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DISCUSSION OF RECENT DECISIONS

ALIENS—DISABILITIES—WHETHER OR NOT REAL ESTATE HELD IN TRUST FOR BENEFIT OF ALIEN MAY BE FORFEITED BY THE STATE—In the case of *People ex rel. Kunstman* v. *Shinsaku Nagano*,[1] a private citizen filed an information in the name of the People of the State of Illinois seeking to forfeit real estate allegedly held by an alien. The action was based on the Aliens Act[2] which permits aliens to acquire and hold real estate by deed, devise or descent, and to transfer, devise or encumber it, but prohibits the holding of title for more than six years.[3] That statute also provides that unless the land is conveyed to a bona fide non-alien purchaser for value or the alien is naturalized within such time, the state's attorney for the county in which the land is situated must proceed to compel sale. If he neglects to do so for thirty days after notice and demand, the statute directs that any citizen may sue in the name of the people, although the proceeds of sale, after deducting fees and costs, are to go to the state. The in-

[1] 389 Ill. 231, 59 N. E. (2d) 96 (1945).

[2] Ill. Rev. Stat. 1943, Ch. 6, § 1 et seq.

[3] If the alien is an infant at the time of acquisition of the land, he may hold title for six years after he reaches majority: Ill. Rev. Stat. 1943, Ch. 6, § 2.

formation charged that Nagano, an alien, had purchased Illinois land; had held it for more than six years without having conveyed to a bona fide non-alien purchaser for value nor having become naturalized; but had, more than six years after acquisition and prior to suit, conveyed the land to an Illinois banking corporation to hold in trust for the alien as beneficiary. The trust agreement declared that the beneficiary's only interest was to be treated as personal property.[4] It was also alleged that demand had been made on the state's attorney, but that official had failed to take action. A motion to dismiss the information, based on several grounds, was sustained by the lower court although that court specified no precise reason for such action. The Illinois Supreme Court, on appeal, affirmed for the reason that Section 2 of the Aliens Act, to the extent that it provided for suit by a private citizen, was unconstitutional as improperly attempting to authorize persons not having the responsibility of office to exercise constitutional powers vested in the state's attorney. Left wholly undecided was the equally important question of whether or not a transfer to a citizen in trust for the benefit of an alien would prevent forfeiture.

The court's decision, so far as it proceeds, rests upon the acknowledged truth that the sovereign is the ultimate proprietor of all lands within its boundaries, and it alone possesses the power to regulate how real estate may be acquired and transferred.[5] Therefore, a proceeding to divest an alien of real estate involves a public interest and should be carried out only by a public official,[6] for the privilege to forfeit for alienage is not a prerogative of one but the collective right of all the citizens of the state. The constitutional representatives of the state, in proceedings by the state affecting a public interest, ought not be stripped of the inherent functions of their offices by legislative enactment.

While the court found it unnecessary to decide the real issue of the case, *i. e.* whether or not a transfer in trust to a citizen for the benefit of an alien is a bona fide conveyance to a non-alien purchaser for value within the definition of the Aliens Act, that problem is one of grave importance in this state and one on which no authoritative statement has been made as yet. A solution may, however, be gleaned by considering the history of land forfeiture because of alienage as it has been worked out in the decisions of other courts.

[4] The statute permits the alien to acquire and hold personal property without limitation: Ill. Rev. Stat. 1943, Ch. 6, § 7.

[5] Wunderle v. Wunderle, 144 Ill. 40, 33 N. E. 195, 19 L. R. A. 84 (1893).

[6] Fergus v. Russell, 270 Ill. 304, 110 N. E. 130, Ann. Cas. 1916B 1120 (1915); People ex rel. Courtney v. Ashton, 358 Ill. 146, 192 N. E. 820 (1934); Ashton v. Cook County, 384 Ill. 287, 51 N. E. (2d) 161 (1943).

At common law, aliens could acquire land by purchase or devise but not by descent, by act of the parties, but not by operation of law.[7] Such restriction has remained in effect except where changed by statute,[8] and in this state the right of an alien to acquire and hold land has been modified but slightly.[9] The title thus acquired is not divested except through a judicial proceeding designated "office found," instituted by the appropriate public official, authoritatively establishing the fact of alienage. Such proceeding is necessary and vital to protect the individual from an arbitrary and unreasonable seizure of his lands by the sovereign. Office found, or its Illinois equivalent,[10] renders the forfeiture a matter of record, allows for notice and hearing, and contemplates that reunion with the public domain will not take place until judgment is rendered.[11] As a consequence, an alien who has lawfully acquired and holds land may continue so to hold against the whole world until office found, and may convey good title by deed or gift.[12]

There is no doubt that a state may regulate indirect as well as direct ownership and control of land within its boundaries by aliens,[13] for the policy of that rule is said to rest upon the ground that it is

[7] King v. Boys, 3 Dyer 283 pl. 31, 73 Eng. Rep. 636 (1569); Anonymous, 1 Leon. 47, 74 Eng. Rep. 44 (1586); King v. Holland, Aleyn 14, 82 Eng. Rep. 889 (1648); Attorney General v. Sands, 2 Freem. Ch. 129, 22 Eng. Rep. 1106 (1670); Attorney General v. Duplessis, Parke 144, 145 Eng. Rep. 739 (1752); Fairfax's Devisee v. Hunter's Lessee, 11 U. S. (7 Cranch) 603, 3 L. Ed. 453 (1813); Phillips v. Moore, 100 U. S. 208, 25 L. Ed. 603 (1879). See also 2 Am. Jur., Aliens, § 29; Tiffany, Real Property, 3d Ed., Vol. 5, § 1377; Washburn, Real Property, 6th Ed., § 131.

[8] The right of a state to exclude aliens from acquiring property within its boundaries to the extent that its safety or policy may direct, except as regulated by treaty, is not a violation of the equal protection clause of the Federal constitution; Cockrill v. California, 268 U. S. 258, 45 S. Ct. 490, 69 L. Ed. 944 (1925), upholding a California statute which forbade aliens, ineligible for citizenship, to acquire, use, or control agricultural lands and provided for the escheat thereof. In Toop v. Ulysses Land Co., 237 U. S. 580, 35 S. Ct. 739, 59 L. Ed. 1127 (1915), a claim that a state statute was repugnant to the Fourteenth Amendment was characterized as too frivolous to support the taking of jurisdiction by the Federal Supreme Court.

[9] Ill. Rev. Stat. 1943, Ch. 6, § 1, permits the acquisition of land by descent. See also John v. John, 322 Ill. 236, 153 N. E. 363 (1926).

[10] Ill. Rev. Stat. 1943, Ch. 6, §§ 2-4.

[11] Phillips v. Moore, 100 U. S. 208, 25 L. Ed. 603 (1879); United States v. De-Repentigny, 72 U. S. (5 Wall.) 211, 18 L. Ed. 627 (1867); Wunderle v. Wunderle, 144 Ill. 40, 33 N. E. 195, 19 L. R. A. 84 (1893).

