay of four years in law cases. At the time of adoption by the Suffolk County Court of Boston the trials of jury cases were approximately five years in arrears. Simes, "A Survey of the Administration of Justice in New England" (1943) 10 B. U. L. Rev. 28. See Fanciullo v. B.G.&S. Theatre Corp., 297 Mass. 44, 8 N.E. (2d) 174 (1947) (passim).
6. Laws, "Pre-Trial Procedure," 1 F.R.D. 397 (1940).
7. While the rule itself provides no penalty for its violation, it has been suggested, 1 Gavit, "Indiana Pleading and Practice" (1941)

either by court order in individual cases or by local rules of court. Fifteen percent of the courts responding to a recent survey[8] report that such local rules of court have been adopted[9]

The Indiana rule gives counsel opportunity to prevent surprise and to know what he must meet and combat on trial, since a pre-trial conference is mandatory[10] in any civil action upon request of either party.[11] Of the 42 courts having no rule of court requiring the procedure, 32 courts report that pre-trial conferences have been requested by counsel. However, of this number, 7 courts report such requests by counsel to be infrequent and 25 courts report that although requests have been made they are very infrequent.

The rule permits the use of pre-trial conference procedure in all civil suits. While the survey findings indicate that counsel have requested the procedure most often in

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97, that an action in which the plaintiff failed or refused to attend a pre-trial conference after being ordered to do so would be subject to dismissal under the fifth clause of Ind. Stat. Ann. (Burns, 1933) §2-901. (" . . . Fifth. By the court, for disobedience by the plaintiff of an order concerning the proceedings in the action".) It has been held under the Federal Rule that the judge may dismiss the plaintiff's case for nonappearance at the pre-trial conference. Wisdom v. Texas, 27 F. Supp. 992 (N.D. Ala. 1938). As regards the defendant, Gavit, op. cit. supra, suggests that failure to attend a pre-trial conference after being ordered to do so would subject him to a default judgment under the law stated in Ind. Stat. Ann. (Burns, 1933) §2-1102. (" . . . If, from any cause either party shall fail to plead or make up the issues within the time prescribed, the court shall forthwith enter judgment as upon default, . . . "). However, an Ohio case has held it prejudicial error for the court to enter a default judgment upon the defendant's failure to appear where by the pleadings, issues of fact had been presented. Szabo v. Warady, 44 N.E.(2d) 270 (Ohio App. 1942).

8. The Indiana Law Journal surveyed 156 Circuit and Superior Courts of the state in an effort to obtain information concerning the use of pre-trial procedure in Indiana. Forty nine courts responded to the survey.

9. Of the courts requiring pre-trial conference by court rule, 2 courts require it in all civil actions; 1 court requires it in all but divorce actions; 3 courts require it in all jury trials. The remaining court requires it in "divorce and other actions."

10. The Indiana rule in this respect is broader than the Federal Rule. In the federal courts, counsel may request a pre-trial conference but cannot demand it as a matter of absolute right.

11. Since there is no general rule in the Indiana practice requiring all motions to be in writing, it would seem that in absence of any local rule of court, the request for a pre-trial conference might be in the form of an oral motion. 1 Gavit, "Indiana Pleading and Practice" (1941) 97.

damage suits, the findings also indicate its use is not restricted to any particular type of action.[12]

Of the 39 courts using pre-trial conference, by either rule of court or on request of counsel, 20 courts reported the procedure was useful in obtaining admissions and agreed statements of fact. Sixteen courts found it useful to simplify and close the issues. Ten courts found it useful for determining the necessity of amending pleadings. Nine courts favored the procedure for limiting the number of expert witnesses. A majority of the courts who have used pre-trial conference procedure report that the conferences were held during the closing of the issues as permitted by clause (a) of the rule.[13]

The last paragraph of the Indiana rule is identical to the federal rule and provides that the court shall note the results of the conference in a pre-trial order.[14] The pre-trial order when entered becomes a part of the record of the case and fixes the issues which are to be litigated at the trial.[15]

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12. Of the 32 courts reporting requests by counsel for pre-trial conference, 10 courts report that such requests were in damage suits; 2 courts report requests in will contests; 2 courts report requests in divorce actions; 2 courts report requests in jury trials and 2 other courts report requests in equity actions. Requests are also reported in ejectment actions, contract actions, claims, and appeals from state boards.

