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APPELLATE PROCEDURE IN WORKMEN'S COMPENSATION CASES

George W. Angerstein *

IN STATEMENTS of the theory and purpose, as well as in definitions of workmen's compensation, reference frequently has been made to the matter of litigation. Beyond question, one of the fundamental purposes of workmen's compensation, including that which underlies the Workmen's Compensation Act of Illinois, was to devise a method of providing prompt benefits according to a fixed schedule with as little litigation as possible. Recognition of that purpose was given quite early in Illinois when the Supreme Court of this state declared ". . . the tendency . . . in following out the spirit of the act has been to permit the hearing and adjudication of claims with as little delay and formality as is consistent with orderly procedure."¹ Again, when upholding the compulsory application of the statute as provided in the 1917 amendment,² the court said: "The theory and purpose of workmen's compensation acts are to provide speedy and equitable relief in case of injury to those exposed to the peculiar hazards of certain businesses and enterprises generally known to be hazardous. . . ."³ In still another case, the court has indicated that the purpose of the law was to

* Member, Illinois bar; LL.B., Northwestern University; author of "The Employer and the Workmen's Compensation Act of Illinois," (Hawkins & Loomis, Chicago, 1923).

¹ *Oriental Laundry Co. v. Industrial Commission*, 293 Ill. 539 at 544, 127 N. E. 676 at 677 (1920).

² *Laws 1917*, p. 507, § 3. As subsequently modified, such provision appears in *Ill. Rev. Stat. 1943*, Ch. 48, § 139.

³ *Illinois Publishing & Printing Co. v. Industrial Com'n*, 299 Ill. 189 at 196, 132 N. E. 511 at 514 (1921).

avoid litigation insofar as possible⁴ and, bearing on questions of promptness and expense, it has pointed out that a prime object of such statutes was the allowance of compensation for accidental injuries to employees as promptly and as cheaply as may be.⁵ From these few of the numerous available references,⁶ it would seem that a belief existed on the part of the original framers of the act that there would be but little litigation between employers and employees based upon accidental injuries sustained by the latter during the course of employment.

Clearly indicative of the truth of the time-honored adage as to the difference which exists between theory and practice, however, is the great mass of litigation which has developed under workmen's compensation acts whether before the administering tribunals or in the reviewing courts. It was anticipated that the Industrial Commission, created by and charged with the duty of administering the law, would undoubtedly have to determine many disputed cases but the volume of work imposed on it as well as upon certain of the courts, particularly upon the Supreme Court, was unforeseen as well as unexpected and has been greater than is generally realized. Much might be said as to ways and means of materially lessening such burden, but such is not the purpose of this article. It deals solely with certain matters of procedure relating to appeal under the provisions of the Illinois act following the final award or decision of the Industrial Commission.

Since all rights under the workmen's compensation law are purely statutory in origin, the right of recovery and the procedure to be followed must be found in the act itself and prescribed methods must be carefully followed. As the court, in *Village of Glencoe v. Industrial Commission*,⁷ once said:

⁴ See *Nega v. Chicago Rys. Co.*, 317 Ill. 482 at 493-4, 148 N. E. 250 at 254 (1925).

⁵ *Liquid Carbonic Co. v. Industrial Commission*, 352 Ill. 405 at 410, 186 N. E. 140 at 143 (1933).

⁶ Other cases discussing the theory and purpose of the Illinois statute are *Ervin v. Industrial Commission*, 364 Ill. 56, 4 N. E. (2d) 22 (1936); *Hays v. Illinois Terminal Transp. Co.*, 363 Ill. 397, 2 N. E. (2d) 309 (1936); *Lewin Metals Corporation v. Industrial Commission*, 360 Ill. 371, 196 N. E. 482 (1935); *Faber v. Industrial Commission*, 352 Ill. 115, 185 N. E. 255 (1933); *Sangamon County Mining Co. v. Industrial Commission*, 315 Ill. 532, 146 N. E. 492 (1925).

⁷ 354 Ill. 190, 188 N. E. 329 (1933).

Proceedings under the Workmen's Compensation act are purely statutory. Compensation for injuries received by an employee was unknown at the common law. The jurisdiction conferred on the circuit and superior courts to review findings of the commission by certiorari is special. The writ of certiorari in this class of cases is not to be confused with the common law writ of certiorari. The powers of the court and the methods of procuring jurisdiction are specifically defined in the Workmen's Compensation act, and courts can obtain jurisdiction only in the manner provided by that statute.⁸

Careful observance of statutory requirements is, therefore, essential. Such statutory provisions and judicial interpretations thereof are, consequently, set out in the following sections.

JURISDICTION TO REVIEW

Section 19(f)(1) of the Illinois act presently declares:

The Circuit Court of the county and the City Court of the city, if it has more than twenty-five thousand (25,000) inhabitants, where any of the parties defendant may be found shall by writ of certiorari to the industrial commission have power to review all questions of law and fact presented by such record.⁹

The statute at one time made provision for review in the circuit court of the county,¹⁰ but the act was amended in 1937 so as to purport to give jurisdiction to review the decisions of the Industrial Commission to certain of the city courts.¹¹ Reference throughout this article to the circuit court must, therefore, be read so as to include within that term such city courts as fall within the legislative classification. Very probably, however, the city court would be lacking in jurisdiction unless one or more of the parties in interest lived within the actual limits of the city boundaries even though they lived in the county in which the city and its court was located.¹²

⁸ 354 Ill. 190 at 193, 188 N. E. 329 at 331. See also *Lewin Metals Corporation v. Industrial Commission*, 360 Ill. 371, 196 N. E. 482 (1935); *Elles v. Industrial Commission*, 375 Ill. 107, 30 N. E. (2d) 615 (1940).

⁹ Ill. Rev. Stat. 1943, Ch. 48, § 156(f)(1).

¹⁰ Laws 1915, p. 410, § 19(f)(1).

¹¹ Laws 1937, p. 559.

¹² *Werner v. Illinois Cent. R. Co.*, 379 Ill. 559, 42 N. E. (2d) 82 (1942), reversing 309 Ill. App. 292, 33 N. E. (2d) 121 (1941), noted in 21 CHICAGO-KENT LAW REVIEW 116. But see *Moffett v. Green*, 386 Ill. 318, 53 N. E. (2d) 941 (1944), which holds that city courts have appellate jurisdiction over judgments of justices of the peace within the township even though the cause of action arose outside the city and could not have been litigated in the city court in the first instance.

While the Superior Court of Cook County is not mentioned in the act, it has been held that such court may exercise jurisdiction to review a decision of the Industrial Commission, pursuant to Section 19(f)(1), by reason of the fact that it possesses the same jurisdiction and powers as the circuit court.¹³

TIME FOR APPEAL

The time allowed for the commencement of proceedings to secure review by writ of certiorari is fixed at twenty days from and after the receipt of notice of the decision of the Industrial Commission.¹⁴ The twenty-day period referred to, according to the holding in the case of *Decatur Construction Company v. Industrial Commission*,¹⁵ means "within twenty days of the receipt of notice of the decision of the commission and not from the time when it was made or filed."¹⁶ It sometimes happens that the decision of the commission will have been reached, entered and filed several days before notice of such fact has been received, hence the statutory requirement that time does not begin to run until receipt of notice of that fact is a wise one.

Just what is meant by "receipt" of notice, however, is not made too clear. Paragraph (i) of Section 19 of the act¹⁷ does provide that each party, upon taking any proceedings or steps whatsoever before the arbitrator, committee of arbitration, industrial commission or court, shall file with the Industrial Commission his address or the name and address of his agent upon whom all notices to be given such party shall be served. That statute permits the giving of notice either personally or by registered mail addressed to the last address so filed with the commission. The "receipt" of notice, therefore, undoubtedly means delivery to the party or to his designated agent by either of the means indicated. Notice to any other person would, logically, seem insufficient to start the period running.

¹³ *Yellow Cab Co. v. Industrial Commission*, 333 Ill. 49, 164 N. E. 164 (1928); *Eugene Dietzgen Co. v. Industrial Commission*, 299 Ill. 159, 132 N. E. 541 (1921).

¹⁴ Ill. Rev. Stat. 1943, Ch. 48, § 156(f)(1).

¹⁵ 296 Ill. 290, 129 N. E. 738 (1921).

¹⁶ 296 Ill. 290 at 292, 129 N. E. 738 at 739.

¹⁷ Ill. Rev. Stat. 1943, Ch. 48, § 156(i).

Such was the holding in *American Gear Company v. Industrial Commission*¹⁸ where notice was sent to the attorneys who had participated in and conducted all of the hearings before the commission for one of the parties but who were not properly listed as designated agents for that purpose. As a consequence, such notice was held to be insufficient and amounted to a mere voluntary act on the part of the commission. On the other hand, notice given to an attorney who was designated as agent was held binding, in *Strebing v. Industrial Commission*,¹⁹ despite the fact that another attorney was subsequently retained and conducted the hearings, because no substitution of agents or attorneys was made of record.

It should be remembered, in this connection, that upon expiration of the twenty-day period from the date of receipt of notice, if no proceedings for certiorari have been instituted, the decision of the Industrial Commission becomes final and conclusive.²⁰ If review is contemplated, timely action is both necessary and advisable.

NECESSITY FOR ADMINISTRATIVE REVIEW

Judicial review of the action taken by administrative tribunals is occasionally denied until the party has exhausted all available remedies within the tribunal.²¹ For that reason it is sometimes necessary to seek a rehearing or other review before the tribunal itself before proceeding to seek judicial action. In that regard, it should be noticed that Section 19(b) of the act makes the decision of the arbitrator the final decision of the commission unless a petition for review is filed by either party within fifteen days after the receipt by said party of a copy of said decision.²² Should review before the com-

¹⁸ 313 Ill. 427, 145 N. E. 180 (1924).

¹⁹ 351 Ill. 627, 184 N. E. 886 (1933).

²⁰ Ill. Rev. Stat. 1943, Ch. 48, § 156(f), declares: "The decision of the industrial commission acting within its powers, according to the provisions of paragraph (e) of this section, shall, in the absence of fraud, be conclusive unless reviewed as in this paragraph hereinafter provided. . . ." Decisions so holding may be found in *Strebing v. Industrial Commission*, 351 Ill. 627, 184 N. E. 886 (1933); *Kudla v. Industrial Commission*, 336 Ill. 279, 168 N. E. 298 (1929); and *Friedman Mfg. Co. v. Industrial Commission*, 284 Ill. 554, 120 N. E. 460 (1918).

²¹ In general, see 42 Am. Jur., Public Administrative Law, § 197. See also, for example, Ill. Rev. Stat. 1943, Ch. 42, § 106, and *Wabash E. Ry. Co. v. Com'rs East Lake Fork Sp. Drain. Dist.*, 134 Ill. 384, 25 N. E. 781, 10 L. R. A. 205 (1890).

²² Ill. Rev. Stat. 1943, Ch. 48, § 156(b).

mission be desired, the moving party is required, in addition to the petition for review, to present, within twenty days after receipt of a copy of such decision, an agreed statement of facts or a correct transcript of the evidence before the arbitrator. The statute indicates that a failure to comply therewith makes the arbitrator's decision the final decision of the commission and, in the absence of fraud, declares the same conclusive.

It was argued, in *Jakub v. Industrial Commission*,²³ that since the aggrieved party had not availed herself of the statutory right to review by the Industrial Commission of the decision of the arbitrator, such decision was not subject to judicial review. The court, however, concluded that the circuit court was given jurisdiction to review the record by certiorari without the necessity of a review of the decision of arbitrator by the commission. By failing to seek review before the commission, however, the party was held to have lost the privilege of introducing additional evidence.²⁴

Subsequent to that decision, by an amendment adopted in 1936, the statute was changed so as to apparently limit the scope of judicial review to those cases wherein internal review before the commission had first been obtained. The statute then read:

(1) The Circuit Court of the county where any of the parties defendant may be found, *except in such cases as arise in a proceeding in which, under paragraph (b) of this section, the decision of the arbitrator or committee of arbitration has become the decision of the industrial commission*, shall by writ of certiorari to the industrial commission have power to review all questions of law and fact presented by such record. . . .²⁵

No decision was ever pronounced on the effect of the statute as so amended, for at the next session of the legislature the provision was again amended to permit review by certain of

²³ 288 Ill. 87, 123 N. E. 263 (1919). See also *Oelsner v. Industrial Commission*, 305 Ill. 158, 137 N. E. 116 (1922).

²⁴ Ill. Rev. Stat. 1943, Ch. 48, § 156(e), requires the commission, on petition for review, to promptly review the decision of the arbitrator, all questions of law or fact which appear in the agreed statement of facts or transcript, and "such additional evidence as the parties may submit."

²⁵ Laws 1935-6, Third Spec. Sess., p. 25. Italics indicate the material added by that amendment. The quoted section has never appeared in the various editions of the revised statutes.

the city courts²⁶ and, in so doing, the italicized language, whether by accident or design, was omitted and has never since reappeared.

This peculiar circumstance raises a possible contention that judicial review should be limited in scope, but in all probability, as the law now stands, an award of the arbitrator which has become the decision of the Industrial Commission because no petition for review has been filed can be examined by the circuit court in like manner as a decision of the commission itself on proceedings for review. The Jakub case would, therefore, still seem to be controlling.

DESIGNATION OF PARTIES

The common-law writ of certiorari, being a high prerogative writ, issued only in the name of the sovereign although it was issued at the instance of a proper petitioner.²⁷ For that reason, certiorari proceedings based on the common-law writ are customarily entitled "People ex rel. [petitioner] v. [respondent]." The writ of certiorari most frequently used today, however, is one authorized by some particular statute which usually differentiates from the common-law writ in that it is granted as a matter of right rather than as a matter of grace.²⁸ Such statutes do not usually designate the style of the writ, so there is some cause to wonder if the proceedings thereunder should not be carried on in the fashion heretofore existing. The Workmen's Compensation Act is likewise silent on the point, but clarification has been added, at least in Cook County, by rules of court which direct that "cases arising under the Workmen's Compensation Act shall be entitled and docketed with the employee as plaintiff and the employer as defendant."²⁹

In certain counties of the state, however, the rules of the circuit court are silent on this point and make no provision as

²⁶ Laws 1937, p. 559; Ill. Rev. Stat. 1937, Ch. 48, § 156(f) (1).

²⁷ See 10 Am. Jur., Certiorari, § 2.

²⁸ Compare *Matthiessen v. Ott*, 190 Ill. App. 301 (1914), affirmed in 268 Ill. 569, 109 N. E. 569 (1915), on the right to use the common-law writ, with *Kudla v. Industrial Commission*, 336 Ill. 279, 168 N. E. 298 (1929), which discusses the nature of the statutory writ available in workmen's compensation cases.

²⁹ Circuit Court of Cook County, Rules revised to May 1, 1944, Rule 65. The rule of the Superior Court is identical in number and language.

to how the parties shall be designated. Such is also the case with certain of the city courts. Absence of rules might lead to question as to the correct style of the proceedings there instituted, but it would seem as though such question should be resolved in favor of the view adopted in Cook County particularly since such procedure has been followed in hundreds of cases with no judicial disapproval and there is no express statutory provision requiring a different method.

Docketing the cause in the Circuit Court may also present a problem judging by the factual situation disclosed in *Elles v. Industrial Commission*.³⁰ There, on certiorari proceedings following a decision of the industrial commission, the cause was designated as "Law No. 3967." The circuit court reversed and remanded the case to the commission to hear additional evidence. After hearing additional evidence pursuant to the remanding order, the commission again denied compensation. The claimant took out a second writ of certiorari³¹ and all documents in connection therewith bore the same number, to-wit: "Law No. 3967," that had been used in the first proceeding. Such fact was advanced as one of the grounds for a motion to quash the writ. On this point, the court stated:

It is not disputed that this new decision of the Industrial Commission could be reviewed only by a new and independent writ of certiorari . . . The praecipe was actually filed and the writs of certiorari and scire facias were issued by the clerk . . . nor did the clerk's failure to enter a new case on the docket as provided by Section 16 of the act relating to clerks of courts . . . affect the court's jurisdiction. The requirements are merely directory to the clerks.³²

VENUE

According to the statute, the appropriate court of the county "where any of the parties defendant may be found" is the one possessing jurisdiction from the standpoint of venue.³³ At first glance, it might appear that since the writ of certiorari

³⁰ 375 Ill. 107, 30 N. E. (2d) 615 (1940).

³¹ A new writ was necessary in view of the decision in *Western Shade Cloth Co. v. Industrial Commission*, 325 Ill. 570, 156 N. E. 796 (1927).

³² 375 Ill. 107 at 110, 30 N. E. (2d) 615 at 617.

³³ Ill. Rev. Stat. 1943, Ch. 48, § 156(f) (1).

is addressed to the Industrial Commission, it or the members thereof are the "parties defendant" referred to, hence suit should be brought wherever they might be found. While it is true that the process runs against the commission and it is the decision of that body which is to be subjected to review, still the real persons concerned are the injured claimant and the employer who is sought to be held for the injury. The commission is, therefore, only a nominal party so venue must be selected with reference to the real parties in interest. That, at least, is the holding to be found in *Louisville & Nashville Railroad Company v. Industrial Commission*³⁴ where the court declared:

We are of the opinion that the words, in "the circuit court of the county where any of the parties defendant may be found," do not include members of the Industrial Board, and do not include, for the suing out of the writ in the circuit court, the counties where the members of the Industrial Board may be found. The only parties in interest are the claimant and the employer. To hold otherwise, it seems to us, would result in absurd consequences, which the legislature never intended.³⁵

That view has also been expressed in two later cases.³⁶

If, by chance, the proceedings have been instituted in the wrong county, there is authority, both by statute³⁷ and by judicial precedent,³⁸ to permit the circuit court wherein the proceedings were begun to transfer the cause to the proper county.

PREPARING THE APPEAL

Before the filing of the praecipe in the appropriate circuit court, certain statutory details prescribed by the act must be transacted. The litigant should first order the transcript of the proceedings had before the commission on review, mentioned in paragraph (e) of Section 19 of the act,³⁹ which will

³⁴ 232 Ill. 136, 118 N. E. 483 (1917).

³⁵ 282 Ill. 136 at 140, 118 N. E. 483 at 484-5.

³⁶ *Arcade Mfg. Co. v. Industrial Board of Ill.*, 282 Ill. 27, 118 N. E. 486 (1917); *Central Illinois Public Service Co. v. Industrial Comm'n*, 293 Ill. 62, 127 N. E. 80 (1920).

³⁷ Ill. Rev. Stat. 1943, Ch. 146, § 36.

³⁸ *Central Illinois Public Service Co. v. Industrial Comm'n*, 293 Ill. 62, 127 N. E. 80 (1920).

³⁹ Ill. Rev. Stat. 1943, Ch. 48, § 156(e).

form the basis of the subsequent judicial review, and second, pay the commission the amount of the probable cost of the record as determined by the commission at the time of its decision on review.⁴⁰ At the time of such payment, it is essential that the litigant procure a receipt therefor since such receipt must be exhibited to the clerk before the writ of certiorari issues.⁴¹

A third preliminary detail, in the event review is sought by the party against whom an award for the payment of money has been made by the industrial commission, is to procure the execution of a bond in the amount fixed by the commission which must later be approved by the clerk of the court and filed with him at the time of filing the praecipe.⁴² This phase of the procedure is hereinafter discussed in more detail.⁴³

THE PRAECIPE

The act of filing a praecipe in proper form and within the proper statutory period is the beginning of the proceeding in the circuit court and gives to that court jurisdiction to review the proceedings of the Industrial Commission.⁴⁴ The form of such praecipe is not prescribed by the statute although certain matters which must appear therein are indicated and, as to those, the statutory requirements must be strictly followed. Where printed forms of praecipe are available, such forms may be followed provided care is taken, even though there is no indicated space for such purpose, to see that the names and addresses of the other parties in interest, to be served with scire facias, are contained in the praecipe. In many of the counties, however, no printed forms are provided by the clerk

⁴⁰ Ill. Rev. Stat. 1943, Ch. 48, § 156(f) (1), directs that: "In its decision on review the industrial commission shall determine in each particular case the amount of the probable cost of the record to be filed as a return to the writ of certiorari in that case. . . ."

⁴¹ Ill. Rev. Stat. 1943, Ch. 48, § 156(f) (1), states: ". . . and no praecipe for a writ of certiorari may be filed and no writ of certiorari shall issue unless the party seeking to review the decision . . . shall exhibit to the clerk . . . a receipt showing payment of the sums so determined. . . ."

⁴² Ill. Rev. Stat. 1943, Ch. 48, § 156(f) (2).

⁴³ See note 83, et seq., post.

⁴⁴ See *Oriental Laundry Co. v. Industrial Commission*, 293 Ill. 539, 127 N. E. 676 (1920); *Levy v. Industrial Commission*, 346 Ill. 49, 178 N. E. 370 (1931). Other jurisdictional facts are considered at note 52, et seq., post.

of the circuit court, hence resort to standard collections of forms may become necessary.⁴⁵

When preparing the praecipe, it should be remembered that the statute specifically directs that the praecipe "shall contain the last known addresses of the other parties in interest and their attorneys of record"⁴⁶ so that a writ of scire facias may be served on them. As a consequence, it is necessary that the praecipe shall not only direct the issuance of the writ of certiorari to the Industrial Commission directing it to certify a transcript of its proceedings but should also direct the issuance of all necessary writs of scire facias.

Failure to include in the praecipe the names of all parties in interest may provide grounds for quashing the writ of certiorari, according to the decision in *Matthiessen & Hegeler Zinc Company v. Industrial Commission*.⁴⁷ In that case, a suit for compensation instituted by a widow in her own name, the award had been made to the widow "for the support of herself and said minor children" after suitable amendment of the application had been made to show that the deceased employee left minor dependents. The praecipe did not name the minors or make them parties to the proceeding either personally or by next friend. The action of the circuit court in quashing the writ of certiorari was affirmed when the Illinois Supreme Court noted that:

It is fundamental that the jurisdiction exercised by the circuit courts under the Workmen's Compensation Act is a special statutory one, and the parties seeking a hearing in the circuit court must comply with all the conditions prescribed . . . A praecipe in due form is necessary in order to give the court jurisdiction . . . Here the praecipe in no way mentioned the minor dependents, who, on plaintiff in error's own motion, were made parties to the proceedings before the Industrial Commission. We are not called upon to decide whether they were necessary parties there. That they were parties in interest cannot be doubted . . . By failing to make these minor dependents

⁴⁵ Forms of praecipe, not necessarily approved by the author, may be found in Nichols Illinois Civil Practice (Callaghan & Co., 1942), Vol. 5, § 5598; Wermuth, Illinois Forms and Precedents (The Bobbs-Merrill Co., 1931), 2d Ed., Vol. 2, Form 1482; Edmunds, Illinois Civil Practice Forms (Callaghan & Co., 1933), Vol. 4, No. 1966.

⁴⁶ Ill. Rev. Stat. 1943, Ch. 48, § 156(f)(1).

⁴⁷ 373 Ill. 294, 26 N. E. (2d) 84 (1940).

or their next friend parties to the certiorari proceeding, plaintiff in error did not meet the requirements of the statute.⁴⁸

In a still more recent case, that of *Elles v. Industrial Commission*,⁴⁹ the person seeking the writ was named as executrix rather than as an individual or as a widow. It was argued that such misnomer justified the action of the trial court in quashing the writ, but that judgment was reversed and the writ was held sufficient to warrant a hearing on the merits. The court seems to have based such holding largely upon the fact that the attorney for the employer had stipulated away the right to complain of the error, for the court said:

The record discloses that Orian J. Elles was the sole dependent of the deceased employee. It also shows that, at the suggestion of one of the attorneys for the employer, it was stipulated that notice and demand were duly and properly given, and, in counsel's own language: "We can stipulate that Orian J. Elles is the legal widow of Albert K. Elles and dependent upon him under the provisions of the act." He further stipulated she was the duly qualified and acting executrix and "that it is the same executrix that is the widow." Later he stated: "We have stipulated the dependency of the widow and notice and demand." In view of this, defendants in error were in no position to raise this question for the first time in the circuit court. By entering into this stipulation they must be deemed to have waived the question of whether Orian J. Elles was properly described in the application. The stipulation shows she was regarded as and was in fact the beneficial party, the dependent widow. Since she was the sole dependent no one can be injured if the money is paid to her as executrix. We, therefore, hold this constituted no ground for quashing the writ.⁵⁰

That decision, therefore, cannot be said to conflict with the holding in the *Matthiessen* case, so the rule thereof may apparently still be regarded as the established law of this state.⁵¹

⁴⁸ 373 Ill. 294 at 296, 26 N. E. (2d) 84 at 85.

⁴⁹ 375 Ill. 107, 30 N. E. (2d) 615 (1940).

⁵⁰ 375 Ill. 107 at 111, 30 N. E. (2d) 615 at 617-8

⁵¹ It is understood that in *Jacob v. Industrial Commission*, Ill. Supreme Court, docket No. 28187, September term, 1944, the court denied a petition for writ of error directed toward the action of the Circuit Court of Cook County in quashing a writ of certiorari on motion of defendant based on the ground that the names of the employer and its attorneys were omitted from the *praeiudice* even though they were served with a writ of *scire facias*. No opinion for publication.

