which result in subordination of claims of a parent corporation based on advances to an inadequately financed subsidiary.[12] Despite these analogies, substitution of a general due care standard for dividends would probably be undesirable. It may be doubted that such a statute would often result in actual recovery from a director, especially if the alternatives were no liability or joint liability for the full amount of the illegal dividends.

There is one situation, however, where a due care rule would seem desirable: the situation of the corporation whose fixed assets have suffered a shrinkage in value. *Randall v. Bailey* apparently not only permits use of increased values for dividend purposes but also requires the use of decreased values. This aspect of the decision will probably give serious concern to corporation lawyers. Indeed, one may question the wisdom of a rule which may require frequent appraisals of fixed assets and going concern values if directors are to be safe in distributing current earnings. Prior to *Randall v. Bailey*, while the authority is meager, it has been generally thought that account need not be taken of unrealized shrinkages in fixed asset values.[13] In many cases the dividend may be entirely sound despite such shrinkages. In other cases, however, where serious and permanent impairment of earning capacity is indicated, the dividend may leave creditors with clearly inadequate protection. Here, the due care requirement might operate usefully to prevent injury to creditors in the more serious cases.

DISBARMENT PROCEEDINGS—CONTROL OF THE JUDICIARY BY UPPER COURTS

Default by the surety on a bail bond instigated an investigation by the Chicago Bar Association of the practice of municipal court judges in the approval of such bonds. As a result of this investigation the Association, acting as commissioners of the court, brought disbarment proceedings against the defendant, a municipal court judge. The commissioners charged that the respondent's failure to ascertain the financial responsibility of those posting bonds "tended to bring the bar and the judiciary into ill repute and to obstruct justice." They contended, moreover, that such carelessness violated the municipal court rule which established as "the duty of a judge [the ascertainment of] the condition of the title and the value of the real estate scheduled."[1] The complaint was *held* dismissed. *In re McGarry.*[2]

[12] Taylor v. Standard Gas & Electric Co., 306 U.S. 307 (1939); Israels, The Implications and Limitations of the "Deep Rock" Doctrine, 42 Col. L. Rev. 376 (1942).

[13] 2 Bonbright, Valuation of Property 924–25 (1937). But see Guaranty Trust Co. v. Grand Rapids, G.H. & M. Ry. Co., 7 F. Supp. 511 (Mich. 1931); Vogtman v. Merchants' Mortgage and Credit Co., 20 Del. Ch. 364, 178 Atl. 99 (1935).

[1] Rule No. 9 of the Municipal Court of Chicago. The rule is quoted in part in the instant case, In re McGarry, 380 Ill. 359, 362, 44 N.E. (2d) 7, 9 (1942).

[2] 380 Ill. 359, 44 N.E. (2d) 7 (1942).

The contention based on Rule No. 9 of the municipal court of Chicago was dismissed because the relators failed to establish that the rule was mandatory rather than merely advisory, as most of the municipal court judges had apparently regarded it.[3] The court likewise dismissed the plea for disbarment premised on the defendant's general dereliction. It was said that a judge might be disbarred only when it was clearly established that the acts complained of were non-judicial in character. Since the commissioners failed to establish this, the proceeding was dismissed.

That a judge should not be liable in a civil suit for damages allegedly arising from his judicial conduct had been established by the United States Supreme Court in *Bradley v. Fisher*.[4] The policy was there articulated that concern for an independent judiciary necessitated immunity for judges for acts done within their judicial capacity, at least from the harassment of disappointed suitors.

To provide some check on the activity of judges, however, states have provided for impeachment by the legislature. The court in the instant case, motivated in part by the immunity policy voiced in the *Bradley* case and in part by the presence of the constitutional remedy of impeachment, refused to disbar the defendant without a showing that his carelessness lay outside his judicial character. Thus, a rule conceived to eliminate the crowding of courtrooms, which would result if suitors were allowed to vent their chagrin on judges who had decided against them, was appropriated in this case to an entirely different situation, where the danger of multifarious suits is absent. The Chicago Bar Association will probably not bring such actions very often.

