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NOTES

DAMAGES—CONSTITUTIONALITY OF THE INDIANA STATUTE REFUSING A NEW TRIAL BECAUSE OF THE SMALLNESS OF DAMAGES.—I. IN GENERAL.—In 1851, the State of Indiana adopted a Constitution which had the following preamble:[1] "To the end, that justice be established, public order maintained, and liberty perpetuated: WE, the People of the State of Indiana, grateful to ALMIGHTY GOD for the free exercise of the right to choose our own form of government, do ordain this constitution."

1 IND. CONST. (1851).

The following year, in 1852, the legislature of the State of Indiana passed the following statute:[2] "A new trial shall not be granted on account of the smallness of damages in an action for injury to the person or reputation, or in any other action in which the damages equal the actual pecuniary injury sustained."

In 1872, the Supreme Court of Indiana was called upon to decide a case, *Sharpe v. O'Brien*,[3] in which the Statute was invoked as pertinent to the issues. This case was an action to recover damages for an assault and battery. The plaintiff showed, in the trial court, that he had spent over $500 for extra labor and for medical and surgical attendance, and he prayed judgment for $10,000. The jury found a verdict of $250, whereupon the plaintiff moved for a new trial on the ground that the "damages assessed are less than the actual pecuniary loss sustained by the plaintiff." The motion was overruled, and the controversy was brought to the Supreme Court. Here, Justice Downey delivered an opinion of which the following excerpt is a part: "The outrage upon the plaintiff was cruel, and without any justification. Injuries were inflicted from which the plaintiff will never recover. We are quite sure that the court and jury must have misapprehended the rule of law by which the damages were to be measured; and if we felt at liberty to do so, we should reverse the judgment on account of the smallness of the damages. Looking at the provisions of the Code with reference to new trials, however, we find no authority for granting a new trial . . ."

In 1880, in an action for the death of a child in which the father was awarded damages of only $50, the Supreme Court of Indiana again invoked the Statute and held that it was error to grant a new trial on the ground of smallness of damages.[4]

In *White v. Sun Publishing Co.*,[5] in 1905, it was held: "In an action for libel, the damages which may be awarded are peculiarly within the discretion of the jury. *Tracy v. Hacket* (1898) 19 Ind. App. 133, 135, and cases cited. Under the code of procedure in civil cases (Sec. 569 Burns, 1901) in actions for injury to person or reputation, a new trial cannot be granted on account of the smallness of the damages assessed by the jury. *Sharpe v. O'Brien* (1872) 39 Ind. 501; *Gann v. Worman* (1880) 69 Ind. 458, 463."

At some time or other, similar statutes have been enacted by Kentucky, Minnesota, Ohio, Nebraska, Kansas, Iowa, Arkansas and Oklahoma, although most of them have been repealed. However, today, in 1937, the same type of statute, which was passed back in 1852 by the

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2 IND. ANN. STAT. (Burns, 1933) § 2-2402; IND. STAT. ANN. (Baldwin, 1934) § 369.

3 39 Ind. 501 (1872).

4 Gann v. Worman, 69 Ind. 458 (1880).

5 164 Ind. 426 (1905).

Indiana Legislature, still remains unchanged on the books of Arkansas, Oklahoma, and Indiana. The purpose of this article is to show that it should be repealed in these remaining states for the reason that it is in conflict with the state constitutions and the Federal Constitution. Proceeding on the theory that substantially the same rights are protected by the constitutions of the states of Arkansas and Oklahoma as are protected by the Constitution of Indiana, the statute in question shall be shown to conflict with the last-named Constitution, but the reasoning should apply with equal force to the constitutions of the other two states. The impression of unfairness that a person gets from a study of the cases decided under the statute in question is not a result of personal caprice; it is logically and soundly based upon a realization that the statute denies rights which are sought to be protected constitutionally.

II. CONFLICT WITH THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.—The unconstitutionality of the Indiana Statute is almost obvious when tested by the Fourteenth Amendment to the Constitution of the United States, which provides: "Nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Section 368 of *Baldwin's Indiana Statutes* (1934)[6] expressly gives to the trial judge the power to set aside the verdict of the jury and to grant a new trial if, in his opinion, the damages awarded are excessive. But, by the Statute in question, the power to grant a new trial is expressly denied to a trial judge when he believes the damages awarded are inadequate. To logically reconcile the provisions of these two statutes in conformity to a recognition of rights provided for by the Fourteenth Amendment is impossible.

The Honorable W. T. Drury, Commissioner of the Court of Appeals of Kentucky, in an article urging the repeal of the Statute in Kentucky,[7] gave the following practical illustration of what the statute really provides: "What would you think of a judge who should greet two opposing litigants in this manner:

"Be seated gentlemen. I shall endeavor to see that you get an impartial jury and a fair trial, and to you Mr. Defendant, I will say that if the jury goes wild and returns against you what I deem an excessive verdict I will set it aside, but Mr. Plaintiff if the jury goes wild and awards you an inadequate verdict, I will do nothing for you no matter how inadequate I may deem it to be.

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[6] IND. STAT. ANN. (Baldwin, 1934) § 368.

[7] Drury, *Constitutionality of the Kentucky Statute Refusing a New Trial Because of the Smallness of Damages* (1935) 23 KY. L. J. 453.