[12] Osterman v. Baldwin, 73 U. S. (6 Wall.) 116, 18 L. Ed. 730 (1867); Mott v. Cline, 200 Cal. 434, 253 P. 718 (1927); George v. People, 180 Misc. 635, 40 N. Y. S. (2d) 830 (1943), affirmed in 267 App. Div. 575, 47 N. Y. S. (2d) 681 (1944); State v. Superior Ct. of Snohomish County, 165 Wash. 648, 5 P. (2d) 1037 (1931); State v. Kosai, 133 Wash. 442, 234 P. 5 (1925); Abrams v. State, 45 Wash. 327, 88 P. 327, 9 L. R. A. (N. S.) 186, 122 Am. St. Rep. 914, 13 Ann. Cas. 527 (1907); Dutton v. Donahue, 44 Wyo. 52, 8 P. (2d) 90, 79 A. L. R. 1355 (1932). See also annotation to Re Melrose Avenue, 234 N. Y. 48, 136 N. E. 235 (1922), in 23 A. L. R. 1233, particularly p. 1249, and Washburn, Real Property, 6th Ed., § 131.

[13] Frick v. Webb, 263 U. S. 326, 44 S. Ct. 115, 68 L. Ed. 323 (1923), affirming 281 F. 407 (1922). See also cases cited in 3 C. J. S., Aliens, § 12.

"unwise to permit the soil of the country to be in the hands of the subjects of a foreign power, and its revenues to be enjoyed by them; since the state must be impoverished by transporting the revenues of the land into foreign countries and weakened by putting a part of its territory under subjection to a foreign prince."[14] The prohibition against aliens holding title to land has also been said to depend on the idea that title should be in the hands of citizens who owe allegiance to the government and can be called upon to discharge the duties of citizenship.[15]

The same principle which forbids or limits legal ownership of lands by an alien extends also to equitable ownership thereof, so that if the alien may not hold land in his own name, he may not hold land in the name of a trustee, as that would permit him to accomplish indirectly what he is forbidden to do directly.[16] A trust in real property for the benefit of an alien is valid, however, where by the laws of the state he might take and hold title to the real property itself, at least for a period of time.[17]

There would seem to be no reason why a use or trust in real estate for the benefit of an alien should not be regarded as valid until proceedings by the state, for no one has a right to complain in a collateral proceeding if the sovereign does not enforce its prerogative. Such a trust would not be void as between grantor and grantee,[18] and it would seem that the state, by virtue of office found, could not oust the trustee who is seized in fee of the lands so held in trust for the alien, although a court of equity might enforce the trust for the benefit of the government.[19] But equity would never raise a resulting trust based on a violation of positive law, so if an alien purchased land and took an absolute conveyance in the name of a citizen without any agreement or declaration of trust, the law would not raise a trust in favor of the alien purchaser if he could not himself hold the title to the land, any more than it would cast title by descent on the alien

[14] Hubbard v. Goodwin, 30 Va. (3 Leigh) 492 at 514 (1832).

[15] Marx v. McGlynn, 88 N. Y. 357 (1882).

[16] Atkins v. Kron, 48 N. C. (5 Ired.) 207 (1848); State v. Morrison, 18 Wash. 664, 52 P. 228 (1898). See also 1 R. C. L., Aliens, § 32, p. 823.

[17] In Kalies v. Ewart, 248 Ill. 612, 94 N. E. 105 (1911), the alien was permitted to become trustee over lands, subject to the limitations of the statute. See also Hayden v. Sugden, 48 Misc. 108, 96 N. Y. S. 681 (1905).

[18] Osterman v. Baldwin, 73 U. S. (6 Wall.) 116, 18 L. Ed. 730 (1867); Taylor v. Benham, 46 U. S. (5 How.) 233, 12 L. Ed. 130 (1847); Craig v. Leslie, 16 U. S. (3 Wheat.) 563, 4 L. Ed. 460 (1818); Isaacs v. DeHon, 11 F. (2d) 943 (1926); Hammekin v. Clayton, Fed. Cas. No. 5996 (1874); Vlahos v. Andrews, 362 Ill. 593, 1 N. E. (2d) 59 (1936); Ales v. Epstein, 283 Mo. 434, 222 S. W. 1012 (1920); Koyoko Nishi v. Downing, 21 Cal. App. (2d) 1, 67 P. (2d) 1057 (1937). See also 2 Am. Jur., Aliens, § 55.

[19] Attorney General v. Duplessis, Parke 144, 145 Eng. Rep. 739 (1752); Attorney General v. Sands, 2 Freem. Ch. 129, 22 Eng. Rep. 1106 (1670); McCaw v. Galbraith, 7 Rich. Law (S. C.) 74 (1853).

heir. The result in such a case must either be that the nominal grantee takes the land discharged of any trust or else that there is a resulting trust in behalf of the people of the state which they alone can enforce against the grantee. The former is the view that has been adopted wherever the question has arisen.[20]

On the other hand, if the alien, to evade the law, purchases lands in the name of a trustee upon an express and declared or secret trust entitling the alien to take and receive the rents and profits, such a trust, upon established principles of equity, will pass to the state to be enforced at its instance and in its favor.[21] To hold otherwise would be to destroy the very object and purpose of the law and make it possible, at very little inconvenience and cost, for the alien to circumvent it. If one is entitled to the rents and profits of land as well as the sale price, including therein any increase in value, he has the real substance of ownership and is deprived only of the privilege of holding the actual legal title and the attributes of possession and control.[22] So, too, if a conveyance be fraudulently made by the alien to prevent forfeiture, such conveyance may be attacked by the state and set aside just as any other fraudulent conveyance may be attacked.[23] However, a conveyance of land to a citizen, in trust to sell the same and to pay the proceeds to an alien creditor, has been held valid so that the interest of the alien in the proceeds is not subject to forfeiture.[24]

In the light of these authorities, it would seem clear that had the court in the instant case decided the problem on the merits rather than on the limited question of the right and capacity of a private citizen to sue, it would necessarily have reached an opposite result. A trust of land for the benefit of an alien who retains the right to the rents and profits for longer than the statutory period, even though in the guise of a personal property interest, would seem to be a clear evasion of the principles prohibiting an alien from holding land and should warrant a decree of forfeiture.

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[20] In re Tetsubumi Yano's Estate, 188 Cal. 645, 206 P. 995 (1922); Ales v. Epstein, 283 Mo. 434, 222 S. W. 1012 (1920); Leggett v. Dubois, 5 Paige (N. Y.) 114, 28 Am. Dec. 413 (1835).

[21] Legget v. Dubois, 5 Paige (N. Y.) 114, 28 Am. Dec. 413 (1835); Anstice v. Brown, 6 Paige (N. Y.) 448 (1837); Hubbard v. Goodwin, 30 Va. (3 Leigh) 492 (1832); McCaw v. Galbraith, 7 Rich. Law (S. C.) 74 (1853); Dutton v. Donahue, 44 Wyo. 52, 8 P. (2d) 90, 79 A. L. R. 1355 (1932).

[22] State v. O'Connell, 121 Wash. 542, 209 P. 865 (1922).

[23] Louisville School Board v. King, 127 Ky. 824, 107 S. W. 247, 15 L. R. A. (N. S.) 379 (1908); State v. Kusumi, 136 Wash. 432, 240 P. 556 (1925); Abrams v. State, 45 Wash. 327, 88 P. 327, 9 L. R. A. (N. S.) 186, 122 Am. St. Rep. 914, 13 Ann. Cas. 527 (1907).

[24] Anstice v. Brown, 6 Paige (N. Y.) 448 (1837).