PAYMENT OF COSTS

It is contemplated, by the statute, that the Industrial Commission should not be required to respond to the writ of certiorari at its own expense and should be entitled to compensation, at statutory rates, to cover the cost of preparing the record.⁵² For that reason, the statute also directs that no writ shall issue unless the party seeking review exhibits to the clerk of the court a receipt showing payment of the estimated charges.

A failure to present such receipt would seem to warrant sustaining a motion to quash the writ of certiorari inasmuch as the statute speaks in mandatory terms. That view has the support of judicial precedent, for in *Moweauqua Coal Mining & Manufacturing Company v. Industrial Commission*,⁵³ the court affirmed a judgment quashing the writ upon a showing, supported by affidavit, that the amount of the probable costs therein was not paid to the commission until almost three months after the filing of the praecipe. In support of such decision, the court said:

The method of bringing before the circuit court for consideration the record of the Industrial Commission is purely statutory, and the court can obtain jurisdiction of the proceeding only in the manner provided by statute . . . The jurisdiction exercised by the circuit courts under the Workmen's Compensation Act is a special statutory jurisdiction, and the parties seeking a hearing in the circuit court under this statute must comply with all the conditions prescribed. The statute says plainly that no praecipe for a writ of certiorari may be filed and no writ shall issue until the parties seeking the writ shall exhibit to the circuit clerk a receipt showing payment of the amount of the probable cost of the record to be filed as a return to the writ of certiorari. The purpose of the statute is to coerce the payment of an amount sufficient to cover the cost of the record which the Industrial Commission must prepare. The Legislature has seen fit to make the payment of this amount a condition precedent to the issuance of the writ. The language of the statute is plain, and there is no room

⁵² Ill. Rev. Stat. 1943, Ch. 48, § 156(f)(1), states: "The industrial commission shall not be required to certify the record of their proceedings . . . unless the party commencing the proceedings for review . . . shall pay to the commission the sum of fourteen cents per one hundred words of testimony taken before said commission, and eight cents per one hundred words of all other matters contained in such record. . . ." The rates mentioned are less than those permitted other tribunals under more recent statutes. See Ill. Stat. 1943, Ch. 91, § 62c, or Ch. 131½, § 10c, for comparisons.

⁵³ 322 Ill. 403, 153 N. E. 678 (1926).

for construction. The clerk had no authority to issue the writ, and it was properly quashed on motion. Where the facts showing the writ was improperly issued are not apparent from an inspection of the record, the practice in certiorari is to hear extrinsic evidence in support of the motion.⁵⁴

Inability to pay court costs may require the granting of permission to sue *in forma pauperis* in order that justice may not be denied.⁵⁵ Whether that relief extends to cover the cost of procuring the record from the Industrial Commission is a matter of some doubt for there is no precise authority on the subject. The case of *Visioni v. Industrial Commission*⁵⁶ may throw some light on that subject, even though it arises under the Occupational Diseases Act⁵⁷ rather than the Workmen's Compensation Act, for the provisions of the two statutes are identical in this regard. In that case, the employee moved in the circuit court for leave to sue as a poor person simultaneously with the filing of his praecipe for writ of certiorari. That court, on *ex parte* hearing, granted such request and directed the commission to certify a transcript of its proceedings "without exhibiting the receipt showing payment" of the cost of preparing the record. The employer moved to quash the writ on the ground that, among other things, the court did not have jurisdiction because the estimated cost of the record had not been paid and the receipt therefor had not been exhibited at the time the praecipe was filed. The motion was denied and that action was affirmed by the Illinois Supreme Court on the ground that the authority to waive costs given to the court by statute⁵⁸ was not limited to the costs of the court itself but might extend to cover those of the commission also, at least so long as the commission itself did not refuse to respond to the writ.⁵⁹ To the point that production of the receipt was a jurisdictional element essential to support the action, the court stated:

... We do hold that the exhibition to the clerk of the receipt for the

⁵⁴ 322 Ill. 403 at 405, 153 N. E. 678-9.

⁵⁵ Ill. Const. 1870, Art. II, § 19.

⁵⁶ 379 Ill. 608, 42 N. E. (2d) 64 (1942).

⁵⁷ Ill. Rev. Stat. 1943, Ch. 48, § 172.1 et seq.

⁵⁸ Ill. Rev. Stat. 1943, Ch. 33, § 5.

⁵⁹ The court refused to pass on the question as to the right of the court to require the commission to make return without first being paid its charges on the ground such question was not before it: 379 Ill. 608 at 614, 42 N. E. (2d) 64 at 67.

estimated cost of the transcript, at the time the praecipe is filed, is not a jurisdictional requirement which cannot be waived by the court, where an appropriate order is entered under the Costs act permitting the one desiring to have the decision of the Industrial Commission reviewed to "commence and prosecute" his suit as a poor person without exhibiting such receipt or the payment of costs. If no such order is entered the clerk must observe the statute and decline to issue the writ, unless such receipt is exhibited.⁶⁰

It would seem, therefore, that a comparable result should be achieved under the Workmen's Compensation Act.

Ability to waive the costs rests in the court rather than in the clerk, so due regard should be given to the last sentence of the quotation from the *Visioni* case. If no judicial order as to costs is obtained, the clerk has no right to issue the writ without the production of the receipt for the estimated costs of the commission and his improvident act in so doing is open to criticism.⁶¹

The right of the Industrial Commission to charge fees for preparing the record is subject to the qualification that the commission itself may, upon being satisfied that the employee is a poor person, dispense with all charges on condition that the same shall later be deducted from any award that might be recovered.⁶² Certainly, if the commission has entered such an order, it would be required to make return to the writ of certiorari and proof of that fact would make it unnecessary to produce a receipt for estimated costs at the time of filing the praecipe. In the absence of such action on the part of the commission, however, it is extremely doubtful that the court would have power to compel the commission to make return even though it might, on motion for leave to sue as a poor person, absolve the litigant from the necessity of producing such receipt or paying the customary filing fees due the clerk of the court. There is no provision in the Workmen's Compensation Act which goes to that length, nor is there any known provision under any other statute of the state which grants to

⁶⁰ 379 Ill. 608 at 614-5, 42 N. E. (2d) 64 at 67.

⁶¹ *Moweaqua Coal Co. v. Industrial Commission*, 322 Ill. 403, 153 N. E. 678 (1926).

⁶² Ill. Rev. Stat. 1943, Ch. 48, § 156a. There is no comparable provision in the Occupational Diseases Act, hence the Industrial Commission, in *Visioni v. Industrial Commission*, 379 Ill. 608, 42 N. E. (2d) 64 (1942), felt itself constrained to deny the request therein made for leave to proceed as a poor person.

a court the power to abrogate the right of the administrative tribunal to its statutory charges.

Payment of charges due the clerk of the court for docketing the cause is a customary incident to the institution of litigation. Refusal to pay such charges in advance, except where leave is given to sue as a poor person, would justify the clerk in refusing to accept the praecipe or docket the certiorari proceeding.⁶³ The fact that the clerk may see fit to accept the praecipe without payment of his just charges in advance is no ground for quashing the writ, as such matter is not considered to be a jurisdictional element. That point was urged in *Elles v. Industrial Commission*,⁶⁴ but was rejected on the ground that the statute which requires payment of fees in advance was merely directory and the failure of the clerk to demand payment in advance would not prevent the court from obtaining jurisdiction.⁶⁵

AMENDING THE PRAECIPE

Although the Civil Practice Act contains liberal provision for the amendment of pleadings in an action so as to enable a party "to sustain the claim for which it was intended to be brought,"⁶⁶ that statute has no application to proceedings under the Workmen's Compensation Act.⁶⁷ As a consequence, it has been determined that a defective praecipe, once filed, cannot be amended. In *Levy v. Industrial Commission*,⁶⁸ for example, the employer filed a praecipe for a writ of certiorari on July 31, 1930, and on the same day the clerk issued writs, both of certiorari and scire facias, returnable on the third Monday in October, 1930. The statute at that time, since amended,⁶⁹ directed that the

⁶³ Ill. Rev. Stat. 1943, Ch. 53, § 31, declares: "The fees of the clerk of the circuit court . . . shall be paid in advance. . . ."

⁶⁴ 375 Ill. 107, 30 N. E. (2d) 615 (1940).

⁶⁵ See also *Dowie v. Chicago, Waukegan & North Shore Railway Co.*, 214 Ill. 49, 73 N. E. 354 (1905).

⁶⁶ Ill. Rev. Stat. 1943, Ch. 110, § 170.

⁶⁷ *Ibid.*, § 125.

⁶⁸ 346 Ill. 49, 178 N. E. 370 (1931).

⁶⁹ Laws 1933, p. 592. The present provision on this point now reads: ". . . Such writ of certiorari and writ of scire facias shall be issued by the clerk of such court upon praecipe returnable on a designated return day, not less than ten or more than sixty days from the date of issuance thereof. . . ." See Ill. Rev. Stat. 1943, Ch. 48, § 156(f) (1).

writs should be "returnable to the next succeeding term of the circuit court, providing ten days shall intervene from the date of issuance thereof and the first day of the next succeeding term of court."⁷⁰ The first day of the August term of the circuit court, the "next succeeding term," fell more than ten days after the time when the praecipe in question was filed, so the writs should have been made returnable to that term rather than to the October one. The claimant, appearing specially, moved to quash the writ for error in the return date. The employer, with leave of court, filed a cross-motion to amend the praecipe and the writs by substituting the words "August term" in place of the words "October term" wherever the latter words appeared in such documents. Upon subsequent hearing, the trial judge denied such cross-motion on the ground that an amendment could not cure the defect and allowed the motion to quash.

That decision was affirmed by the Illinois Supreme Court, on writ of error, when that court also concluded that amendment of the praecipe could not be permitted. In that regard, the court stated:

The sole question at issue is whether the Statute of Amendments and Jeofails . . . and section 39 of the Practice Act . . . gave the circuit court the power to amend the defective praecipe and the writs of certiorari and scire facias.

This court has held that a summons returnable to the wrong term is a nullity and will not authorize a judgment . . . While circuit courts are courts of general jurisdiction, their powers are limited by the language of the statute when they exercise a special jurisdiction derived solely from the statute. The writ of certiorari, by which the circuit court is given power to review the award of the Industrial Commission in compensation cases, is wholly statutory, and the authority of the court to make any order must be found in the statute . . . In reviewing decisions of the Industrial Commission, the writ of certiorari is not the common law writ, but is a statutory writ, and the circuit court has only such powers as the statute confers . . . In compensation cases the circuit court can only look to the provisions of the Workmen's Compensation Act to determine whether it has jurisdiction of the persons of the litigants. When a review on a writ of certiorari is sought, jurisdiction over the person is accomplished

⁷⁰ Smith-Hurd Ill. Anno. Stats., Ch. 48, § 156(f)(1), sets forth the text of the 1925 amendment which first imposed a time limitation on the return. Prior to that time, the statute was silent on this point.

when the case sought to be reviewed is laid to the proper term. Here the August and September terms intervened between the issuance of the writs and the October term, to which they were made returnable, and ten days intervened between the date the writs were issued and the first day of the August term. The writs were therefore a nullity and failed to confer that jurisdiction of the persons of the litigants which would authorize the court to allow an amendment at the October term.⁷¹

A subsequent change in the statute, undoubtedly made necessary in order to assimilate the practice somewhat with that followed in case of return of ordinary process,⁷² now directs that the writs of certiorari and scire facias shall be returnable "on a designated return day not less than ten or more than sixty days from the date of the issuance thereof."⁷³ The identical problem of the Levy case is not, therefore, likely to arise again, but as definite limits are still set upon the process issued it would still seem that substantial defects in the praecipe growing out of failure to comply with statutory requirements would prevent the court from acquiring jurisdiction either over the subject matter or over the person and would provide sufficient ground for dismissing the proceeding on motion made under special or limited appearance.

The holding in *Elles v. Industrial Commission*⁷⁴ does not contradict this view though it does throw more light on the return day which should appear in the praecipe and the writs issued thereunder. The writs therein were made returnable on August 10, 1937, which date was within the proper statutory time period fixed by the amended statute but which date fell on a Tuesday. One ground urged under a special appearance and motion to quash the writs was that the same were not returnable on the first or third Monday in the month as is necessary in the case of other ordinary process.⁷⁵ The petitioner sought leave to amend by changing the return date, but this was denied and the writ was quashed by the trial court.

When the case reached the Illinois Supreme Court on writ of error, that court reversed the decision of the trial court,

⁷¹ 346 Ill. 49 at 51-2, 178 N. E. 370 at 371.

⁷² Ill. Rev. Stat. 1943, Ch. 110, § 259.4.

⁷³ Ill. Rev. Stat. 1943, Ch. 48, § 156(f)(1).

⁷⁴ 375 Ill. 107, 30 N. E. (2d) 615 (1940).

⁷⁵ Ill. Rev. Stat. 1943, Ch. 110, § 259.4.

not because amendment should have been permitted but rather because amendment was unnecessary. It noted that the problem involved the question as to whether the Civil Practice Act provisions, and the rules thereunder, applied to process issued in workmen's compensation cases, but decided that such was not the case by reason of the exception created by Section 1 thereof.⁷⁶ That exception was not deemed in any way affected by Rule 2 of the Illinois Supreme Court⁷⁷ which purports to make the provisions of the Civil Practice Act apply where the separate statutes governing particular statutory actions are silent on procedural questions. When concluding that the return date in the writs in question was properly fixed, the court said:

Thus, it is apparent that the provisions of the Civil Practice act and rules of this court do not apply to cases arising under the Workmen's Compensation act, in so far as or to the extent that the procedure is regulated by section 19 of the Workmen's Compensation act . . . There would be no justification for our reading into this statute that part of rule No. 4 concerning return days. Nor is there any reason to invoke rule No. 2 of this court, that the Civil Practice act shall apply to matters of procedure not regulated by separate statutes. The matter of when the writs of certiorari and scire facias are returnable is regulated by the Workmen's Compensation act. In such case, that same rule provides the provisions of the separate statute shall apply. To uphold defendants in error's contention would be to read into the statute an additional element not found therein.⁷⁸

The distinction between the Levy case and the Elles case, therefore, lies in the fact that in the former case the writs were not returnable in the fashion directed by the Workmen's Compensation Act while, in the latter, they did not comply with the Civil Practice Act though they did measure up to the requirements of the statute under which they were issued. Since the practice statute was deemed inapplicable,⁷⁹ the result achieved in the Elles case was both proper and consistent with the earlier holding. It may be concluded, then, that the

⁷⁶ *Ibid.*, § 125.

⁷⁷ *Ibid.*, § 259.2.

⁷⁸ 375 Ill. 107 at 113, 30 N. E. (2d) 615 at 618.

⁷⁹ In *Village of Glencoe v. Industrial Commission*, 354 Ill. 190 at 193, 188 N. E. 329 at 331 (1933), the court had noted that the provisions of the Civil Practice Act granting municipalities exemption from the requirement of bond had no application to workmen's compensation cases.

praecipe must be drafted with care since no amendment thereof, after filing, will be permitted.

ALIAS WRITS

If, for any reason, service of the writs of certiorari or scire facias cannot be had within the time fixed for their return, a question could well arise as to whether alias writs might be issued in view of the fact that the Workmen's Compensation Act is silent on this point. Such alias writs would clearly be invalid if based on an insufficient praecipe for the court has acquired no jurisdiction of any kind upon the filing of that worthless document. When a valid praecipe has been filed in apt time, though, the court has obtained jurisdiction over the subject matter hence should be in a position to complete its authority by obtaining jurisdiction over the persons concerned. If that cannot be done by the original writs, then the court would be powerless if it lacked the ability to issue as many alias or pluries writs as might be necessary until personal jurisdiction was secured.

That problem was, in fact, presented in *Oriental Laundry Company v. Industrial Commission*⁸⁰ wherein the original counsel for the petitioner seeking certiorari had caused writs of certiorari and scire facias to be promptly issued on a proper praecipe but had inadvertently failed to deliver the same to the sheriff for service and the original writs had become lost. Almost a year later, substituted counsel for petitioner made affidavit as to these facts and asked the court to order that alias writs should issue. Such order was entered, but on special appearance the respondent questioned the jurisdiction of the court on the ground that the Workmen's Compensation Act gave no authority for such action. The Illinois Supreme Court upheld the action of the trial court and stated:

To hold that the circuit court had no authority to enter an order directing alias writs of certiorari and scire facias when there was a praecipe on file, and in view of the proof of loss of the previous papers, would, in our judgment, be contrary to the intention of the Legislature and the purposes and wording of the act. The conclusion

⁸⁰ 293 Ill. 539, 127 N. E. 676 (1920).

follows that the circuit court did not err in holding that it had jurisdiction under the alias writ.⁸¹

Service of process on the respondents within the statutory period does not, therefore, become essential to proper commencement of the proceedings for review as the court would acquire jurisdiction over the cause immediately upon the filing of a proper praecipe.⁸² Resort to alias writs, if necessary, may be taken to perfect the jurisdiction thus acquired.

THE BOND

The Workmen's Compensation Act directs that no writ of certiorari shall issue "unless the one against whom the industrial commission shall have rendered an award for the payment of money" shall file, with his praecipe, a bond conditioned that if he shall not successfully prosecute the writ he will pay "the award and the costs of the proceedings in said court."⁸³ The amount of such bond is to be fixed by any member of the commission, but the surety is to be approved by the clerk of the court.

The legislative purpose of requiring bond only from the one against whom an award for the payment of money has been made is best illustrated by a quotation from the decision in *Nierman v. Industrial Commission*.⁸⁴ The court there stated:

The bond which the employer is required to give before he is permitted to prosecute a writ of certiorari from the circuit court to review an award makes unnecessary the rendition by the circuit court of a judgment for the payment of money in case the decision of the Industrial Commission is confirmed . . . If every award of compensation confirmed by the circuit court upon review necessarily resulted in a judgment subjecting the employer's property to a lien for the payment of the award, the number of such liens would not only be considerable, but the liens might continue for many years, and the employer's property, particularly his real estate, would be rendered

⁸¹ 293 Ill. 539 at 544, 127 N. E. 676 at 677-8. The court noted that while *Fruit v. Industrial Board*, 284 Ill. 154, 119 N. E. 931 (1918), was not directly in point, it justified a fair inference that alias writs would be authorized under the statute where the original praecipe was filed in apt time if the original process was not served since this "necessitated the issuance of the alias writ."

⁸² On this point generally, see *Schroeder v. Mer. & Mechanics' Ins. Co.*, 104 Ill. 71 at 74-5 (1882).

⁸³ Ill. Rev. Stat. 1943, Ch. 48, § 156(f)(2).

⁸⁴ 329 Ill. 623, 161 N. E. 115 (1928).

unmarketable. The employer has the right, by giving the required bond, to avoid such a judgment and consequent lien . . . The legislative intention is that the employee shall be protected by the bond.⁸⁵

In case review were sought by the disappointed claimant for compensation, no such bond would be needed, hence the legislature has not required that bond be filed by every person seeking review of the action of the Industrial Commission.

Where bond is necessary, however, the statutory requirement becomes an element necessary to proper institution of the proceedings, is jurisdictional in effect, and non-compliance therewith would warrant dismissing the proceedings. So important, in fact, is the requirement that the bond not only be filed but that the sureties thereon be approved by the clerk that omission on the latter point cannot later be rectified by a *nunc pro tunc* order. The record must, to support review, be complete in all respects before jurisdiction exists.

The leading case on that point is that of *Village of Glencoe v. Industrial Commission*⁸⁶ wherein praecipe and bond were filed on December 31, 1931. Several months later, the claimant moved to quash the writ of certiorari on the ground that the sureties on the bond had not been approved by the clerk when the bond was filed. A cross-motion was interposed by the employer seeking an order of court, to be entered *nunc pro tunc* as of December 31, 1931, directing the clerk to affix his signature as approving the bond on that date. That motion was supported by an affidavit of the deputy clerk stating that he did, in fact, approve the bond at the time when it was first presented but had omitted to indorse the clerk's approval thereon. The cross-motion was granted by the trial court although it affirmed the award on the merits of the case. On writ of error to the Illinois Supreme Court, the claimant contended that the trial court was without jurisdiction to enter any order other than one quashing the writ, to which the employer replied that (1) bond was not required of municipal employers,⁸⁷ or (2), if required, it had been approved,

⁸⁵ 329 Ill. 623 at 626, 161 N. E. 115 at 116.

⁸⁶ 354 Ill. 190, 188 N. E. 329 (1933).

⁸⁷ That contention was based on the claim that the exemption of the Civil Practice Act, Ill. Rev. Stat. 1943, Ch. 110, § 206(3), applied to proceedings under the compensation act. The court held it did not. The compensation act was subsequently amended on this point; see note 93, post.

and (3) the error was waived by claimant's general appearance in the cause.

With respect to the second contention, i. e. that the bond was, in fact, approved, the court distinguished the situation before it from that presented in the *Moweauqua* case,⁸⁸ and said:

To confer jurisdiction on the court under the Workmen's Compensation Act it is necessary to make a record in compliance with that act. Here the record shows no approval of the bond. So far as appears from the record this jurisdictional requirement was not met when the bond and praecipe were filed. In that condition of the record the court did not obtain jurisdiction and the writ of certiorari should not have been issued. The praecipe and bond were filed December 31, 1931. The motion for an order *nunc pro tunc* directing the clerk to affix his name to the bond was not made until October 24, 1932, long after the twenty days given the employer to complete his application for writ of certiorari had expired. During all that time the court had before it a record showing no jurisdiction of the subject matter, and, of course, could not by a *nunc pro tunc* order confer jurisdiction of the subject matter on itself. Neither could an affidavit be made effective for such purpose. It has long been the rule that court records may not be amended by affidavit as here attempted. Such records import verity . . . We are of the opinion, therefore, that the court did not obtain jurisdiction of the subject matter by the filing of a praecipe for certiorari and a bond which, so far as the record shows, was not approved. The question whether a court has jurisdiction of the subject matter is one always open, and the court may of its own motion dismiss the proceeding where want of such jurisdiction appears.⁸⁹

To the argument that formal insufficiencies in the appeal bond were not sufficient to prevent jurisdiction from attaching to the reviewing court, the higher court said:

Such is not the rule, however, where jurisdiction of the subject-matter depends on compliance with the statute. In the case before us the question of jurisdiction of the court to review the award of the commission is, as we have said, wholly statutory, and in the absence of complete compliance with the act jurisdiction of the subject-matter is not obtained.⁹⁰

Clearly, then, the provisions of the statute relative to filing

⁸⁸ *Moweauqua Coal Mining & Mfg. Co. v. Industrial Commission*, 322 Ill. 403, 153 N. E. 678 (1926). The point there involved is discussed above. See footnote 53, ante.

⁸⁹ 354 Ill. 190 at 195-6, 188 N. E. 329 at 332.

⁹⁰ 354 Ill. 190 at 196, 188 N. E. 329 at 332.

a bond in the amount fixed by the Industrial Commission become jurisdictional requirements and the clerk of the court is not only without authority to issue a writ of certiorari until such bond is filed and approved but should not be compelled to do so by writ of mandamus. Moreover, the person seeking review should be sure to ascertain that formal approval of the bond is suitably endorsed thereon at the time of its filing so that the record will be complete in this respect.

Financial inability to secure the necessary bond affords no legal excuse for failure to comply with statutory requirements, nor can it be urged that inability to provide bond would deprive the employer of his constitutional right to seek judicial review of an award unless some other avenue were open to him. Such was the problem posed in *People ex rel. Radium Dial Company v. Ryan*,⁹¹ a case growing out of the Occupational Diseases Act, wherein the employer sought review of an award which was claimed to be wholly void.⁹² According to the facts therein, the claimant had secured an award and the commission had fixed the amount of the bond to be filed in certiorari proceedings at \$10,000. The employer paid the costs of the transcript and filed the necessary praecipe but did not offer any bond. The clerk, upon failure to present bond, refused to issue the writs of certiorari and scire facias. The employer then petitioned the circuit court to order the clerk to accept the record and issue such writs without the giving of bond as required by the statute. Such petition was denied. Original proceedings for mandamus were then instituted in the Illinois Supreme Court by the employer predicated on the ground that it was unable to secure a bond with surety and that to refuse to review a void award unless bond was given was tantamount to depriving the employer of due process of law.

Mandamus was denied when the Illinois Supreme Court determined that no violation of constitutional rights had occurred for the court indicated that the case was not one in which no judicial review was provided for but rather one in

⁹¹ 371 Ill. 597, 21 N. E. (2d) 749 (1939).