"Would you want to try your case before a judge, who would take such an attitude? Of course not. Yet that attitude is forced on every trial judge in Kentucky, Indiana, Arkansas and Oklahoma by the statute in question.

"Courts are set up and laws are written for the establishment of justice. The moment inequality appears justice has gone, and injustice is at hand. If a statute applies unequally justice cannot result from its operation. Can it be constitutional for the legislature to invest a trial judge with plenary power to protect a defendant from brain-storms in the jury box and deny to that judge all power to protect a plaintiff from a like peril? There can be but one answer that the average reasonable man would give, and that is 'No,' for it does not look to him like this law affords equal protection; neither does it look so to the text writers and to the courts."

Mr. Drury's illustration may be charged as not being in conformity to actualities, but is it not, in substance, exactly what the court said in *Sharpe v. O'Brien*? [8]

The fact that the Statute in question undoubtedly discriminates between persons similarly situated is precisely the reason for its unconstitutionality.

"A statute is void which prescribes a rule of procedure that operates as a discrimination between persons similarly situated, as, for example, an act which allows an appeal in civil cases to one party without allowing it on equal terms to the other party." [9]

People v. Sholem [10] holds that while the legislature has power to regulate appeals and writs of errors, it has no right to allow an appeal to one party from an adverse decision without allowing it on equal terms to the other party.

"A statute is void as a denial of due process of law which denies an appeal to certain persons while granting it to other persons similarily situated." [11] "Due process is not accorded by a statute which discriminates between the parties as to the grounds on which a reversal may be had." [12] "A statute is unconstitutional which grants to certain persons a remedy that is denied to others in like circumstances, or which forbids the pursuit against certain persons of remedies that are allowed against others in like circumstances." [13]

In *Sunday Lake Iron Co. v. Wakefield* [14] the Supreme Court of the United States held that the Fourteenth Amendment to the Federal Con-

8 *Op. cit. supra* note 3.
9 CONSTITUTIONAL LAW, 12 C. J. 1185 (§ 948).
10 238 Ill. 203, 87 N. E. 390, 392 (1909).
11 CONSTITUTIONAL LAW, 12 C. J. 1210 (§ 983, note 85).
12 CONSTITUTIONAL LAW, 12 C. J. 1239 (§ 1015, note 80).
13 CONSTITUTIONAL LAW, 12 C. J. 1183 (§ 942, notes 39, 40).
14 247 U. S. 350 (1917).

stitution "secures every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents."

As another reason for the unconstitutionality of the Statute in question, it shall later be shown that the passage of the Statute was a legislative interference with a judicial function, but regardless of whether or not this is proven to be true, the prohibitions of the Fourteenth Amendment to the Federal Constitution apply with equal force to legislative acts as well as judicial acts of the state,[15] so no question can be raised as to the applicability of the Fourteenth Amendment to the immediate problem.

III. CONFLICT WITH THE CONSTITUTION OF INDIANA. A. *Its Denial of Justice.*—Lord Bramwell once made a remark that if juries had to give *valid* reasons for their verdicts, the jury system would not last five years. Support must be given to this contention upon an examination of a few of the many "freak" verdicts returned by juries.

In *Bradwell v. Pittsburgh & W. E. R. Co.*[16] the damages awarded for serious personal injuries amounted to *six and one-fourth cents.* Among other things, the court in this case said: "In finding for plaintiff, the jury must have reached the conclusion that his injuries were caused by the defendant company's negligence, and that he himself was not guilty of any negligence contributing thereto. Under these circumstances, he was entitled, as a matter of right, to have the jury pass fairly on the question of damages, and, by their verdict, award him such sum as under the evidence, he was entitled to."

A verdict of *six cents* was awarded to the plaintiff in *Sloane v. McCauley*[17]—an action for personal injuries. Here, the court said: "The jury by their verdict having determined the plaintiff's right to recovery, it was their duty to award such damages as would compensate him for the injuries he received. . . . It is obvious that in assessing the plaintiff's damages for six cents the jury did not take into consideration the items of damage whereby the plaintiff's right to a compensatory award is to be measured in an action of this character. . . . The damages being unquestionably insufficient, the verdict must be set aside, and a new trial ordered."

In *Gunderson v. Danielson*[18] the plaintiff was awarded a verdict of *one dollar.* The action was one for personal injuries incurred in an

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15 Scott v. McMeal, 154 U. S. 34 (1893); Pacific Gas Imp. Co. v. Ellert, 64 Fed. 421 (C. C., N. D. Cal. 1894); Nashville, C. & St. L. R. Co. v. Taylor, 86 Fed. 168 (C. C., M. D. Tenn. 1898); Huntington v. City of New York, 118 Fed. 683 (C. C., S. D. N. Y. 1902).

16 20 Atl. 1046 (Pa. 1891).

17 68 N. Y. S. 187 (1901).