DEEDS—CONSTRUCTION AND OPERATION—WHETHER OR NOT CONVEYANCE BY HOLDER OF TITLE, JOINED IN BY SPOUSE, TO UN-NAMED GRANTEE DESIGNATED AS "SURVIVOR" OPERATES TO PASS TITLE TO SPOUSE—**In *Pure Oil Company* v. *Bayler*,[1] the Illinois Supreme Court had occasion to pass upon the validity of a deed to certain land owned in fee simple by one Henry Gray in which deed the grantor and his wife purported to convey the premises to themselves not by name but by the words "to the survivor in Fee Simple forever survivor to dispose of [as] they shall see fit to do." The husband-grantor predeceased his wife. After the death of both parties, neither leaving children surviving, a dispute arose between the respective heirs of the husband and wife with reference to the effect of the deed. The Illinois Supreme Court, affirming a decision of the trial court, held that the title to the real estate in question vested in the wife upon delivery of the deed subject, however, to a condition of defeasance if she should predecease her husband. Upon a finding that she had survived him, it was declared that title vested in her heirs.**

Three major contentions were advanced by the heirs of the husband to establish their claim to an interest in the land, namely: (1) that the deed was void because of uncertainty; (2) if not void, that it conveyed only an undivided one-half interest to the wife as a tenant in common because it was an unsuccessful attempt to create a joint tenancy; and (3) that it was an attempted testamentary disposition of the property without meeting the formal requirements of the statute applicable thereto. Disposition of the second and third contentions was deemed to be a matter of comparative ease. There was said to be no attempt to create an estate in joint tenancy for the reason that all of the land in question was conveyed. In cases where it has been held that a conveyance by one person to himself and another as joint tenants operates to convey only an undivided one-half interest to the other as tenant in common, it was manifest that the grantor intended to retain an equal share for himself, with the result that the four unities of time, title, interest and possession, essentials of a joint estate, were lacking.[2] It could not be successfully contended that the deed was an attempted last will and testament for cases of that character are based on lack of legal delivery.[3] Delivery of the deed here in question was not challenged.

The most perplexing problem which the court had to solve in reaching its decision was whether or not the identity of the grantee was made certain. It is well established that to be effective, a deed must designate as grantee an existing person in whom title can and

[1] 388 Ill. 331, 58 N. E. (2d) 26 (1944).

[2] Deslauriers v. Senesac, 331 Ill. 437, 163 N. E. 327 (1928); Porter v. Porter, 381 Ill. 322, 45 N. E. (2d) 635 (1943).

[3] Elliott v. Murray, 225 Ill. 107, 80 N. E. 77 (1906); Benner v. Bailey, 234 Ill. 79, 84 N. E. 638 (1908).

does immediately vest.[4] In holding that the unnamed "survivor" was such a grantee, the court found it necessary to ascertain and follow the real intention of the parties as gathered from the entire instrument and the surrounding circumstances.[5] The deed was inartificially drawn upon a printed blank, the spaces of which had undoubtedly been filled out by the grantor. The word "survivor," as used in this deed, obviously was intended to refer back to the only parties named therein, to-wit: the grantors. Inasmuch as a person cannot convey to himself that which he already owns,[6] the deed operated to convey nothing to the husband. But the inclusion of a grantee who cannot take title does not vitiate a deed if there is another grantee capable of taking,[7] so it followed that there was an effective conveyance to the wife. Designation of a grantee need not be by name if he or she is described with sufficient certainty to distinguish him or her from all other persons.[8]

There does not appear to be any other case, either in Illinois or elsewhere, involving a parallel set of facts. The designation of the grantee in the deed in question is not analogous to that found in deeds where, for example, the attempted conveyance was to "the members" of a named church,[9] or to "the inhabitants" of two named districts,[10] or to "each and every attorney at law in Iowa."[11] Such deeds have rightly been held void as being too indefinite for they tend to violate the policy of the law not to allow title to realty to be permanently tied up. In the deed here involved, on the other hand, there were only two persons named, and one of those was incapable of conveying to himself. It seems logical, therefore, that the court should have held that there was a valid conveyance to the grantee who could take title.

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[4] Duffield v. Duffield, 268 Ill. 29, 108 N. E. 673 (1915); Legout v. Price, 318 Ill. 425, 149 N. E. 427 (1925); Albers v. Donovan, 371 Ill. 458, 21 N. E. (2d) 563 (1939); Herrick v. Lain, 375 Ill. 569, 32 N. E. (2d) 154 (1941); Chance v. Kimbrell, 376 Ill. 615, 35 N. E. (2d) 48 (1941).

[5] Texas Co. v. O'Meara, 377 Ill. 144, 36 N. E. (2d) 256 (1941); Porter v. Porter, 381 Ill. 322, 45 N. E. (2d) 635 (1943); Henry v. Metz, 382 Ill. 297, 46 N. E. (2d) 945 (1943); Shell Oil Co. v. Moore, 382 Ill. 556, 48 N. E. (2d) 400 (1943); Law v. Kane, 384 Ill. 591, 52 N. E. (2d) 212 (1944).

[6] Deslauriers v. Senesac, 331 Ill. 437, 163 N. E. 327 (1928). See also 18 C. J., Deeds, § 36, p. 159; 26 C. J. S., Deeds, § 13, p. 185.

[7] See Creighton v. Elgin, 387 Ill. 592, 56 N. E. (2d) 825 (1944) noted in 23 CHICAGO-KENT LAW REVIEW 263; Hartwick v. Heberling, 364 Ill. 523, 4 N. E. (2d) 965 (1936); Herrick v. Lain, 375 Ill. 569, 32 N. E. (2d) 154 (1941).

[8] 16 Am. Jur., Deeds, § 76, p. 482; 18 C. J., Deeds, § 56, p. 174; 26 C. J. S., Deeds, § 24, p. 205.

[9] Morris v. State, 84 Ala. 457, 4 So. 628 (1888).

[10] Hunt v. Tolles, 75 Vt. 48, 52 A. 1042 (1902).

[11] State v. McGee, 200 Iowa 329, 204 N. W. 408 (1925).

LANDLORD AND TENANT—TERMS FOR YEARS—WHETHER OR NOT TENANT MAY TERMINATE LEASE BECAUSE OF LIMITATIONS IMPOSED ON USE OF PREMISES BY WARTIME REGULATIONS—In *Crosby* v. *Baron-Huot Oil Company*,[1] the Appellate Court for the Second District had occasion to decide whether the tenant, under a fifteen-year lease made in 1931, had the right to terminate his lease because of restrictive governmental wartime regulations where a provision in the lease permitted termination if ". . . the use of the said premises for an oil and gasoline filling station be prevented, suspended or limited by any zoning statute, or ordinance, or any other Municipal or Governmental action or law, or regulation. . . ." The tenant contended that, under this provision, it was not liable for rent in view of its formal notice to the lessor of its election to terminate the lease on account of the rationing of tires, tubes, gasoline and automobiles by the Office of Price Administration, the restriction on credit sales of these products, and the limitation on hours of operation imposed by the Petroleum Administration for War. The trial court held the tenant liable for rent, interpreting the cancellation clause as applying only to real estate regulations, i. e. those affecting the use of the particular property as distinguished from the business conducted thereon. The Appellate Court, however, took the opposite view, holding that the intent of the parties, as evidenced by the clause in question, was to permit cancellation upon governmental restriction of the ordinary business of operating and maintaining a filling station. It, therefore, reversed the judgment.

