

*Hallock*.<sup>23</sup> In view of the revenue statutes the court reached the logical result, but a more complete discussion of the largely undecided question of secondary liability could have made a valuable addition to the case law of taxation.

In a lengthy dictum the court indicated that many of the valuations which courts are constantly forced to make prove to be utterly false; hence, a tax on the actuarial valuation of a remainder which may never come into being is no worse than a tax on the valuation of city real estate, whose "market value" may turn out to be a "mirage."<sup>24</sup> But there is a difference, if only in degree, between property valuations based on past earnings, or present or past cost, and actuarial valuations which are estimates of mathematical probabilities. The former valuation is intended to be a unique appraisal of the individual property surveyed; the latter is not intended to be more than a mathematical statement of a group phenomenon.<sup>25</sup> The actuarial system of valuation is a legal *deus ex machina*, too well established to be attacked in principle. But its inherent limitations are so great that its use should be avoided where feasible, although in the instant case the court could not properly escape it.

The instant case leaves the taxpayer faced with the probability of double taxation and the certainty of taxation of arbitrarily valued uncertainties. It might be argued that double taxation is a valid means of enforcing a legislative policy against trusts with reversionary interests. No direct evidence of such congressional intent exists. And if the double taxation created by the instant case may be taken to represent a social policy against trusts in general,<sup>26</sup> it effectuates it in an inefficient and somewhat accidental manner.

<sup>23</sup> 309 U.S. 106 (1940). "It may well be that the Supreme Court has succeeded in ridding the law of estate taxation of the 'casuistries of conveyancing' only to find that it has removed them over into the field of gift tax. For a decision intended to dispel confusion and uncertainty, the majority opinion in the *Hallock* case leaves a great deal unanswered." Nash, *Implications of Developments in the Taxation of Trusts*, 18 *Taxes* 267, 324 (1940).

<sup>24</sup> *Com'r v. Marshall*, 125 F. (2d) 943, 946 (C.C.A. 2d 1942), citing *Abrams*, *Revolution in Land* 81-89, 132-33, 198-200 (1939). The court here is talking about extreme possibilities, a rather defeatist approach. A better attitude is to compare the *usual* results of land valuation with the *usual* results of actuarial valuation. Bonbright states that death-tax valuation (including actuarial estimates) ". . . presents American legal valuation at its best . . ." and that property valuation and rate making are the worst. 2 Bonbright, *op. cit. supra* note 6, at 745. But land valuation is extremely difficult, while the actuarial system is comparatively simple, once the proper tables have been chosen. For a discussion of the virtues and drawbacks of taxing by actuarial estimates, see *Some Statutory Provisions for the Taxation of Contingent Remainders and Defeasible Estates*, 29 *Col. L. Rev.* 180 (1929).

<sup>25</sup> The larger the experiential data on which the actuarial system is based, the more nearly will the total estimates of remainder values equal the total actually realized values. Hence it is a desirable system from the standpoint of the government. But the equality of the sums involved may not make for even a maximum probability of accuracy in the particular case, as statisticians realize. Land is not capable of statistical analysis, and hence the experiential data on which land valuation is based are apt to be more complex and less precise. But precision and mechanical ease in application should not be mistaken for fairness.

<sup>26</sup> Such a policy might be advocated. Compare the common law hostility to restraints on alienation.

**Unemployment Compensation—Benefits Withheld because Stoppage of Work Results from Labor Dispute—[Neb.]**—A local Truck Drivers Union and the Nebraska Truckers Association were engaged in a dispute over a closed shop provision in a labor contract which was being negotiated. As a result of the inability of the parties to reach agreement, claimant employees of a member of the association went out on strike in September, 1938. In May, 1939, the striking employees applied for unemployment benefits under the Unemployment Compensation Law.<sup>1</sup> The district court allowed the benefits, setting aside the decision of the Appeal Tribunal of the Nebraska Department of Labor denying the claims. On appeal to the Nebraska Supreme Court, the judgment of the district court was reversed and the cause remanded. *Held*, a 30 per cent decrease in the total business transacted by the employing company was a substantial stoppage of work resulting from a labor dispute and hence disqualified the claimants under the terms of the act. *Magner v. Kinney*.<sup>2</sup>

Disqualification clauses withholding benefits from all workers<sup>3</sup> whose unemployment is caused by a labor dispute are found in each of the unemployment compensation statutes of the fifty-one United States jurisdictions.<sup>4</sup> The disqualification section of the Illinois statute, which is similar to those found in the other jurisdictions and almost identical with the Nebraska statute, reads, "An individual shall be ineligible for benefits . . . (d) for any week with respect to which it is found that his total or partial unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment, or other premises at which he is or was last employed. . . ." <sup>5</sup> Not the least trying of the problems raised by this section of the statutes is the defining of the term "stoppage of work."