18 211 N. W. 471 (Minn. 1926).

automobile accident whereby the plaintiff was rendered unconscious, confined in bed for a week, and lost time from work. The court said: "The jury found liability. It seems to us that there was a fatal inconsistency in finding liability and fixing the damages at $1. Obviously the jury compromised damages with liability, disregarding the principles upon which a proper recovery must rest. . . . In the present case the damages were nominal, and manifestly inadequate. We recognize that a jury has a great discretion in accepting and rejecting testimony. Particularly is this true as to opinion testimony and as to a person's testimony relating to his own subjective injuries. But upon the record in this case there can be no doubt that plaintiff's expenses and loss of time were substantially correct. Her claim of injury is substantiated by the doctor. . . . The verdict leaves the impression upon the judicial mind that the jury was actuated by prejudice and passion. The damages were inadequate. . . . Such inadequacy renders the verdict perverse."

A verdict for $1 for the death of a young, able-bodied man was held so inadequate as to demand a new trial in *Greer v. Board of Com'rs.*[19] After first holding that such a verdict indicated a compromise by the jury instead of a decision of the issues submitted to them, the court said: "Under the authorities herein cited, it seems to be well settled, not only in Ohio, but other jurisdictions, that a new trial may be granted for inadequacy of the verdict, as well as on the ground that the verdict is excessive. We further hold that, where the verdict of a jury and the judgment entered on it are so grossly inadequate as to shock one's sense of justice and fairness—after it is found from the record facts that a recovery should be had—it is the bounden duty of a reviewing court to set aside the verdict and grant a new trial."

Mr. Drury's article includes the following paragraph:[20] "Jurors sometimes allow their passions and their prejudices to be reflected in their verdicts; for example, a verdict of $1.00 was returned for the negligent killing of a man 22 years of age, a like sum for the negligent killing of a 17-year-old boy, $300 for the negligent killing of a 20-year-old miner, $1.00 for serious personal injuries and the loss of two horses and a buggy, 1 cent for the loss of an arm, 1 cent for the loss of a hand and $1.00 for negligent killing of a boy 20 years of age. If space allowed, these instances of freak verdicts could be multiplied a hundred fold. When such verdicts as these are returned and allowed to stand justice is denied just as effectually as if the judge had ordered the cases stricken when first he saw them on the docket, or the clerks had refused to file them when they were presented to them."

As Mr. Drury has stated, case after case can be cited in which the verdicts of juries are such as these. However, the few cases cited here

19 169 N. E. 709 (Ohio App. 1927).
20 *Op. cit. supra* note 7.

should clearly indicate how unfounded and unfair are some of the verdicts which are returned by juries. In the cases cited, the rights of the plaintiffs were finally recognized by the granting of new trials. But in Indiana, or Arkansas, or Oklahoma, if the same or similar cases should arise, where juries return similarly unfair verdicts, a statute (the Statute in question) which has been imposed by the legislature of each of these states stands in the way of the final granting of justice to the injured parties.

The Statute in question, by barring new trials because of the smallness of damages, directly prevents plaintiffs in actions from recovering compensations to which they are justly entitled, and consequently is in conflict with Article 1, Section 12, of the Bill of Rights, in the Constitution of the State of Indiana, which provides:[21] "All courts shall be open; and every man, for an injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely and without denial; speedily and without delay."

When a plaintiff in an action, in the eyes of the court, and in the eyes of everybody but an unmistakably prejudiced jury is awarded inadequate damages and yet is prevented from further remedy, who will dare to contend that justice has been rendered to him "completely and without denial"? The Statute in question forces a plaintiff to be satisfied with inadequate damages if such are awarded to him by jury's verdict. What sensible person will maintain that the Statute in question does not prevent a plaintiff from securing justice, "completely and without denial"?

The constitutional provision cited does not mean that every man who thinks he has been awarded inadequate or insufficient damages should have the right to a new trial. Whether or not a man is entitled to a new trial should be decided by the discretion of the court. The power to grant a new trial when, in the opinion of the court, the damages awarded are excessive has been recognized by statute in Indiana.[22] The power to grant a new trial because of inadequate damages would require no new qualification in a court, and should be recognized.

B. *Conflict with "Trial by Jury."*—Before there can be an adequate understanding of how the statute in question conflicts with the constitutional provision protecting the right to trial by jury, there must first be an understanding of what the constitutional provision consists of, as well as what is meant by "Trial by Jury."

The Bill of Rights in the Constitution of Indiana [23] contains the provision that "In all civil cases, the right of trial by jury shall remain

21 IND. CONST. Art. I, § 12.

22 *Op. cit. supra* note 6.

23 Art. I, § 20, Constitution of Indiana (1851).

inviolate." The question of *how* the right shall remain inviolate, "must," in the words of Judge Michael L. Fansler of the Supreme Court of Indiana, "be interpreted in the light of the common law of England." [24] Therefore, the common law conception of "Trial by Jury" is of primary importance in the determination of what rights are protected by the constitution.

The following definition by Justice Gray, in *Capital Traction Company v. Hof*,[25] is accepted and followed generally:[26] " 'Trial by Jury,' in the primary and usual sense of the term at the common law and in the American Constitutions, is not merely a trial by a jury of twelve men before an officer vested with authority to cause them to be summoned and impaneled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, (except on acquittal of a criminal charge) to set aside their verdict if, in his opinion, it is against the law or the evidence."

For purposes of closer study this definition may be separated into six elements, each of which is distinct from the others and each of which is essential to trial by jury:[27]

"(a) A jury of twelve men must be legally selected.

"(b) A duly commissioned judge must be presiding.

"(c) He must superintend the jury, that is, direct the trial.