The interpretation of the phrase "use of the said premises," when employed in this connection, has been considered by courts in other jurisdictions with somewhat conflicting albeit not wholly irreconcilable results. Where the phrase was used, as here, in conjunction with the words "prevented, suspended or limited" the Kentucky and Minnesota courts interpreted it as covering more than mere real estate restrictions and as extending to restrictions on the conduct of the business apart from the real estate.[2] On the other hand, when the phrase was used, in one instance,[3] with the words "prevented" and "restricted" and, in another,[4] with the words "prohibited, limited or restricted," the New York courts interpreted it as applying merely to real estate restrictions and as being ineffective to create a right in the tenant to terminate the lease because of wartime business regulation. The court, in *Mid-Continent Petroleum Corporation* v.

[1] 324 Ill. App. 651, 59 N. E. (2d) 520 (1945).

[2] Mid-Continent Petroleum Corp. v. Barrett, 297 Ky. 709, 181 S. W. (2d) 60 (1944); Orme v. Atlas Gas & Oil Co., 217 Minn. 27, 13 N. W. (2d) 757 (1944).

[3] Robitzek Investing Co. v. Colonial Beacon Oil Co., 40 N. Y. S. (2d) 819, 265 App. Div. 749 (1943), leave to appeal denied 291 N. Y. 830, 50 N. E. (2d) 555.

[4] First Nat. Bank of New Rochelle v. Fairchester Oil Co., Inc., 45 N. Y. S. (2d) 532, 267 App. Div. 281 (1943), affirmed in 292 N. Y. 694, 56 N. E. (2d) 111 (1944), cert. den. 323 U. S. —, 65 S. Ct. 69, 89 L. Ed. (adv.) 43 (1944).

Barrett,[5] attempted to distinguish these rulings by pointing out that the words "prevented" and "restricted" are usually used in speaking of real property, whereas the words "suspended or limited" have no such connotation. There is little to distinguish the facts of the four cases noted, however, other than a slight difference in the words used in the cancellation clause so, despite the admitted merit of the attempt to reconcile these divergent opinions, it would appear that the cases really represent two distinct viewpoints. The Illinois court, therefore, had some precedent for its holding particularly since the language used in the two cases similarly decided was virtually identical with that found in the Illinois lease, while the opposing cases dealt with leases using slightly different phraseology.

Several cases have been argued during this war wherein the tenant has sought to have the lease terminated because of governmental restrictions on the business conducted in the demised premises even though the lease contained no such option as is found in the instant case. The majority of these cases involved leases of premises to be used as filling stations or automobile sales and service stations. The arguments propounded in support of such attempts have been based on the "commercial frustration" doctrine or on what amounts to the same thing, namely: that the lessee has been deprived of the contemplated beneficial use of the premises. Prior wars have not given rise to any such regulation of business as has characterized the present one. Consequently, while commercial frustration is not a new doctrine, there has been no direct precedent prior to now for situations where the frustration arises through governmental regulations of a restrictive but not of a prohibitive nature.

The closest analogy is to be found in the prohibition cases, although they reflect a situation of absolute interdiction whereas wartime regulation generally has not wholly stopped but merely limited certain business activities. Many conflicting decisions concerning the rights of landlords and tenants under leases for saloon purposes were promulgated during the period of the Eighteenth Amendment. Where the lessee expressly reserved the right to terminate the lease in the event of prohibition, the tenant was, of course, allowed to cancel.[6] Where that right was not reserved, the majority of courts held that the lessee could terminate the lease anyway,[7] although there

[5] 297 Ky. 709, 181 S. W. (2d) 60 (1944).

[6] Hooper v. Mueller, 158 Mich. 595, 123 N. W. 24 (1909); Kahn v. Wilhelm, 118 Ark. 239, 177 S. W. 403 (1915).

[7] Levy v. Johnston & Hunt, 224 Ill. App. 300 (1922); Greil Bros. Co. v. Mabson, 179 Ala. 444, 60 So. 876 (1912); Kahn v. Wilhelm, 118 Ark. 239, 177 S. W. 403 (1915); Christopher v. Charles Blum Co., 78 Fla. 240, 82 So. 765 (1919); Schaub v. Wright, 79 Ind. App. 56,. 130 N. E. 143 (1921); Halloran v. Jacob Schmidt Brewing Co., 137 Minn. 141, 162 N. W. 1082 (1917); Kaiser v. Zeigler, 187 N. Y. S. 638, 115 Misc. 281 (1921); Heart v. East Tennessee Brewing Co., 121 Tenn. 69, 113 S. W. 364 (1908); Brunswick-Balke-Collender Co. v. Seattle Brewing & Malting Co., 98 Wash. 12, 167 P. 58 (1917).

was a respectable minority view which held that as the lessee had failed to foresee this contingency and protect himself against it, he was bound to pay rent despite the fact that prohibition made impossible the only use permitted by the lease.[8] Where the lease permitted other uses of the premises, although use for the sale of spiritous liquors was the principal use intended, prohibition did not, according to the majority rule, operate to relieve the lessee of his obligations.[9]

Cases arising out of wartime business regulations have not been as strong as the saloon cases because, as pointed out before, these regulations have generally been restrictive rather than prohibitive. The question of the right of the lessee to terminate because of such regulations, in the absence of any express provision granting him such an option, was before an Illinois court in the case of *Deibler* v. *Bernard Brothers, Incorporated*,[10] but the court there did not have to decide that issue for, although the lease described the premises as an auto showroom and garage, the court found the lessee was not restricted to such use but could make any other legitimate use of the premises. Generally, however, the courts have held that the tenant is not released even though the use of the premises is restricted to business activities which have been severely curtailed by wartime regulations. Thus, leases restricting use of the premises to the sale and service of automobiles,[11] to the sale of automobiles and automobile accessories,[12] to the sale of gasoline,[13] to tire and battery sales and service,[14] to the sale of tires and automobile supplies where actual operations had been confined to tire sales,[15] or to gasoline filling station purposes[16] have been held enforcible even though wartime regulations made profitable operation impossible. In all such cases, the courts uniformly found that the restricted uses of the demised premises as fixed by the terms of the several leases were still possible to some degree, so the liability to pay rent remained.

[8] Goldrum Tobacco Co. v. Potts-Thompson Liquor Co., 133 Ga. 776, 66 S. E. 1081 (1910); Hecht v. Acme Coal Co., 19 Wyo. 18, 113 P. 788 and 117 P. 132 (1911).

[9] Christopher v. Charles Blum Co., 78 Fla. 240, 82 So. 765 (1919); Home Brewing Co. v. Kaufman, 78 Ind. App. 462, 133 N. E. 842 (1922); Shreveport Ice & Brewing Co. v. Mandel Bros., 128 La. 314, 54 So. 831 (1911); Standard Brewing Co. v. Weil, 129 Md. 487, 99 A. 661 (1916). Contra: Doherty v. Monroe Eckstein Brewing Co., 191 N. Y. S. 59, 198 App. Div. 708, affirming 187 N. Y. S. 633 (1921).