While the Illinois courts have not yet had occasion to define the term "stoppage of work" the Director of Labor has passed upon a number of appeals<sup>6</sup> involving stoppage and closely related problems. An analysis of these decisions indicates that what authority exists in Illinois is contrary to the decision of the Nebraska court in the instant case.

A unanimously accepted principle is that the stoppage of work relates to the conditions existing at the place of last employment, not to the stoppage of work by the individual claimant.<sup>7</sup> This principle has been tacitly accepted by the Illinois adminis-

<sup>1</sup> Neb. Comp. Stat. (Supp. 1941) §§ 48-701 et seq.      <sup>2</sup> 2 N.W. (2d) 689 (Neb. 1942).

<sup>3</sup> The disqualification applies to all workers who are participating, financing, or interested in the labor dispute which causes the stoppage, or who are members of a grade or class of workers who are participating, financing, or interested in the dispute. Neb. Comp. Stat. (Supp. 1941) § 48-705(d). The corresponding provision in Illinois is found in Ill. Rev. Stat. (1941) c. 48, § 223(d). See note 27 *infra*.

Defining the term "labor dispute" for the purposes of this section has caused considerable difficulty. A liberal labor policy requires a narrow definition of the term under unemployment compensation acts, and a broad definition under the various anti-injunction statutes. There is no inconsistency in requiring different definitions of the same term.

<sup>4</sup> See Fierst and Spector, *Unemployment Compensation in Labor Disputes*, 49 *Yale L. J.* 461 (1940), for a general discussion of the section.

<sup>5</sup> Ill. Rev. Stat. (1941) c. 48, § 223(d).

<sup>6</sup> From the decision of the deputy, who investigates the claim and makes the original determination, appeal by the employee or employer lies direct to the Director of Labor.

<sup>7</sup> *Magner v. Kinney*, 2 N.W. (2d) 689, 693 (Neb. 1942); Fierst and Spector, *op. cit. supra* note 4, at 483.

trators. The stoppage must be substantial;<sup>8</sup> disqualification does not result merely because one less worker is employed, or because one job is left undone;<sup>9</sup> but the stoppage need not be complete before benefits are withheld.<sup>10</sup>

Various factors are considered in the determination of what constitutes a substantial stoppage. Production, shipments, pay-rolls, pay-hours, number of employees, orders received, and even electric and power consumption bills<sup>11</sup> during the questioned period have been compared with a normal base period in arriving at a decision. The most significant factor appears to be the production differential. Thus, where production was 43 per cent of normal a stoppage was declared although the number of employees had decreased only 25 per cent and shipments 30 per cent.<sup>12</sup> And when the number of employees was only 36 to 54 per cent of normal, but production-hours were 53 per cent of normal, it was held there was no stoppage.<sup>13</sup> On the basis of these decisions it might be concluded that a working rule followed by the Illinois Department of Labor is that there is no stoppage unless production is below 50 per cent of normal. However, the scarcity of borderline situations does not justify much reliance on such a conclusion.<sup>14</sup>

A less certain, but more judicious test for determining stoppage has been suggested

<sup>8</sup> Ill. Dept. Lab., In the Matter of the Appeal of the Burton-Dixie Corp., No. 40-DL-11, 12, 14 (1940); Ill. Dept. Lab., In the Matter of the Appeal of the New York Handkerchief Mfg. Co., No. 41-DL-77 (1941); Ill. Dept. Lab., In the Matter of the Appeal of the Claimant Employees of Hibbard, Spencer, Bartlett & Co., No. 41-DL-108 (1942).

<sup>9</sup> Ill. Dept. Lab., In the Matter of the Appeal of the Burton-Dixie Corp., No. 40-DL-11, 12, 14 (1940).