The court having decided that a judge could not be disbarred unless the acts complained of fell outside his judicial function, dismissal of the rule against the respondent was inevitable. For almost all activities involved in the setting of bail are traditionally judicial.[5] Yet, establishing the judicial or non-judicial character of one's activities as the criterion for disbarment seems highly unsatisfactory. A review of the precedents will reveal that a workable distinction has never been formulated.[6] Until such a distinction is clearly set out, if that is pos-

[3] The rule was ignored on 2400 occasions by the municipal court judges, but no other judge ignored it as frequently as did the respondent, who approved bonds in violation of the rule 398 times. In re McGarry, 380 Ill. 359, 362, 372, 44 N.E. (2d) 7, 9, 13 (1942).

[4] 80 U.S. 335 (1851).

[5] Smart v. Cason, 50 Ill. 195 (1869); Solomon v. People, 15 Ill. 291 (1853). Under the Ill. Rev. Stat. (1941) c. 37, § 406, it is arguable that the respondent's acts were the type which might be delegable to a clerk and therefore non-judicial. But this statute was not considered, and the court felt that at best the relators had failed to establish the respondent's conduct as of non-judicial character.

[6] In fact, no line of cases applying a consistent approach has been found. The approaches of higher courts to the problem of disbarring a sitting judge have been singularly complicated. It is all the more surprising, therefore, that the Illinois court should have ostensibly predicated its decision on the resolution of the issue of whether the acts involved were judicial or non-judicial. The following cases are cited because they reveal the failure to develop an understandable and objective approach to the problem. In the first group, the courts implicitly con-

sible, decisions based on that approach must be hit-or-miss.

Other states have avoided the problem posed by the tenuousness of this distinction. The New York court, for example, has refused to disbar a sitting judge on any grounds.[7] This position is determined largely by the fact that in New York membership in the state bar is a prerequisite to judicial office. So, if a sitting judge were disbarred he would lose one of the qualifications necessary to hold office; and yet the disbarring court would not have the power to remove him from office. An impossible situation with respect to tenure would therefore have arisen. The Wisconsin court has attacked this dilemma, implying that loss of membership in the state bar will involve loss of office.[8] Seizing the other horn, in *In re Holland*, the Illinois Supreme Court stated that disbarment proceedings would be considered as dealing only with a defendant's status as attorney and not as judge.[9]

Though this statement is only a dictum in the *Holland* case, it permits the inference that the Illinois Supreme Court, besides disregarding the logical impasse which has frustrated the New York court, intends to maintain impeachment as the only means of disciplining a sitting judge. The position reduces to

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strued the acts complained of as judicial in character; in the second group, the acts were impliedly non-judicial. (1) *Acts considered judicial in character:* In re Gibbs, 51 S.D. 464, 214 N.W. 850 (1927) (municipal court judge bestowed favors on certain lawyers and remitted fines *inter alia;* these were said to be judicial actions, but the court refused disbarment); In re Silkman, 84 N.Y. Supp. 1025, 88 App. Div. 102 (1903) (surrogate judge practiced law in violation of a constitutional provision; this was said to be a judicial act, but the court refused disbarment, holding that this would effect the removal of a judge, a function strictly delegated to the legislature); Baird v. Justice's Court of Riverside Township, 11 Cal. App. 439, 105 Pac. 259 (1909) (to the same effect as the Silkman case). (2) *Acts considered non-judicial in character:* In re Hobbs, 75 N.H. 285, 73 Atl. 303 (1909) (attorney-respondent, while serving as a justice of the peace, tried and convicted defendants without having any complaint or warrant as the basis of such proceedings; the court considered this only as conduct unbecoming to an attorney, and the respondent's judicial capacity was not considered); State v. Peck, 88 Conn. 447, 91 Atl. 247 (1914) (respondent was an attorney who, while acting as a probate judge, extorted a fee from an estate before him in probate; he was disbarred, the court holding that the acts complained of were unworthy of an attorney, and the respondent's judicial character was not considered); In re Copland, 66 Ohio App. 304, 33 N.E. (2d) 857 (1940); appeal dismissed 137 Ohio St. 637, 32 N.E. (2d) 23 (1941) (municipal judge published an opinion in a fictitious cause; this was regarded by the court as a non-judicial act).

This note is obviously not directed to the function of building order from the chaos of the existing approaches to the problem of disbarring a sitting judge. Adequate treatment of this problem would involve a major investigation, an investigation which might well be undertaken, however, in view of the importance of the problem to the legal profession as well as to the community.