[10] 385 Ill. 610, 53 N. E. (2d) 450 (1944), affirming 319 Ill. App. 504, 48 N. E. (2d) 422 (1943), noted in 23 CHICAGO-KENT LAW REVIEW 11.

[11] Byrnes v. Balcom, 38 N. Y. S. (2d) 801, 265 App. Div. 268 (1942), affirmed in 290 N. Y. 730, 49 N. E. (2d) 1004 (1943).

[12] Colonial Operating Corp. v. Hannan Sales & Service, Inc., 39 N. Y. S. (2d) 217, 265 App. Div. 411 (1943).

[13] Knorr v. Jack & Al, Inc., 38 N. Y. S. (2d) 406, 179 Misc. 603 (1942).

[14] Davidson v. Goldstein, 58 Cal. App. (2d) 909, 136 P. (2d) 665 (1943).

[15] Mitchell v. Ceazan Tires, Ltd., 25 Cal. (2d) —, 153 P. (2d) 53 (1944).

[16] Wood v. Bartolino, 48 N. M. 175, 146 P. (2d) 883 (1944).

A more restrictive lease was involved in the California case of *Lloyd* v. *Murphy*[17] where the tenant held under a lease made for the "sole purpose of . . . the business of displaying and selling new automobiles (including the servicing and repairing thereof and of selling the petroleum products of a major oil company) and for no other purposes whatsoever without the written consent of the lessor" except to make "an occasional sale of a used automobile." The tenant was also denied the right to sublease except with the lessor's consent. After the government had greatly limited these business activities, the tenant explained to the lessor the degree to which his business would be curtailed and the lessor offered to reduce the rent, to waive the lease provisions with respect to the limitations on use, and to allow the tenant to sublet the property if he chose to do so. The tenant, nevertheless, vacated and gave notice that he considered the lease terminated. When deciding against the tenant, the court said that, for the tenant to be relieved on the ground of commercial frustration, he must prove "that the risk of the frustrating event was not reasonably foreseeable and that the value of counterperformance is totally or nearly totally destroyed. . . ."[18] The mere fact that performance had become unprofitable, more difficult, or more expensive did not excuse the tenant, particularly since the National Defense Act[19] had been in effect for more than a year prior to the time when the lease was executed, thereby giving notice that restrictions of the sort complained of might come into existence at any time during the term.

Of doubtful authority, in view of the foregoing more recent decision of a higher court, is the decision of an intermediate California court in *20th Century Lites, Inc.* v. *Goodman*,[20] holding that the lessee of neon advertising lights for use outdoors was released by the dimout regulations. The lessor there sought a ruling that the lease had merely been suspended and not terminated. It pointed out that the display was custom-made and suitable only for the particular lessee, but the court held that the lease had been completely terminated by the original restriction against outdoor lighting displays and could not be revived, even though daytime use was possible throughout the entire period.

Courts have stated that if the governmental wartime regulation amounts to a complete prohibition of all the uses permitted under the lease, such regulation would terminate the obligations created thereby. These statements, however, have been made in opinions holding that the plaintiff-lessor was not entitled to summary judg-

17 25 Cal. (2d) —, 153 P. (2d) 47 (1944).
18 25 Cal. (2d) — at —, 153 P. (2d) 47 at 50.
19 50 U. S. C. A. § 1152(2).
20 64 Cal. App. (2d) 938, 149 P. (2d) 88 (1944).

ment for rent and that the lessee should have his day in court to prove, if he could, "that the primary and principal purpose for which [he] leased the premises has been destroyed by reason of government regulations."[21] These cases do not determine that wartime restriction of business has in fact accomplished such destruction of the beneficial use of the premises as to vitiate the tenant's obligation to pay rent. They, too, therefore provide an uncertain basis for the claim that governmental regulation necessarily means an end to the tenant's obligations.

The tenor of the current decisions, then, is to the effect that a tenant cannot terminate his lease even though the business activities permitted by the lease have been sharply curtailed by governmental wartime regulation. Nothing short of virtually complete prohibition of all business uses allowed by the terms of the lease will suffice to permit termination on the ground of commercial frustration if there is no escape clause appearing therein. Where such an escape clause is employed, care should be taken to assure that the language used is not susceptible of a more limited interpretation than was intended. Although the Appellate Court has, in the instant case, interpreted the language in favor of the tenant, the holding is a close one and a slight change in the words used might easily have led to an opposite result.

J. F. PARTRIDGE

LIMITATION OF ACTIONS—COMPUTATION OF PERIOD OF LIMITATION—WHETHER OR NOT PENDENCY OF PROCEEDING IN COURT LACKING JURISDICTION OPERATES TO TOLL STATUTE OF LIMITATIONS—The plaintiff brought an action in the City Court of Granite City predicated upon the Federal Employers' Liability Act[1] and the Federal Safety Appliances Act[2] for the loss of his foot while trying to set a brake on a railway car. The brake was defective. The jury found for the plaintiff, but the court returned a judgment *non obstante veredicto* for the defendant on the ground that the plaintiff was not working in interstate commerce. Upon appeal, in *Herb* v. *Pitcairn*,[3] the Appellate Court upheld the plaintiff's contention that the question of interstate commerce was a fact for the jury to find, and that there was sufficient evidence to support their findings. It, therefore, under the Civil Practice Act[4] reversed and reinstated the verdict of the jury. The defendant appealed to the Illinois Supreme Court on the ground that the provision of the Practice Act under which the Appellate Court

[21] Canrock Realty Corp. v. Vim Electric Co., 37 N. Y. S. (2d) 139 at 141, 179 Misc. 391 at 393 (1942). Of like effect is Shantz v. American Auto Supply Co., 36 N. Y. S. (2d) 747, 178 Misc. 909 (1942).

[1] 45 U. S. C. A. § 51 et seq.

[2] 45 U. S. C. A. § 1 et seq.

[3] 306 Ill. App. 583, 29 N. E. (2d) 543 (1940).

[4] Ill. Rev. Stat. 1930, Ch. 110, § 192(3)c.

reversed the judgment and reinstated the verdict was unconstitutional.[5] That court pointed out that it had previously held the provision to be unconstitutional.[6] It, therefore, reversed and remanded with directions to send the case back to the circuit court to entertain a motion for a new trial, or, if denied, to enter judgment on the original verdict.

In the meantime, the Illinois Supreme Court had decided two cases in which it was held that city courts were limited in their jurisdiction.[7] As the accident took place outside of Granite City, the court in which the proceeding was originally instituted lacked jurisdiction, so the plaintiff applied for a change of venue to the Circuit Court of Madison County.[8] Change of venue was granted. The defendant then contended in the circuit court, among other things, that more than two years had elapsed between the accident and the bringing of the action in the circuit court, and, therefore, the suit was barred.[9] The circuit court so held and dismissed the suit. The plaintiff then appealed directly to the Illinois Supreme Court because the validity of a statute was involved,[10] contending that as the suit was commenced in the city court in apt time, even though such court had no jurisdiction to hand down any valid judgment, the filing of the complaint there was a sufficient commencement of the suit under the federal statute. The Illinois Supreme Court ruled against this contention and affirmed the judgment of dismissal. Plaintiff then applied for certiorari to the United States Supreme Court, which was granted.[11] At first that court refused to render a decision until it was made clear whether the judgment of the Illinois court was based upon state or federal law,[12] but upon certificate by the Illinois Supreme Court that such judgment was partially based upon the federal statute, the Supreme Court of the United States decided that the starting of a suit in a court which had absolutely no jurisdiction would be a sufficient commencement under the federal statute so long as there was a state statute calling for a change of venue to a court that had jurisdiction.[13]

[5] Herb v. Pitcairn, 377 Ill. 405, 36 N. E. (2d) 555 (1941).