13. The time of the pre-trial conference will be determined by circumstances of each particular case. In order that the factors prevailing at the time of the conference be as near as possible those which will exist at the time of the trial, it should be held as close to the date of trial as practicable. In determining this, the nature of the post pre-trial preparation must be considered. F.D.I.C. v. Fruit Growers Service Co., 2 F.R.D. 131 (E.D. Wash. 1941); Crawford, "Legal Problems of the Pre-Trial Conference" (1946) 31 Corn. L.Q. 285.

14. The pre-trial order should be in writing and be signed by the pre-trial judge, Fanciullo v. B.G. & S. Theatre Corp., 297 Mass. 44, 8 N.E.(2d) 174 (1937). However, the absence of his signature will not invalidate the order if his name is typed thereon, Gurman v. Stowe-Woodward, Inc., 302 Mass. 442, 19 N.E.(2d) 717 (1939). All admissions should be particularly set out in the order, U.S. v. Hartford-Empire Co., et al., 1 F.R.D. 424 (N.D. Ohio 1940). For forms of pre-trial orders see: Klitzke v. Herm et al., 242 Wis. 456, 8 N.W.(2d) 400 (1943); Note (1943) 23 B.U.L. Rev. 43.

15. Barry v. Reading Co., 3 F.R.D. 305 (D.N.J. 1943); Gurman v. Stowe-Woodward, Inc., 302 Mass. 442, 19 N.E.(2d) 717 (1939); Silver v. Cushner, 300 Mass. 583, 16 N.E.(2d) 27 (1938).

This order is binding on the parties[16] and court unless modified at trial to prevent manifest injustice.[17]

PROCEDURE

THE RULE-MAKING POWER

Petitioner sought a writ of prohibition to enforce the provisions of a statute[1] providing that when a trial judge failed to determine an issue of law or fact within ninety days after taking same under advisement, any party was entitled to apply for withdrawal of the issue from the judge and for appointment of a special judge to take jurisdiction of the case. The trial judge refused petitioner's application. Held: Writ denied. Statute is an unconstitutional legislative interference with the judicial function.[2] *State ex rel Kostas v. Johnson,* 69 N.E.(2d) 592 (Ind. 1946).

In 1923, when the statutory provision involved in the principal case was enacted, there was general acquiescence in the power of the legislature to prescribe rules of practice and procedure,[3] although a strong inclination to the contrary had been indicated by the Indiana Supreme Court.[4] However, the legislative power was always subject to constitutional limitations to prevent interference with action of the courts

16. Where it was stipulated by pre-trial order that a contract was made in Florida but at the trial there was evidence from which it could be inferred that the contract was made in Texas, the court held that the stipulation was binding since the order was not modified, Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Olvera, 119 F. (2d) 584 (C.C.A. 9th, 1941). Accord, Gurman v. Stowe-Woodward, Inc., 302 Mass. 442, 19 N.E.(2d) 717 (1939); E. Dunkel, Inc. v. Barletta Co., 302 Mass. 7, 18 N.E.(2d) 377 (1937).

17. It has been held that in order to prevent manifest injustice the trial judge in the exercise of his judicial discretion may: permit amendments or corrections of mistakes in the pleadings, McDowall v. Orr Felt & Blanket Co., 146 F.(2d) 136 (C.C.A. 6th, 1945); discharge stipulations entered into under a misapprehension, Gurman v. Stowe-Woodward, Inc., 302 Mass. 442, 19 N.E.(2d) 717 1939); or improvidently made, Capano v. Melchinno, 297 Mass. 1, 7 N.E.(2d) 593 (1937).

1. Ind. Acts 1923, c. 83, § 1, Ind. Stat. Ann. (Burns, Repl. 1946) §2-2102.

2. Ind. Const. Art. 3, § 1 and Art. 7, § 1.

3. Smythe v. Boswell, 117 Ind. 365, 20 N.E. 263 (1888); Fletcher v. Holmes, 25 Ind. 458 (1865).

4. Gray v. McLaughlin, 191 Ind. 190, 131 N.E. 518 (1921); Solimeto v. State, 188 Ind. 170, 122 N.E. 578 (1919); Parkison v. Thompson, 164 Ind. 609, 73 N.E. 109 (1905).

in the exercise of their judicial function.[5] It seems clear that the statute in the principal case violated these limitations when enacted.[6]

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5. Consistent with the general rule in the United States under the doctrine of separation of powers. Burney v. Lee, 59 Ariz. 360, 129 P.(2d) 308 (1942); State v. Roy, 40 N.M. 397, 60 P.(2d) 646 (1936); In Re Constitutionality of Sect. 251.18, Wisconsin Statutes, 204 Wis. 501, 236 N.W. 717 (1931); Note (1945) 158 A.L.R. 705, 713.