"(d) He must instruct them in the law.

"(e) He must advise them on the facts, that is, determine what evidence the jury shall hear.

"(f) Except on acquittal of a criminal charge, he must set aside their verdict if in his opinion it is against the law or the evidence."

The power of a judge, except on acquittal of a criminal charge, to set aside the verdict of a jury if in his opinion it is against the law or the evidence is as essential to trial by jury as any of the other elements named. The Statute in question interferes with this power and

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24 Millers Nat. Ins. Co. v. American State Bank, 206 Ind. 511, 190 N. E. 433 (1934).

25 174 U. S. 1 (1898).

26 Drury, *op. cit. supra* note 7; Davis v. Cent. States Fire Ins. Co., 121 Kan. 69, 245 Pac. 1062 (1926); Demnee v. McCoy, 4 Ind. Ter. 233, 69 S. W. 858 (1902); State v. McMahon, 17 Nev. 365, 30 Pac. 1000 (1883); In re Opinion of Justices, 41 N. H. 550 (1860); Hallett v. Boyer, 114 N. Y. S. 559 (1909); Smith v. Atlantic & C. R. Co., 25 Ohio St. 91 (1874); White v. White, 108 Tex. 570, 196 S. W. 508, L. R. A. 1918A, 339 (1917); Territory v. Hopt, 3 Utah 396, 4 Pac. 250 (1884); JURIES, 35 C. J. 143 (§ 9).

27 This separation is made by Commissioner Drury. *Op. cit. supra* note 7.

is, consequently, an interference that goes to the very nature of trial by jury. Therefore the Statute is unconstitutional.

In *Simmons v. Fish*[28] the court stated: "There can be no doubt as to the power of the court at common law to set aside a verdict as a whole for insufficient as well as for excessive damages. . . . It is a constitutional incident of trial by jury, which cannot be taken away by legislative action, that the assistance and protection of the presiding judge shall be available to the litigants in setting aside verdicts not so supported by law and evidence that they ought to stand."

This position is strongly supported by the United States Circuit Court in *Hughey v. Sullivan*.[29] In this case, a statute of the State of Ohio, identical to the Statute in question, was declared unconstitutional. For the reason that this decision conforms very closely to the immediate problem, the Circuit Court is liberally quoted: "The control of the court over the verdict after it is given is as much a part of the trial by jury as the giving of the verdict itself, and the right to have the issues tried by a second jury, or even a third jury, when the verdict of the first jury is affected by some infirmity for which the common law required the trial court to set that verdict aside, is as much a right of 'trial by jury' preserved by the constitution as the first trial." In regard to the powers of the trial judge, the court said: "He alone can, on the application for a new trial, correct the errors that are made by the jury; and, if legislation may control his judgment or prohibit him in the exercise of it, the right of trial by jury is to that extent impaired and restricted, and not preserved as it was known at common law. . . . If a statute should be passed requiring the minority of a jury to conform their judgment to the majority, and return a verdict accordingly, it would be conceded everywhere that this would be an impairment of the right of trial by jury, because it would be imposing by law upon the jury a rule of judgment not known to the common law. So, when the trial judge comes to receive the verdict, and, on proper motion, to inspect it, and determine whether or not it is affected by any infirmity which would authorize the court to set it aside, would it not be just as much of an impairment of the right of trial by jury if the legislature should say that he should either set it aside, or let it stand, upon some rule that it should prescribe to control his judgment? While the legislature may prescribe any rule of property or any rule of pleading or any rule of practice or any form of procedure, it cannot invade the domain of judgment either of the jury or its presiding judge, and direct what that judgment shall be, in the discharge of the respective or joint functions of either."

The law and reasoning as set out above should be sufficient authority to raise a reasonable question as to the constitutionality of the

28 97 N. E. 102 (Mass. 1912).
29 80 Fed. 72 (C. C., S. D. Ohio 1897).

Statute in question. Some doubt might be raised, however, to its applicability in the present problem, due to the fact that it was rendered by a federal court and concerned a statute of another state. Although this doubt cannot have a good basis because substantially the same rights are protected by the constitution of Ohio as by the constitution of Indiana, the efficacy of the arguments of the Circuit Court have been upheld in a recent decision by the Supreme Court of Indiana. In *Millers Nat. Ins. Co. v. American State Bank* [30] the court held that ". . . at common law the right to trial by jury was only satisfied by a trial before a jury of twelve, presided over by a judge with power and authority to direct the conduct of the trial, and advise the jury concerning the law, and to arrest and set aside judgments. It is well settled that the constitutional requirement is only satisfied by a trial by such a jury, so presided over, and that the right may not be curtailed by legislative enactment reducing the number of jurors, or dispensing with judicial supervision of the trial."

It must be conceded therefore, that, since the Constitution of Indiana provides that trial by jury shall remain inviolate, and since courts generally agree that this constitutional provision must be interpreted in the light of the common law which holds that supervision by the trial judge is essential to trial by jury, the only logical conclusion to be drawn is that any law which attempts to take away the common-law right of supervision is unconstitutional. The Statute in question is such a law, and is, consequently, unconstitutional.