⁹² The invalidity of the award was said to lie in the fact that the employment had terminated in 1931 and the finding of the commission was that disability arose in 1934, long after the termination of employment.

which such review was permitted only upon terms imposed by the legislature. If those terms were not clearly unreasonable, then review was possible only in the manner fixed by the statute. The court found that a requirement of bond as a condition precedent to review was not unreasonable, so concluded that the employer had not established a clear legal right to require the granting of mandamus. As the legality of the proceedings before the commission could have been reviewed in the manner provided by the statute had bond been given, the court decided that the fact such proceedings were void was no reason to change the legislative requirement of a bond as a condition precedent to the issuance of the writ of certiorari.

Subsequent to the decision in the Village of Glencoe case, and apparently with an eye to adopting one of the arguments advanced by the municipality therein, the legislature inserted an additional provision into the Workmen's Compensation Act which reads as follows:

The State and every county, city, town, township, incorporated village, school district, body politic or municipal corporation having a population of five hundred thousand or more against whom the industrial commission shall have rendered an award for the payment of money shall not be required to file a bond to secure the payment of said award and the costs of the proceeding in said court to authorize said court to issue such writ of certiorari.⁹³

Inherent in such additional provision was a problem as to whether the population limitation there fixed applied to counties as well as the lesser political subdivisions or related only to the latter.

That problem was resolved in the case of *County of St. Clair v. Industrial Commission*⁹⁴ in which the commission made an award against the employer and fixed bond in the amount of \$1,500. The employer, County of St. Clair, filed a praecipe and exhibited a receipt showing payment of the probable cost of the record but did not furnish any bond. Motion was subsequently made by the employee to quash the writs of certiorari and scire facias because of the county's failure to comply with the statutory requirement concerning bond. The employer contended that no bond was necessary

⁹³ Laws 1935, p. 866; Ill. Rev. Stat. 1943, Ch. 48, § 156(f) (2).

⁹⁴ 380 Ill. 376, 44 N. E. (2d) 30 (1942).

because, being a county, it had the benefit of the statutory exception even though its total population was less than 500,000. The writs were quashed in the trial court and that decision was affirmed by the Illinois Supreme Court. That court noted the change in the statute since its decision in the Village of Glencoe case, but stated the problem before it to be one of construction of said amendment. It said:

... we are asked to construe the second paragraph as though it read: The State and every county, and every city, etc., having a population of 500,000 or more shall not be required to file a bond. In order for us to so hold it would be necessary for us to construe this statute as though a county was in a different classification than a city, town or township . . . There is nothing in the amendment that is ambiguous or obscure. Two types of public corporations are exempted from filing bonds—first, the State; second, every county, city, township, incorporated village, school district, body politic, or municipal corporation having a population of 500,000 or more. In the ordinary use of the English language there is no possibility in creating three classifications, viz.—first, the State; second, the county; and third, political subdivisions having 500,000 or more. We take judicial notice of the fact that St. Clair county does not have more than 500,000 population, and therefore under the statute as it exists it would have required the filing of a bond in the amount fixed by the Industrial Commission to give the circuit court of St. Clair county jurisdiction.⁹⁵

Bond is still required, therefore, in the case of most municipal or political employers.

THE RECORD

It is provided, in the final sentence of sub-section (e) of Section 19 of the Workmen's Compensation Act, that:

The applications for adjustment of claim and other documents in the nature of pleadings filed by either party, together with the decisions of the arbitrator and of the industrial commission and the statement of facts or transcripts of evidence hereinbefore provided in paragraphs (b) and (c) shall be the record of the proceedings of said commission, and shall be subject to review as hereinafter provided.⁹⁶

⁹⁵ 380 Ill. 376 at 379, 44 N. E. (2d) 30 at 31.

⁹⁶ Ill. Rev. Stat. 1943, Ch. 48, § 156(e). Attention is called to an error in the quoted sentence. Paragraphs "(b) and (c)" should be paragraphs "(b) and (e)," inasmuch as no mention is made of any statement of facts or transcript of evidence in paragraph "(c)." Obviously, paragraph (e) was meant by the framers because it is in such paragraph that provision is made for a statement of facts or transcript of the proceedings had on review. Nevertheless, the indicated error appears in the printed copies of the act distributed by the Industrial Commission and also in the various editions of the statutes.

The record compiled by the Industrial Commission in conformity with the foregoing statutory provision is the record to be prepared and certified by it to the circuit court as its return to the writ of certiorari. Hearing in the circuit court will, of course, be confined to such record for that court has no authority to try the case *de novo* or even to hear any additional evidence.⁹⁷

The record of the Industrial Commission, being a public record, imports verity and is presumed to speak the truth. The reviewing court must, then, act upon the transcript of the record as certified.⁹⁸ If the record should fail to speak the truth it is not competent for the circuit court to alter the record although it has power to authorize the withdrawal thereof so that additions or corrections might be made therein. In that regard; the Illinois Supreme Court has held that no consideration should be given to an evidentiary exhibit omitted from the record filed in the circuit court even though supplied to the court by the parties, and they have refused to consider such an exhibit when it was sent up to the higher court by stipulation of the parties.⁹⁹ All such errors and omissions in the record must, therefore, be remedied by the Industrial Commission before the case is submitted to the circuit court for decision.

As the entire record is brought up for review on certiorari, there is no occasion for any "cross-writ of certiorari" in workmen's compensation cases as would be necessary in the case of review of ordinary civil causes.¹⁰⁰ The other party may, therefore, preserve his right to raise any question based on the record or in the decision being reviewed without the

⁹⁷ Ill. Rev. Stat. 1943, Ch. 48, § 156(f) (1) and (2). See also *Plano Foundry Co. v. Industrial Commission*, 356 Ill. 186, 190 N. E. 255 (1934); *Merritt v. Industrial Commission*, 322 Ill. 160, 152 N. E. 505 (1926).

⁹⁸ The same rule applies in case writ of error is issued to the circuit court, for the record on review is the sole, conclusive and unimpeachable evidence of the proceedings: *Village of Glencoe v. Industrial Commission*, 354 Ill. 190, 188 N. E. 329 (1933); *Strebing v. Industrial Commission*, 351 Ill. 627, 184 N. E. 886 (1933).

⁹⁹ *Lawrence Ice Cream Co. v. Industrial Commission*, 298 Ill. 175, 131 N. E. 369 (1921); *Lumbermen's Casualty Co. v. Industrial Commission*, 303 Ill. 364, 135 N. E. 756 (1922).

¹⁰⁰ As to the necessity for notice of cross appeal in ordinary civil cases, see Ill. Rev. Stat. 1943, Ch. 110, § 203 and § 259.35.

necessity of seeking a cross-writ of certiorari, or being obliged to request an independent writ in his own right.¹⁰¹

When the steps herein mentioned have been correctly taken, the decision of the Industrial Commission is ready for judicial review, but the scope and extent of that review must be left for treatment at another time.

*(To be continued)**

¹⁰¹ Murrelle v. Industrial Commission, 382 Ill. 128, 46 N. E. (2d) 1007 (1943).

* The balance of this article will appear in the September issue.

JUDICIAL REVIEW OF ADOPTION DECREES

William F. Zacharias*

NO SMALL amount of discussion has been evoked by the recent decision of the Illinois Supreme Court in the case of *Ekendahl v. Svolos*¹ wherein a petition was filed in the appropriate County Court praying for a decree of adoption on the ground that the minor child therein named had been abandoned and deserted. The natural parents were made parties defendant and were duly served. The natural mother answered the petition and contested the allegations and the prayer thereof but, after hearing, an order of adoption was entered. Appeal was taken from that order, by the natural mother, to the Appellate Court for the First District. The petitioners moved to dismiss such appeal on the ground that there was no authority in law for either appeal or writ of error in adoption cases. That court denied such motion, considered the appeal on the merits and reversed the decree of adoption.² Leave to appeal having been granted, the Illinois Supreme Court reversed that decision on the same ground as that suggested in petitioner's motion to dismiss.

Earlier decisions in Illinois on the point bear out this view,³ but they rested on the fact that, at the outset, the natural parents were not parties to the adoption proceedings, or, when made parties by statutory mandate,⁴ that the proceeding was not a "case" according to the common law, hence any semblance of judicial review was possible only through

* Professor of Law, Chicago-Kent College of Law.

¹ 388 Ill. 412, 58 N. E. (2d) 585 (1945), reversing *In re Petition of Ekendahl*, 321 Ill. App. 457, 53 N. E. (2d) 302 (1944), noted in 39 Ill. L. Rev. 88.

² 321 Ill. App. 457, 53 N. E. (2d) 302 (1944). The court held that inadvertent use of an appeal instead of a writ of error would not defeat jurisdiction in view of Rule 28 of the Illinois Supreme Court: Ill. Rev. Stat. 1943, Ch. 110, § 259.28.

³ The rule was first laid down in *Meyers v. Meyers*, 32 Ill. App. 189 (1889), on analogy with cases involving the appointment of a guardian for a minor, c.f. *Cramer v. Forbis*, 31 Ill. App. 259 (1889), and a finding of insanity, c.f. *People ex rel. Fullerton v. Gilbert*, 115 Ill. 59, 3 N. E. 744 (1885). Subsequent cases in accord are: *In re Warner's Petition*, 193 Ill. App. 382 (1915); *Holman v. Brown*, 215 Ill. App. 247 (1919), where writ of error was held improper; *Dixon v. Haslett*, 232 Ill. App. 152 (1924). Appeal from an order denying a petition to vacate a decree of adoption was dismissed in *Moore v. Brandt*, 234 Ill. App. 306 (1924).

⁴ Statutory requirement that the parents be made parties was first added in 1907. See Laws 1907, p. 3.

habeas corpus.⁵ The unfortunate result of such holdings was that the natural parent could assert a right to custody of the adopted child only if it could be shown that the court in which adoption was decreed was entirely lacking in jurisdiction so as to make the decree a nullity.⁶ If jurisdiction was present but the order was based on an erroneous finding, no review was available.⁷

Support for so narrow a view was said to rest in the fact that adoption proceedings were unknown to the common law, did not belong to the general jurisdiction of county courts, and existed, if at all, only by reason of special statutes establishing a special and summary manner of procedure.⁸ Unless appeal was expressly provided for therein, no review in that fashion was deemed possible.

While it is no doubt true that adoption proceedings are purely the creature of statute and formed no part of the common law,⁹ it was thought that a way for obtaining appellate review of adoption decrees had been opened by the holding of the Illinois Supreme Court in the recent case of *Superior Coal Company v. O'Brien*.¹⁰ That case declared that review of purely statutory proceedings was possible by writ of error where no other method of review was provided and the use of writ of error was not expressly forbidden, since the last named form of review was said to be a matter of right.

Application of that rule to the instant problem was rejected, in the *Ekendahl* case, on the ground that such a writ may only be used where (1) some property right is affected, or (2) personal liberty is involved. No question over the per-

⁵ *Sullivan v. People*, 224 Ill. 468, 79 N. E. 695 (1906).

⁶ In *People ex rel. Witton v. Harriss*, 307 Ill. App. 283, 30 N. E. (2d) 169 (1940), the court said: "... the sole inquiry to be made ... is whether the county court had jurisdiction to render the order. ..."

⁷ The Appellate Court, in *People ex rel. O'Connor v. Cole*, 238 Ill. App. 413 at 423 (1925), made a trenchant comment on this point when it stated: "It is hardly to be thought that the legislature would provide a procedure by which, without the right of trial by jury and without the right to a review of the evidence by a higher court, a parent could, as against his will, have his child taken from him and given to another." The comment appears to have passed unnoticed.

⁸ In *re Warner's Petition*, 193 Ill. App. 382 (1915), elaborates on this point.

⁹ An ancient and curious case, which might indicate that the contrary is true, is discussed at length in *Zane, A Mediaeval Cause Celebre*, 1 Ill. L. Rev. 363 (1907).

¹⁰ 383 Ill. 394, 50 N. E. (2d) 453 (1943), noted in 23 CHICAGO-KENT LAW REVIEW 33.

sonal liberty of the natural parent is concerned in an adoption proceeding, hence the writ could not be sought by the parent on that ground. Whether or not some property interest is involved is, however, a debatable question. On that score, the Illinois Supreme Court flatly rejected any such possibility by saying: "There is nothing in the nature of the right which natural parents have in their children and to their custody that will support a review of an adoption proceeding by writ of error."¹¹ Mere contingent possibilities that property rights might be affected were said to be insufficient to justify the use of such a writ. In that regard, it might be said that in *Holman v. Brown*¹² a writ of error was dismissed because no contention had been made that any property right had been affected by the decree of adoption. Attempt was subsequently made, in *Dixon v. Haslett*¹³ to distinguish the case from the *Holman* decision on the ground that property rights were there involved. On this point the court said: "The foundation of the argument that property rights are involved is that the children will inherit from their adoptive parents and their adoptive parents will inherit from them."¹⁴ That argument was refuted by the court when it found that no present property right was concerned since the heir apparent might not live to inherit, or, living to the time to inherit, might be cut off by will.

The only other possibility that a "property" right might be affected by the adoption proceeding would seem to lie in the fact that a parent, if entitled to custody, is entitled to the child's earnings and, in case injury is done to the child affecting that earning capacity, to a cause of action in his own right against the wrongdoer to recover damages.¹⁵ True, in the case of most minors, such right is more nebulous than real, but it must be a right *in esse* to ripen into a cause of action if invaded. Such interests, while not encompassed within any narrow definition of property, could have satisfied the requirement that some property right be affected so as to warrant

¹¹ 388 Ill. 412 at 415, 58 N. E. (2d) 585 at 587.

¹² 215 Ill. App. 257 (1919).

¹³ 232 Ill. App. 152 (1924).

¹⁴ 232 Ill. App. 152 at 154-5.

¹⁵ *Kerr v. Forgue*, 54 Ill. 482 (1870).

the use of a writ of error had the Illinois Supreme Court seen fit to give liberal treatment to the problem before it in the Ekendahl case.¹⁶ The narrow attitude displayed, probably out of respect to the idea that statutes in derogation of the common law are to be confined as much as possible, is, however, in direct contrast to the liberality usually displayed by that court in cases affecting the welfare of children.

Whatever the reason may be, judicial review of adoption proceedings in this state can now only be obtained if the legislature sees fit to amend the present statute.¹⁷ Mere deletion of the restriction therein against reliance upon the appellate provisions of the Civil Practice Act will not accomplish the purpose of providing adequate review of adoption decrees. If, therefore, the legislature is concerned in remedying what would appear to anyone to be an obvious defect in the law, serious consideration should be given to the problem as well as to proposals already made for its rectification.¹⁸ Some form of statute ought to be adopted for it is unthinkable, in this day and age, that a parent, no matter how callous, should be deprived of the custody of his child and his parental ties destroyed, without relief from his parental obligations,¹⁹ unless some review before a higher court of the evidence supporting such action is granted.

Before considering the specific proposals pending in the Illinois legislature, it might prove worthwhile to examine the state of the law as it exists in the other American jurisdic-

¹⁶ Illustrative of the liberal treatment accorded in some states is the case of Appeal of Cummings, 126 Me. 111, 136 A. 662 (1927), where statutory review, granted to a "person aggrieved," was permitted to the natural parent, although such parent was said not to have any tangible, valuable or enforceable property rights, because the decree deprived the parent of the status of heir presumptive of the child being adopted which was treated as enough of an interest to support proceedings to review.

¹⁷ Ill. Rev. Stat. 1943, Ch. 4, § 13, currently declares that the provisions of the Civil Act shall apply to adoption proceedings "except as to any provision for appeal and except as otherwise provided in this Act."

¹⁸ Following the decision in the Ekendahl case, measures were introduced in the 64th General Assembly by Representative Edwards, H. B. 219 and H. B. 220; by Senator Daley, S. B. 207; and by Senator Baker, S. B. 226. A companion bill to S. B. 226 was introduced in the House by Representatives O'Grady and Stransky: See H. B. 356. They will be discussed at greater length hereafter in this article. The proposals of Representative Edwards have passed the House, and are pending in the Senate Committee on Judiciary at the time of writing, while the Senate bills have not yet been enacted by that body.

¹⁹ See note to Dwyer v. Dwyer, 366 Ill. 630, 10 N. E. (2d) 344 (1937), in 16 CHICAGO-KENT REVIEW 198.

tions. As late as 1936, an eminent compiler of American statutes dealing with the family relationship, when writing on this point, stated: "The statutes of ten jurisdictions expressly provide for an appeal. Where such provisions are not found, an appeal may no doubt be taken, ordinarily, under general statutes."²⁰ Since that time, nine other states have enacted statutory provisions, to a total of nineteen,²¹ but the diversity in the language thereof is noteworthy. The suggestion that reliance may be placed on general statutes covering appeals in other civil causes, however, does not appear to be generally supported by decisions for in those states without express statutory enactment only three have recognized a clear right to some form of review,²² three others have seemingly permitted review without inquiry over the point,²³ while four others, including Illinois, have flatly rejected the possibility.²⁴ The remaining twenty states and the District of Columbia have neither statute nor judicial decision bearing on the point.

When analysis is made of the existing statutes, it would

²⁰ Vernier, *American Family Laws*, Vol. IV, p. 297.

²¹ The most recent check discloses statutes in the following jurisdictions: Arizona, Code Anno. 1939, Vol. II, Ch. 27, § 27-209; Florida, Laws 1943, Vol. I, p. 187, § 17; Kansas, G. S. 1943 Supp., Probate Code, Art. 59-2401; Kentucky, Rev. Stat. 1944, p. 2762, § 405.220; Louisiana, Dart La. Gen. Stat. 1939, Vol. III, § 4839.37; Maine, Rev. Stat. 1930, Ch. 80, § 39; Massachusetts, Ann. Laws., Vol. VI, Ch. 210, § 11; Missouri, Rev. Stat. 1939, Vol. II, § 9611; Montana, Laws 1941, p. 187, amending Rev. Code 1935, Vol. III, Ch. 9, § 5859; Nebraska, Rev. Stat. 1943, Vol. III, § 43-112; North Carolina, Gen. Stat. 1943, Vol. II, § 48-5; Oregon, Comp. Laws Ann., Vol. V, § 63-409; Rhode Island, Gen. Laws 1938, Ch. 420, § 8, supplemented by Acts and Resolves, 1940, p. 608; South Carolina, Code 1942, Vol. I, § 255(20); South Dakota, Code 1939, Vol. I, § 14.0405, and Vol. II, § 35.2102; Vermont, Pub. Laws 1933, § 3334; Washington, Laws 1934, Ch. 268, § 11, p. 831; West Virginia, Code 1943, § 4760; Wisconsin, Stats. 1943, § 324.01 and § 324.02.

²² Arkansas permits appeal by one who is a party to the proceeding: *Fries v. Phillips*, 189 Ark. 712, 74 S. W. (2d) 961 (1934), but denies it to one not a party: *Deffenbaugh v. Roden*, 182 Ark. 348, 31 S. W. (2d) 406 (1930). Limited review by certiorari is permitted in North Dakota: *Nelson v. Ecklund*, 68 N. D. 724, 283 N. W. 273 (1938), but an appeal was dismissed on the court's own motion in *In re Mair*, 61 N. D. 256, 237 N. W. 756 (1931). In Pennsylvania, review to the extent possible under certiorari was permitted in *Appeal of Weinbach*, 316 Pa. 333, 175 A. 500 (1934). See also *In re Young*, 259 Pa. 573, 103 A. 344 (1918).

²³ *Criswell v. Jones*, 3 S. E. (2d) (Ga. App.) 115 (1939); *Vaughan v. Hubbard*, 38 Ida. 451, 221 P. 1107 (1923); *Waller v. Ellis*, 169 Md. 15, 179 A. 289 (1935).

²⁴ *In re Palmer's Adoption*, 129 Fla. 630, 196 So. 537 (1937); *Leonard v. Honisfarger*, 43 Ind. App. 607, 88 N. E. 91 (1909), followed in *Shirley v. Grove*, 51 Ind. App. 17, 93 N. E. 874 (1912), and *Freeland v. Weed*, 75 Ind. App. 273, 128 N. E. 656 (1920); *In re Hughes*, 88 Okla. 257, 213 P. 79 (1923). The effect of the Florida decision was subsequently nullified by Fla. Laws 1943, Vol. I, p. 187, § 17. The Oklahoma case cited indicated that adoption, in that state, was essentially a matter of contract rather than a judicial proceeding although it required the sanction of a judicial officer for its consummation. The court therein also suggested that California might be in the same category. The Illinois cases are listed in footnotes 1 and 3, ante.

seem that in no single instance has the problem of the right of appeal been thoroughly examined. In some, careful attention has been given to one or more of the following subordinate elements, to-wit: (1) who should be permitted to appeal, (2) when and how appeal should be taken, (3) should an appeal bond be necessary, (4) ought costs for an unsuccessful appeal be imposed, (5) should the appeal be limited to cases where a decree of adoption has been entered and denied in case the petition to adopt is rejected, (6) ought appeal be permitted in case the adoption decree is subsequently vacated on petition, and (7) what disposition should be made of the custody of the minor pending appeal; but no one measure encompasses all points. A comparison of the several statutes, with critical comment on their provisions, should possess some value.

With respect to the first point, i. e. who should be entitled to appeal, the widest dissimilarity is present. Under the Kansas statute, for example, the right of appeal is assimilated to appeals in other civil cases,²⁵ while in Arizona a broad class of persons entitled to appeal is expressly named.²⁶ The phrase most frequently found in use in such statutes indicates that "any party [person] aggrieved" may appeal.²⁷ The term "party," of course, would seem to limit the right of appeal only to those litigants actually concerned in the proceeding,²⁸ while the looser term "person" might extend to one not named therein.²⁹ When the expression is qualified by the adjective "aggrieved," still further uncertainty is introduced. In order to be "aggrieved," the individual must usually show that the decree or judgment operates on his property or bears directly upon his interests.³⁰ Such might be the case in the

²⁵ Kansas, G. S. 1943 Supp., Probate Code, Art. 59-2401, merely states an appeal may be taken without saying by whom.

²⁶ See Arizona, Code Anno. 1939, Vol. II, Ch. 27, § 27-209.

²⁷ In Florida, Laws 1943, Vol. I, p. 187, § 17, and South Dakota, Code 1939, Vol. II, § 35.2102, the word "party" appears. In Kentucky, Rev. Stat. 1944, p. 2762, § 405.220, and Wisconsin, Stats. 1943, § 324.01, the term "person" has been substituted for "party."

²⁸ Such was the holding in *Fries v. Phillips*, 189 Ark. 712, 74 S. W. (2d) 961 (1934), in the absence of statute. H. B. 219, § 11, uses the term "party to the proceeding."

²⁹ There are no decisions on this point, but the term "person" is used in S. B. 226, § 7-2, instead of "party."

³⁰ See comment in 23 CHICAGO-KENT LAW REVIEW 94 on the use of this term in connection with appeals from decisions in probate matters.

event the appellant was either the minor or the petitioner, but, in the light of the attitude displayed by the Illinois Supreme Court in the Ekendahl case, the term "aggrieved" could hardly be said to extend to the natural parent.³¹ Use of such phrase to describe the persons entitled to appeal is not desirable,³² particularly if the objective sought is one permitting appeal by the natural parent.

Somewhat similar phraseology appears in other statutes. In Vermont and West Virginia, the right is confined to "any person interested,"³³ which is closely parallel to that given by the Louisiana statute to "any party in interest,"³⁴ but no interpretation of the essential "interest" has been provided by judicial decision. The North Carolina statute permits appeal by a "party to . . . adoption proceedings,"³⁵ but is defective in that the appeal can only be taken by such person from a "completed and final adoption," hence is not broad enough to include an unsuccessful petitioner. In Washington, the statute, at least by implication, extends the right of appeal to "parties . . . and those notified as herein provided,"³⁶ but no reason appears for the latter expression since it would seem that if one is entitled to notice he should be a "party." The Missouri statute is at least more logical for it confines the right to appeal to a person who should consent to the adoption but does not.³⁷ Although that phraseology would seem to be inapplicable to the petitioner, it has been held in that state that the successful petitioner may appeal, under another statute permitting appeals from orders granting new trials, if the adoption decree is subsequently vacated.³⁸

Specific description of the person entitled to appeal is con-

³¹ It was held broad enough, for this purpose, in *Appeal of Cummings*, 126 Me. 111, 136 A. 662 (1927).

³² S. B. 226, § 7-2, and its companion, H. B. 356, uses the phrase "any person who considers himself aggrieved." Italics added. The use of a subjective rather than an objective test is not deemed suitable in legal proceedings.

³³ Vermont, Pub. Laws 1933, § 3334, and West Virginia, Code 1943, §4760.

³⁴ Dart Gen. Stat. 1939, Vol. III, § 4839.37.

³⁵ North Carolina, Gen. Stats. 1943, Vol. II, § 48-5.

³⁶ Washington, Laws 1943, Ch. 268, § 11.

³⁷ Missouri, Rev. Stat. 1939, Vol. II, § 9611.