<sup>10</sup> Ill. Dept. Lab., In the Matter of the Appeal of Claimant Employees of the Ad-Plate Engraving Co., No. 41-DL-88 (1941); Ill. Dept. Lab., In the Matter of the Appeal of Claimant Employees of the Corey Steel Co., No. 41-DL-95 (1941). However, it has been said that "the word stoppage unmistakably suggests a situation more closely akin to the term cessation than to mere retardation." Ill. Dept. Lab., In the Matter of the Appeal of Claimant Employees of the Kellogg Switchboard & Supply Co., No. 40-DL-9 (1940).

<sup>11</sup> Ill. Dept. Lab., In the Matter of the Appeal of Claimant Employees of Revere Copper & Brass, Inc., No. 39-DL-1 (1939); Ill. Dept. Lab., In the Matter of the Appeal of the Burton-Dixie Corp., No. 40-DL-11, 12, 14 (1940); Ill. Dept. Lab., In the Matter of the Appeal of Claimant Employees of the Central Screw Co., No. 41-DL-6, 7 (1941).

<sup>12</sup> Ill. Dept. Lab., In the Matter of the Appeal of the New York Handkerchief Mfg. Co., No. 41-DL-77 (1941). But where pay-hours and pay-rolls fell from 20 to 25 per cent it was held there was no stoppage. Ill. Dept. Lab., In the Matter of the Appeal of the Burton-Dixie Corp., No. 40-DL-11, 12, 14 (1940).

<sup>13</sup> Ill. Dept. Lab., In the Matter of the Appeal of the Claimant Employees of the Kellogg Switchboard & Supply Co., No. 40-DL-9 (1940). Production in this company was on a long-term job basis, hence accurate production figures for a relatively short term were not available. From the decision it appears that for the purpose of determining stoppage, production-hours were considered as equivalent to production.

<sup>14</sup> Although no production figures were given, no challenge was made of the deputy's decision that a stoppage was terminated when 3334 out of 6300 employees returned to work. This would seem to support the rule if the presumption is made that production is approximately proportional to employment. Ill. Dept. Lab., In the Matter of the Appeal of Claimant Employees of the International Harvester Co., No. 41-DL-17, 18 (1942).

by the Director's Representative.<sup>15</sup> It was pointed out in one decision<sup>16</sup> that the labor dispute disqualification clause had been adopted so that employers will not be required to finance labor activity designed to coerce them into granting their employees' demands. Hence, only when the coercion applied is sufficient to be successful is the disqualification clause applicable. When the resultant stoppage does not seriously inconvenience the employer the strike cannot be successful and benefits should be allowed. A substantial stoppage, by this rationale, would be one which exerts sufficient pressure to force the employer either to negotiate or submit to the demands of his employees. This "strike-effectiveness" test was applied, among other criteria, in determining that there was a stoppage in a coal mine; although production had stopped completely, the decision noted the fact that the strike had accomplished its purpose since a labor contract was negotiated and signed immediately after the workers returned.<sup>17</sup> As yet, however, the strike-effectiveness test has not displaced the percentage-of-production test as the most significant factor in the determination of a stoppage. On this basis the Illinois Department of Labor would probably have held that no stoppage existed in the instant case where the business transacted was 70 per cent of normal.

Another principle, widely applied in other states as well as Illinois, is that even though there is a stoppage and a causally connected labor dispute, benefits will be allowed if the stoppage can be attributed to any other cause.<sup>18</sup> Thus, where a union member was ill and could not work he was granted benefits although the mine at which he was employed was shut down because of a labor dispute.<sup>19</sup> And when a labor dispute caused a shut-down of a number of mines, the Director, in overruling the Deputy's decision, held that the stoppage ". . . was due primarily to the regular seasonal shut-down of the industry and to lack of work."<sup>20</sup> Another application of this principle is found in a decision involving a dispute in the clothing industry,<sup>21</sup> where a frequent cause for lay-offs is the shutting down of a particular department because of lack of work. An investigation was made to determine whether any striking employee would have been unemployed even if there had been no strike. And to those individuals whose unemployment could be attributed to a lack of work in a department, rather

<sup>15</sup> The decision is officially made by the Director of Labor, but as a matter of course the Director adopts as his decision the recommendations and report of disinterested representatives. Dr. Elmo Hohman of Northwestern University and Prof. Charles O. Gregory of the University of Chicago have acted as representatives in a number of appeals.