C. *Legislative Attempt to Exercise a Judicial Function.*—As has been pointed out, the power to grant new trials, under the common law definition of "Trial by Jury," belongs to the trial judge. It remains to be seen that this power is exclusively judicial and that the Statute in question is a legislative interference with it contrary to the provision of the Constitution of Indiana, which separates the executive, legislative and judicial functions of government.[31] This separation of powers is provided for in every constitution which exists in the United States,[32] and Indiana is no exception.

Article VII, Section I, of the Constitution of Indiana, vests in its courts the judicial power of the State.[33] The power to grant a new trial is judicial,[34] so unless the Legislature has a concurrent power to control the granting of a new trial, any attempt by the Legislature to do so is an interference with a judicial function and is, consequently, unconstitutional. But, nowhere in the Constitution of Indiana does it appear that the Legislature has been given the power to control the

30 *Op. cit. supra* note 24.

31 IND. CONST. Art. III, § 1.

32 Merrill v. Sherburne, 1 N. H. 199, 8 Am. Dec. 52 (1818).

33 IND. CONST. Art. VII, § 1.

34 Young v. State Bank, 4 Ind. 301, 58 Am. Dec. 630 (1853).

granting of, or to grant, a new trial. Consequently, it remains to be shown that the power to grant a new trial, besides being a judicial function, is not also a legislative function.

It is not always easy to distinquish between acts that are judicial and those which are legislative, but courts of last resort have worked out some definite principles to facilitate the making of the distinction. For example, Justice Field, in his dissenting opinion in *Central Pacific R. R. Co. v. Gallatin* ("Sinking Fund Cases"),[35] wrote: "The distinction between a judicial and a legislative Act is well defined. The one determines what the law is, and what the rights of parties are, with reference to transactions already had; the other prescribes what the law shall be in future cases arising under it. Wherever an Act undertakes to determine a question of right or obligation, or of property, as the foundation upon which it proceeds, such Act is to that extent a judicial one, and not the proper exercise of legislative functions." In *Smith v. Strother*,[36] decided in California in 1885, the court wrote: "What constitutes the distinction between a legislative and judicial act? The former establishes a rule regulating and governing in matters or transactions occuring after its passage. The other determines rights or obligations of any kind, whether in regard of persons or property, concerning matters or transactions which already exist and have transpired ere the judicial power is invoked to pass on them."

Professor Willis says [37] that "Perhaps it is better to say that it is a legislative function to make all substantive law, and a judicial function finally to determine constitutional jurisdiction and the application of substantive law to specific facts. . . . Defining the functions of government in this way, and it would be meaningless to define them in any other way, the doctrine of separation of powers should mean that each one of the departments of government has its proper power, delegated to it by the sovereign people, but that no department can delegate its powers to, nor exercise the powers of, another department; and that no department is supreme over the other departments."

In spite of the fact that a statute similar to the one in question is still in force in Arkansas, the Supreme Court of that State, in *The State v. Morrill*,[38] said: "The Legislature may *regulate* the exercise of, but cannot abridge the express or necessarily implied powers, granted to this Court by the Constitution. If it could, it might encroach upon both the judicial and executive departments, and draw to itself all the powers of government, and thereby destroy that admirable system of checks and balances to be found in the organic framework of both the

35 99 U. S. 727, 761 (1879).

36 68 Cal. 194, 196, 197, 8 Pac. 852, 853, 854 (1885).

37 WILLIS, CONSTITUTIONAL LAW (1936) 131, 132.

38 16 Ark. 384, 390 (1855).

federal and state institutions, and a favorite theory in the governments of the American people." (Italics are mine.)

By applying these principles to the immediate problem the only conclusion to be reached is that the Legislature of the State of Indiana had no constitutional power to enact the Statute in question. It has the power to make reasonable regulations concerning new trials, but it cannot validly command a court as to what judgment the court must make. The question of whether or not, after a consideration of the law and evidence, a verdict should be voided and a new trial granted is peculiarly a matter to be decided by the discretion of the trial judge in the scope of his judicial power. Any act such as the Statute in question, which does not regulate but which controls this discretion, is a usurpation of a judicial function and is unconstitutional and void.

This position is supported by decisions of the Supreme Court of Indiana in similar problems. In *Johnson v. Gehbauer* [39] the court decided that an act giving trial courts under certain conditions power to extend time to file bills of exceptions was unconstitutional because it was an attempt by the legislature to control the judicial discretion of a court. In *Young v. State Bank* [40] the court decided that the power to grant a new trial was a judicial one which could not be exercised by the legislature. It held: "There is no section of the constitution permitting the legislature to grant new trials. The granting of a new trial is a judicial act, and, in this state, controlled by settled rules of law. If an inferior court should, in any given case, exercise the power to grant new trials, in violation of these settled rules, this Court would set aside the grant, and leave the judgment rendered unaffected. Now, the constitution says the legislature shall not perform a judicial act. The granting of a new trial, we have seen, is a judicial act, Therefore, the legislature cannot grant a new trial."

Since the Supreme Court thus holds that the power to grant a new trial is so exclusively judicial that it cannot be exercised by the Legislature, it is logically a contradiction to contend that the Legislature has the power to refuse the trial court the same right. If the Legislature, itself, cannot exercise the power by what right can it refuse to allow a court to exercise it?