6. The permissible extent of legislative interference with judicial procedure has been frequently litigated in Indiana in the past. In Gray v. McLaughlin, 191 Ind. 190,194, 131 N.E. 518,519 (1921) it was observed that "There is probably no state in the Union where so much has been said in the decisions on the subject of practice as in this state." It has been held that the legislature may exeed its procedural rule-making powers in prescribing requirements for briefs, Solimeto v. State, 188 Ind. 170, 122 N.E. 578 (1919); Gray v. McLaughlin, 191 Ind. 190, 131 N.E. 518 (1921); in requiring members of the Supreme Court to prepare syllabi of decisions rendered, In Re Griffiths, 118 Ind. 83, 20 N.E. 513 (1889); in restricting a court's power to punish for contempt, Hawkins v. State, 125 Ind. 570, 25 N.E. 818 (1890); Holman v. State, 105 Ind. 513, 5 N.E. 556 (1886); Little v. State, 90 Ind. 338 (1883), (although the legislature could regulate within limits the procedure for contempt cases) Mahoney v. State, 33 Ind. App. 655, 72 N.E. 151 (1904); and in regulating the procedure on appeals where appellate jurisdiction is restricted, Seagram and Sons v. Board of Commissioners, 220 Ind. 604, 45 N.E. (2d) 491 (1943); Warren v. Ind. Telephone Co., 217 Ind. 93, 26 N.E.(2d) 399 (1940); City of Elkhart v. Minser, 211 Ind. 20, 5 N.E.(2d) 501 (1936); Curless v. Watson, 180 Ind. 86, 102 N.E. 497 (1913), (although it may prescribe such procedure) Stocker v. City of Hammond, 214 Ind. 628, 16 N.E.(2d) 874 (1938); Hunter v. Cleveland, C. C. & St. L. Ry., 202 Ind. 328, 174 N.E. 287 (1930); Lake Erie and W. Ry. v. Watkins, 157 Ind. 600, 62 N.E. 443 (1902); State v. Rockwood, 159 Ind. 94, 64 N.E. 592 (1902). Compare State ex rel Emmert v. Hamilton Circuit Court, 223 Ind. 418, 61 N.E.(2d) 182 (1945) for the most recent position of the court as to procedure on appeals. The legislature can abolish the issuance of writs of error, Pittsburgh, C. C. & St. L. Ry. v. Hoffman, 200 Ind. 178, 162 N.E. 403 (1928); Montgomery v. Jones, 5 Ind. 526 (1854); Hornberger v. State, 5 Ind. 300 (1854).
The legislature cannot properly remove, disqualify, or grant a change of judge in a certain case, State ex rel Youngblood v. Warrick Circuit Court, 208 Ind. 594, 196 N.E. 254 (1935); indirectly restrict judicial power to appoint counsel for paupers, Knox County Council v. State ex rel McCormick, 217 Ind. 493, 29 N.E.(2d) 405 (1940), (although it had previously been held to the contrary) Board of Commissioners v. Moore, 93 Ind. App. 180, 166 N.E. 779 (1931); Board of Commissioners v. Mowbray, 160 Ind. 10, 66 N.E. 46 (1903); enact a statute granting a new trial, Young v. State Bank, 4 Ind. 301 (1853); although it could regulate and place restrictions on procedure for new trials and the right to a new trial, Amacher v. Johnson, 174 Ind. 249, 91 N.E. 928 (1910). Statutes cannot prescribe requirements for records on appeal, Davis v. State, 189 Ind. 464, 128 N.E. 354 (1920); Johnson v. Gebhauer, 159 Ind. 271, 64 N.E. 855 (1902) (Procedure as to bills of exceptions); Adams v. State, 156 Ind. 596, 59 N.E.