<sup>16</sup> Ill. Dept. Lab., In the Matter of the Appeal of the Burton-Dixie Corp., No. 40-DL-11, 12, 14 (1940).

<sup>17</sup> Ill. Dept. Lab., In the Matter of the Appeal of Claimant Employees of the Knoxville Mining Co., No. 41-DL-8 (1941).

<sup>18</sup> Fierst and Spector, *op. cit.* supra note 4, at 484.

<sup>19</sup> Ill. Dept. Lab., In the Matter of the Appeal of Claimant Employees of the Lumaghi Coal Co., No. 41-DL-2 (1941).

<sup>20</sup> Ill. Dept. Lab., In the Matter of the Appeal of Members of the Progressive Mine Workers of America, Claimant Employees of the Mt. Olive & Staunton Coal Co., No. 41-DL-24 (1941); Ill. Dept. Lab., In the Matter of the Appeal of Members of the United Mine Workers of America, Claimant Employees of the Peabody Coal Co., No. 41-DL-30 (1941).

<sup>21</sup> Ill. Dept. Lab., In the Matter of the Appeal of Claimant Employees of Wm. Shanhouse Sons, Inc., No. 41-DL-68 (1941).

than to the strike, benefits were allowed. The probable reason for this "but-for"<sup>22</sup> test is to prevent employers from claiming labor disputes when it becomes necessary for them to lay off employees for various reasons such as seasonal slack, or shortage of materials, thereby disqualifying the employees from receiving benefits.

The "but-for" test appears to have been abandoned, however, in two Illinois Department of Labor decisions. In one the striking construction workers maintained that weather conditions were such that during the period of the labor dispute they could not have worked even if no strike had been called. The Director's Representative states ". . . the members of the Laborer's Local were in a continuous state of being unwilling to work with the members of the Mason's Local as long as the suspension was in effect. This was true regardless of the weather, and would have been just as effective on bad days as on good. In other words, the labor dispute was the primary and motivating cause of the stoppage, since it operated independently of the weather and could not have been changed by the weather, while the temperature and other weather conditions are only secondary and incidental causes."<sup>23</sup> In the other case, the employer hired new workers to replace those who had struck; the replacement force was 75 per cent of the previous labor force. Since the work was specialized, the new force because of their inexperience could operate at only 43 per cent of the efficiency of the former employees. It was held that the stoppage was due to a labor dispute and benefits were denied the former employees even though they had been almost entirely replaced.<sup>24</sup> A consistent application of the "but-for" test would require a different result in each of these cases.

Although a number of other problems are presented by the labor dispute disqualification clause,<sup>25</sup> sufficient difficulties have been considered to warrant a consideration

<sup>22</sup> ". . . those workers . . . would have been further employed but for the stoppage of work . . ." Ill. Dept. Lab., In the Matter of the Appeal of Claimant Employees of Cave-In-Rock Spar Co., No. 41-DL-90 (1941).

<sup>23</sup> Ill. Dept. Lab., In the Matter of the Appeal of Claimant Employees of Holm-Page Construction Co., No. 41-DL-14 (1941). However, this might be considered as mere dictum, since it was also found that there were sufficient days of suitable weather scattered through the disputed period so that it would have been possible to work at least one day per week, thus disqualifying the claimants for the entire week, and hence the entire period.

<sup>24</sup> Ill. Dept. Lab., In the Matter of the Appeal of the New York Handkerchief Mfg. Co., No. 41-DL-77 (1941).

<sup>25</sup> The terms "labor dispute," "establishment," and "interested" found in the disqualification sections have caused considerable difficulty. The temptation is always present to give labor dispute the broad meaning required to accomplish the purpose of the various anti-injunction statutes, when a liberal labor policy requires a narrow definition under the unemployment acts. And when one plant of a company having many plants throughout the country is shut down, shall the test be whether the stoppage is substantial with respect to the entire company or merely to the one plant? Likewise, when the stoppage is complete for one department but not substantial for the whole plant, shall benefits be allowed? It has been held that "establishment" relates to a geographically separated and functionally integrated unit. In Ill. Dept. Lab., In the Matter of Claimant Employees of American Cyanamid & Chemical Corp., No. 40-DL-15 (1941), in a stoppage in one plant of a company having thirty-five plants, the one plant was treated as the establishment and hence there was a substantial stoppage. In Ill. Dept. Lab., In the Matter of the Appeal of The Caterpillar Tractor Co., No. 40-DL-17 (1941). 108 patternmakers and 12 apprentices went out on strike, shutting down the entire pattern