Commissioner Drury has very concisely stated and answered the problem:[41] "When by a motion for a new trial, the correctness of a verdict awarding inadequate damages, is challenged there is raised the question whether that verdict is consonant with the law and the evidence, a question that in its very essence is judicial, and when by the

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39 159 Ind. 271, 64 N. E. 855 (1902).

40 *Op. cit. supra* note 34.

41 *Op. cit. supra* note 7.

statute in question the legislature has bluntly ordered the court to refuse it, the legislature has invaded the field constitutionally allotted to the judiciary and the act is void."

IV. CONCLUSION.—The Statute in question has been shown to be unconstitutional because it violates at least four separate provisions contained in the Constitution of the United States and the Constitution of Indiana. Nevertheless, this Statute has been allowed to remain in force in Indiana for the greater part of one century. This is resultant largely from the fact that the courts of Indiana have invoked the Statute with a presumption that it is valid, and in no case, apparently, has any one assailed the constitutionality of the Act.[42] However, even if the Supreme Court of Indiana does declare the Statute in question unconstitutional, the problem will not be solved, because such a decision acts only *in personam,* and establishes only a precedent for subsequent proceedings in which the Statute is adequately developed. In *Shepard v. Wheeling* [43] the court said: "When, in the course of determining the rights of the parties to a particular suit or controversy, the court finds it necessary to ascertain whether or not a statute is unconstitutional, the court must necessarily pass upon the question; but in doing so it does not annul or repeal the statute if it finds it in conflict with the Constitution. It simply refuses to recognize, and determines the rights of the parties just as if such statute had no existence. The court may give its reasons for ignoring or disregarding the statute, but the decision affects the parties only, and there is no judgment against the statute. The opinion or reasons of the court may operate as a precedent for the determination of other similar cases, but it does not strike the statute from the statute-book; it does not repeal, 'supersede, revoke, or annul' the statute. The parties to that suit are concluded by the judgment, but no one else is bound. A new litigant may bring a new suit, based upon the very same statute, and the former decision cannot be pleaded as an estoppel, but can be relied on only as a precedent. This constitutes the reason and basis of the fundamental rule that a court will never pass upon the constitutionality of a statute unless it is absolutely necessary to do so in order to decide the cause before it. Cooley, Const. Lim. 163. . . ."

Obviously, therefore, the solution of the immediate problem is a direct attack on the very existence of the Statute itself by an act of the Legislature repealing it. The Legislature of the State of Indiana

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42 Sharpe v. O'Brien, *op. cit. supra* note 3; White v. Sun Publishing Co., *op. cit. supra* note 5; Gann v. Worman, *op. cit. supra* note 4; Thompson v. Town of Ft. Branch, 178 N. E. 440, 82 A. L. R. 1413 (Ind. 1931); Paxson v. Dean, 67 N. E. 112 (Ind. 1903); F. & B. Livery Co. v. Indianapolis Traction & Terminal Co., 124 N. E. 493 (Ind. App. 1919); Jennings v. Loring, 5 Ind. 250 (1854); Patton v. Hamilton, 12 Ind. 256 (1859); Hudspeth v. Allen, 26 Ind. 165 (1866); Merritt v. Richey, 127 Ind. 400 (1890); Chaplin v. Sullivan, 128 Ind. 50 (1890).

43 30 W. Va. 479, 4 S. E. 635 (1887).

should recognize and protect the rights of the people of the state against possible unfairness and injustice by repealing this Statute.

There are many instances in the various reports in cases wherein injustice has resulted by an award of insufficient compensatory damages, as has been herein noted, and there is no guaranty that such will never be the case in Indiana. Where such injustice occurs, without any reversible error in the trial, the Statute bars relief. There seems to be no good reason why this act should remain on the statute-books of Indiana.

William J. Fish.

QUASI CONTRACTS—RECOVERY FOR BENEFITS CONFERRED AT REQUEST, BUT IN THE ABSENCE OF CONTRACT—MISTAKE AS TO A MATERIAL FACT.—In the law of quasi contracts when benefits are conferred upon a person in the absence of a contract it falls into one of two groups, either service intended as a gift, or services rendered gratuitously due to mistake of fact. The rule in regard to gifts is well-stated. Woodward states the rule as follows: "If one, at the time of conferring a benefit upon another, confers it as a gift, that is, without intending thereby to establish contractual relations, it cannot afterward be claimed that the benefit was conferred in misreliance upon a supposed contract. Consequently, though the donor's intention may subsequently be altered, no quasi contractual obligation to make restitution will arise." [1] A very early and leading case in support of this rule is *Osborn v. Governors of Guy's Hospital,*[2] where the plaintiff transacted the business affairs of Mr. Guy. At the time the services were rendered, it appeared that the plaintiff did not intend to charge therefor, but he had hopes that Mr. Guy would remember him in his will. It was held that the fact that he was disappointed in his expectations did not entitle him to charge for services which were rendered with no expectation of compensation.[3]

Where service or benefits are rendered as a gratuity because of a mistake as to a material fact, the courts often allow recovery. Many cases falling within this group are those dealing with money paid under mistake of fact.[4] The general rule which governs cases of this type

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1 WOODWARD, QUASI CONTRACTS (1913) 74.

2 2 Str. 728 (K. B. 1726).