³⁸ In *re Zartman's Adoption*, 334 Mo. 237, 65 S. W. (2d) 951 (1933). Further enlargement appears to have been permitted in the case of *In re Hickman*, 170 S. W. (2d) (Mo. App.) 695 (1943), where petitioner successfully appealed from an order denying the petition. No question was presented, however, as to the right to maintain such an appeal.

tained in other statutes, but again wide dissimilarity is apparent. Under the South Carolina statute, for example, appeal is limited to the "parent or, in case there be no parent, by the guardian, custodian or next friend."³⁹ Clearly the disappointed petitioner would not fall in this category, but it is not clear whether the parent could proceed in his own right or must seek review on behalf of the child. The Montana statute seems equally confined for the phrase there used would seem to limit the right of appeal to parent who had been made a party to the proceeding.⁴⁰ Even more limited is the Massachusetts statute which restricts appeal to "a parent, who upon a petition for adoption, had no personal notice of the proceedings before the decree."⁴¹ More elaborate would seem the language in the Nebraska statute which authorizes an appeal "by any person against whom such order, judgment or decree may be made, or who may be affected thereby,"⁴² but in the last analysis such cumbersome language would seem to boil down so as to be the equivalent of "any person aggrieved."

In three of the statutes, those found in Maine, Oregon and Rhode Island, the class of persons who may appeal is limited to (a) the petitioner, and (b) the adopted child acting through a next friend.⁴³ Unless the natural parent proceeds as a next friend, therefore, the parent's appeal from the adoption decree will be dismissed according to the holding in the case of *Moore v. Phillips*.⁴⁴ Certainly, if the natural parent's feelings in the matter are to be consulted, no such circumscrip-

³⁹ South Carolina, Code 1942, Vol. I, § 255(20).

⁴⁰ Montana, Laws 1941, p. 187, amending Rev. Code 1935, Vol. III, Ch. 9, § 5859. Prior thereto, a writ of review was permitted to a parent who had not been notified on the ground that while a writ of habeas corpus could test the validity of the adoption it was not adequate: *State ex rel. Thompson v. District Court*, 75 Mont. 147, 242 P. 959 (1926).

⁴¹ Mass., Ann. Laws, Vol. VI, Ch. 210, § 11. The extreme nature of the limitation on the right to review is illustrated by *Hurley v. St. Martin*, 283 Mass. 415, 186 N. E. 596 (1933), wherein the natural mother was denied review because she had not sustained the burden of proving that her petition to vacate, made necessary by the statute, was filed "within one year after actual notice" of the decree.

⁴² Nebraska, Rev. Stat. 1943, Vol. III, § 43-112. There is dicta in *In re Zehner's Estate*, 130 Neb. 375, 264 N. W. 891 (1936), to the effect that the natural heir of the adoptive parent would have no appealable interest.

⁴³ Compare Maine, Rev. Stat. 1930, Ch. 80, § 39, with Oregon, Comp. Laws Ann., Vol. V, § 63-409, and Rhode Island, Gen. Laws 1938, Ch. 420, § 8.

⁴⁴ 94 Me. 421, 47 A. 313 (1900). The natural parent, in *Appeal of Cummings*, 126 Me. 111, 136 A. 662 (1927), was allowed to conduct an appeal under another statute, Rev. Stat. 1930, Ch. 67, § 31, permitting "any person aggrieved by any order" to appeal from the same. The court rejected a similar contention, in *Moore v. Phillips*, since other provisions of that statute were not satisfied therein.

tion should be placed in the appeal provision. Still more elaborate is the Vermont statute under which the "parent, grand-parent, guardian or husband" of an adopted minor may seek to have the adoption decree vacated. The decision on such petition may be reviewed by "a party interested,"⁴⁵ so presumably all of the persons named as well as the formerly successful adopting parent whose decree is vacated might obtain review. The minor himself, however, would seem to be without remedy in the premises except as some slight relief is furnished by a provision, enacted, in 1941, under which the minor, within one year after attaining majority, may file a dissent from such adoption.⁴⁶ Most elaborate of all, is the Arizona provision which grants a right of review to the "petitioner, parent, guardian or other person having the custody of the child," and the child itself "by next friend."⁴⁷ Unfortunately, that statute contains the qualification that the appeal may run only "from a decree of adoption," with the consequent result that appeal from an order denying a petition to adopt was held improper in *Sargent v. Superior Court*.⁴⁸ If any conclusion is to be drawn from this analysis as to the persons who should be permitted to appeal, then it could only be one to the effect that careful thought is necessary to fix and name the class in question.

The time and manner of taking the appeal, where permitted, is customarily handled in the same fashion as is true of civil cases generally. There would seem to be no reason why any different regulation should be imposed in adoption cases, particularly where the parties are before the court or have been personally served with notice of the pendency of the proceedings. For that reason, the adoption decree usually becomes final as to such persons at the expiration of thirty days after the entry thereof.⁴⁹ In some instances the appeal procedure merely contemplates a hearing *de novo* in the next

⁴⁵ Vermont, Pub. Laws 1933, § 3334.

⁴⁶ Vermont, Pub. Laws 1941, p. 61.

⁴⁷ Arizona, Code Anno. 1939, Vol. II, Ch. 27, § 27-209.

⁴⁸ 28 Ariz. 605, 238 P. 387 (1925). In the case of *In re Clark's Adoption*, 38 Ariz. 481, 1 P. (2d) 112 (1931), the court indicated, without discussing the point here concerned, that denial of a petition to adopt would not be disturbed on appeal "without a showing of a very grave abuse of discretion."

⁴⁹ Compare Washington, Laws 1943, Ch. 268, § 11, with S. B. 226, § 7-2.

highest court,⁵⁰ but in other statutes the nature of the review intended is clearly that customarily provided by appellate tribunals.⁵¹ Where the court hearing the adoption proceeding in the first instance is a court of record, and particularly where the evidence in the proceeding is preserved in the record,⁵² it would seem that appellate review rather than trial *de novo* should suffice. The bills now pending in the Illinois legislature, at least, are drawn along the line of providing for appellate review only.⁵³

A common provision found in statutes regulating the right of appeal requires the appellant to post a bond for costs, or an even more substantial bond in case the appeal is to operate as a supersedeas.⁵⁴ There would seem to be no occasion for changing this requirement in adoption cases, except in one particular, so most of the statutes permitting appeal direct that the same shall be taken "in manner and form provided for appeals in civil actions."⁵⁵ The exception referred to becomes of grave concern in case the appellant is the minor, frequently one who has been adopted at a time when his wishes in the matter could not be ascertained because of his immaturity. Such person would be unable to procure bond while the onus of incurring expense in the minor's behalf, with the risk of suffering judgment for costs, should not be thrust on his next friend. Only four of the statutes analyzed seem to give consideration to this problem, but they do provide that no bond shall be required of, or costs awarded

⁵⁰ See, for example, Kansas, G. S. 1943 Supp., Probate Code, Art. 59-2401; Kentucky, Rev. Stat. 1944, p. 2762, § 405.220; Nebraska, Rev. Stat. 1943, Vol. III, § 43-112; Oregon, Comp. Laws Ann., Vol. V, § 63-409; Rhode Island, Gen. Laws 1938, Ch. 420, § 8; South Carolina, Code 1942, Vol. I, § 255(20); West Virginia, Code 1943, § 4760.

⁵¹ See Arizona, Code Anno. 1939, Vol. II, Ch. 27, § 27-209; Louisiana, Dart Gen. Stat. 1939, Vol. III, § 4839.37; Maine, Rev. Stat. 1930, Ch. 80, § 39; Massachusetts, Ann. Laws 1933, Vol. VI, Ch. 210, § 11.

⁵² On that point, attention is invited to Ill. Rev. Stat. 1943, Ch. 110 § 188(3), which directs that no certificate of evidence is necessary to support the decree "in any case in equity." See also *Eick v. Eick*, 277 Ill. App. 329 (1934).

⁵³ H. B. 219 provides that appeals from the final order or judgment shall be taken "to the Appellate Court for the proper district, in the method and manner provided by the Civil Practice Act in other cases." As the Appellate Court is a court of limited jurisdiction, a companion measure, H. B. 220, seeks to enlarge the jurisdiction of that court by suitable amendment to Ill. Rev. Stat. 1943, Ch. 37, § 32.

⁵⁴ See, for example, Ill. Rev. Stat. 1943, Ch. 110, § 206.

⁵⁵ That phrase, or comparable language, appears in at least twelve of the statutes. The same thought appears carried over into H. B. 219, S. B. 207 and S. B. 226.

against, the minor or his next friend.⁵⁶ To require the minor to wait until attaining his majority before permitting him to act to rescind a decree of adoption, as is done in some states,⁵⁷ affords no reasonable solution to this problem for irreparable damage to the minor's interests might be done in the meantime. The oversight on the part of most of the legislatures is one that calls for attention.

In several instances, the adoption statutes would seem to limit the right of appeal to cases wherein adoption has been decreed.⁵⁸ So far as the natural parent is concerned, there would be no occasion to seek review if the contested petition to adopt was denied since the parent's rights would in no way be disturbed and any question of custodial rights could be dealt with through habeas corpus proceedings. Ordinary fairness, however, would seem to indicate that if the natural parent is to be entitled to seek review, so too should the disappointed petitioner whose request for adoption has been denied. Where the right is granted to "any person aggrieved," that phraseology might be construed sufficiently broad to permit review at the request of the petitioner but there are decisions to the contrary.⁵⁹ If it is intended that the petitioner should have the right to seek review from an adverse order, clarity of expression would dictate naming him as a person entitled to the benefit of the statutory provision.⁶⁰

⁵⁶ See Arizona, Code Anno. 1939, Vol. II, Ch. 27, § 27-209; Maine, Rev. Stat. 1930, Ch. 80, § 39; Rhode Island, Gen. Laws 1938, Ch. 420, § 8; Wisconsin, Stats. 1943, § 324.02. The proposed measures in Illinois are silent on this point.

⁵⁷ Vermont, Laws 1941, p. 61; West Virginia, Code 1943, § 4760.

⁵⁸ Arizona, Code Anno. 1939, Vol. II, Ch. 27, § 27-209; Maine, Rev. Stat. 1930, Ch. 80, § 39; Massachusetts, Ann. Laws 1933, Vol. VI, Ch. 210; § 11; Missouri, Rev. Stat. 1939, Vol. II, § 9611; Montana, Laws 1941, p. 187; North Carolina, Gen. Stats. 1943, Vol. II, § 48-5; Vermont, Pub. Laws 1933, § 3334. The wording of Kentucky, Rev. Stat. 1944, p. 2762, § 405.220, is ambiguous for while it purports to permit appeal by any person aggrieved, it declares that: "The appeal of any minor from *an order of adoption* may be taken by any person on his behalf or by guardian ad litem." Italics added.

⁵⁹ Compare Sargent v. Superior Court, 28 Ariz. 605, 238 P. 387 (1925), with *In re Hickman*, 170 S. W. (2d) (Mo. App.) 695 (1943), decided under a statute which apparently limited appeal to a non-consenting parent.

⁶⁰ See Kansas, G. S. 1943 Supp., Probate Code, Art. 59-2401; Oregon, Comp. Laws Ann., Vol. V, § 63-409, applied in *In re Flora's Adoption*, 152 Ore. 155, 52 P. 178 (1935); Rhode Island, Gen. Laws 1938, Ch. 420, § 8; Vermont, Pub. Laws 1933, § 3334; Washington, Laws 1943, Ch. 268, § 11. Proposed H. B. 219 uses the expression "any party to the proceeding" which might be construed to be sufficient to permit appeal by the petitioner. S. B. 207, on the other hand, is open to criticism on this point for proposed Section 10a specifically grants a right of appeal to "a natural parent who was a defendant in an adoption proceeding hereunder and who was deprived of the custody of his child" and then purports to make appli-

Of equal concern should be the question of the right of the natural parent or other similar person, who was not notified personally and who did not participate in the proceeding, to make application to vacate any decree based upon publication either (a) within a reasonable time after the entry thereof, or (b) within a specified period after actual notice of such decree. A substantial number of adoption decrees are based on service by publication, sometimes addressed to interested persons by the description of "all whom it may concern,"⁶¹ so that the absent parent might not learn of the decree in time to seek appeal under ordinary rules.⁶² The former Chancery Act of this state gave any person notified by publication an absolute right to have a decree in equity vacated upon request made within one year from the date thereof.⁶³ That provision was repealed at the time of the enactment of the Civil Practice Act, and in lieu thereof the present statute authorizes a petition within one year after such decree upon which, after hearing, the court may set the decree aside or alter or amend the same "if it shall appear that such decree ought not to have been made against such defendant."⁶⁴ There is doubt that such statute would have application to adoption proceedings since it commences with the words "when any final decree in *chancery* shall be entered," and would seem to be limited in application. It could scarcely be contended that adoption proceedings fit that category, but assuming that such section did apply, there is a vast difference between the right to have a decree vacated and the mere possibility of being able to convince the court that "such decree ought not to have been made," as the latter contemplates some exercise of discretion on the part of the trial court. Should the petitioner be successful, there is still left undetermined the question of the right of the adopting parent to seek review of an order vacating the decree. In one state, a provision of limited nature permits direct appeal from the decree itself by the natural parent

cable the general provisions of the Civil Practice Act, "including the provisions for appeal." The particular grant of the right to appeal might be held to overrule the general one. S. B. 226 is likewise vague in describing the appellant as "any person who considers himself aggrieved."

⁶¹ Ill. Rev. Stat. 1943, Ch. 4, § 2.

⁶² The Washington statute limits the time for appeal to thirty days after entry of the decree: Washington, Laws 1943, Ch. 268, § 11.

⁶³ Cahill, Ill. Rev. Stat. 1931, Ch. 22, § 19.

⁶⁴ Ill. Rev. Stat. 1943, Ch. 110, § 174(8).

without preliminary petition to vacate the same.⁶⁵ Only in Vermont,⁶⁶ Washington⁶⁷ and West Virginia,⁶⁸ however, has the problem been given serious consideration, and only the Washington statute expressly recognizes the right of the adopting parent to seek review of an order vacating the adoption decree. Under the circumstances, it would seem that any statutory provision for review should be reasonably explicit on these points.⁶⁹

When denying the right to an appeal in insanity proceedings,⁷⁰ the Illinois Supreme Court once expressed concern that to permit the taking of an appeal "would suspend the proceeding and leave the insane person at large until the appeal . . . could be decided."⁷¹ Much the same concern might have been in the mind of the first Illinois court asked to determine whether appeal was possible in adoption matters, for it cited that case in support of its holding denying such right. Certainly, no minor should "be left at large" until the appeal could be decided, but it does not follow that provision could not be made for the minor's custody pending the appeal. In only one instance, however, does it appear that any legislature has given thought to this problem and then, apparently, only as an afterthought. An addition to the Rhode Island statute, enacted in 1940, states: "During the pendency of such appeal the superior court shall have jurisdiction with respect to the custody of such child and shall make such orders as may be for the best interest of such child. This jurisdiction shall continue after verdict or decision until the final determination of the appeal."⁷² A similar provision could be inserted in any proposed amendment to the Illinois act and the custody of the minor pending appeal could well be left to the discretion of the trial judge, thereby obviating a potential objection to granting appeal in such cases.

⁶⁵ See Massachusetts, Ann. Laws 1933, Vol. VI, Ch. 210, § 11, but consider *Hurley v. St. Martin*, 283 Mass. 415, 186 N. E. 596 (1933), in connection therewith.

⁶⁶ Vermont, Pub. Laws 1933, § 3334, fixes a one-year limitation.

⁶⁷ Washington, Laws 1943, Ch. 268, § 11, permits application within six months from decree.

⁶⁸ West Virginia, Code 1943, § 4760.

⁶⁹ None of the Illinois proposals, except by inference which might be drawn from reference to the applicability of the Civil Practice Act, touch on this point. Assumption that the Civil Practice Act covers the situation is unwarranted.

⁷⁰ Such right has since been granted: Ill. Rev. Stat. 1943, Ch. 91½, § 24.

⁷¹ *People ex rel. Fullerton v. Gilbert*, 115 Ill. 59 at 61, 3 N. E. 744 at 745 (1885).

⁷² Rhode Island, Acts and Resolves 1940, p. 608.

Tested in the light of these suggestions, the proposed amendments to the Illinois act would all appear to be inadequate. House Bill 219 proposes to eliminate the qualification on the language which makes the Civil Practice Act applicable to adoption proceedings by deleting the words "except as to any provisions for appeal and" as they now appear in Section 11 of the Adoption Act. That is the first essential step. But that bill then proposes to add the following: "Any party to the proceedings may appeal from the final order or judgment of the Court to the Appellate Court for the proper district, in the method and manner provided by the Civil Practice Act in other cases." Such language would seem sufficiently broad to permit appeal by either the petitioner, the parent, or the minor from decrees of adoption or orders denying the prayer of the petition. The time and manner of taking appeal can be determined by reference to other statutory provisions, but the quoted language would appear to be insufficient to settle the other problems which will be apt to arise upon proceedings to review unless some amplification is made. The companion bill, House Bill 220, is essential in order to enlarge the jurisdiction of the Appellate Court. Care must be taken, however, to avoid the situation of conferring jurisdiction of appeals taken under an act which might, at the same session, be repealed.⁷³

Proposed Senate Bill 207 is designed to add a new section to the present statute. That section, designated Section 10a, would read:

A natural parent who was a defendant in an adoption proceeding hereunder and who was deprived of the custody of his child by the decree entered in such proceeding may appeal to the Appellate Court for a review of all questions of law and fact presented by the record.

It is followed by a slight modification of Section 11 under which the words "except as to any" would be deleted and the word "including" substituted in place thereof so as to make the Civil Practice Act "including the provisions for appeal" cover adoption proceedings. The scope of review permitted

⁷³ S. B. 226 proposes to repeal the act of Feb. 27, 1874, as amended, and to substitute an entirely new statute in its place. The language of H. B. 220 would be nullified if such measure were passed unless suitable amendment was made therein.

by proposed Section 10a is obviously very narrow, but conflict is engendered with the subsequent change which purports to throw the door wide open. One significant thing should be noticed, and that is the fact that proposed Section 10a would permit review "of all questions of law and fact presented by the record." It would be unfortunate if appellate review were to be limited merely to questions of law, for the most seriously disputed question before the trial court, in adoption cases, is the one over the point of whether or not the natural parent is so far at fault as to warrant taking the child from under his custody and placing it with another.

More comprehensive is the change proposed by Senate Bill 226 which would repeal the existing statute and substitute a new adoption act in place thereof. There is no occasion, here at least, to comment on all of its provisions,⁷⁴ but the section regarding the question of review is worthy of attention. That section now reads:

Sec. 7-2. Appeals from the final orders or judgments of the County Court or the Circuit Court, made and entered in proceedings under this Act, may be taken, by any person who considers himself aggrieved, to the Appellate Court of this State, in the same manner as in other civil cases in courts of record, provided, that no appeal may be taken more than thirty days after the entry of the order or judgment appealed from.

Two points should be noted, to-wit: (1) the appellant may be "any person who considers himself aggrieved," and (2) the time for taking the appeal is limited to "thirty days after the entry of the order or judgment appealed from." The ambiguity concerning the person who might appeal would doubtless require judicial construction. The short period permitted in which the appeal might be taken would not be objectionable as applied to one who had been personally served and was present in court, but it seems unreasonably short as applied to one presumably notified by publication, particularly if the notice was not, in fact, received.

⁷⁴ As introduced, that statute, like the present one, makes no specific reference to the consequences of adoption as between the child and the adopting parents, nor does it purport to change the rule laid down in *Dwyer v. Dwyer*, 366 Ill. 630, 10 N. E. (2d) 344 (1937), noted in 16 CHICAGO-KENT REVIEW 198, with respect to the duty owed to the child by the natural parents after adoption has taken place. S. B. 226 is also silent on the right of the adopting parents to seek to vacate the decree in case the adopted child should subsequently, within a reasonable period, be discovered to be insane, feeble-minded or the like.

As none of the proposed amendments would seem sufficient to meet the needs of the situation produced by the decision in the Ekendahl case, a proposed statute is here presented for consideration. Such statute is admittedly lengthy, but it purports to cover all of the problems noted above. It may be substituted for Section 11 of the present act, or, with suitable modification, might be inserted in place of Section 7-2 of the contemplated new statute on the subject. A companion bill enlarging the jurisdiction of the Appellate Court, similar to House Bill 220, would be required to provide complete coverage. The text of the appeal provision should be substantially as follows:

The provisions of the Civil Practice Act and all existing and future amendments of said Act and modifications thereof, and the rules now or hereafter adopted pursuant to said Act, shall apply to all proceedings hereunder, except as otherwise provided in this Act. No matters not germane to the distinctive purpose of this proceeding shall be introduced by joinder, counterclaim or otherwise.⁷⁵

Any petitioner, parent, guardian or other person having the custody of a child,⁷⁶ may appeal from the final order or judgment of the Court⁷⁷ to the Appellate Court for the proper district, in the method and manner provided by the Civil Practice Act in other civil cases in courts of record, for a review of all questions of law and fact presented by the record, provided, that no appeal may be taken more than thirty days after the entry of the order or judgment appealed from;⁷⁸ and the child adopted may, by next friend, appeal in like manner, but no bond shall be required of or costs awarded against such child or next friend on an appeal from an order of adoption.⁷⁹ During the pendency of any such appeal, the court in which the adoption proceedings were instituted shall have jurisdiction with respect to the custody of the child and shall make such orders as

⁷⁵ The first paragraph is taken from the present statute with the words "except as to any provisions for appeal and" deleted.

⁷⁶ The class of persons names is borrowed from Arizona, Code Anno. 1939, Vol II, Ch. 27, § 27-209.

⁷⁷ The words "final order or judgment" are to be preferred over "decree of adoption," so as to permit appeal by either side.

⁷⁸ A fixed time limitation would seem desirable to avoid the possibility of both a "short" appeal and a "long" appeal permitted under Ill. Rev. Stat. 1943, Ch. 110, § 200.

⁷⁹ This clause is substantially similar to Arizona, Code Anno. 1939, Vol. II, Ch. 27, § 27-209. It should be noticed that the qualification that no bond shall be required of or costs awarded against the minor is confined to appeals from "an order of adoption." The minor would scarcely need to seek relief except from such a decree. If, therefore, the minor or his next friend wishes to appeal from any other final order, he should be prepared to bear the onus of an unsuccessful appeal.

may be for the best interests of the child, which jurisdiction shall continue until the final determination of the appeal.⁸⁰

If notice of the pendency of adoption proceedings be given to any person by publication in the manner herein provided,⁸¹ and such person shall fail to appear or participate in such proceedings, any such person may, prior to the expiration of twelve months from the entry of any final decree of adoption,⁸² file in the court in which such adoption proceedings were instituted his verified petition for the vacation or modification of the final decree alleging the grounds, if any he has, for such action.⁸³ Upon the filing of such petition, the court shall, upon application, fix a time for hearing thereon and shall require the petitioner to give not less than ten days' notice, in writing, to all of the parties to the adoption proceeding of the date set for such hearing. The court may permit such parties to answer such petition. If, upon the hearing upon said petition, it shall appear that such decree ought not to have been made, the same may be set aside, altered or amended as shall appear just; otherwise such petition shall be dismissed at petitioner's costs.⁸⁴ An appeal from any order vacating, altering or amending such decree or dismissing the petition, may be taken in the manner and within the time hereinabove set forth.⁸⁵

If no appeal be taken or if no petition to vacate be filed, within the time hereby permitted, then any decree of adoption granted hereunder shall be final and conclusive and shall not be subject to attack either directly or collaterally.⁸⁶

If such a statute were enacted, it could well be contended that Illinois recognizes the wisdom of permitting appeals in adoption cases and has made adequate provision to see that justice is done to all concerned therein.

⁸⁰ This sentence, with suitable modification, is borrowed from Rhode Island, Acts and Resolves 1940, p. 608.

⁸¹ Service by publication in certain cases is permitted by Ill. Rev. Stat. 1943, Ch. 4, § 2, and is contemplated under S. B. 226, § 2-2.

⁸² Any reasonable period of time might be substituted, but it is thought that the same amount of time should be allowed as is granted in cases of decrees in chancery based on publication under Ill. Rev. Stat. 1943, Ch. 110, § 174(8), so that the practice might be substantially similar. That statute fixes the time period at "within one year after such decree."

⁸³ The requirement that the petitioner shall advance "the grounds, if any he has, for such action," borrowed from Washington, Laws 1943, Ch. 268, § 11, is inserted to indicate that the petitioner is not entitled to have the decree vacated as a matter of absolute right.

⁸⁴ The procedure subsequent to filing the petition is substantially similar to that laid down in Ill. Rev. Stat. 1943, Ch. 110, § 174(8).

⁸⁵ A discussion of the need for this provision is given above: footnotes 61 to 69, ante.

⁸⁶ This idea is borrowed from Washington, Laws 1943, Ch. 268, § 11.

NOTES AND COMMENTS

"THE DECISION . . . WILL BE FINAL!"

The dulcet tones of the radio announcer have oft proclaimed, "The decision of the judges will be final!" Emphasis so laid on finality may evoke a random thought in the mind of the average listener but to the legal mind, inured to the mutability of judicial pronouncements, those words possess a hollow ring. And, judging by the recent case of *Groves v. Carolene Products Company*,¹ they have engendered a controversy unique in the annals of Illinois jurisprudence.