In 1937, the Indiana General Assembly purported to withdraw[7] from its joint participation in prescribing rules of judicial procedure,[8] and the Supreme Court was vested with authority to adopt, amend, and rescind rules of court which would supersede all conflicting laws. The 1937 Rules of the Court[9] provided that "All rules of practice and procedure

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24 (1910) (Preparation of transcript of record).
Further, the constitutional function of the Supreme Court cannot be encroached upon by the creation of a body of commissioners of the Supreme Court to assist it in performing its duties, State ex rel Hovey v. Noble, 118 Ind. 350, 21 N.E. 244 (1889) or by the creation of an appellate court with equal finality of decision, In Re Petitions to Transfer Appeals, 202 Ind. 365, 174 N.E. 812 (1931); Ex Parte France, 176 Ind. 72, 95 N.E. 515 (1911). With the above Indiana cases compare the following state cases in which a legislature was held to have infringed upon the courts' exercise of the judicial function: In prescribing the place for hearing certain cases on appeal to the Supreme Court, Talbot v. Collins, 33 Idaho 169, 191 Pac. 354 (1930); in prescribing procedure for hearing and deciding claim against the state, Lacy v. State, 195 N.C. 284, 141 S.E. 886 (1928); in providing for trial within ten days after answer filed in certain class of cases and limiting time for taking appeal therefrom, Atchison, T. & S. F. Ry. v. Long, 122 Okla. 86, 251 Pac. 486 (1926); and in restricting effective date of mandate of the court until thirty days after a decision, Comm. ex rel, Attorney General v. Furste, 288 Ky. 631, 158 S.W.(2d) 59 (1941); Burton v. Mayer, 274 Ky. 263, 118 S.W. (2d) 547 (1938).
Other states have held that a statute may validly prescribe procedure for rendering and entering judgment in criminal cases, Anderson v. State, 54 Ariz. 387, 96 P.(2d) 281 (1939); require a court to review the sufficiency of evidence on motion for a new trial, De Camp v. Central Arizona Light and Power Co., 47 Ariz. 517, 57 P.(2d) 311 (1936) (Supreme Court could make no conflicting rule); provide that charges to the jury be in writing and that judge write "given" or "refused" upon those submitted by parties and that they become part of the record, Porter v. State, 234 Ala. 11, 174 So. 311 (1937); prescribe procedure concerning hearing, final decree, and appeal in proceedings to validate county and municipal bond issues, Bryan v. State, 94 Fla. 909, 114 So. 773 (1927); prescribe procedure in case bill is taken pro confesso, Sydney v. Auburndale Constr. Co., 96 Fla. 688, 119, 128 (1928); prescribe time for filing petition for rehearing of appeals to Supreme Court, Herndon v. Imperial Fire Ins. Co., 111 N.C. 384, 16 S.E. 465 (1892) (Although a court rule on the subject would prevail over a conflicting statute); and require that a judgment set a day certain for the execution of a death sentence, rather than a week certain as provided by the court, State ex rel Conway v. Superior Court, 60 Ariz. 69, 131 P.(2d) 983 (1942).

7. See 1 Gavit, "Ind. Pleading and Practice," §§ 3, 4, 12, and 13 for instances of continued legislative activity in the procedural field.
8. Ind. Acts 1937, c. 91 § 1, Ind. Stat. Ann. (Burns, Repl. 1946) § 2-4718.
9. Rules of the Supreme Court of Indiana, promulgated by order of June 21, 1937.

adopted by statutory enactment and in force as of this date are adopted as rules of this court . . . "[10]

It may be argued that the Supreme Court adopted only the valid legislative rules—those constitutionally enacted prior to the rule-making act;[11] but it is at least arguable that all of the legislative rules were an invasion of the judicial function.[12] Nevertheless, this objection would cease to exist when the court adopted as a rule, not the statute, but a rule identical with it.[13] Thus, the limitation upon the trial judge remained "in force" as the *Court's* rule of judicial procedure. However objectionable the rule, it would no longer be a legislative infringement upon the judiciary and for that reason repugnant to the constitutional provisions for the separation of governmental functions.[14]

The Supreme Court by the exercise of its rule-making power could obviate such litigation in the future either by establishing a comprehensive system of rules, possibly based upon the Federal Rules of Civil Procedure[15] or by examining the existing statutes and adopting rules rescinding unwanted enactments.[16]

The rule-making power should not only free the court from its traditional requirement that parties must present by litigation questions of the constitutional validity of a statute;[17] but also should cast upon them the obligation to fa-

10. Similar provisions are contained in Rule 1-1 of the "1940 Revision" and the "1943 Revision" of the Rules of the Supreme Court of Indiana.