3 Accord: Cicotte v. Church of St. Anne, 27 N. W. 682 (Mich. 1886) (The court said: "When services are performed from kindly motives, and with charitable intentions, the law will not imply a promise to compensate for them."); Doyle v. The Rector, etc., 31 N. E. 221 (N. Y. 1892); Kinner v. Tshirpes, 54 Mo. App. 575 (1893).

4 Mayer v. Mayor, etc., of New York, 63 N. Y. 455 (N. Y. 1875). See excellent Note in 24 L. R. A. (N. S.) 517.

is: "No matter how close at hand the means of knowledge may be, no matter how stupid or careless the failure to ascertain the truth may be, if one confers a benefit under an honest mistake, i. e., in unconscious ignorance of the truth, the retention of the benefit is ordinarily inequitable. By the weight of authority restitution may be enforced." [5]

In re Agnew's Will,[6] decided a few years ago, was held to fall within the above rule. The decision provoked considerable discussion at the time.[7] The decedent without disclosing that he was worth over $400,000, availed himself of the charity service of the hospital and submitted to an operation that he had been advised to have performed six months previous. The decedent agreed to pay for the room, nursing and post-operative care. The staff surgeons performed the operation under mistaken belief that he was a pauper, and the decedent received the benefits thereof in mistaken belief that such services were gratuitous. The court held that his executors in equity and good conscience should recompense the surgeons for the reasonable value of their services. The surgeon relying upon the patient's classification as a charity patient performed the operation without intending to charge and without any expectation of being paid by the patient. The surgeons had no contractual relations with decedent, but were discharging their duty to the hospital, on one mistakenly supposed to be a charity patient. The court goes on to say that if the surgeons knew the patient was well able to pay, they could have refused to treat him gratuitously under their arrangement with the hospital. The patient on the other hand knowingly accepted the service under the mistaken idea he would not have to pay for anything more than he was asked to pay for. The surgeons were induced to render services, which they would not have done had they known the real facts of the case. The decision was not based on fraud, and the court entertains no idea that fraud was present. While the decision is correct, the reason is untenable, if we follow the general rule as laid down by Woodward in regard to conferring a benefit upon another as a gift. Would it not be more plausible to treat the decision as an exception to the rule on benefits intended as a gift? Although the court stated that "the staff surgeons performed the operation without the intention of charging therefor, and without any expectation of any recompense from the patient," this fact was disregarded entirely in the reasoning. If the intent governs, the court is

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[5] WOODWARD, *op. cit. supra* note 1 at 16. Woodward cites many cases, and, as a leading case, he gives Kelly v. Solari, 9 M. & W. 54 (1841), where Parke, B., says: "But if it (money) is paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been, in omitting to use due diligence to inquire into the fact."

[6] 230 N. Y. S. 519 (1928).

[7] 24 ILL. LAW REV. 491; 9 B. U. L. REV. 58; 14 CORN. L. Q. 239; 29 COL. L. REV. 95; 42 HARV. L. REV. 283; 6 N. Y. U. L. REV. 209; 7 TENN. L. REV. 327.

wrong in its reasoning and conclusion.[8] Although there was no intention on the part of the surgeons to charge for their services at the time they rendered them, the services were rendered by them under mistake as to a material fact.[9] In *Baxter v. Gray*[10] it was held that the plaintiff, a surgeon and apothecary, who had attended the testatrix of the defendant during an illness, intending to charge therefor, but who had refrained from rendering a bill in the hope that the testatrix would leave him a legacy, could nevertheless recover for the services rendered.

Woodward says: "In a few cases it has been held, apparently, that even though the plaintiff intends not to charge for his services, he may recover if the defendent is unaware of such intention"; and he cites as a leading case *Thomas v. Thomasville Shooting Club*,[11] which was also cited in the *Agnew* decision. In the *Thomas* case the plaintiff, at the instance of the defendant, procured hunting ground leases which were accepted and received by the defendant. The plaintiff, anticipating early payment of money due from the defendant and also that he would be given remunerative employment by the defendant, did not intend to charge for his services, but there was no agreement that the service should be rendered free of charge. The court held that the plaintiff was entitled to recover the reasonable value of his services. The instructions the court gave to the jury and which were approved by the supreme court were: "If Thomas did not intend at the time to charge for getting up the leases, and this was known to the defendant, then he could not charge and recover for the same; but, if it was not known to the defendant that Thomas did not intend to charge, then Thomas could afterwards sue for and recover for his services in getting up the leases." Woodward criticizes the decision in no uncertain terms: "Indeed, it is difficult upon any ground to support the decision. The plaintiff's lack of intent to contract is fatal to the theory of a genuine implied contract. Nor do the elements of quasi contractual obligation appear to be present, for one who renders services without the intention to charge therefor can hardly be said to rely upon a supposed right to compensation."

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8 Collyer v. Collyer, 21 N. E. 114 (N. Y. 1889), where Earl, J., said: "It is undoubtedly true that the plaintiff showed great kindness and liberality to his sister; but no one can read this evidence and draw therefrom any inference that he expected any reward from his sister during her lifetime. He knew that she was to the utmost degree penurious and miserly, and that she would hoard her pelf and cling to her property so long as she lived, but doubtless expected that by his kindness to her she would be induced to make a favorable disposition of her property in his favor at her death. The fact that his expectation has been disappointed furnishes no ground for now stamping what at the time were acts of kindness and generosity with the mercenary features of contract and compensation."