of the justification for the clause.<sup>26</sup>

The rationale cannot be the voluntary character of the unemployment on the part of the employee, since benefits are withheld although a particular employee may be opposed to the strike.<sup>27</sup> Superficially, a more persuasive reason is that there is something unfair in requiring an employer to finance workers striking against him. The employer finances the strike, however, only in the sense that the unemployment benefits come from a common fund to which the state and each employer contribute, the benefit payments being charged against the individual employer for the purpose of determining his merit rating.<sup>28</sup> At the end of the year a state average is computed and the individual employer's merit rating is determined by the variance between the state average payments and the amount of benefits charged to him. The merit rating determines the tax rate for the individual employer for the succeeding year, the rates varying from one-half to three per cent.

If the term "merit" is given its plain meaning, the merit rating system can be justified only on the premise that the employer exercises some control over conditions which lead to unemployment. It would seem that an employer can exercise more control over conditions which lead to labor disputes than over market conditions which result in seasonal lags, yet the employer's merit rating is chargeable with benefits paid because of seasonal lay-offs, while he escapes any penalty for pursuing a labor relations policy which promotes strikes. In those circumstances in which the employer has acted reasonably and the fault can be attributed to the employees, the moral blame notion would require that no benefits be charged to the employer. At present, regardless of the cause of the labor dispute, no benefits are paid and hence the employer is not charged. If merit does signify moral blame, then benefits should be paid and the employer should be chargeable at least in those instances where he is at fault. Since he is not charged, however, in any instance, and since he is charged with unemployment due to seasonal lay-offs—which clearly is not explicable on a blame notion—perhaps the merit rating system is a "cost of the business" concept. If the merit rating system is viewed in this manner a business which has a higher labor-dispute unemployment record should probably pay a higher premium.

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shop of the plant. The plant was treated as the establishment rather than the pattern shop, and the stoppage was held not substantial with respect to the entire plant.

<sup>26</sup> The present discussion is of necessity limited in scope. Many factors pertinent to an ultimate decision regarding the desirability of retaining the labor dispute disqualification clauses in the various unemployment compensation acts cannot be considered. The discussion is not intended to be an exhaustive analysis, but rather a supplement to existing material. For a more complete analysis, see Fierst and Spector, *op. cit. supra* note 4.

<sup>27</sup> Ill. Dept. Lab., In the Matter of the Appeal of Claimant Employees of International Harvester Co., Rock Falls, Ill., No. 41-DL-3, 4 (1941).

<sup>28</sup> The merit rating will go into effect in 1943, determined by the employment record for the preceding four years. There are two other methods of financing the unemployment benefits: the common-fund method in which each employer contributes a fixed percentage to a fund without regard to payments chargeable to him, and the direct-payment plan, whereby each employer pays a percentage of the benefits chargeable to him because of payments to the employee. The Illinois merit-rating plan is a compromise between these two methods. Under all these plans, the employer only contributes a portion of the total payment, the remainder coming from the state.

The present statutory provisions that no benefits shall be paid whenever unemployment is caused by a labor dispute lead to comparative ease of administration. If these clauses were abolished completely, the same administrative simplicity would be the result, and benefits would be allowed for all labor-dispute claims. Neither of these alternatives results in substantial justice. In the former situation an employer who pursues a hostile labor relations policy escapes any liability. In the latter circumstance, unreasonable employees would receive unjustified benefits. The latter position, however, would appear more tenable. Probably in the majority of labor disputes both parties have conducted themselves as reasonable employers and employees. In these cases perhaps the cost should be borne by the employer as a cost of the business. In that area of cases wherein the employer is at fault the cost should be borne by the employer both on cost-of-the-business and fault notions. In the remaining situations where the employee is at fault, the cost of the business idea is still present; it may be that the administrative simplicity to be gained in all cases by not requiring an investigation into fault tips the balance in favor of abolishing the disqualification sections.