The defendant company there concerned, apparently in an effort to stimulate lagging sales, had advertised a prize contest. Various rewards were offered for lists of words constructed from the letters contained in the phrase "Milnot Whips." The rules of the contest provided that, without questioning the veracity of the phrase, contestants were to create words anagrammatically therefrom. Such rules further declared that "Whoever builds the most words wins a U. S. Defense Bond worth \$1,000 at maturity. Prizes will be awarded for the most complete list of words . . . But, remember, if one contestant has the longest list of correct words, she will be declared the winner . . . Decision of the judges to be final."² It is from that fateful last sentence that the tempest arose.

The plaintiff in that action, like Milnot, whipped into activity and promptly produced and dispatched a truly formidable list of words. It appeared from the pleadings that this list did, in fact, dwarf all others submitted. The contest judges, despite such magnificent effort, awarded the first prize to another contestant though they did graciously scrape a \$2.00 crumb into the plaintiff's lap. His wrath aroused, plaintiff promptly brushed that crumb aside and, with the fury of the just, he riposted immediately by filing the instant suit. The defendant company recovered quickly from this attack, and lunged forward with a motion to strike the complaint. Six times did plaintiff file new complaints. Six times, defendant moved to strike, each time on the ground that plaintiff had agreed that the "decision of the judges" was to be final. As regularly as clockwork, the lower court six times agreed with the defendant and swept away the several complaints. Ultimately, as it must come to all men, weariness descended on plaintiff and he appealed from the last strike. The Appellate Court, implying that the decision of the contest judges was but dross at the feet of Justice, reversed and remanded with directions to deny the motion to strike.

It is a remarkable fact that assiduous investigation reveals no case directly in point, and there are but few cases which bear at all

¹ 324 Ill. App. 102, 57 N. E. (2d) 507 (1944).

² 324 Ill. App. 102 at 103, 57 N. E. (2d) 507 at 508.

on the question.³ Yet the irresistible force of logic compels agreement with the holding of the Appellate Court. Certain conclusions are so basic in the law of contracts that to give citation thereto would merely insult the reader. The advertisement announcing this contest was an offer to enter into a unilateral contract, which offer was accepted by submitting a list of words. Any ambiguity in that offer must be construed against him who had prepared the same, for the court must construe the meaning of the contract from the whole document. Now, was the offer equivocal?

There could be no answer to this question but, "Yes, indeed!" Look at the rules of this contest so carefully expounded by the defendant company! Observe how insistently they declared that the submitter of the longest list was to be entitled to the first prize! Not once was this stated, not twice, but again and again and again! Very well, one is overwhelmed; the longest list must be awarded the first prize. Now to whom do these rules apply? To the common man of course; to the postprandial peruser of the periodicals. But do they also apply to the honorable judges of the contest? Could it be that defendant intended that these judges were to extemporize, to invent their own rules, as they proceeded? None could countenance such a contention; no man of reason would so intend. It was the poet who declared:

"Who to himself is law, no law doth need,
Offends no law and is a king indeed."

But in the history of this nation, one doctrine has stood triumphant—this is a government of laws, not one of men! All must obey the laws, even that esoteric class of persons called contest judges. Observe, in that regard, what the judiciary, that noble body of men who interpret the laws, have said: "The duty of the [contest] board was purely ministerial, and it could no more permit the terms of the contest to be ignored than could the defendant himself."⁴ With this, all must agree. Contest judges, like more ordinary mortals, must be bound by the rules.

Well, then, under these rules, what were these lofty citizens to do? They were to decide; a most elementary thing! Yet, again, what is meant by that apparently innocuous word "decide"? Enlightenment may be found in defendant's own authority which states that a "decision" is a "determination or result arrived at after consideration, as of a question."⁵ Then it must follow, as the night the day, that these judges did not "decide," for they had nothing to decide. One could not dignify a result by the term "decision" unless there is first,

³ See annotations in 67 A. L. R. 413 and 33 L. R. A. (N. S.) 305.

⁴ *Smead v. Stearns*, 173 Iowa 174 at 186, 155 N. W. 307 at 311, Ann. Cas. 1918C 745 at 750 (1915).

⁵ Webster's New International Dictionary.

in fact, a question or something that requires consideration and discretion to determine. But here that was not so; the judges were simply to count the words and verify them against the dictionary. Their duty was purely "ministerial," they must obey the rule that ". . . the candidate who . . . is shown to have earned the largest vote [in the instant case, to have submitted the longest list] in accordance with the rules, is entitled to . . . receive the promised award."⁶

Was this done? No, it was not! The infamy of the act of the contest judges called out for vengeance! They did not heed the biblical injunction to "Render therefore unto Caesar the things which are Caesar's."⁷ They ignored the words of the eminent justice who had so gallantly insisted that they could not "rightfully take away from her [plaintiff] that which she had earned under the terms of the contract, even though the defendant had contemplated by another provision of the contract to make the decision of the [judges] absolute and final."⁸ Flaunting all such guidance and with reprehensible temerity, they awarded the first prize to a lesser entry!

In law and in justice such thing could not be countenanced. Be proud that a reviewing court could rise up in righteous wrath and strike down so miserable a wrong. Well did that august body know that ". . . the actual finding that plaintiff had given the correct number in his answer,"⁹ or, as in this case, had submitted the longest list of words, entitled him to the special first prize. And so it spoke in gravest tones and said, "Reversed and remanded with directions." Thus nobly did it charge that the reward must go to plaintiff, for

"Twas he that ranged the words at random flung,
Pierced the fair pearls and together them strung."¹⁰

Not even a contest judge may dam the tide of logic and arithmetic.
Justice has again prevailed!

A. BAUM

CIVIL PRACTICE ACT CASES

JUDGMENT—MERGER AND BAR OF CAUSES OF ACTION AND DEFENSES—
WHETHER OR NOT MORE THAN ONE JUDGMENT MAY BE GRANTED IN
FAVOR OF PLAINTIFF IN THE SAME ACTION AGAINST THE SAME PARTY
DEFENDANT—Section 50(1) of the Illinois Civil Practice Act¹ has

⁶ See note 4, ante.

⁷ Matt. 22, v. 21.

⁸ Long v. Chronicle Pub. Co., 68 Cal. App. 171 at 180, 228 P. 873 at 876 (1924).

⁹ Minton v. F. G. Smith Piano Co., 36 App. D. C. 137 at 148, 33 L. R. A. (N. S.) 305 at 310 (1911).

¹⁰ *Bidpai (Pilpay)*, Anvar-i Suhali, trans. by author.

¹ Ill. Rev. Stat. 1943, Ch. 110, § 174. That statute provides, in part, that: ". . . Judgment may be rendered in favor of or against such parties respectively at any stage of the proceedings . . . Judgment may be entered in such form as

received additional interpretation through the recent case of *Zimmerman v. Bankers Life & Casualty Company*.² The facts therein show that plaintiff based his claim upon a contract under which he was to receive certain commissions. Defendant filed an answer thereto purporting to state a defense to the entire claim. Later, plaintiff moved for a judgment for part of the sum claimed as having been "admitted in the defendant's affidavit of merits." That motion was sustained and a final judgment for such part was entered against the defendant. Satisfaction of that judgment was acknowledged. Still later, the case came on for trial as to the balance of the claim and plaintiff was awarded another judgment for the amount thereof over defendant's objection that the matter had already been fully adjudicated. Defendant's appeal, based on the ground that there can be only one judgment and one satisfaction in the same cause of action, proved unsuccessful when the Appellate Court for the First District, affirming judgment for the plaintiff, held that Rule 75 of the Municipal Court of Chicago³ and Section 50(1) of the Illinois Civil Practice Act permit more than one judgment in the same cause. It said, in passing, that the court "may dispose of a segment of the litigation and render judgment thereon, reserving the remaining issues for trial at a later time. At the later trial a distinct judgment may be rendered."⁴

The common law rule, still followed except where modified by statute, was that but one final judgment could be entered in any action for the reason that, upon rendition thereof, the court's jurisdiction over the cause ceased except for the purpose of assisting in the collection of that judgment.⁵ Such judgment was also held to be a bar

may be required by the nature of the case and by the recovery or relief awarded, and more than one judgment may be rendered in the same cause." The section was adopted from New Jersey, Pub. Laws 1912, Ch. 231, §§ 20-1, with the addition of the clause that "more than one judgment may be rendered in the same cause." It applies in all civil actions, carries over the practice previously existing in chancery cases, and is an incident to the broad provisions as to joinder.

² 324 Ill. App. 370, 58 N. E. (2d) 267 (1944).

³ Manual of the Municipal Court of Chicago, 1940, p. 50. The provisions of that rule, at least in this regard, are identical with those of Section 50 of the Civil Practice Act.

⁴ 324 Ill. App. 370 at 374, 58 N. E. (2d) 267 at 269.

⁵ See Freeman, Judgments, 5th Ed., Vol. I, § 101, and cases there cited. In *Brewer v. Christian*, 9 Ill. App. 57 at 59 (1881), the court said: ". . . the plaintiff having already taken a final judgment against defendants for that part of the amount claimed by him, not answered by the declaration, with an award of execution therefor, he is not now entitled to a second judgment for the same sum. The practice in such cases, as we understand it, is for the plaintiff to have an interlocutory judgment entered for the part of the declaration unanswered, but no final judgment should be entered until the trial of the issues, when the whole amount of the recovery can be included in one verdict and one judgment be rendered for the whole. But we are unable to perceive how the plaintiff can be allowed to sever his action either as to person or amount and have several judgments rendered against several persons, or against the same persons for several sums at different stages of the proceeding." Accord: *Vanduzen v. Pomeroy*, 24 Ill. 289 (1860); *Free-land v. Board of Supervisors*, 24 Ill. 303 (1862); *Wight v. Meredith*, 5 Ill. (4 Scam.) 360 (1843).

to further proceedings on that claim on principles of public policy. As one writer states, "the peace and order of society, the structure of our judicial system, and the principles of government require that a matter once litigated should not again be drawn in question between the same parties or their privies."⁶ A final judgment pronounced by a court of competent jurisdiction upon the merits, in the absence of fraud or collusion is, therefore, conclusive of rights, questions, and facts in issue, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction.⁷ This doctrine, which has formed a part of the legal systems of all civilized nations, contemplates that no question shall become *res adjudicata* until it is settled by a final judgment,⁸ hence interlocutory judgments or decrees may at any time be modified or vacated by the court which rendered them for they are not conclusive adjudications.⁹ But once a final judgment is rendered, it is said to be conclusive as to all matters urged or which might have been urged at the hearing. A judgment which has been entered as the result of a compromise between the parties may likewise possess the force of *res adjudicata*.¹⁰ In the absence of statute, therefore, the defendant's contention in the instant case would not have been absurd.

Section 50(1) of the Illinois Civil Practice Act was obviously designed to relax the common law rule which allowed but one final judgment in an action, for it permits plural judgments although it specifically directs that there shall be but one satisfaction. Several illustrations of the change thus accomplished have already been provided although none of them reach specifically the point in the instant case. In *National Builders Bank of Chicago v. Simons*,¹¹ for example, the trial court had vacated a judgment by confession instead of ordering the same to be opened up and to stand as security for the indebtedness pending further hearing. Thereafter, the trial court entered a summary judgment and, upon realizing within thirty days that it had been a mistake to vacate the original judgment, it attempted to rectify the error by setting aside the vacation order and reinstating the judgment by confession. Such action was held proper, under the present practice, even though it meant that the record showed there were two judgments on the same claim. In another case, that of *Shaw*

⁶ Freeman, *Judgments*, 5th Ed., Vol. II, § 626, p. 1318.

⁷ *Ibid.*, Vol. II, § 624. See also *People v. Amos*, 246 Ill. 299, 92 N. E. 857, 138 Am. St. Rep. 239 (1910).

⁸ *Schmidt v. Glade*, 126 Ill. 485, 18 N. E. 762 (1888).

⁹ *People ex rel. O'Connell v. Noonan*, 276 Ill. 430, 114 N. E. 928 (1916); *Quinn v. McMahan*, 40 Ill. App. 593 (1891). See also *Knox & Lewis v. Alwood*, 228 F. 753 (1915).

¹⁰ *Freasman v. Smith*, 379 Ill. 79, 39 N. E. (2d) 367 (1942); *Wadhams v. Gay*, 73 Ill. 415 (1874). In *Riggs v. Barrett*, 308 Ill. App. 549, 32 N. E. (2d) 382 (1941), the court held that a decree entered by consent of the parties was binding upon them and could not be reversed.

¹¹ 307 Ill. App. 552, 31 N. E. (2d) 269 (1940).

v. Courtney,¹² an action against several defendants for an assault, the jury apportioned the damages among the joint tort feorsors and it was held that the court did not abuse its discretion in entering several judgments on the several verdicts. The case of *Kulesza v. Alliance Printers & Publishers, Inc.*,¹³ also upheld several judgments in the same case based on separate findings against the several defendants. The instant case, however, is the first one, since the adoption of the Civil Practice Act, which sanctions several judgments in the same case against the same person.

The result in the instant case not only seems proper but is comparable to that obtained in the earlier case of *Mester Coal Company v. Pope*,¹⁴ which arose under Section 55 of the Practice Act of 1907, as amended.¹⁵ Plaintiff there filed an affidavit of its claim to which defendant, pursuant to the then existing statute, filed an affidavit of merits stating that the defendant had a good defense to the suit, upon the merits, to the whole of plaintiff's demand, "except as to the sum of \$106.06, which is admitted by the defendant to be due to the plaintiff." Judgment for the plaintiff for the sum admittedly due was held proper even though the jury allowed nothing on the disputed balance. That result was said to be justified under the statute as it then existed, the court saying: "That amendment authorizes . . . the rendition of a judgment for the part admitted to be due and owing. That is the amendment authorizes two judgments in one action where but one was before permissible."¹⁶

Such result would seem to be the only sensible solution, for there does not appear to be any valid reason, in this state, why a person who has a sum of money admittedly due him should not be able to secure prompt enforcement of that claim, even though other parts of the same claim may be in dispute and may need determination at a subsequent time. Granted that two suits would be improper,¹⁷ still two judgments in the same suit should accomplish the desired result. The practitioner who contemplates taking a judgment for the admitted portion of a claim would do well, however, to observe the cautionary admonition of the court in the instant case. To avoid any implication that such judgment is final as to all issues involved, the judgment order should continue the cause for trial as to any balance in dispute, thereby clearly indicating an intention to reserve jurisdiction over all unsettled matters.

H. H. FLENTYE

¹² 317 Ill. App. 422, 46 N. E. (2d) 170 (1943), noted in 21 CHICAGO-KENT LAW REVIEW 249, affirmed in 385 Ill. 559, 53 N. E. (2d) 432 (1944).

¹³ 318 Ill. App. 231, 47 N. E. (2d) 547 (1943).

¹⁴ 155 Ill. App. 667 (1910).

¹⁵ Cahill Ill. Rev. Stat. 1931, Ch. 110, § 55. The present provision in Ill. Rev. Stat. 1943, Ch. 110, § 181, is similar in purpose and stems from the earlier statute.

¹⁶ 155 Ill. App. 667 at 671.

¹⁷ *City of Bloomington v. Burke*, 12 Ill. App. 314 (1883).

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DISCUSSION OF RECENT DECISIONS

BANKS AND BANKING—LIABILITY OF SHAREHOLDERS—WHETHER OR NOT HOLDERS OF BENEFICIAL INTERESTS IN A BUSINESS TRUST WHICH OWNS STOCK OF BANK ARE SUBJECT TO SUPERADDED LIABILITY IMPOSED ON STOCKHOLDERS OF INSOLVENT BANK—In *Reconstruction Finance Corporation v. Goldberg*,¹ the facts disclosed that judgment had been taken against the holder of record of certain shares in a closed bank but that, pursuant to reservation of jurisdiction, certain members of a syndicate organized as a business or so-called Massachusetts trust were made additional parties defendant in order to impose liability on them for the same shares. It appeared that the active control of the trust business was in the hands of a managing committee of three members, of whom appellant was one, which committee, on behalf of the beneficiaries of the trust and in the course of authorized trust business, had purchased shares of bank stock and caused the same to be registered in the name of a nominee. The trust agreement contained a standard exculpatory clause which recited that neither the managing committee, which was authorized to hold legal title to all securities purchased, nor the members of the syndicate, should be per-

¹ 143 F. (2d) 752 (1944).

sonally liable for any debt or contract and that any one contracting with the committee should look only to the trust property for satisfaction. It was urged, by way of defense, that plaintiff's election to sue the holder of record had operated to release defendant,² and that, as the bank stock was owned by the syndicate as an entity under a valid trust, only syndicate funds could be subjected to obligations arising out of ownership of the stock in view of the exculpatory clause. Judgment for plaintiff on summary proceedings was affirmed in the Circuit Court of Appeals for the Seventh Circuit when that court held that the double liability imposed by the Illinois constitution on stockholders of insolvent banking corporations³ attached to shareholders in a business trust, at least to the extent of their proportionate interests therein, and that the prior judgment against the holder of record was not *res adjudicata* on the question.⁴

In order to arrive at such decision, the court lacked substantial precedent insofar as the shareholdings of a business trust might be concerned although a line of cases⁵ culminating in *Anderson v. Abbott*⁶ have held stockholders in holding companies owning bank stock liable as the beneficial owners thereof. In such cases, the courts have had no hesitancy in "piercing the corporate veil" and finding the shareholders in the several holding companies to be the beneficial or real owners of the bank stock and liable thereon though it is true that, in the majority thereof, the bank stock was the chief, if not the only, asset of the particular holding company concerned and control of the bank in question was the main purpose for its organization.⁷

² That issue had been determined, adversely to defendant's contention, in *Anderson v. Abbott*, 321 U. S. 349 at 354, 64 S. Ct. 531 at 534, 88 L. Ed. 535 at 538 (1944), noted in 22 CHICAGO-KENT LAW REVIEW 284, particularly p. 287, note 18.

³ Ill. Const. 1870, Art. XI, § 6.

⁴ The argument that *Reconstruction Finance Corporation v. Pelts*, 123 F. (2d) 503 (1941), and *Reconstruction Finance Corporation v. Barrett*, 131 F. (2d) 745 (1942), had been nullified by *Trupp v. First Englewood State Bank*, 307 Ill. App. 258, 30 N. E. (2d) 198 (1940), and *Capetti v. Allborg*, 319 Ill. App. 643, 49 N. E. (2d) 795 (1943), was rejected on the ground that in the last mentioned cases no attempt had been made to reserve jurisdiction over the cause. *Anderson v. Abbott*, 321 U. S. 349, 64 S. Ct. 531, 88 L. Ed. 535 (1944), speaks more clearly on the point.

⁵ *Barbour v. Thomas*, 300 U. S. 670, 57 S. Ct. 513, 81 L. Ed. 877 (1937); *Nettles v. Rhett*, 94 F. (2d) 42 (1938); *Metropolitan Holding Co. v. Snyder*, 79 F. (2d) 263, 103 A. L. R. 912 (1935); *Corker v. Soper*, 53 F. (2d) 190 (1931); *Fors v. Farrell*, 271 Mich. 358, 260 N. W. 886 (1935); *Simons v. Grosbeck*, 268 Mich. 495, 256 N. W. 496 (1934); *Nettles v. Sottile*, 184 S. C. 1, 191 S. E. 796 (1937). See also *McClanahan, Bank Stock Liability and the Holding Company Device*, 19 CHICAGO-KENT LAW REVIEW 160 (1941). Illinois cases having bearing on the point are *Gahagan v. Whitney*, 359 Ill. 419, 194 N. E. 581 (1935); *Flanagan v. Madison Square State Bank*, 302 Ill. App. 468, 24 N. E. (2d) 202 (1939). Of further interest is *United States v. Gridley*, 52 F. Supp. 398 (1943).

⁶ 321 U. S. 349, 64 S. Ct. 531, 88 L. Ed. 535 (1944), noted in 22 CHICAGO-KENT LAW REVIEW 284.

⁷ *Burrows v. Emery*, 285 Mich. 86, 280 N. W. 120 (1938), however, indicates that a different result might be achieved if the holding company is a bona fide organization possessing other assets beside the bank stock on which liability is sought to be imposed.

In view of the more or less settled law as to holding companies as indicated by such cases, it is only to be expected and seemingly proper for the court in the instant case to hold the shareholders of a business trust liable upon its bank stock holdings on much the same theory. If corporate structure does not serve to insulate from liability, certainly a mere trust agreement, no matter how valid the same might otherwise be, should not.

Reliance was placed by defendant in the instant case on an exculpatory clause such as is usually found in trust agreements of the type involved. The court indicated that as it was not shown that the creditor of the insolvent bank had knowledge of the existence of such clause, the same could not operate as a defense.⁸ Had the creditor possessed knowledge and dealt with the bank in the face thereof, it was said that the defendant still could not escape liability of the kind in question for, just as legislation will not be permitted to defeat the purpose of a constitutional provision imposing such liability,⁹ the parties to the trust agreement could not extinguish or narrow the same by the terms of their contract. While the latter statement was pure dictum, it would seem sound for any contract violating a constitutional provision would be regarded as opposed to public policy. It should be noticed, however, that such dictum could not apply as to the ordinary creditors of a business trust for it has been held that they may enforce their rights only pursuant to the terms of the trust agreement.¹⁰ In dealing with such an organization, they should be held chargeable with knowledge of the terms of the agreement or else be held bound to inquire into the same.¹¹

J. HONOROFF

BANKS AND BANKING—LIABILITY OF SHAREHOLDERS—WHETHER OR NOT UNCOLLECTED JUDGMENTS AGAINST STOCKHOLDERS OF CLOSED BANK BASED ON THEIR CONSTITUTIONAL LIABILITY MAY BE SOLD AND ASSIGNED BY RECEIVER APPOINTED IN STOCKHOLDERS' LIABILITY SUIT—In *Decker*

⁸ 143 F. (2d) 752 at 757.

⁹ In *Sanders v. Merchants' State Bank*, 349 Ill. 547 at 557, 182 N. E. 897 at 900 (1932), the court said: "No banking act can go into operation in this state of which the constitutional provision in question shall not be a part. By virtue of the inherent power of the Constitution itself, such provision is grafted into every banking law which is passed by the Legislature or submitted to the votes of the people."

¹⁰ *Schumann-Heink v. Folsom*, 328 Ill. 321, 159 N. E. 250, 58 A. L. R. 485 (1927); *Levy v. Nellis*, 284 Ill. App. 228, 1 N. E. (2d) 251 (1936); *Hunter v. Winter*, 268 Ill. App. 487 (1932). But see *Review Printing & Stationery Co. v. McCoy*, 291 Ill. App. 524, 10 N. E. (2d) 506 (1937).

¹¹ In general, see Bogert, *Trusts and Trustees*, Vol. II, §§ 294-300.

v. Domoney,¹ certain creditors of an Illinois state bank brought a representative suit some time after the bank had been closed to enforce the stockholders' constitutional liability.² That liability was, in due course, reduced to judgment against all shareholders within the jurisdiction of the court and a receiver was appointed, who proceeded to collect a substantial amount of account thereof and made distribution through the liquidating receiver of the closed bank. Plaintiffs subsequently filed a petition with the court requesting an order directing the receiver in the shareholders' liability suit to sell the uncollected portion of such judgment at public sale and to execute proper assignment to the purchaser. An order for sale was entered. More than thirty days thereafter,³ other creditors of the bank obtained leave of court to move to vacate the order of sale on the ground that the judgment involved belonged exclusively to the creditors of the bank and was not assignable particularly in the absence of constitutional or statutory provision on the point.⁴ The trial court agreed that it lacked jurisdiction and vacated the order of sale. On direct appeal to the Illinois Supreme Court because a construction of constitutional provisions was involved, that court reversed on the ground that, as the liability of stockholders in a defunct bank was enforceable in equity in a representative action, the absence of statutory authority did not limit the general equity powers of the trial court which might, for the purpose of making distribution of the assets, order its receiver to compromise or sell the uncollected claims.

The decision is one of significance as well as of first impression in this state for it settles a point over which there has been some doubt. It goes far toward facilitating the settlement and termination of representative suits which have dragged along to the point where the rule of diminishing returns has now set in.⁵ It suggests a practical pro-

¹ 387 Ill. 524, 56 N. E. (2d) 750 (1944). A comparable problem involving assignment of claim for stockholder's liability in a national bank was subsequently presented in *Wagner v. South Chicago Sav. Bank*, 146 F. (2d) 686 (1945), where the majority of the court arrived at substantially the same conclusion. Major, C. J., wrote a dissenting opinion.

² Ill. Const. 1870, Art. XI, § 6. See also Ill. Rev. Stat. 1943, Ch. 16½, § 6.

³ Such order would ordinarily be final after the expiration of thirty days from the date of its rendition: Ill. Rev. Stat. 1943, Ch. 110, § 174(1). The right to move to vacate after the lapse of thirty days was said to rest on the fact that the order was void for lack of jurisdiction: 387 Ill. 524 at 527, 56 N. E. (2d) 750 at 752.