11. See n. 8 supra.

12. See Wigmore, "All Legislative Rules For Judiciary Procedure Are Void Constitutionally" (1928) 23 Ill. L. Rev. 276. Cf. Ploughe v. Indianapolis Rys., Inc., 222 Ind. 125, 128, 61 N.E.(2d) 626, 627 (1943). Is this not now an academic question which may properly be disregarded to obtain practical results?

13. 1 Gavit, "Ind. Pleading and Practice," § 2.

14. Ind. Const. Art. 3, § 1.

15. For a comparison of the Federal Rules of Civil Procedure with the Indiana rules and an analysis of how the adoption of similar rules would change the law of civil procedure in Indiana, see Gavit, "The New Federal Rules and Indiana Procedure" (1938) 13 Ind. L. J. 203, 299.

16. For expressions of satisfaction with Chapter 91 of the Acts of 1937 and optimism in the part the Supreme Court was to play in continually supervising and improving the practice and procedure within the state, see "The Indiana Rule Making Act—How Procedure and Practice Can Be Improved Under The Act" (1937) 13 Ind. L. J. 1.

17. E.g., in State v. Wirt, 203 Ind. 121, 177 N.E. 441 (1931) the statute in question was construed to create a procedural privilege

cilitate the judicial process and to avoid uncertainty as to the proper rules of procedure within the state-court system[18] Such uncertainty is not avoided when the impression is permitted to prevail that the rules of procedure previously having their sanction in legislative enactment are now sanctioned as rules of the Supreme Court, only to discover that the court "amends its own rules" by declaring legislation of long standing unconstitutional.

RENT CONTROL

NECESSITY OF COMPLYING WITH RENT REGULATIONS

Suit by tenant against landlord for rent-overcharge penalty. D attempted to show he had given P the required notice of increase and that the new rent was justified as not being more than P collected for the premises from subtenants. Judgment for P. Held: Affirmed. *Martino* v. *Holzworth*, 158 F.(2d) 845 (C.C.A. 8th, 1947).

This case illustrates the requirement for strict compliance with the Maximum Rent Regulations. There are a few exceptions,[1] but mere "substantial performance" is ordinarily inadequate.[2] The general rule applies to the popularly termed "rent decontrol" for transient rooms.[3] Before the landlord can possibly qualify for decontrol, he must first file a supplemental registration statement so the Rent Director can classi-

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which could be and was held to have been waived in that case, without reference to the constitutionality of the statute.

18. The responsibility of the court seems increasingly important where the legislature has actually abandoned the procedural field and corrective measures are possible only through court rules. For a discussion of the general theories of the rule-making power, see 1 Sutherland, "Statutory Construction" (3rd ed. 1943) § 226.

1. Hotel Enterprise v. Porter, 157 F.(2d) 690 (Ct. Em. App., 1946) (illness of manager excused late application for rent adjustment); Peters v. Porter, 157 F. (2d) 186 (Ct. Em. App., 1946) (requirement of re-registration after remodeling so concealed in the language of the regulations that they were not apparent to landlord of reasonable intelligence).

2. Ambassador Ap'ts. v. Porter, 157 F.(2d) 774 (Ct. Em. App., 1946) (foreign residence and ignorance of procedural regnlations of persons controlling corporate landlord held no excuse); Bowles v. Meyers, 149 F.(2d) 440 (C.C.A. 4th, 1945) mere belief that the order is invalid does not excuse).

3. Rent Regulations for Transient Hotels, Residential Hotels, Rooming Houses and Motor Courts, Amend. 102, 12 Fed. Reg. 395 (Jan. 18, 1947).

fy his premises;[4] only *then* may he make the required application under the decontrol order. A landlord is not eligible to be considered for decontrol until both steps have been taken. An increase in rent without authorization is a violation of the regulations.[5]

TORTS

INDEPENDENT INTERVENING CAUSE

P was riding in an automobile driven by D when it overturned. No one was injured, and the passengers of the car immediately set about to right the car. While assisting, P cut his wrist on broken window glass, for which injury he brought suit. D was found negligent in operating the automobile and liable for P's injuries. Held: Affirmed, P's act was the normal response to the stimulus of the situation created by D's negligence and not a superseding cause which would relieve D of liability. *Hatch v. Smail,* 23 N.W. (2d) 460 (Wis. 1946).