9 See Higgins v. Breen Adm'r of McNally, 9 Mo. 497 (1845).

10 4 Scott M. R. 374.

11 28 S. E. 293 (N. C. 1897).

It will be seen at once that the decision in the *Agnew* case cannot be sustained if it is to be placed within the general rule, that a party who confers a benefit upon another with the intention of conferring a gift, he cannot later change his mind and demand payment therefor.[12] The decision, however, could be supported on the theory of a mistake as to duty incident to status.[13] The surgeons performed the operation in the mistaken belief that because they were hired by the hospital to do charity work they were under an obligation to render services for the decedent, who the surgeons mistakenly believed to be a pauper.[14] There is no doubt but that the surgeons would have charged for their services but for the fact that they believed the decedent to be a pauper. Services performed by physicians, while prompted by motives of humanity, are generally rendered with the expectation of compensation.[15] The mistake of fact under which the surgeons labored, was induced through the concealment of the decedent that he was a very wealthy man, by presenting himself at the hospital dressed in shabby clothes. The decedent knew he was a rich man, yet he wished to take advantage of the surgeons, because he knew the operation would be performed free of charge, if he concealed his wealth and gave the appearance of being a poor man. How the court failed to find fraud in this transaction is a matter that taxes the imagination, for it is well-known that fraud may be committed by actions alone.[16] It would have been more reasonable for the court to have adopted the rule as laid down in *Boardman v. Ward*,[17] where the court held that "Where one is induced under a mistake of fact, through the fraud or concealment of another, to render valuable services for the latter, he may recover the reasonable value thereof, though they were rendered without any expectation at the time of being paid for."

An English case, *In re Clabbon*,[18] that involves the same point as that raised in the *Agnew* case was decided in favor of the plaintiffs. In that case the guardians of the poor had supplied necessaries to an infant who later inherited a sum of money. The plaintiffs recovered, the court saying: "I cannot agree that a pauper who takes relief in the shape of necessaries which keep him alive, takes that relief so entirely of right, that he is not under a legal liability to pay if he afterwards comes into money." The court in the *Agnew* case must have had that thought underlying their decision when they said: "He [the decedent]

12 Prince v. McRae, 84 N. C. 674 (1881); Frain v. Brady, 134 Atl. 645 (R. I. 1926); Hanrahan v. Baxter, 116 N. W. 595 (Iowa 1908).

13 WOODWARD *op. cit. supra* note 1, § 184.

14 See: Hickam v. Hickam, 46 Mo. App. 496 (1891); Boardman v. Ward, 42 N. W. 202 (Minn. 1889).

15 Cotnam v. Wisdom, 104 S. W. 164 (Ark. 1907).

16 THROCKMORTON'S COOLEY ON TORTS 582.

17 *Op. cit. supra* note 14; Anderson v. Eggers, 49 Atl. 578 (N. J. 1901).

18 [1904] 2 Ch. 465.

received at their hands . . . a valuable benefit which entailed a duty of restitution; and I am of opinion that in equity and good conscience his executors should recompense them. . . ."

Another New York case decided five months after the principal case in which the plaintiff's claim was disallowed is *In re Thomas' Estate*.[19] The testatrix was committed as a poor person to the county hospital where she received maintenance for a period of twenty-nine days. At the time of commitment she was the owner of sixteen acres of land, with a house and barn thereon. There was no proof that the testatrix concealed property or deceived the overseer of the poor in any way into believing that she was destitute. The court disallowed the county's claim saying: "In the absence of misrepresentation or concealment of property a person duly committed to an almshouse is a charity case, and raises no implied promise of repayment by the person benefited." The court makes clear that there was no evidence that the testatrix made any personal application for relief and that an investigation as provided by Section 20 of the *Poor Law* would have disclosed the fact that the testatrix was not a poor person within the meaning of the law. Section 57 of the *Poor Law* provides a remedy for persons who are committed to almshouses when they own property and conceal or misrepresent their ownership. But the court should have taken the case out of the general rule when they said: "The authorities in charge of the hospital acted in good faith, and are not chargeable with any lack of official vigilance." The court claims that the error lies in the original act of committing the testatrix from the town of Westmoreland. The decision is in conflict with the principal case if the principles of equity and good conscience are invoked as they were in the *Agnew* case.

The error courts often fall into is their failure to distinguish between an implied contract and a quasi contract. Even Woodward disregards the distinction in his criticism [20] of *Thomas v. Thomasville Shooting Club*.[21] The lack of intent may be fatal to an implied contract, but it has no relation to a genuine quasi contract. Judge Knowlton defines a quasi contract in substance as an obligation not arising from any agreement, expressed or implied, but imposed by law and enforced by action ex-contractu.[22]

A true contract exists as an obligation, because the contracting parties have so intended and the law attaches an obligation on the parties that they shall be bound. This statement is as true of a contract implied in fact as of an express contract. As Keener says, "The division of simple contracts into express contracts and contracts implied in fact

19 231 N. Y. S. 93 (1928).

20 WOODWARD, *op. cit. supra* note 1, at 77-78.

21 *Op. cit. supra* note 11.

22 Keith v. De Bussigney, 60 N. E. 614, 615 (Mass. 1901).