⁴ Ill. Rev. Stat. 1943, Ch. 16½, § 11, was enacted to provide machinery for the enforcement of the constitutional provision. That statute is silent as to the right of the receiver in the liability suit to sell uncollected judgments although it does authorize the liquidating receiver of the closed bank to take such action.

⁵ As the suit continues, it becomes increasingly difficult to collect any money at all. It is scarcely worth the time and effort of the receiver, while the expenses of the suit, receiver's fees, attorney's fees, etc., tend to exceed the amount collected. As a consequence, the creditors cannot expect any appreciable benefit from a continuation of the suit and would, in the main, be better off by sale and distribution of the sale proceeds.

cedure to be followed for the closing of such cases, but whether it is logically sound or not is another problem.⁶

There are two lines of authority throughout the country on this subject which present conflicting views. Under one of them, the stockholders' liability evidenced by judgment is regarded in the nature of a trust fund for the sole and exclusive benefit of the creditors and, although collectible by a receiver appointed in a representative suit, the latter may not assign or transfer either the claim or the judgment arising therefrom. According to that view, the creditors have exclusive title to the judgment while the receiver is merely an officer of the court to accept satisfaction thereof. Lacking any title, the receiver cannot give any valid assignment.⁷ Practical considerations are rejected under that view as not being in conformity with the purpose of the statute imposing liability.⁸ In contrast, the rule prevails elsewhere that judgments rendered in stockholders liability suits are assignable in the same fashion as other judgments,⁹ although that view is sometimes founded upon statutory authority.¹⁰

While the Illinois court has seen fit to adopt the latter view in the absence of statutory authority, the premises underlying its de-

⁶ Argument was advanced in the instant case that to permit the sale of such judgments would be opening the door to potential fraud upon creditors by permitting sale at less than what might be collected thereon. The court herein disposed of that argument by saying that since the sale was to be conducted under the direction and subject to the approval of the court and must be found to be for the best interests of the creditors, such creditors were sufficiently protected: 387 Ill. 524 at 530, 56 N. E. (2d) 750 at 753.

⁷ In *Andrew v. State Bank of Swea City*, 214 Iowa 1339, 242 N. W. 62 (1932), an order was obtained by a receiver to sell uncollected stock assessments which had not been reduced to judgment. Such assessments were held unassignable on the theory that they represented the sole and exclusive property of the creditors. Subsequently, in *Roe v. King*, 217 Iowa 213, 251 N. W. 81 (1933), an attempt was made to distinguish that case from the holding in the *Andrew* case on the ground that the assessments had been reduced to judgment. Despite this, the court held that the receiver could assign nothing. See also *Hood v. Richardson Realty, Inc.*, 211 N. C. 582, 191 S. E. 410 (1937); *Griffin v. Brewer*, 167 Okl. 654, 31 P. (2d) 619 (1934); *American Exchange Bank v. Rowsey*, 144 Okl. 172, 289 P. 726 (1930); *State v. Kelley*, 141 Okl. 36, 284 P. 65 (1930). Textual treatment of the subject may be found in *Fletcher, Cyclopedia of Corporations* (Perm. Ed.), Vol. 13, § 6499.

⁸ See, for example, *Andrew v. State Bank of Swea City*, 214 Iowa 1339 at 1346, 242 N. W. 62 at 65, where the court said: "Moreover, the enforcement of this claim . . . cannot be justified upon any ground such as that it is economical to gather up the tag ends of a receivership and dispose of them for whatever they will bring at auction in order that the receivership may be closed. That reasoning may be perfectly good as to property other than this special limited liability involved in this case. Such liability cannot be hawked at auction and sold to speculators for their individual aggrandizement, with little or no benefits flowing to the stockholders. To do so would be to plainly circumvent the manifest purpose of the statute."

⁹ *Waldron v. Alling*, 76 N. Y. S. 250 (1902); *Schaberg's Estate v. McDonald*, 60 Neb. 493, 83 N. W. 737 (1900).

¹⁰ *White v. Taylor*, 187 Ark. 1, 58 S. W. (2d) 210 (1933). The holding in *Shaw v. Strong* (Tex. Civ. App.), 35 S. W. (2d) 769 (1931), which denied a right to assign, was subsequently changed by statute permitting such action: *Hill v. South Texas Bank & Trust Co.* (Tex. Civ. App.), 73 S. W. (2d) 1043 (1934).

cision are vaguely indicated by the statement that such authority is said to rest on the general equitable powers of the court. The principle was laid down quite early in *Golden v. Cervenka*¹¹ that the liability of the shareholders imposed by the state constitution was designed for the sole and exclusive benefit of the creditors of the bank to be enforced individually in an action at law¹² or collectively in a representative suit in equity.¹³ For that reason, it was declared in *Burket v. Reliance Bank & Trust Company*¹⁴ that a receiver appointed by the court in such a proceeding was merely the court's officer for the purpose of collecting, receiving and disbursing the proceeds of that liability and was not a party to and had no control over the creditor's suit to determine the extent of that liability. That decision would seem to indicate that the receiver, being only a representative of the court and not of the creditors, would have no title to the cause of action or to the judgment flowing therefrom. It should be noted, however, that the court said he was not a party to the determination of the stockholders' liability. After that determination, the creditor-plaintiff conducting the suit could no longer settle his claim or agree to a dismissal of the suit for by then the right of all the creditors had become vested in the judgment which inured to their collective benefit.¹⁵ By reason of the statute, collection or composition of the judgment so rendered can be made only by the receiver appointed in such proceeding,¹⁶ but that fact does not vest title to the judgment in such receiver. While the stockholders who have paid would seem to have no interest in the distribution of the fund which they were compelled to create for the satisfaction of their liabilities,¹⁷ it does not follow that the receiver is entitled to that fund or to more than the right to collect the judgment as the arm of the court which pronounced the same. Distribution of funds collected by that receiver may best be accomplished by delivering the same to the liquidating receiver of the closed bank for ultimate payment to those entitled thereto,¹⁸ but

¹¹ 278 Ill. 409, 116 N. E. 273 (1917). That case emphatically denies that the liquidating receiver has any authority or right to enforce the constitutional liability.

¹² *Schalucky v. Field*, 124 Ill. 617, 16 N. E. 904 (1888); *Wincock v. Turpin*, 96 Ill. 135 (1880); *Culver v. Third Nat. Bank of Chicago*, 64 Ill. 528 (1871).

¹³ *Leonard v. Bye*, 361 Ill. 185, 197 N. E. 546, 101 A. L. R. 569 (1935). But see *Zimmerman v. Zeimer*, 363 Ill. 220, 1 N. E. (2d) 854 (1936).

¹⁴ 367 Ill. 196, 11 N. E. (2d) 6 (1937).

¹⁵ *Freeman*, *Judgments*, 5th Ed., Vol. 1, p. 173.

¹⁶ Ill. Rev. Stat. 1943, Ch. 16½, § 11.

¹⁷ *Comstock v. Morgan Park Trust & Savings Bank*, 363 Ill. 341, 2 N. E. (2d) 311 (1936). But see *Holderman v. Moore State Bank*, 383 Ill. 534, 50 N. E. (2d) 741 (1943), noted in 22 CHICAGO-KENT LAW REVIEW 216, which indicates that the receiver can be directed to pay back funds remaining in his hands in excess of the debts accrued.

¹⁸ Ill. Rev. Stat. 1943, Ch. 16½, § 11, does direct that: "The funds so collected . . . shall be distributed according to law among the creditors of said bank in such manner as the court shall direct." See also *Heine v. Degen*, 362 Ill. 357, 199 N. E. 832 (1936).

authority to collect and distribute falls short of the power to assign and pass title.¹⁹

The court in the instant case said, in effect, that the judgments, to the extent which they remained uncollected, were choses in action and constituted a res under the jurisdiction of the court which, pursuant to its equity powers, could be sold just as it had power to collect and distribute the funds arising therefrom. That authority, if it exists, could not be drawn from the language of the statute for the situation is not comparable to that in which a liquidating receiver of the closed bank seeks to sell and dispose of its assets²⁰ nor is it like that found in the case of the dissolution of an ordinary private corporation.²¹ It must, then, rest on certain alleged "general equity powers."

The fundamental power of a court of equity to assert control over property through a receiver is usually confined to taking possession thereof rather than title thereto.²² If any sale of such property is made, it can be done only because the court has acquired jurisdiction over the res.²³ When that res takes the form of a judgment which the court itself has pronounced, it is fundamental law that jurisdiction over that judgment, as a species of property, can be exercised only for certain limited purposes such as acting to vacate or review the same, to enforce the collection thereof, or entering satisfaction when satisfaction has been made. In all other respects, the judgment is the property of the judgment creditor and may not be taken from him except by due process of law.²⁴ If the judgment runs in favor of several persons, it may not be split between them so as to permit one of them to exercise a right to redeem from an execution sale or to permit him to make a fractional assignment thereof.²⁵ Being joint property,²⁶ it can only be dealt with by all of them acting

¹⁹ An attorney at law, for example, has no right to assign a judgment in favor of his client in the absence of express authority: *Schroeder v. Wolf*, 227 Ill. 133, 81 N. E. 13 (1907). See also *Peacock v. Pembroke*, 8 Md. 348 (1855). No one could validly claim that a sheriff, although he may collect and satisfy a judgment pursuant to a writ of execution, would be in a position to give an assignment of such judgment without express authority from the judgment creditor. Both of these officers are as much officers of the court as the receiver.

²⁰ Ill. Rev. Stat. 1943, Ch. 16½, § 11, specifically gives such receiver the "title to the books, records and assets of every description of such banks." See also *McIlvaine v. City Nat. Bank & Trust Co. of Chicago*, 314 Ill. App. 496, 42 N. E. (2d) 93 (1942), noted in 22 CHICAGO-KENT LAW REVIEW 3, cause transferred 371 Ill. 565, 21 N. E. (2d) 737 (1939).

²¹ Ill. Rev. Stat. 1943, Ch. 32, § 157.87.

²² *Hooper v. Winston, Trustee*, 24 Ill. 353 (1860). See also *Tardy's Smith on Receivers*, 2nd Ed., Vol. 1, §§ 41-2.

²³ *Republic Life Ins. Co. v. Swigert*, 135 Ill. 150, 25 N. E. 680 (1890).

²⁴ *Burket v. Reliance Bank & Trust Co.*, 367 Ill. 196, 11 N. E. (2d) 6 (1937).

²⁵ *Chicago Trust Co. v. Dorchester Terrace Bldg. Corp.*, 317 Ill. App. 293, 45 N. E. (2d) 1001 (1943), noted in 22 CHICAGO-KENT LAW REVIEW 50.

²⁶ *Freeman, Judgments*, 5th Ed., Vol. 1, p. 173.

jointly unless it might be said that, on proper application, partition could be made or sale had because partition was impossible.²⁷

It is only on this latter theory that there might be any legal justification for the conclusion reached in the instant case, but it does not appear that any such application was made therein. Although the decision is of doubtful validity, it must be acknowledged that the outcome of the case furnishes a practical and expedient solution for what might otherwise become an intolerable situation. If title to the judgment could be transmitted only by assignment executed by all of the judgment creditors, practical obstacles would be apt to defeat the giving of such an assignment. Assuming such action was impossible, the only alternatives would be to discharge the receiver when it reasonably appeared that further collection was unlikely, leaving no one actively interested in the enforcement of the unpaid judgment, or else retain the receiver in office until the judgment was ultimately extinguished by passage of time. Perhaps an exercise of vague "general equitable powers" could, therefore, be said to be warranted.

R. BURDETT

DEEDS—CONSTRUCTION AND OPERATION—WHETHER OR NOT DEED DELIVERED AFTER DEATH OF ONE OF CO-GRANTORS IS EFFECTIVE TO TRANSFER THE INTEREST OF THE SURVIVING GRANTOR—A rather novel factual situation was presented in the case of *Creighton v. Elgin*¹ recently decided by the Illinois Supreme Court. It appeared that, in 1918, one Creighton executed a deed to certain real property to his two sons as tenants in common. The deed was also signed and acknowledged by the grantor's wife, although she owned no interest in the property at that time other than an inchoate right of dower. That deed was never effectively delivered during Creighton's lifetime but remained in his wife's custody. Upon his death, his wife became owner in fee of the property covered by the deed as sole devisee under her husband's will. In 1936, she apparently delivered the deed to one of the grantees and it was then recorded. After the death of one of the grantees, Mrs. Creighton having died in the meantime, a suit for partition was brought by such grantee's widow on the theory that the subsequent delivery of the deed by Mrs. Creighton was competent to convey her entire fee simple interest to the grantees, thereby giving the plaintiff certain rights as sole devisee of such deceased grantee. The trial court held the deed void for want of delivery during Mr. Creighton's lifetime. On appeal, however, the Supreme Court reversed and remanded, being of the opinion that the deed was in form

²⁷ Although statutory partition is confined to interests in land, Ill. Rev. Stat. 1943, Ch. 106, § 1, equitable right to compel partition of personal property has been recognized: *Robinson v. Dickey*, 143 Ind. 205, 42 N. E. 679, 52 Am. St. Rep. 417 (1896). See also 47 C. J., Partition, § 66; 40 Am. Jur., Partition, § 104.

¹ 387 Ill. 592, 56 N. E. (2d) 825 (1944).

legally sufficient to convey the fee simple title to the property despite the death of one of the grantors prior to delivery, although there was some question as to the effectiveness of the purported delivery in 1936 which required a new trial.

The question here presented can be simply stated as follows: If A and B, as co-grantees, execute a deed to C and D as tenants in common, but the deed is not delivered until after A's death, is such deed competent to convey B's interest in the property although void as to A's interest for want of delivery? If so, should the holding be any different if B's rights or estate have been increased or enlarged between execution and delivery?

There can be no argument as to the insufficiency of the deed here involved to pass the interest of Mr. Creighton, for it is well established that a deed which is not effectively delivered during the grantor's lifetime is incapable of transferring the property after the grantor's death.² No act of the grantee can complete the delivery after that time.³ The logic for such rule lies in the fact that if a grantor wishes to convey real property by deed, he must effectively deliver it while he lives; for if he intends the deed to become operative only in the event of his death, the instrument would amount to an attempt to make a testamentary disposition and would be valid only if statutory requirements as to execution and attestation were satisfied.⁴

Just why a joint deed, on the other hand, should be rendered void in its entirety if not effectively delivered prior to the death of either grantor is not too clear. Had the co-grantors, instead of joining in the same deed, sought to accomplish their purpose by conveying their respective interests through separate deeds, the death of one grantor before delivery of his deed could not possibly affect the validity of the deed of the other if it was properly delivered. There is no patent interrelation between the two deeds which should operate to nullify both. Where, for convenience, both parties use the same instrument to transfer the separate rights of each, there would seem no logical basis for achieving any different result.

While, after death of a co-grantor, the joint deed may contain extraneous matter, e. g. the name of the deceased grantor, his signature, the description of any property which would not pass by such deed, and the deceased grantor's personal covenants, still that provides no plausible reason why the entire instrument should be invalidated. Applying the theory that the instrument may be severable

² *Johnson v. Fulk*, 282 Ill. 328, 118 N. E. 706 (1918); *Nofftz v. Nofftz*, 290 Ill. 36, 124 N. E. 838 (1919); *Ehrlich v. Tritt*, 316 Ill. 221, 147 N. E. 40 (1925).

³ *Biggins v. Lambert*, 115 Ill. App. 576 (1904), affirmed in 213 Ill. 625, 73 N. E. 371, 104 Am. St. Rep. 238 (1905).

⁴ Ill. Rev. Stat. 1943, Ch. 3, §§ 193-4. See also, for example, *Rouland v. Burton*, 296 Ill. App. 138, 15 N. E. (2d) 920 (1938).

in its nature and need not stand or fall as a unit, it may be regarded as valid in part although inoperative in part.⁵ So long as the deed satisfies the statutory requirements, contains the names of the grantor bound thereby as well as the grantee, uses appropriate words of grant, has an accurate description of the real estate conveyed, and bears the signature of the surviving grantor, it should pass that grantor's estate.⁶ It need not be acknowledged as the words of the statute are not mandatory,⁷ nor is any exact or prescribed form of words necessary so long as an intention to convey is expressed.⁸ From pure reasoning, therefore, the instant holding would seem correct particularly when it is remembered that every deed speaks only as of the time of its delivery regardless of its date.⁹

Reported cases from other jurisdictions on the exact issue here involved are admittedly scarce. However, *Schoenberger's Executors v. Zook*¹⁰ is such a case. There, certain property owned by a woman was to be conveyed by deed which she had signed and in which her husband had joined. The grantee refused to accept delivery during the woman's lifetime, but after her death took delivery from the surviving co-grantor. The court held such deed was competent to pass the husband's interest as tenant by the curtesy, although it declared that the conveyance did not affect the rights of the heirs of the deceased wife who, upon her death, had succeeded to the reversion.

Decisions on the converse to that situation, and opposite to the problem presented by the instant case, would serve to reinforce the correctness of that holding. In *Hopkins v. Slusher*,¹¹ for example, a deed was made in favor of two grantees but was not delivered until after the death of one of them. It was held to operate as a conveyance to the surviving grantee, but only of such interest as he would have taken had his deceased co-grantee survived the delivery. Direct and indirect precedent, therefore, sustain the instant decision at least as to the first query.

On the remaining point, i. e. whether the deed was sufficient to transfer only the inchoate interest held by the surviving grantor on the date of the deed or would serve to pass the interest later acquired,

⁵ *Payne v. The Mayor of Brecon*, 3 H. & N. 572, 157 Eng. Rep. 597 (1858). Analogous cases may be found with reference to the effect of an alteration made by one party upon the obligations of another party contained in the same deed: *Williston, Contracts*, Rev. Ed., Vol. VI, § 1888. As to partial enforcement of valid portions of contracts partly tainted by illegality, see *Williston, op. cit.*, Vol. V, § 1660.

⁶ Ill. Rev. Stat. 1943, Ch. 30, § 8.

⁷ *Ibid.*, Ch. 30, § 19.

⁸ *Cross v. Weare Commission Co.*, 153 Ill. 499, 38 N. E. 1038, 46 Am. St. Rep. 902 (1894).

⁹ *Totten v. Totten*, 294 Ill. 70, 128 N. E. 295 (1920); *Bearss v. Ford*, 108 Ill. 16 (1883); *MacVeagh v. Chase & Sanborn*, 67 Ill. App. 160 (1896).

¹⁰ 34 Pa. St. 24 (1859).

¹¹ 266 Ky. 300, 98 S. W. (2d) 932, 108 A. L. R. 662 (1936).

the law is much clearer. Although, at time of signing, it may have been the intention of the surviving grantor to pass only an inchoate interest, the effective date on which to measure the true intent is that on which delivery takes place.¹² At that time the surviving grantor in the instant case knew she held a larger interest for she had, in the interim between signing and delivery, conveyed portions of the described premises. Under the circumstances, therefore, the surviving grantor's intent must have been to transfer the interest she then possessed. That the deed then described more property than the surviving grantor owned would not of itself render the conveyance nugatory nor affect the title of the innocent interim purchasers.¹³ If, therefore, the deed concerned in the instant case was, in fact, eventually delivered, a holding that it was operative to convey the interest of the surviving co-grantor was justified.

M. C. MAITLAND

EXECUTORS AND ADMINISTRATORS—APPOINTMENT, QUALIFICATION, AND TENURE—WHETHER OR NOT HOSTILITY TOWARD DISTRIBUTEES AFFECTS COMPETENCY OF PERSON OTHERWISE ENTITLED TO ACT AS ADMINISTRATOR—In *Dennis v. Dennis*,¹ the court was asked to determine the right of one son, named Jacob, to be appointed administrator with the will annexed of the mother's estate as opposed to the appointment of a nominee of another son, named Frederick, who had been named as executor thereunder but was disqualified from acting by reason of his confinement in the penitentiary.² Under the father's will, his entire estate had been given to Jacob after a life estate in favor of the mother and Frederick had been disinherited. The mother, deeming that an injustice had been done to her wayward son, renounced the provisions of that will and claimed her statutory share in fee. She thereafter, by will, devised such share to Frederick. Upon her death, rival petitions for appointment to administer her estate were filed by the two sons. The county court, finding that a long-standing animosity existed between the two sons and that Jacob had made no accounting of the father's estate, appointed Frederick's nominee. That order was reversed by the Circuit Court upon the ground that although there was a great conflict of personal feelings there was no such adversity of legal interest as to require the disqualification of Jacob, as a member of a class, in favor of a mere nominee.³ On appeal,

¹² See cases cited in note 9, ante.

¹³ *Doe ex dem. McConnel v. Reed*, 5 Ill. (4 Scam.) 117 (1842); *Brown v. Banner Coal & Oil Co.*, 97 Ill. 214 (1881).

¹ 323 Ill. App. 328, 55 N. E. (2d) 527 (1944).

² Ill. Rev. Stat. 1943, Ch. 3, § 229 and § 246, declares that a person convicted of a crime rendering him infamous is not qualified to act as executor or administrator.

³ As to preference between a member and nominee of a member, see *In re Marco's Estate*, 314 Ill. App. 560, 41 N. E. (2d) 783 (1942), noted in 21 CHICAGO-KENT LAW REVIEW 194.

the Appellate Court for the Fourth District reversed the circuit court and remanded with directions to appoint Frederick's nominee because it found that the hostile feeling between the two brothers amounted to a sufficient conflict of interest to warrant such action.⁴

No clear precedent for such action exists in Illinois for it was heretofore regarded as necessary that, in order to pass over a member of a class in favor of a nominee, the member had to be disqualified by reason of some actual legal adverse interest to the estate over which he sought to administer⁵ or else had demonstrated his unfitness by a failure to observe his duties in managing the affairs of another and related estate.⁶ While it is true that Jacob had not performed his duties as administrator of the father's estate with technical precision,⁷ there was no showing that he had been guilty of mismanagement nor did it appear that he had any claim against the mother's estate which might render him incapable of acting in a disinterested fashion.⁸ The sole conflict, therefore, had to lie in the animosity of personal feeling which existed between the two sons.

There is no doubt that, under the law of other jurisdictions, antagonism toward those interested in an estate may be taken into consideration when determining the fitness of a person to act as administrator or executor,⁹ for the right of interested parties to have an impartial and equitable distribution of the estate is the dominant one and ascendant over the right of any particular individual to administer.¹⁰ An antagonistic and hostile feeling must actually exist, however, for mere prejudice toward the distributees will not serve to disqualify,¹¹ and that unfriendly or hostile feeling must be of such character as would be likely to prevent the management of the estate in accordance with the dictates of prudence and in the interest of the heirs, devisees and creditors.¹²

Cases do exist which declare that mere personal hostility toward a distributee will not necessarily serve to disqualify one from acting as personal representative of an estate, but on analysis they reveal

⁴ Although Ill. Rev. Stat. 1943, Ch. 3, § 246, does not impose such test to determine qualification, that view was engrafted by *Heward v. Slagle*, 52 Ill. 336 (1869).

⁵ See, for example, *Heward v. Slagle*, 52 Ill. 336 (1869).

⁶ *Justice v. Wilkins*, 251 Ill. 13, 95 N. E. 1025 (1911).

⁷ It did appear that no account had been filed therein although he had served as administrator for some twenty-one months, and petition to compel him to report had become necessary, but the estate appeared to be a complicated and substantial one and the delay might have been justified: 323 Ill. App. 328 at 331 and 338, 55 N. E. (2d) 527 at 528 and 531.

⁸ On that point, see *Stines v. Brock*, 185 Ill. App. 22 (1913).

⁹ *Martin v. Otis*, 233 Mass. 491, 124 N. E. 294, 6 A. L. R. 1340 (1919); *Nickels v. Horsley*, 126 Va. 54, 100 S. E. 831 (1919).

¹⁰ *Ex parte Small*, 69 S. C. 43, 48 S. E. 40 (1904).

¹¹ *In re Wright*, 177 Cal. 274, 170 P. 610 (1918); *In re Bauquier's Estate*, 88 Cal. 478, 26 P. 373 (1891).

¹² *Stevens v. Larwill*, 110 Mo. App. 140, 84 S. W. 113 (1904).

that, as in *Davis' Administrator v. Davis*,¹³ the alleged hostility lay more nearly in the nature of a lack of interest in the heir or legatee rather than one of hatred,¹⁴ or else, as in *Barnett's Administrator v. Pittman*,¹⁵ represented a conflict of financial interests. In only one case, that of *Dooley v. Dooley*,¹⁶ does it appear that a clearly contrary holding to that in the instant case was reached. There rival petitions for administration of an estate were presented by two brothers, each being supported by an equal number of the other children, but the court upheld the right of one brother to administer, despite his enmity toward some of the other children, on the ground that such children were protected by the official bond required of the administrator in case of any mismanagement of the estate. In contrast to such paucity of authority, many decisions support the proposition that hostility toward distributees will justify the disqualification of a person otherwise entitled to act as an administrator.¹⁷

Practical considerations governing the appointment of an administrator would seem to support the decision in the instant case as well as the holdings in other jurisdictions which subscribe to the principles followed therein. Certainly, when the chief beneficiary of the estate is confined in the penitentiary, he needs the assistance of a wholly disinterested and loyal person to watch over his interests and should not be forced to rely solely on an official bond.