In the principal case, D claimed that his negligence was not the proximate cause of the injury,[1] but that P's voluntary act in helping to right the car was an independent intervening force which cut off the chain of causation from D's negligence, and set in movement a new chain.[2] But the chain

4. 11 Fed. Reg. 13038 (Nov. 2, 1946). Rooms are to be classified as transient hotel, residential hotel, rooming house and motor court. Only those classed as transient hotel and motor court room are eligible for decontrol .

5. Wilfully raising rent without first qualifying may be criminal violation of the Emergency Price Control Act, 50 U.S.C.A. (App.) §901 et seq. ( ). Wilton v. U.S., 156 F.(2d) 433 (C.C.A. 4th 1946).

1. In determining proximate cause, the "substantial factor" test has been stressed in Indiana in recent years, Swanson v. Slagel, 212 Ind. 394, 8 N.E.(2d) 993 (1937); the courts often speak in terms of "material contribution", "direct cause" or "efficient cause", Earl v. Porter, 112 Ind. App. 71, 40 N.E.(2d) 381 (1942; Cousins v. Glassburn, 216 Ind. 431, 24 N.E.(2d) 1013 (1940); Columbia Creosoting Co. v. Beard, 52 Ind. App. 260, 99 N.E. 823 (1912); See Harper, "Development in the Law of Torts" (1946) .21 Ind. L.J. 447,453. Foreseeability is an essential element of proximate cause in Indiana, see Dalton Foundries v. Jeffries, 114 Ind. App. 271,283, 51 N.E.(2d) 13,18 (1943); For a discussion of the use of foreseeability in determining proximate cause, see Harper, supra at 455.

2. An intervening cause is one not produced by prior negligence, but independent of it, which interrupts the course of events so as to produce a result different from the one that could have

of causation is not broken where his negligent conduct creates a situation calculated to invite or induce the intervention of some subsequent cause as a normal response.[3] Normal reactions not operating as superseding causes have been held to include the attempt to avert harm,[4] the impulse to assist others in emergencies,[5] as well as the instinct toward preservation of person or property, including escape from peril caused by D's negligence.[6] The test to determine whe-

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been anticipated and is itself the natural and logical cause of the harm, see 38 Am. Jur. 22; Tabor v. Continental Baking Co., 110 Ind. App. 633,643, 38 N.E.(2d) 257,261 (1941); City of Indianapolis v. Willis, 208 Ind. 607, 194 N.E. 343 (1935) (taxi driver's negligence in driving into canal at street end on rainy, foggy night was not a sufficient intervening cause of passenger's death to preclude recovery from city for its negligent failure to erect barricades or warnings).

3. Restatement, "Torts" (1934) §§443,445; Milwaukee & St. Paul Ry. v. Kellogg, 94 U.S. 469 (1876); Littell v. Argus Production C., 78 F.(2d) 955 (C.C.A. 10th, 1935); Brown v. New York Cent. Ry., 53 F.(2d) 490 (E.D. Mich., 1931), aff'd. 63 F.(2d) 657 (C.C.A. 6th, 1933), cert. denied 290 U.S. 634 (1933), (P's voluntary act in climbing up railroad car to reach brake wheel when automatic coupling failed was not an independent intervening force which would relieve D of liability for providing faulty equipment); Pitcairn v. Whiteside, 109 Ind. App. 693, 34 N.E. (2d) 943 (1941); Kramer v. Chicago, M., St. P. & P. Ry., 226 Wis. 118, 276 N.W. 113 (1937).

4. Hedgecock v. Orlosky, 220 Ind. 390, 44 N.E.(2d(93 (1942) (attempting to avert further harm by unlocking car bumpers); Superior Oil Co. v. Richmond, 172 Miss. 407, 159 So. 850 (1935) (act of another in throwing electric switch to stop oil pump and avert harm from burning oil, did not supersede negligence of oil company's servant in permitting storage tank to overflow. "Natural and ordinary thing for one to do . . . would be to attempt to prevent the threatened harm.") Wilson v. Northern Pacific Ry., 30 N.D. 456, 153 N.W. 429 (1915).