[6] Goodrich v. Sprague, 376 Ill. 80, 32 N. E. (2d) 897 (1941).

[7] Mitchell v. L. & N. R. R. Co., 379 Ill. 522, 42 N. E. (2d) 89 (1942); Werner v. I. C. R. R. Co., 379 Ill. 559, 42 N. E. (2d) 82 (1942).

[8] Ill. Rev. Stat. 1943, Ch. 146, § 36.

[9] 45 U. S. C. A. § 56, was amended Aug. 11, 1939, making the period three years instead of two.

[10] Herb v. Pitcairn, 384 Ill. 237, 51 N. E. (2d) 277 (1943).

[11] Herb v. Pitcairn, 321 U. S. 759, 64 S. Ct. 786, 88 L. Ed. 1058 (1944).

[12] Herb v. Pitcairn, 323 U. S. —, 65 S. Ct. 459, 89 L. Ed. (adv.) 481 (1945). Such practice is not novel though rarely used: International Steel & I. Co. v. National S. Co., 297 U. S. 657, 65 S. Ct. 619, 80 L. Ed. 961 (1936).

[13] Herb v. Pitcairn, 323 U. S. —, 65 S. Ct. 954, 89 L. Ed. (adv.) 931 (1945).

There are few decisions where the courts did not have the benefit of any kind of statute when asked to decide exactly the same problem, and all such cases have reached the same conclusion; i. e., that an action brought in a court having no jurisdiction does not serve to toll the statute of limitations.[14] Such holdings contemplate that in order to stop the running of the statute of limitations a suit must be commenced within the time limit laid down by the statute. As a decision rendered in a court having no jurisdiction is necessarily null and void and can be attacked directly or indirectly, it follows that the whole proceeding is null and void and just as if it had never taken place. In that light, no action has been commenced; hence, there is nothing to operate to toll the statute.

Opposite results have been obtained with the help of one particular type of statute, prevalent in most of the states,[15] which directs that where an action is brought and dismissed or nonsuited for any reason other than on the merits a specified time is given, usually one year, in which to bring another action, even though the statute of limitations has run in the meantime. Courts have interpreted such a statute to be applicable to actions dismissed for want of jurisdiction, as where the court in which it was brought lacked jurisdiction to hear the case, even though the statute of limitations had run, because the case was dismissed for something other than on its merits. As a consequence, the plaintiff has been granted the specified time in which to bring another action in a court of competent jurisdiction.[16] Courts speak of statutes of this type as helping the dismissed suit to toll the statute of limitations. Whether it tolls the statute or merely extends the period is a matter of conjecture. Whichever way it is defined, it still gives the plaintiff an opportunity to remedy his error.

The basic case on this aspect is *Coffin* v. *Cottell*.[17] While the factual situation there involved was different from subsequent cases, it was the first time that a statute of the type mentioned was given such construction. The statute of limitations had run while the case

[14] Smith v. Cincinnati, H. & C. R. Co, 11 F. 289 (1882); Fairclough v. Southern Pac. Co., 157 N. Y. S. 862 (1916); Ball v. Hagy, 22 Tex. Civ. App. 318, 54 S. W. 915 (1899). See also Pecos & N. T. Ry. Co. v. Rayzor, 106 Tex. 544, 172 S. W. 1103 (1915); Gulf, C. & S. F. Ry. Co. v. Gordon, 218 S. W. (Tex. Civ. App.) 74 (1919).

[15] Illinois has such a statute. See Ill. Rev. Stat. 1943, Ch. 83, § 24a.

[16] Smith v. McNeal, 109 U. S. 426, 3 S. Ct. 319, 27 L. Ed. 986 (1883); Gilmore v. Gilmore, 270 F. 260 (1921); Little Rock, M. R. & T. Ry. Co. v. Manees, 49 Ark. 248, 4 S. W. 778, 4 Am. St. Rep. 45 (1887); Rifner v. Lindholm, 132 Kans. 434, 295 P. 670 (1931); Hawkins v. Scottish Union & National Ins. Co., 110 Miss. 23, 69 S. 710 (1915); Wente v. Shaver, 350 Mo. 1143, 169 S. W. (2d) 947 (1943); Gaines v. City of New York, 215 N. Y. 533, 109 N. E. 594, L. R. A. 1917C 203, Ann. Cas. 1916A 259 (1915); Meshek v. Cordes, 164 Okla. 40, 22 P. (2d) 921 (1933); Stevens v. Dill, 142 Okla. 138, 285 P. 845 (1930); Davis v. Parks, 151 Tenn. 321, 270 S. W. 444 (1924); Tompkins v. Pacific Mut. Life Ins. Co., 53 W. Va. 479, 44 S. E. 439, 62 L. R. A. 489, 97 Am. St. Rep. 1006 (1903).

[17] 34 Mass. (16 Pick.) 383 (1832).

was pending in the probate court. The decision rendered by the judge, on appeal, was declared null and void because the judge was related to the plaintiff. The plaintiff was nevertheless allowed to bring another action under the saving clause before a court having the right to hear the case. The same principle was reiterated in *Woods* v. *Houghton*.[18] The theory behind these two cases has been followed in all subsequent decisions. The reasoning therein follows equitable lines. As the primary purpose of the statute of limitations is to compel a creditor to enforce his rights within a reasonable time or lose his remedy, it does seem unjust to say that a creditor who has tried to enforce his rights within the allotted time but has made an error in choosing the proper forum should lose his right. The jurisdiction of courts is not always well defined, and the question as to how much jurisdiction a particular court possesses may be debatable. To penalize a person so heavily for a mistake of this nature where the error was made in good faith is far too harsh. Where the plaintiff, in bad faith, attempts to confer jurisdiction upon a court by falsely alleging the existence of other claims in order to reach the jurisdictional minimum required, however, it has been held that he should be denied the benefit of the saving clause[19] as has also been the case where gross negligence was present.[20]

The rule above indicated has been applied in law courts but has also been utilized in equity and federal courts. The saving clause has been given similar construction, for example, where a suit was brought in equity and dismissed for want of jurisdiction because there was an adequate remedy at law;[21] where one federal action was dismissed for want of jurisdiction, but was shifted to another federal court having competent jurisdiction;[22] or where the action was first brought in a federal court having no jurisdiction and, after dismissal, was brought in a state court.[23] Only two cases seem to reject this view, and they have been subjected to criticism.[24]

[18] 67 Mass. (1 Gray) 580 (1854).

[19] Harden v. Cass County, 42 F. 652 (1890).

[20] Warner v. Citizens' Nat. Bank, 267 F. 661 (1920).

[21] McKinney v. Springer, 3 Ind. 59, 54 Am. Dec. 470 (1851); Burns v. People's Telephone & Telegraph Co., 161 Tenn. 382, 33 S. W. (2d) 76 (1930); Swift & Co. v. Memphis Cold Storage Warehouse Co., 128 Tenn. 82, 158 S. W. 480 (1913); Hevener v. Hannah, 59 W. Va. 476, 53 S. E. 635 (1906).