M. C. MAITLAND

MUNICIPAL CORPORATIONS—OFFICERS, AGENTS, AND EMPLOYEES—WHETHER CIVIL SERVICE EXAMINEES, WRONGFULLY REFUSED CERTIFICATION AND APPOINTMENT, MAY RECOVER WAGES FOR THE ELAPSED PERIOD BETWEEN MANDAMUS ORDER AND ACTUAL APPOINTMENT—In the case of *Corbett v. City of Chicago*,¹ plaintiffs had taken and passed civil service examinations for positions as police clerks. Having been refused certification and appointment, they instituted mandamus proceedings and were granted a peremptory writ in 1941. The defendant city appealed from such decision, but the same was affirmed by the

¹³ 162 Ky. 316; 172 S. W. 665 (1915).

¹⁴ The court noted that the allegedly disqualified person was the paternal grandfather of the child, lived just across the street, but had rarely seen the child, had never exhibited any interest in or solicitude about its welfare, and, in fact, had entertained some doubts as to its paternity: 162 Ky. 316 at 319, 172 S. W. 665 at 666.

¹⁵ 282 Ky. 162, 137 S. W. (2d) 1098 (1940).

¹⁶ 240 S. W. 1112 (Tex. Civ. App., 1922).

¹⁷ In re Tracy's Estate, 214 Iowa 881, 243 N. W. 309 (1932); *Hunt v. Crocker*, 246 Ky. 338, 55 S. W. (2d) 20 (1932); In re Drew's Appeal, 58 N. H. 319 (1878); *Ellis v. Ellis*, 42 N. D. 535, 174 N. W. 76 (1919); In re Estate of Schmidt, 183 Pa. St. 129, 38 A. 464 (1897); In re Warner's Estate, 207 Pa. 530, 57 A. 35, 99 Am. St. Rep. 804 (1904); In re Fleming's Estate, 135 Pa. Super. 423, 5 A. (2d) 599 (1939); In re Pike's Estate, 45 Wis. 391 (1878).

¹ 323 Ill. App. 429, 55 N. E. (2d) 717 (1944).

Appellate Court and leave to appeal was denied.² Plaintiffs were finally certified and appointed in 1942. They thereupon filed the present suit, seeking to collect wages for the period from the date of the original peremptory writ to the actual time of appointment. Plaintiffs' motion to strike the defendant's amended answer, which relied on the defense of payment to de facto incumbents, was allowed and judgment for the salary accrued was awarded plaintiffs. On appeal from that judgment, the Appellate Court for the First District affirmed on the ground that payment of the wages to de facto employees during the contested period was not a good defense.

The precise question presented by the instant case does not appear to have been before any Illinois reviewing court, nor before the courts of any other jurisdiction. Proper consideration of the controversy can, therefore, only be obtained from a review of allied problems. The situation is directly analogous to cases involving the wrongful removal of civil service employees. In cases of that type, the decisions of the Illinois courts present a pattern which is kaleidoscopically confused. One of the early cases, that of *City of Chicago v. Luthardt*,³ responsible for much of the subsequent confusion, dealt with the general question of the right of a wrongfully removed employee to obtain compensation for the period of his removal. When deciding that the employee had the right to such compensation, the court said: "The legal right to the office carried with it the right to the salary or emoluments of the office. The salary follows the legal title."⁴ There was, however, clear implication in that decision that payment to a de facto employee would have constituted a good defense. So, even at the inception of the "title theory" in this state, qualifications were apparently recognized.

Some time afterward, the Supreme Court again had occasion to speak on this problem. In *Bullis v. City of Chicago*,⁵ it reiterated the doctrine of the Luthardt case and even strengthened it by a further statement to the effect that the salary follows the legal title and not the occupation and exercise of the duties of the office. Yet it again gave tacit recognition to the exception that actual payment to a de facto employee should be regarded as a good defense. That fundamental doctrine appeared to be so settled that, in a subsequent case,⁶ the question of the right to compensation was decided without further discussion.

Ultimately, however, the Supreme Court was brought face to face

² See *People ex rel. Corbett v. Allman*, 312 Ill. App. 484, 38 N. E. (2d) 810 (1942). Leave to appeal denied: 316 Ill. App. xiv.

³ 191 Ill. 516, 61 N. E. 410 (1901).

⁴ 191 Ill. 516 at 523, 61 N. E. 410 at 412, quoting from *Andrews v. City of Portland*, 79 Me. 484, 10 A. 458, 10 Am. St. Rep. 280 (1887).

⁵ 235 Ill. 472, 85 N. E. 614 (1908).

⁶ *People ex rel. Sellers v. Brady*, 262 Ill. 578, 105 N. E. 1 (1914).

with a situation which involved actual payment of the salary to a de facto employee who had served during the period of removal.⁷ For the first time, the court recognized that there existed serious disagreement throughout the country over this question.⁸ Nevertheless, with a cursory reference to the "title theory" of the Luthardt case, it decided that such payment was no defense. Illinois was thereby aligned, at least for a time, with the distinct minority of the American jurisdictions.

That problem again came before the Supreme Court in *People ex rel. Sartison v. Schmidt*,⁹ where it at last received the intelligent discussion which it merited. The relator therein had been wrongfully removed and sought reinstatement and compensation for the period of his removal. The defense of payment to a de facto employee was raised. The court, without regard to the holding in *People ex rel. Blachly v. Coffin*,¹⁰ considered the question to be one of first impression in Illinois. It proceeded to a discussion of the law in other jurisdictions as well as a learned and intelligent dissertation of the compelling public aspects of the problem. Upholding the defense of payment to a de facto employee, it said: "We are of the opinion that payment to a de facto public officer of the salary of the office, made while he is in possession, is a good defense to an action brought by a de jure officer to recover the same salary after he has *acquired or regained* possession."¹¹ The court was careful, however, to add a necessary qualification to such holding by saying: "If the salary or compensation has been paid *in good faith* . . . it cannot . . . be recovered. . . ."¹² There should be little doubt as to the validity of that proviso, for the sovereign ought not be protected when it acts in bad faith. In its opinion in the Schmidt case, the court considered all of the previous utterances on the subject, distinguished the problem from that in the Luthardt and Bullis cases, and necessarily rejected the Coffin and Brady cases, even though, with judicial courtesy, it refrained from a direct refutation of the latter. Shortly afterward, however, in *People ex rel. Durante v. Burdett*,¹³ it reaffirmed such holding and expressly overruled the Coffin case.

The controversy then appeared to be well-settled, but it arose again to confront the court in *People ex rel. McDonnell v. Thompson*.¹⁴ This time, the point of attack centered on the "good faith"

⁷ *People ex rel. Blachly v. Coffin*, 279 Ill. 401, 117 N. E. 85 (1917).

⁸ See annotation to *Hittell v. City of Chicago*, 327 Ill. 443, 158 N. E. 683 (1927), in 55 A. L. R. 997 for a very thorough analysis of this point.

⁹ 281 Ill. 211, 117 N. E. 1037 (1917).

¹⁰ 279 Ill. 401, 117 N. E. 85 (1917).

¹¹ 281 Ill. 211 at 215, 117 N. E. 1037 at 1038. Italics added. It is interesting to note that the court's reference to "acquired or regained," impliedly recognizes the essential similarity between a wrongful removal and a wrongful failure to appoint.

¹² 281 Ill. 211 at 217, 117 N. E. 1037 at 1039. Italics added.

¹³ 283 Ill. 124, 118 N. E. 1009 (1918).

¹⁴ 316 Ill. 11, 146 N. E. 473 (1925).

referred to in the Schmidt case. Plaintiff therein was seeking compensation not for the entire period of his removal but for the time which had elapsed between the entry of the order directing his reinstatement and the actual restoration to the position. The court awarded compensation, referring to a "well-defined exception" to the doctrine of the Schmidt case. The result was justified both in law and in policy, but the reasoning of the court could hardly be called compelling.

Probably because of the weakness of the reasoning in the Thompson case, the next time the question arose, as it did in *Hittell v. City of Chicago*,¹⁵ the Supreme Court was obliged to consider the problem of good faith at some length. It re-examined the statement in the Schmidt case and gave it approval. Explanation for such view was provided in the following words: "The exigencies of society require efficient performance of official duties, and to secure such performance prompt payment therefor is an essential requisite. Disbursing officers of municipalities are not clothed with judicial power to determine whether or not a person vested with the indicia of an office and performing the duties of such office is, in fact, a *de jure* officer, *where there has been no judicial determination of such fact.*"¹⁶ By that statement, the court provided not only an explanation as to what was the good faith required of the sovereign by the Schmidt case but, more important, why protection for acts done in good faith was necessary. The necessity for judicial determination of the right to office before bad faith could be said to exist was emphasized when the court said: ". . . in no case where the question was involved do we find that it has been held by this court that proof of the good faith of the payment to the *de facto* employee was a requisite element of such defense *prior to a judicial determination as to which was the de jure employee.*"¹⁷

It appears, therefore, that the present doctrine in Illinois regarding this situation is that payment of the interim salary to a *de facto* employee will ordinarily constitute a good defense. If there has been a judicial determination of the right to office, however, the municipal employer must also show good faith as an essential element of its defense. The question of good faith was not raised in the instant case, but it would seem clear that, had it been raised, the court could have held that good faith was lacking as a matter of law.¹⁸ It is true that the municipal defendant argued that a decision of a lower court, during pendency of an appeal, was not, in point of law, a judicial determination of the right to office until the appeal had been finally

¹⁵ 327 Ill. 443, 158 N. E. 683 (1927).

¹⁶ 327 Ill. 443 at 447, 158 N. E. 683 at 684. Italics added.

¹⁷ 327 Ill. 443 at 445, 158 N. E. 683 at 684. Italics added.

¹⁸ Holdings from other jurisdictions supporting such view may be found in 55 A. L. R. 997 at 1013.

determined. To support such argument, it contended that to hold otherwise would be to penalize the city for exercising its right to appeal. That argument was refuted, and correctly so, when the Appellate Court pointed out that, using the analogous situation of an unsuccessful appeal from a money judgment followed by the imposition of interest from the date of the judgment in the lower court, any penalty suffered was the consequence of the lack of success on appeal. The mere pendency of an appeal from a judicial determination of a right to office cannot, therefore, be deemed sufficient to justify a claim of good faith in refusing to appoint or restore to appointment while the municipal employer continues to pay the salary of the office to another.

An interesting problem is thereby posed to the officials of the municipality, for if the appeal is unsuccessful they will have incurred a duty to make double compensation. That problem is not insurmountable, however, for upon entry of the order for appointment or reinstatement in the lower court, the city could comply by discharging the interim employee and offering the position to the successful plaintiff. It might still appeal and, if the decision of the lower court was affirmed, the plaintiff would merely continue in office. Should the lower court's decision be reversed, the city could then remove the plaintiff from office and reinstate the interim employee. The latter could have no claim against the city for compensation during the period of his removal for, by the clear-cut law of Illinois, the municipality could use the defense of payment in good faith to a de facto appointee. In either eventuality, therefore, the city would suffer no penalty for exercising its right to appeal. If it should be urged that, by abiding by the order of the lower court, the municipality had lost its right to appeal,¹⁹ the appointment of the plaintiff could be made on a temporary basis until the disposition of the appeal.²⁰

A. BAUM

PAWNBROKERS AND MONEY LENDERS—WHO ARE PAWNBROKERS AND MONEY LENDERS—WHETHER OR NOT AN OCCASIONAL ISOLATED SMALL LOAN CONSTITUTES DOING BUSINESS WITHIN MEANING OF "SMALL LOAN ACT" SO AS TO SUBJECT LENDER TO THE PENALTIES THEREOF—In the recent case of *Snyder v. Heinrichs*,¹ the Appellate Court of Indiana was called upon to construe the meaning of the Indiana Small Loan Act as it applied to the business of making small loans.² The litigation therein arose after the borrower had defaulted on a promissory note for \$200 calling for twenty-four per cent. interest, given to a lender

¹⁹ Freeman, *Judgments*, 5th Ed., Vol. II, p. 2406.

²⁰ Ill. Rev. Stat. 1943, Ch. 24, § 9-16.

¹— Ind. App. —, 55 N. E. (2d) 332 (1944).

² Burns' Ann. Stat. 1933, § 18-3001 to § 18-3004; Baldwin's Ann. Stat. 1934, §§ 10465-8.

whose principal occupation was that of tavern owner and operator. It appeared that similar loans had been made by plaintiff to the borrower's step-son on two occasions, but the evidence disclosed them to be more or less isolated transactions. The borrower contended that, as the plaintiff had not complied with the terms and conditions of the Small Loan Law and possessed no license to loan money at more than ordinary rates, the lender should forfeit both principal and interest. Judgment for plaintiff in the amount of the principal sum without interest was affirmed when the court concluded that the Small Loan Law applied only to persons who "engage in the business" of making loans at interest in excess of ordinary rates and that plaintiff was not in that category. By so doing, the court set a precedent for that state which does little more than add to the general confusion as to what is meant by the language of statutes, now found in a majority of states, purporting to regulate the so-called "small loan" business.

In order to arrive at that decision, the Indiana court relied on cases which define the words "doing business" but which are based on statutes entirely irrelevant to the problem in the instant case,³ although one case, that of *Stevens v. Grossman*,⁴ might be said to have some bearing since in it a note given to a contractor for a balance due was enforced although he was not licensed under the Small Loan Act, despite the fact that it called for more than ordinary interest, because the contractor was said not to be engaged in the loan business.⁵ If the act in question be designed solely to regulate persons who make small cash loans as a regular business, then it should not apply to the occasional lender.

In this state, the Illinois Supreme Court, after upholding the constitutionality of a statute which is almost identical with the Indiana Act,⁶ decided one criminal case based upon an alleged violation thereof where it indicated that its views would accord with those of the Indiana court in the instant case for it there said: "The object of the law is not to regulate the rate of interest, but . . . is to regulate the business of making loans of small sums of money to wage earners and salaried people."⁷ The Appellate Courts of Illinois, however, are not in agreement on the subject for that of the First District, First Division, has held a single loan on an automobile, secured by chattel mortgage, will bring the lender within the penalty provisions

³ *Vandalia R. Co. v. Stilwell*, 181 Ind. 267, 104 N. E. 289, Ann. Cases 1916D 258 (1914); *Roseland v. Phister Mfg. Co.*, 125 F. (2d) 417, 139 A. L. R. 1013 (1942).

⁴ 100 Ind. App. 417, 196 N. E. 123 (1935).

⁵ *Lockwood, Adm'r v. Woods*, 3 Ind. App. 258, 29 N. E. 569 (1892), was said to require disallowance of the usurious interest but not the forfeiture of the principal.

⁶ Laws 1935, p. 925; Ill. Rev. Stat. 1943, Ch. 74, § 19 et seq. The former statute, Laws 1917, p. 553, was held constitutional in *People v. Stokes*, 281 Ill. 159, 118 N. E. 87 (1917).

⁷ *People v. Stokes*, 281 Ill. 159 at 174, 118 N. E. 87 at 92 (1917):

of the act if there is a failure to secure a license,⁸ although the First District, Third Division, has reached an opposite holding on a similar issue.⁹ The debt at usurious interest must be one for money loaned, though, for the taking of a note to cover the cost of certain automobile repairs has been held not to be the sort of transaction or business regulated by the statute.¹⁰

The inference contained in the instant case that the lender must be in the sole business of, or at least devote a substantial portion of a varied business to, loaning money before he comes within the purview of such statutes seems to be borne out by other cases. It has been held, for example, that the act does not apply to persons loaning money to laborers to be paid back on pay-day;¹¹ to jewelers loaning money on warehouse receipts;¹² to garageman being paid a single repair bill in installments with interest;¹³ to a lender securing an isolated loan by a chattel mortgage;¹⁴ to a person in the pawnbroking business but making only one loan;¹⁵ to a lawyer occasionally loaning money on notes secured by second mortgages;¹⁶ and to commercial banks.¹⁷ In contrast, it has been held that the Small Loan Act does apply to Morris Plan banks or to companies doing a similar business;¹⁸ to loans made by an insurance agency which coerced borrowers into the purchase of insurance;¹⁹ to licensed security dealers who purchase wage assignments;²⁰ to retail merchants who do likewise;²¹ and has been held to apply to a single transaction.²²

⁸ In *Ranning v. Peyser*, 259 Ill. App. 152 at 154 (1930), the court said: "The statute . . . has been construed to mean that even a single forbidden transaction makes the lender guilty of a violation of its provision."

⁹ The court, in *Turk v. Bender*, 273 Ill. App. 84 at 86-8 (1933), declared: "This is the one and only loan ever made by the plaintiff . . . and there is no proof that plaintiff was in such business. We hold the statute in question has no application here."

¹⁰ *People v. Morse*, 270 Ill. App. 207 at 210 (1933), states: "The statute is clearly applicable only to a case involving loaning money. It should not . . . include an arrangement whereby a bill for repairs may be paid in installments."

¹¹ *Means v. State*, 75 S. W. (2d) (Tex. Civ. App.) 953 (1934).

¹² *City of Chicago v. Hulbert*, 118 Ill. 632, 8 N. E. 812 (1886).

¹³ *People v. Morse*, 270 Ill. App. 207 (1933).

¹⁴ *Turk v. Bender*, 273 Ill. App. 84 (1933).

¹⁵ In *Craddock v. Woods*, 60 Ga. App. 377 at 380, 3 S. E. (2d) 924 at 926 (1939), the court said: "Being in the loan business and making one loan . . . does not demand the inference that plaintiff was doing business under the Small Loan Act." See also *Levison v. Boas*, 150 Cal. 185, 88 P. 825, 12 L. R. A. (N. S.) 575 (1907). In *Rice v. Garnett*, 17 Ala. App. 239, 84 So. 557 (1919), the court did indicate, however, that the evidence might be sufficient to make this a question for the jury.

¹⁶ *Zirkle v. Daly*, 54 F. (2d) 455 (1932).

¹⁷ The Small Loan Act has been held inapplicable to banks in *City of Allentown v. Personal Finance Co.*, 19 Lehigh L. J. (Pa. Com. Pl.) 247 (1942).

¹⁸ *Whaley v. State*, 176 Tenn. 170, 139 S. W. (2d) 255 (1939).

¹⁹ *Commonwealth ex rel. Grauman v. Continental Co., Inc.*, 275 Ky. 238, 121 S. W. (2d) 49 (1938), condemned the practice on the ground that it was a device to obtain a rate of interest in excess of ordinary rates.

²⁰ *State ex rel. Ormes v. Tennessee Finance Co.*, 152 Tenn. 45, 269 S. W. 1119 (1925).

²¹ *Costello v. Great Falls Iron Works*, 59 Mont. 417, 196 P. 982 (1921); *Koen v. State*, 162 Tenn. 573, 39 S. W. (2d) 283 (1931).

²² *Rice v. Franklin Loan & Finance Co.*, 82 Colo. 163, 258 P. 223 (1927).

It can be seen, then, that there is a lack of uniformity on the question although perhaps the majority of cases would free the isolated lender from the rather severe penalties of the Small Loan Act and impose on him only the milder consequences of the ordinary usury laws. Such would seem to be more in accord with the philosophy behind such legislation, but the language thereof is unfortunate for it poses the question as to when one ceases to be an occasional lender so as to make conformity with the act necessary. Uncertainty in the law of Illinois on this point remains to be solved although there is some reason to believe, from the cited illustrations, that the courts of this state would absolve the occasional usurious lender if his principal business was not allied to that usually associated with pawn brokers and money lenders.

A. LUDWIG

PAYMENT—RECOVERY OF PAYMENTS—WHETHER MONEY PAID WITH FULL KNOWLEDGE OF FACTS AND IGNORANCE ONLY OF LEGAL RIGHTS MAY BE RECOVERED IN ABSENCE OF COMPULSION—In the recent case of *Western & Southern Life Insurance Company v. Brueggeman*¹ the Appellate Court of Illinois had occasion to give utterance to a sometimes overlooked rule of law when it denied recovery of money paid under mistake. In that case, an insurance company sought to recover an overpayment made on a life insurance policy containing a military service exemption clause.² Through inadvertence, and while having in its possession the full story of the insured's death while in military service in time of war, the company paid the full face value of the policy. Demand for the return of the erroneous overpayment was refused and suit followed. Judgment in the trial court for the defendant was affirmed, the Appellate Court saying: "The general rule seems to be that a payment made, with full knowledge of the facts and in ignorance only of legal rights cannot be recovered back."³

It would appear at first blush, from that statement, that one who inadvertently hands over two \$100 currency notes instead of one in payment of a debt for \$100 may not sue as in general assumpsit for money had and received to recover the overpayment. Such a rule, however, would completely abrogate the basic doctrine of quasi-contract which, being equitable in nature, is predicated upon the theory that defendant has received money which in equity and good conscience he ought not be permitted to retain.⁴ Unless, therefore, he

¹ 323 Ill. App. 173, 55 N. E. (2d) 719 (1944).

² The clause read: "In the event the insured dies while in Military or Naval Service in time of war, the liability of the company shall be limited to the amount of the premiums paid on this policy, with interest thereon at the rate of three per centum per annum."

³ 323 Ill. App. 173 at 178, 55 N. E. (2d) 719 at 721.

⁴ *Moses v. Macferlan*, 2 Burr. 1005, 97 Eng. Rep. 676 (1760).

can show a right to keep it, the money should be returned. Payment made and received by reason of a mistake of fact of the kind thus illustrated provides clear basis in equity for the return thereof.⁵

Confined to its proper limits, however, the rule so stated seems to be well established that a voluntary known and intended payment made to one under a claim of right, with full knowledge of all the facts and in ignorance only of legal rights, cannot be recovered provided that there is no fraud or compulsion tantamount to duress. Such rule appears to have been given its earliest utterance by the eminent Lord Ellenborough in a case very similar in facts and principles to the instant case,⁶ and has since been affirmed both in England⁷ and the majority of the American courts.⁸ Illinois has followed that majority without a single case of exception.⁹

The instant case, however, appears to go farther in its application of the doctrine for the court held that the insurance company had waived its rights to assert the military exemption clause by the mere act of mailing a check for the full face value of the policy to the beneficiary. It cannot be said that the company clearly intended a waiver for its attention was seemingly concentrated on a suicide clause contained in the same policy and the military exemption clause was overlooked. But the modern trend would seem to be that courts will find a waiver or estoppel against an insurance company whenever

⁵ Pool v. Allen, 29 N. C. 120 (1846).

⁶ Bilby v. Lumley, 2 East 469, 102 Eng. Rep. 448 (1802). An underwriter there sued to recover payment on the ground that defendant had failed to disclose to plaintiff a material letter relating to the transaction. Defendant proved that plaintiff had possession of the letter before the policy was adjusted and the money paid. The contents of the letter disclosed a good defence on the policy. Recovery was denied when the court found a voluntary payment present even though plaintiff acted in ignorance of his legal rights.

⁷ Brisbane v. Dacres, 5 Taunt. 143, 128 Eng. Rep. 641 (1813); Currie v. Goad. 2 Madd. 163, 56 Eng. Rep. 295 (1817); Martin v. Morgan, 1 Brod. & Bing. 289, 129 Eng. Rep. 734 (1819); The East India Co. v. Tritton, 3 B. & C. 280, 107 Eng. Rep. 738 (1824); Bramston v. Robins, 4 Bing. 11, 130 Eng. Rep. 671 (1826); Stevens v. Lynch, 12 East 38, 104 Eng. Rep. 16 (1810). See also 22 Eng. & Emp. Dig. 161; 35 *ibid* 158-9.

⁸ See, for example, Utermehle v. Normant, 197 U. S. 40, 25 S. Ct. 291, 49 L. Ed. 655 (1905); Lamborn v. Dickinson County Com'rs, 97 U. S. 181, 24 L. Ed. 926 (1878); Detroit Edison Co. v. Wyatt Coal Co., 293 F. 489 (1923); Taylor, Jr., & Sons v. First Nat. Bank, 212 F. 898 (1914); Kundsen-Ferguson F. Co. v. Chicago, St. P., M. & O. Ry. Co., 149 F. 973 (1906); Brumagim v. Tillinghast, 18 Cal. 265 (1861); Lester v. Mayor and City Council of Baltimore, 29 Md. 415 (1868); Deveraux v. Rochester German Ins. Co., 98 N. C. 6, 3 S. E. 639 (1887); Shuck v. Interstate Bldg. & Loan Ass'n, 63 S. C. 134, 41 S. E. 28 (1902); Mayor & c of Richmond v. Judah, 32 Va. (5 Leigh) 305 (1834); Haigh v. U. S. B. L. & L. Association, 19 W. Va. 792 (1882).