[7] In re Strahl, 195 N.Y. Supp. 385 (1922); In re Silkman, 84 N.Y. Supp. 1025 (1903).

[8] In re Stolen, 193 Wis. 602, 214 N.W. 379 (1927); cf. In re Spriggs, 36 Ariz. 262, 284 Pac. 521 (1930).

[9] In re Holland, 377 Ill. 346, 36 N.E. (2d) 545 (1941); cf. In re Burton, 67 Utah 118, 246 Pac. 188 (1926); In re Breen, 30 Nev. 164, 93 Pac. 997 (1908).

this: A judge may not be disciplined for acts which are done in his judicial capacity (the annexed theory of *Bradley v. Fisher*); but if a person who is both attorney and judge *is* disciplined, the censure (disbarment) will attach only to his identity as attorney. So, a judge may not be attacked for his derelictions if they are *within* his judicial capacity; nor may he be attacked—qua judge—if the acts complained of are *not* judicial in character. Add to this the unsatisfactory test for distinguishing judicial from non-judicial acts, and it appears that any control over the conduct of lower court judges is in Illinois largely illusory.

Public sentiment and impeachment proceedings by the legislature, then, are the only reins. As for public sentiment, if the system of electing municipal court judges is any indication,[10] there will be little to ameliorate the situation from this, the most important, source. As for the legislature, though it may not, like public feeling, be characterized as apathetic, still, in view of the ramified proceedings necessary to institute impeachment action, little can be hoped for from that direction.[11]

Suspicious policing of the activities of municipal court judges is neither desirable nor necessary. It is not desirable because it is to the interest of society to maintain a dignified, independent judiciary. It is not necessary because the machinery exists which will provide a satisfactory framework of freedom and control if it is allowed to operate. This suit brought by the Chicago Bar Association indicates the existence of the machinery.

Perhaps the coercion exerted by the Bar Association is less desirable than the healthy criticism, expressed at the polls as well as from day to day, of an informed and moral community; yet, it takes no keen insight to detect the absence of the latter. Accordingly, it seems unfortunate that the Illinois Supreme Court should have extended the policy of *Bradley v. Fisher* to such cases as this, in which the possibility of vexatious suits is absent.

Indeed, freedom and responsibility of the judiciary might be promoted if the upper courts, cooperating with the Bar Association or a similar organization, assumed more control of the judicial actions of lower court members.[12] If the

[10] Voters in Chicago are even more indifferent to the qualifications of candidates for judicial office than they are with respect to candidates for other offices. Seemingly at least, the most important prerequisite to election to the municipal bench is getting one's name on the right side of the ballot.

[11] The situation in In re Burton, 67 Utah 118, 154, 246 Pac. 188, 201 (1926), is an impressive example of the inadequacies of impeachment as a means of controlling, let alone improving, the judiciary.

[12] Courts have long accepted responsibility for the activities of members of the bar [see the statement by Chief Justice Marshall in Ex Parte Burr, 9 Wheat. 529 (1824)]. Some state courts have indicated impatience, moreover, with the notion that control of judges is to be restricted to the legislature [see In re Copland, 66 Ohio App. 304, 33 N.E. (2d) 857 (1940); State v. Peck, 88 Conn. 447, 91 Atl. 274 (1914)]. That the courts may in the future find some means of slashing through the conceptualistic difficulties posed by a strict separation of powers theory is therefore not inconceivable. See In re Breen, 30 Nev. 164, 93 Pac. 997 (1908).

control were properly exercised it would not impair the power of impeachment delegated to the legislature in state constitutions.[13]

[13] The suggestion here is that the courts, in order to exercise a reasonable control, need not pre-empt the impeachment power of the legislature. More flexible means of control would not involve a high degree of creativeness but merely serious attention to a situation which is much in need of remedy. If a judge knew that his conduct might lead to disbarment, such awareness would necessarily affect his behavior in a healthy way. If, in addition, he knew that laxity in office might, for example, stimulate the upper courts to impose a fine, he might similarly be induced to more dignified conduct. By restricting the right of bringing actions against judges to some such organization as the Bar Association, the objection that judges would be subjected to the sort of harassment meant to be avoided by the rule of Bradley v. Fisher could not reasonably be interposed.