[22] Sachs v. Ohio Nat. Life Ins. Co., 131 F. (2d) 134 (1942). The court construed a like Illinois statute to be applicable to cases where there is a dismissal for want of jurisdiction.

[23] Park & Pollard Co. v. Industrial Fire Ins. Co., 189 N. Y. S. 866 (1921); Pittsburgh C. C. & St. L. Ry. Co. v. Bemis, 64 Ohio St. 26, 59 N. E. 745 (1901); Edmison v. Crutsinger, 165 Okla. 252, 25 P. (2d) 1103 (1933). Contra: United States v. Boomer, 183 F. 726 (1910).

[24] Solomon v. Bennett, 62 App. Div. 56, 70 N. Y. S. 856 (1901) criticised in Davis v. Parks, 151 Tenn. 321, 270 S. W. 444 (1924); Sweet v. Chattanooga Electric Light Co., 97 Tenn. 252, 36 S. W. 1090 (1896) criticised in Burns v. People's Telephone & Telegraph Co., 161 Tenn. 382, 33 S. W. (2d) 76 (1930).

Justification for the holding in the instant case might also be found, in some states, on the basis of another type of statute, to wit: one dealing with change of venue from one court to another. Statutes of this nature vary widely in their language and operation. Only two such statutes appear to comprehend the immediate problem here concerned. Kentucky, for example, provides that when an action is commenced in due time and in good faith in any court, and it is subsequently adjudicated that such court has no jurisdiction, then the plaintiff may, within three months, commence a new action in the proper court. It is expressly declared that "the time between the commencement of the first and last actions shall not be counted in applying any statute of limitations."[25] A statute in Texas contains a substantially similar provision provided there has been no "intentional disregard of jurisdiction."[26] Under these statutes, the present question would seem amply settled by express language.[27]

Another comparable set of statutes is illustrated by California, where, upon finding of lack of jurisdiction, the court in which the case was instituted is empowered to transfer the same to the proper court wherein the matter is to be treated as if the same had "been commenced at the time the complaint or petition was filed in the court from which it was originally transferred."[28] The pertinent Illinois statute would seem to fit in this category except for the fact that it is silent as to when the action in the court to which it is transferred shall be deemed to have been commenced.[29] The absence of the phrase "as if there originally instituted" leaves the statute open to the construction adopted by the Illinois court in the instant case that the suit cannot be regarded as commenced in the court to which it is transferred until the time such transfer takes place. Addition of that simple phrase to the Illinois statute would seem to be highly desirable in order to reach an obviously just though different interpretation.

Still another group of statutes provide that if objection to jurisdiction is presented, the court in which the case was instituted shall transfer the same to the proper court but, upon transfer, the case shall proceed as if it had been there originally instituted.[30] Pre-

[25] Ky. Rev. Stat. 1944, Ch. 413 § 413-270.

[26] Vernon's Tex. Stat. Anno. 1925, Tit. 91, Art. 5, § 39A.

[27] Analogous statutes may be found in Vt. and W. Va.: Vt. Pub. Laws 1933, Tit. 9, Ch. 72, § 1665; W. Va. Code Anno. 1943, § 3410.

[28] Deering's Calif. Code of Civ. Procedure and Probate 1941, Tit. 4, § 396. See also Thompson's Laws of New York 1939, Vol. II, § 110 of the Civ. Prac. Act; Wis. Stat. 1943, Ch. 269, § 269.51 (2).

[29] Ill. Rev. Stat. 1943, Ch. 146, § 36, merely provides that, upon transfer, the cause "shall be then pending and triable . . . as in other cases of change of venue."

[30] Conn. Gen. Stat. 1930, Tit. 58, Ch. 288, § 5485; Mass. Laws Anno. 1933, Vol. VII, Ch. 223, § 15; Utah Code Anno. 1943, Vol. VI, Tit. 104, § 104-4-9.

sumably, in these states, a failure to raise the question of lack of jurisdiction will operate as a waiver of that question, although the statute does not purport to authorize the court to proceed even in the absence of objection.

Confusion may be generated, however, in connection with statutes found in still other jurisdictions if attention is not given to a fundamental distinction between jurisdiction to pass upon the subject matter and jurisdiction viewed simply from the standpoint of venue. It has been said that jurisdiction in the former sense can never be conferred by agreement of the parties,[31] hence a failure to object that jurisdiction is lacking could not be regarded as a waiver of that fact. If the court has power to determine the subject matter but, for reasons of convenience, it is denied the right to hear because of lack of venue, the parties well might, in disregard of their own convenience, permit the court where the cause was instituted to proceed with the case and thereby be barred from raising the fundamental question including the problem here presented. For that reason it would seem that statutes such as exist in most of the other states fall wide of the mark,[32] and little reliance can be placed thereon to settle the instant problem.

It can be seen, then, that some but too little consideration has been given to provide adequate relief for the unfortunate litigant who, through error, institutes his proceeding in the wrong court and does not learn of his mistake until it is too late to transfer or recommence his suit in a proper court. Although the United States Supreme Court suggests a possible form of relief, it would seem that the adoption of adequate legislation on the subject would be more desirable.

W. HEINDL

MARRIAGE—ANNULMENT—WHETHER ARREST, OR THREAT OF ARREST, ON SEDUCTION OR BASTARDY CHARGE WILL CONSTITUTE SUFFICIENT DURESS TO SUPPORT PROCEEDINGS TO ANNUL A MARRIAGE—The recent case of *Smith* v. *Saum*[1] involved a plaintiff eighteen years of age in the service of the United States Navy who charged that he had been arrested on the complaint of the defendant, nineteen years of age, accusing him

[31] Werner v. I. C. R. R. Co., 379 Ill. 559, 42 N. E. (2d) 82 (1942).

[32] Arizona Code Anno. 1939, Vol. II, Ch. 21, § 21-102, indicates that if the action is brought in the wrong county, i. e. venue is lacking, still the court "may continue the hearing unless the defendant objects" and wants the action transferred. See also Iowa Code 1939, Tit. 31, Ch. 488, § 11053; Idaho Code Anno. 1932, Vol. I, Tit. 5, § 406-407; Minn. Stat. 1941, Vol. II, Ch. 542, § 542-10; Mont. Code Anno. 1935, (Anderson & McFarland), Vol. IV, Ch. 30, § 9097-8; N. C. Gen Stat. 1943, Ch. I, § 1-83; N. D. Rev. Code 1943, Vol. III, Ch. 28-04, § 28-0407; Oregon Comp. Laws Anno. 1940, Vol. I, Tit. I, § 1-404; S. C. Code 1942, Vol. I, Tit. 6, § 426; S. D. Code 1939, Vol. II, Tit. 33, § 33.0306.