⁹ Illinois Glass Co. v. Chicago Telephone Co., 234 Ill. 535, 85 N. E. 200 (1908); People v. Foster, 133 Ill. 496, 23 N. E. 615 (1890); Union Building Ass'n v. City of Chicago, 61 Ill. 439 (1871); City of Chicago v. Stuart, 53 Ill. 83 (1869); Stover v. Mitchell, 45 Ill. 213 (1867); Bryan v. Pilgrim Nat. Life Ins. Co., 294 Ill. App. 356, 13 N. E. (2d) 850 (1938); Sando v. Smith, 237 Ill. App. 570 (1925).

it has done anything inconsistent with the provisions of the policy which have been inserted therein for its benefit.¹⁰

There may be some justification for such a view when an insurance company waives a defence which it might have asserted to a suit by the beneficiary as, for example, because of his failure to file proofs of loss within the specified time, but it is quite another matter to hold it to a waiver which results in the creation of a liability in the first instance. Waiver of a defence presupposes the existence of a liability which might have been avoided, so that payment under such circumstances might be said to involve no inequity on the part of the recipient calling for its return. A waiver of the type claimed in the instant case, however, creates a liability which was never there so long as the provision in question remained to confine the risk. Receipt of payment when no debt is due or owing would certainly seem to justify proceedings for the recovery of the amounts so paid. The court met this problem by adding to the rule aforementioned the additional words: ". . . and proof that the one making the payment was, in fact, under no obligation to pay, and the other had no right to receive the payment, is of no consequence."¹¹ By so doing, it appears to have extended the rule for it previously had been confined so as to require that the recipient of the payment must have had some claim of right thereto, however colorable, and the payor must have been under some obligation to pay.¹²

Opposition to such holding may be found, but it represents a distinctly minority view and turns upon the fact that the voluntary payment must have been made with such full and actual knowledge as would support the idea of either a conscious waiver or else a gift of the amount of the overpayment. Leading exponent of that view is the Alabama case of *Franklin Life Insurance Company v. Ward*¹³ wherein the court said: ". . . money voluntarily paid with full knowledge of the facts cannot be recovered, but having the means of ascertaining the real facts is not tantamount to actual knowledge of such

¹⁰ *Dwelling House Ins. Co. v. Dowdall*, 159 Ill. 179, 42 N. E. 606 (1895); *Manufacturers' & Merchants' Mut. Ins. Co. v. Armstrong*, 145 Ill. 469, 34 N. E. 553 (1893); *Germania Fire Ins. Co. v. Klewer*, 129 Ill. 599, 22 N. E. 489 (1889); *Beddow v. Hicks*, 303 Ill. App. 247, 25 N. E. (2d) 93 (1940); *Eagleton v. Prudential Ins. Co. of America*, 193 Ill. App. 306, abstr. opin. (1915); *Cox v. The American Ins. Co.*, 184 Ill. App. 419 (1913).

¹¹ 323 Ill. App. 173 at 178, 55 N. E. (2d) 719 at 721.

¹² Compare the instant case with that of *Illinois Glass Co. v. Chicago Telephone Co.*, 234 Ill. 535, 85 N. E. 200 (1908), where the quoted language was used in connection with the plaintiff's contention that it was under a business compulsion, hence the payment was not a voluntary one. See also *City of Chicago v. Northwestern Mut. Life Ins. Co.*, 218 Ill. 40, 75 N. E. 803 (1905); *Gannaway v. Barricklow*, 203 Ill. 410, 67 N. E. 825 (1903); *Yates v. Royal Ins. Co.*, 200 Ill. 202, 65 N. E. 726 (1902); *Pemberton v. Williams*, 87 Ill. 15 (1877); *C. & A. R. R. Co. v. C., V. & W. Coal Co.*, 79 Ill. 121 (1875); *Elston v. City of Chicago*, 40 Ill. 514 (1866).

¹³ 237 Ala. 474, 187 So. 462 (1939).

facts."¹⁴ Similar holdings may be found in other cases arising in the same state¹⁵ or in Michigan¹⁶ but there is a notable absence of decisions in other jurisdictions. That minority view, however, has an appeal to the sense of fairness and equity.

In view of the fact that the contract of insurance in the instant case called for payment of the face amount upon the death of the insured but expressly limited liability in the event the insured died while in military service to the return of premiums paid with interest, the maximum legal and equitable obligation of the company under the circumstances was to refund the premiums paid. In equity and good conscience, therefore, the mistaken payment of any excess over that figure, in the absence of actual and conscious knowledge that an overpayment was being given, ought fairly to be recoverable. To impose a penalty of the magnitude herein involved for an honest mistake, whether attributable to an insurance company or a human being, seems far too harsh to comport with basic principles underlying the remedy of quasi-contract.

S. L. EHRLICH

WILLS—RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES—WHETHER THE SALE OF THE SUBJECT OF A SPECIFIC DEVISE PURSUANT TO COURT ORDER FOR THE BENEFIT OF AN INCOMPETENT TESTATOR WORKS AN ADEMPTION THEREOF—The courts of this country are not in accord upon the question whether the sale of the subject of a specific devise by a court order for the benefit of an incompetent testator works an ademption thereof. The Supreme Court of Illinois had occasion, in the recent case of *Lewis v. Hill*,¹ to examine into that problem for the first time. The facts therein showed that the testatrix, by her last will and testament, devised certain real estate to the plaintiff. A few years after making such will, the testatrix was adjudged to be incompetent and defendant was appointed conservator of her estate. The conservator filed a petition to sell the real estate in question on the ground that the sale was necessary to provide money for his ward's care. Sale was ordered and the property was sold in due course. Testatrix died shortly thereafter and her will was admitted

¹⁴ 237 Ala. 474 at 481, 187 So. 462 at 467.

¹⁵ *Roney v. Commercial Union Fire Ins. Co.*, 225 Ala. 367, 143 So. 517 (1932); *Beasley v. Beasley*, 206 Ala. 480, 90 So. 347 (1921); *Traweek v. Hagler*, 199 Ala. 664, 75 So. 152 (1917); *Ledger Pub. Co. v. Miller*, 170 Ala. 437, 54 So. 52 (1910); *Merrill v. Brantley*, 133 Ala. 537, 31 So. 847 (1902); *Hemphill v. Moody*, 64 Ala. 468 (1879); *Young & Son v. Lehman, Durr & Co.*, 63 Ala. 519 (1878); *Town Council of Cahaba v. Burnett*, 34 Ala. 400 (1859); *Rutherford v. McIvor*, 21 Ala. 750 (1852).

¹⁶ *Truax v. Bliss*, 139 Mich. 153, 102 N. W. 635 (1905); *Pingree v. Mutual Gas Co.*, 107 Mich. 156, 65 N. W. 6 (1895); *Lane v. Pere Marquette Boom Co.*, 62 Mich. 63, 28 N. W. 786 (1886).

¹ 387 Ill. 542, 56 N. E. (2d) 619 (1944), affirming 322 Ill. App. 68, 53 N. E. (2d) 736 (1944). See also another aspect of the same case in 317 Ill. App. 531, 47 N. E. (2d) 127 (1943).

to probate, defendant being appointed executor thereof. At that time, defendant reported a balance of money on hand. Plaintiff, devisee under the will, then brought suit in the circuit court to impress a trust on such fund to the extent of the sale price on the theory that the sale of the real estate did not operate to adeem the specific devise of that property to her and prayed that defendant be ordered to pay plaintiff such sum in the due course of administration. Defendant moved to dismiss the complaint on the ground that, among other things, the circuit court lacked jurisdiction² and that the devise to plaintiff was adeemed. After denial of such motion, the court found in plaintiff's favor. Such decree was affirmed both in the Appellate Court and by the Supreme Court on certificate of importance.

In arriving at the conclusion that an ademption did not take place, the Illinois Supreme Court had to engraft an exception on the general rule prevailing in this state to the effect that where a specific article of property is bequeathed or devised and such article is lost, destroyed, or disposed of by the testator during his lifetime, so that it is not in existence or does not belong to him at his death, there is an ademption or extinguishment of such bequest or devise.³ While the court recognized that the real estate of the testatrix in the possession of her conservator constituted assets to be used, if necessary, for her support and for the payment of her debts; yet, if the conversion of the real estate into personalty was made for the sole purpose of her support and benefit, the fund produced by the sale, or any unexpended balance thereof, could not be regarded as personalty for the benefit of residuary legatees.⁴

The rule seems to have prevailed in some of the old English cases that whether an ademption took place or not was a question which turned on the intention to be imputed to the testator, the courts

² The Appellate Court held that action in the circuit court was proper for the reason that, by tracing the proceeds of the sale into the hands of the executor, the plaintiff's attempt to impress the fund with a trust brought the controversy within the general equitable jurisdiction of that court: 317 Ill. App. 531 at 533, 47 N. E. (2d) 127 at 128.

³ *Lenzen v. Miller*, 378 Ill. 170, 37 N. E. (2d) 833 (1941); *Tanton v. Keller*, 167 Ill. 129, 47 N. E. 376 (1897).

⁴ The court said: "The governing principle in the management of property belonging to a person of unsound mind is the furtherance of his interest. Therefore, his property may be converted from realty into personalty whenever it appears to be for his interest to do so, regardless of the contingent interests of the real and personal representatives or the interests of those who may have the eventual rights of succession." See 387 Ill. 542 at 546, 56 N. E. (2d) 619 at 621. But the court likened the problem to that which arises when an executor sells real estate of the testator for the payment of his debts. In such case, the conversion of realty into personalty is completed to all intents and purposes only to the extent to which the purchase money is required for the particular objects for which the sale takes place and the excess, though in the form of money, remains impressed with the character of real estate for the purpose of determining who is entitled to receive it: *Smith v. Smith*, 174 Ill. 52, 50 N. E. 1083, 43 L. R. A. 403 (1898).

thereby adopting the *animus adimendi* of the civil law.⁵ Since Lord Thurlow's decision in *Ashburner v. MacGuire*,⁶ however, the English courts have generally held that the only test to apply in cases involving ademption by extinction is: (1) was the legacy specific, and (2) was the subject of the legacy in existence at the testator's death and did he then own it. If the legacy was specific and if the subject thereof was sold or destroyed before the testator died, or not then owned by him, it was adeemed and the legatee lost the legacy, in whole or in part.⁷ Much the same view has been held by some of the American courts, at least in cases which did not involve the subsequent mental derangement of the testator.⁸

On the precise point here concerned, some of the English cases have held that, aside from the effect of any controlling statute, an ademption of a specific legacy will occur where, after the insanity of the testator occurs, the thing bequeathed or devised is converted by his conservator having legal authority to represent him without regard to whether or not the proceeds are preserved as such until the testator's death.⁹ No ademption occurs, however, when the conversion has been made by one without authority, particularly if the proceeds have been set apart and preserved up to the time of the testator's death.¹⁰ Three other English cases have declared that an actual intention on the part of the testator is an essential element of ademption, especially where the subject of the bequest has been sold, invested, or changed in some manner by a party who purports to represent the testator in such transactions but is acting without his authority.¹¹ To eliminate hardships which had arisen by reason of the application of the general doctrine to cases involving incompetent testators, a statute known as the Lunacy Act of 1890 was enacted in England which purports to treat the fund created by the conversion, or any balance thereof, in the same fashion as if conversion had never taken place.¹² In one case arising since that statute, however, the

⁵ See Justinian, Inst., lib. II, tit. xx, § 12.

⁶ 2 Bro. C. C. 108, 29 Eng. Rep. 62 (1786).

⁷ See Page, Ademption by Extinction: Its Practical Effects, 1943 Wis. L. Rev. 11.

⁸ Gardner v. McNeal, 117 Md. 27, 82 A. 988 (1911); Unitarian Society v. Tufts, 151 Mass. 76, 23 N. E. 1006 (1890); Hosea v. Skinner, 67 N. Y. S. 527, 32 Misc. 653 (1900).

⁹ In re Freer, 22 L. R. Ch. Div. 622 (1882); Jones v. Green, 5 L. R. Eq. 555 (1868).

¹⁰ In re Larking, 37 L. R. Ch. Div. 310 (1887).

¹¹ Jenkins v. Jones, 2 L. R. Eq. 323 (1866); Taylor v. Taylor, 10 Hare 475, 68 Eng. Rep. 1014 (1853); Basan v. Brandon, 8 Sim. 171, 59 Eng. Rep. 68 (1836).

¹² 53 and 54 Vict., c. 5, § 123(1). It provides: "The lunatic, his heirs, executors, administrators, next of kin, devisees, legatees, and assigns, shall have the same interest in any moneys arising from any sale, mortgage, or other disposition, under the powers of this act which may not have been applied under such powers as he or they would have had in the property the subject of the sale, mortgage, or disposition, if no sale, mortgage, or disposition, had been made, and the surplus moneys shall be of the same nature as the property sold, mortgaged, or disposed of."

same was held insufficient to protect the rights of a legatee to whom a bank deposit had been bequeathed when, under order of court, such deposit was paid into court and invested pursuant to its direction because it was said that the operation of that statute had to be confined to cash balances on hand at time of death and could not apply to other kinds of property.¹³

In this country, Pennsylvania applied the objective test of the English courts quite early¹⁴ and in 1853 extended its application to a case concerning an incompetent testator by expressly denying that ademption was a question of intention of the testator, either explicit or implied.¹⁵ In New York, on the other hand, it had at one time been held that the intention theory could be invoked in cases involving incompetent testators, and, by reason of such incompetency, no ademption could arise.¹⁶ The highest court of that state, in 1931, in a case concerning an incompetent testator, repudiated that view and decided that a specific legacy was adeemed since the lack of intent on the part of the testator was immaterial.¹⁷ After noting that the bequest therein of certain preferred stock was a specific legacy and, as such stock was not in existence at the time the will took effect, there had been an ademption or withdrawal of the gift, the court said: "In the absence of statute, there is no power in the courts to change a specific into a general legacy or turn over the balance of the proceeds derived from the sale of the specific property to the legatee in place of the particular thing intended to be given . . . The rule as it existed at common law, and still exists, admits of no such exception."¹⁸

¹³ *In re Walker*, 2 Ch. Div. (1921) 63.

¹⁴ *In Blackstone v. Blackstone*, 43 Pa. (3 Watts) 335 (1834), a bequest of bank stock was made in a will but, subsequent to execution, the same was exchanged for a bond with the declared intention of keeping the bond for the legatee in lieu of the stock. Ademption was found for reasons paramount to all considerations of intention, and the legacy having ceased to exist in specie, no matter how its extinction was caused, neither the bond taken as a substitute for it, nor its value, could be demanded from the executor.

¹⁵ See *Hoke v. Herman*, 21 Pa. St. (9 Harris) 301 (1853). The court, at p. 305, said: ". . . if a thing bequeathed in a will by such a description as to distinguish it from all other things be disposed of, so that it does not remain at the death of the testator, or if it be so changed that it cannot be called the same thing, the bequest is gone. If such legacy be of a debt, payment necessarily makes an end of it. The legatee is entitled to the very thing bequeathed if it be possible for the executor to give it to him; but if not, he cannot have money in place of it. This results from an inflexible rule of law applied to the mere fact that the thing bequeathed does not exist, and it is not founded on any presumed intention of the testator."

¹⁶ *Snedecker v. Ellis*, 241 N. Y. S. 563, 136 Misc. 607 (1930); *In re Garlick's Estate*, 161 N. Y. S. 1113, 96 Misc. 653 (1916); *In re Carter*, 130 N. Y. S. 201, 71 Misc. 406 (1911).

¹⁷ See *In re Ireland's Estate*, 257 N. Y. 155, 177 N. E. 405 (1931), noted in 1 *Brooklyn L. Rev.* 127, 45 *Harv. L. Rev.* 710, 9 *N. Y. U. L. Rev.* 506, and 41 *Yale L. J.* 101. The opinion of the lower court, 231 *App. Div.* 288, 247 *N. Y. S.* 267 (1931), was commented upon favorably in 16 *Corn. L. Q.* 623, 79 *U. of Pa. L. Rev.* 990, and 17 *Va. L. Rev.* 584.

¹⁸ 257 *N. Y.* 155 at 158, 177 *N. E.* 405 at 406.

Cases arising in the states of New Jersey,¹⁹ Missouri,²⁰ New Hampshire,²¹ and Michigan,²² as well as in the federal court sitting in this state,²³ however, have held that no ademption occurs in cases of this type because of the necessity of an intention to adeem which would be absent in the case of an incompetent person. The unfairness to a legatee caused by applying the objective test is clearly revealed in those cases where the property has been converted or changed in character by paramount law without any act on the part of the testator. In one such case,²⁴ the devised realty was taken by an exercise of the power of eminent domain, yet it was held that the devise had been adeemed. It was said that such holding was justified because the testator could have changed his will after the condemnation of the particular parcel of property. Such argument could not apply to cases wherein the testator has become incompetent since making the original devise for he would, legally, be unable to make a new will.

Although the conservator should have the right to make changes in investments, and even to sell property to secure ample funds for the care of his ward, yet, if the general doctrines of ademption are allowed to prevail, he could favor one legatee over another by choosing to dispose of a particular parcel of property instead of some other asset. Justice would seem to demand, as was decided in the instant case, that an exception to the theory of ademption should be allowed.

H. H. FLENTYE

¹⁹ *In re Estate of Cooper*, 95 N. J. Eq. 210, 123 A. 45 (1923), noted in 37 Harv. L. Rev. 1141.

²⁰ *Buder v. Stocke*, 343 Mo. 506, 121 S. W. (2d) 852 (1938); *Lamkin v. Kaiser*, 256 S. W. (Mo. App.) 558 (1923), noted in 24 Col. L. Rev. 405; *National Board v. Fry*, 293 Mo. 399, 239 S. W. 519 (1922).

²¹ *Morse v. Converse*, 80 N. Hamp. 24, 113 A. 214 (1921).

²² *In re Barnes' Estate*, 162 Mich. 79, 127 N. W. 37 (1910).

²³ *Wilmerton v. Wilmerton*, 176 F. 896 (1910).

²⁴ *Ametrano v. Downs*, 170 N. Y. 388, 63 N. E. 340 (1902).

BOOK REVIEWS

QUESTIONED DOCUMENT PROBLEMS. Albert S. Osborn, revised and edited by Albert D. Osborn, New York: Boyd Printing Company, 1944. Pp. xxviii, 486, with bibliography.

A well-equipped law library is sure to contain two earlier works by Albert S. Osborn, for his "Questioned Documents," first published in 1910, and his "The Problem of Proof," issued in 1927, have become essential handbooks on certain phases of evidence law. This companion work, not intended to take the place of either of the others, presents definite suggestions to the lawyer and the document examiner who may have occasion to face an issue as to the validity of a doubtful or even spurious document.

Much of the book is a reprinting of materials that have appeared elsewhere or represents the reduction to print of papers read at scientific meetings. Unfortunately, repetition is likely to creep into a work prepared in such fashion unless subjected to intensive editorial treatment, so the reader is apt to be impressed with the feeling that the material has been poorly integrated. One might almost remark that there is as much internal evidence throughout the book to prove the authorship of the several parts as would convince a handwriting expert that a given specimen was genuine from the constant reiteration of peculiar characteristics in penmanship.

If faults of this kind are not permitted to detract from the message conveyed, however, there is much in this book to be read with profit. No small feature is the challenge provided the reader to check his own skill in detecting similarities and dissimilarities in handwriting samples. Certainly, the suggestions as to testing, photographing, and protecting the questioned document are of supreme value as are also the outlines of study to be pursued by one who might plan a career as a questioned document examiner. A critical bibliography of recent publications on the subject should be more than helpful, while the references to decided cases involving problems of proof of this specialized topic are especially valuable.

The author has a tendency, though, to depart from his main thesis—if that thesis can be gathered from the title given this book—to tilt at more than one windmill that has stood alongside his path in a long lifetime of experience as a lay witness. It may be captious criticism to say that such asides have little bearing on the fundamental problems covered, for the discussion lets welcome fresh air blow into more than one musty corner of the law. His suggestions for the improvement of the administration of justice, for the development of a system of ethics among professional witnesses, and even for enhancement of the law school curriculum are worthy of notice even though they may be said to be out of place. The advice he extends

to the young lawyer discloses a sympathetic understanding of the needs of the novitiate. Digressions by one so obviously sincere can well be condoned.

W. F. ZACHARIAS

CASES ON AGENCY. Warren A. Seavey. St. Paul, Minnesota: American Casebook Series, West Publishing Company, 1945. Pp. xxix, 676.

This publication comes to fill the need for modern cases in the casebooks on the law of Agency. The author feels, from his many years of teaching experience, that students crave for recent cases, and he ministers to their desire. Indeed, from the very first chapter the student might possibly get the impression that all law on the subject had its origin in the Restatement. Yet he will find in the first two chapters alone, in concentrated form, alive and replete with the most modern fact situations, a rather complete survey of Agency law including references to agency for two principals and borrowed servant problems.

Older members of the teaching profession will be startled by the absence of footnotes and the scarcity of additional citations. References to the Restatement and to articles by the author and by Professor Wambaugh are not lacking, but footnoted compilations are omitted. Most will agree, though, that the average law student of today feels it below his dignity to read footnotes or to look up citations. He will never miss them, whereas both the publisher and the war effort will benefit from the resultant saving of paper.

Except for simplification, and except for the absence of discussion over weight of authority and minority holdings or the omission of historical consideration of the evolution of the law, the book is thoroughly modern in its arrangement of cases. Typical factual situations are grouped together. While cases involving negotiable instruments remain interspersed throughout the book, the systematic omission of most workmen's compensation and labor law cases will, no doubt, be approved by all.

It has been sometimes thought an art to present a conclusion first and, having thus aroused curiosity, to devote the rest of a given work to the exposition of that conclusion. The instructor who prefers to conform to traditional methods may well begin at Chapter Three, using the beginning of the book for review purposes. The modern-minded innovator, however, will make full use of this artistic method of exposition to develop the interest of his class in the subject.

G. MASCHINOT

MONEY AND THE LAW. Proceedings, Institute on Money and the Law, 1945, New York: New York University School of Law, 1945. Paper, pp. viii, 159.

A volume of addresses delivered at a technical institute can make dry reading. In direct contrast, the fifteen papers reported in this volume, presented at a joint conference on the economic, political and legal issues raised by the Bretton Woods and Dumbarton Oaks proposals, possess a high degree of interest not only because of their timeliness but also because they represent a scholarly appraisal by experts of matters of grave concern.

It would not be expected that fifteen eminent men in fields so generally as wide apart as economics and law could come to substantially similar conclusions on proposals for international co-operation like these, for such plans have been said to mean "all things to all men." It is a fact, though, that each one of the contributors reasons toward the result that much will need to be done before plans of this type can be made into effective agencies for peace. No one of these experts decries the proposals as utterly unsound, either in law or economics, but each advances the points of criticism he considers important. The result is that no less than fifteen different weaknesses are disclosed in the planned structure. If these defects are not corrected, the whole idea would be likely to collapse before the impact of reality thereby jeopardizing human faith in the ideal of international unity. In fact, suggestions emanating from the Bretton Woods conference would, in the opinion of some of these experts, be more likely to produce monetary inflation than to control it.

The criticism is not all destructive, however, for excellent suggestions for revision are made. In view of the fact that the Bretton Woods and Dumbarton Oaks proposals have not been submitted on the "take it or leave it" basis that accompanied the recommendation for American participation in the League of Nations, it is to be hoped that at least some of these recommendations will be given consideration. One thing is certain, this publication provides excellent ammunition for anyone who wishes to debate the wisdom of the more recent of the *new* New Deal plans for world betterment.

W. F. ZACHARIAS

MUNICIPALITIES AND THE LAW IN ACTION: 1945 Edition. Edited by Charles S. Rhyne. Washington, D. C.: National Institute of Municipal Law Officers, 1945. P. 500.

Another valuable and interesting volume has been added to the excellent series of publications produced by the National Institute of Municipal Law Officers. Arranged somewhat on the plan of the annual reports of the American Bar Association, these volumes contain a series of reports and monographs on widely varied aspects of municipal law, all keyed to the tempo of the times.

The changing emphasis from war to post-war problems is illustrated by discussions of housing and slum clearance projects as a source of peacetime employment, and of the difficulties which may arise in civil service over the return of former municipal employees. Revenue problems would still seem to be a matter of municipal concern, judging from the amount of space allotted to reports on municipal revenue from Federally-owned or controlled property, and the collection of delinquent taxes. In that regard, an extended discussion of a recent Missouri statute should make enlightening reading to the public officials of this state particularly as it provides for a land trust under which delinquent property can be acquired for public use or held as a public land reserve. A retrospective view of civil liberties in wartime indicates that the story of the handbill ordinances has not yet been fully unfolded. Opposition to any increase in liability for torts committed in the exercise of municipal functions is also displayed.

The editor deserves congratulation for being able to obtain so substantial an amount of readable material from so many busy contributors. He might, though, consider the advisability of numbering his volumes if it is intended that the series should continue for there is a tendency to assume that the latest publication is designed to supplant former editions.

W. F. ZACHARIAS