5. Brugh v. Bigelow, 310 Mich. 74, 16 N.W.(2d) 668 (1944) (passersby should be anticipated to relieve dire necessity resulting from accidents, as rescue is usual response in such circumstances); Wagner v. International Ry., 232 N.Y. 176, 133 N.E. 437 (1921), 19 A.L.R. 1,4 (1922) |the land-mark case presenting Cardozo's "rescue" doctrine): Restatement, "Torts" (1934) §472.

6. Littell v. Argus Production Co., 78 F.(2d) 955 (C.C.A. 10th, 1935) (farmer's voluntary act in pulling cable to free cultivator from entanglement was not independent intervening cause relieving D of liability for injuries resulting to P and machine from negligent burying of oil derrick anchors); Chicago Great Western Ry., v. Machie, 60 F.(2d) 384 (C.C.A. 8th, 1932) (P's voluntary conduct in attempting to free horse which had been caused to stumble due to D's negligent maintenance of railroad crossing was not an independent intervening force, and D was liable for P's injuries received in trying to free it); Churchman v. Sonoma County, 59 Cal. App.(2d) 801, 140 P.(2d) 81 (1943) (P's act in extricating himself from partially overturned car did not break chain of causation created by D's negligent failure to properly maintain roadways). See also Handelun v. Burlington,

ther there was a continuous succession of events leading proximately from fault to injury is whether P's act was a normal response to the stimulus of a dangerous situation created by the fault of D.[7]

The theory followed in cases allowing recovery in situations similar to that of the principal case is that the defendant's force is really continuing in active operation by means of the force it stimulates into activity. Where P was induced to act by the negligent calling of a railway station and was thereby injured, the negligence of the railway company, and not P's voluntary conduct, was held to be the proximate cause as it set in motion the chain of events leading up to the injury.[8] D's negligence was also held to be the proximate cause of the injuries where D hit the back of a truck, and P, a passer-by, in attempting to help, got between the two cars and was crushed when another car hit the rear truck. P's intervening act was held to be a normal reaction to the stimulus of the situation created by D's negligence and did not break the chain of causation.[9] In another case, P's act in extricating himself from a partially overturned car was held not to break the chain of causation created by D's negligent failure to properly maintain the roadways, and the county was held for P's injuries. P's getting out of the car was a reaction that could be expected and causation continued.[10] In these cases, as in the principal one, the

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C.R. & N. Ry., 72 Iowa 709, 32 N.W. 4 (1887); Scott v. Shepherd, 2 Black. W. 892 (C.P. 1772) (the squib case). When placed in a position of peril, not created by one's own negligence, one has a right to make a choice of means to be used to avoid the peril, and is not held to a strict accountability for taking an unwise course, Zoludow v. Keeshin Motor Express, 109 Ind. App. 575, 34 N.E.(2d) 980 (1941).

7. Anti-Mite Engineering Co. v. Peerman, 113 Ind. App. 280, 46 N.E.(2d) 262 (1942); Riesbeck Drug Co. v. Wray, 111 Ind. App. 467, 39 N.E.(2d) 776 (1941); New York Central Ry. v. Brown, 63 F.(2d) 657, (C.C.A. 6th, 1933), cert. denied 290 U.S. 634 (1933).

8. Cincinnati, Hamilton & Indianapolis Ry. v. Worthington, 30 Ind. App. 663, 65 N.E. 557 (1902). Cf. International-Great Northern Ry. v. Lowry, 132 Tex. 272, 121 S.W.(2d) 585 (1938) (negligence of conductor in failing to notify train to stop at certain point held not the legal cause of injuries of brakeman who jumped from train to make repairs, as it was not such a natural and probable consequence of negligence as could have been anticipated).

9. Rovinski v. Rowe, 131 F.(2d) 687 (C.C.A. 6th, 1942).

10. Churchman v. Sonoma County, 59 Cal. App.(2d) 801, 140 P.(2d) 81 (1943). Recovery here can also be explained on the perilous position doctrine that being put in a dangerous position invites

defendants' liability continued, as plaintiffs' acts were normal responses to the stimuli of the dangerous situations created by fault of the particular defandant and not independent intervening forces.

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escape. The issue of sudden peril is ordinarily for the determination of the jury, Hedgecock v. Orlosky, 220 Ind. 390, 44 N.E.(2d) 93 (1942).