[1] 324 Ill. App. 299, 58 N. E. (2d) 248 (1944).

of being the father of her unborn child. After arrest, plaintiff was surrendered by the civil authorities to the Navy's Shore Patrol; was imprisoned overnight; was not permitted to consult friends or counsel; but, on the following morning was brought into court where a Naval Petty Officer, without previous notice to plaintiff and in spite of his statement that he was not and could not be the father of the child, told the court that plaintiff, defendant therein, was willing to marry the complaining witness if the proceedings were dismissed. The quasi-criminal proceedings[2] were dismissed and plaintiff and defendant, accompanied by their parents and guardians and a civilian police officer, obtained a marriage license and had a marriage ceremony performed. The marriage was never consummated. Plaintiff's complaint, after alleging these facts, charged that he was immature and unexperienced, went through the ceremony against his will in the belief that the Naval Petty Officer had authority to compel him to do so and that, immediately after the ceremony, he sought to have the marriage set aside. Defendant moved to dismiss the complaint for want of equity, which motion was sustained by the trial court. Plaintiff elected to stand by his complaint and his suit was dismissed. On appeal, the Appellate Court for the First District affirmed that decision on the ground that a marriage could not be annulled for duress where the party seeking the decree married to escape prosecution, provided the charge was not made maliciously or without probable cause.

Although the question presented by these facts is one of first impression in Illinois, it has been presented and decided with similar results in many other jurisdictions.[3] The case possesses additional interest, however, because of the likelihood that wartime conditions will possibly bring similar problems before the courts in the immediate future. That the facts show actual duress can scarcely be denied

[2] Ill. Rev. Stat. 1943, Ch. 17, authorizes a bastardy proceeding which, though designated as a quasi-criminal action, has more of the characteristics of a civil action than a criminal one. Section 15 of the statute also provides that if the parties marry after the child is born, the child shall be deemed legitimate.

[3] Newman v. Sigler, 220 Ala. 426, 125 So. 666 (1930); Kibler v. Kibler, 180 Ark. 1152, 24 S. W. (2d) 867 (1930); Griffin v. Griffin, 130 Ga. 527, 61 S. E. 16, 16 L. R. A. (N. S.) 937, 14 Ann. Cas. 866 (1908); Sherman v. Sherman, 174 Iowa 145, 156 N. W. 301 (1916); Shepherd v. Shepherd, 174 Ky. 615, 192 S. W. 658 (1917); Pray v. Pray, 128 La. 1037, 55 So. 666 (1911); Wimbrough v. Wimbrough, 125 Md. 619, 94 A. 168, Ann. Cas. 1916E 920 (1915); Day v. Day, 236 Mass. 362, 128 N. E. 411 (1920); Zeigler v. Zeigler, 174 Miss. 302, 164 So. 768 (1935); Blankenmeister v. Blankenmeister, 106 Mo. App. 390, 80 S. W. 706 (1904); Willits v. Willits, 76 Neb. 228, 107 N. W. 379, 5 L. R. A. (N. S.) 767, 14 Ann. Cas. 883 (1906); Ingle v. Ingle, 38 A. (N. J. Ch.) 953 (1897); Scott v. Shufeldt, 5 Paige (N. Y.) 43 (1835); State v. Davis, 79 N. C. 603 (1878); State v. English, 101 S. C. 304, 85 S. E. 721, L. R. A. 1915F 979 (1915); Garcia v. Garcia, 144 S. W. (2d) (Tex. Civ. App.) 605 (1940); Harrison v. Harrison, 110 Vt. 254, 4 A. (2d) 348 (1939); Thorne v. Farrar, 57 Wash. 441, 107 P. 347, 27 L. R. A. (N. S.) 385, 135 Am. St. Rep. 995 (1910). See also Robert C. Brown, "Duress and Fraud as Grounds for the Annulment of Marriage," 10 Ind. L. J. 473 (1935).

but, in finding the same did not amount to legal duress sufficient to warrant annulling the marriage, the court was basing its decision on principles of public policy. To permit one to marry a person he has wronged, thereby escaping prosecution for his illegal acts, and then to allow him to annul the very marriage by which he secured such relief, would be tantamount to eliminating the right to prosecute for the original offense against public policy and good morals.[4] The state has a direct interest in securing the future support of the issue of such an illegal union and would prefer to insure its legitimation, whereas annulment would strike at both objectives. As a consequence, it has been held that a marriage consented to because of some sense of duty and a desire to right a moral wrong will be upheld even though there is some evidence of duress.[5]

In much the same manner, if the plaintiff can be presumed to have elected to go through with the marriage instead of contesting the criminal charge, such an election may not be rescinded after the ceremony even though he was not guilty of the alleged offense.[6] In the early New York case of *Scott* v. *Shufeldt*,[7] for example, annulment was denied, insofar as the proceedings were based on a claim of duress, where the man arrested had married the complaining witness to escape prosecution even though he discovered that the child, born a few days before his arrest, was a mulatto whereas both he and the woman were wholly of white blood. If the criminal complaint is brought maliciously or without probable cause, the election to marry rather than defend the charge may be rescinded and the marriage annulled. Such holdings, though, usually rest on the claim of fraud rather than of duress, and in most of such cases the party seeking the annulment appears to have been young and naive.[8]

A mere mistaken belief as to the nature of the penalty, on the other hand, is not sufficient grounds for annulment,[9] nor is the fact that the arrest was illegal or without possibility of conviction.[10] Cohabitation after the ceremony when coercion has ceased to exist will, of course, destroy any right that might have originally existed

[4] Sherman v. Sherman, 174 Iowa 145, 156 N. W. 301 (1916).

[5] Collins v. Ryan, 49 La. Ann. 1710, 22 So. 920, 43 L. R. A. 814 (1897); Meredith v. Meredith, 79 Mo. App. 636 (1899); Shepherd v. Shepherd, 174 Ky. 615, 192 S. W. 658 (1917); Kelley v. Kelley, 206 Ala. 334, 89 So. 508 (1921).

[6] Day v. Day, 236 Mass. 362, 128 N. E. 411 (1920).

[7] Scott v. Shufeldt, 5 Paige (N. Y.) 43 (1835).

[8] Short v. Short, 265 Ill. App. 133 (1932); Smith v. Smith, 51 Mich. 607, 17 N. W. 76 (1883); Ingle v. Ingle, 38 A. (N. J. Ch.) 953 (1897); Shoro v. Shoro, 60 Vt. 268, 14 A. 177, 6 Am. St. Rep. 118 (1888).

[9] Rogers v. Rogers, 151 Miss. 644, 118 So. 619 (1928); Ingle v. Ingle, 38 A. (N. J. Ch.) 953 (1897).

[10] Marvin v. Marvin, 52 Ark. 425, 12 S. W. 875, 20 Am. St. Rep. 191 (1890); Ingle v. Ingle, 38 A. (N. J. Ch.) 953 (1897); Scott v. Shufeldt, 5 Paige (N. Y.) 43 (1835).

to have the marriage annulled,[11] unless the party coerced was immature.[12]

A nice question is presented where actual and legal duress is present but the coercion is brought to bear by third persons. The majority rule seems to be that the defendant must have participated in the coercion or knowingly have taken advantage of it in order for the victim of the duress to succeed in his annulment suit,[13] although at least one court has held that participation in the duress will be irrebuttably presumed where the duress was brought to bear by relatives or close friends.[14] A minority view, followed in Illinois, regards this as unnecessary,[15] so that the acts of public officials or others, if constituting legal duress, would be sufficient to support annulment even though not sanctioned or ratified. The significant feature of the instant case, therefore, lies in the fact that plaintiff accepted the election proposed rather than in any question as to the sufficiency of the duress imposed.

While the result of the instant case would probably not have been reached if only a simple contract were involved, still, when public policy and social conventions are considered, the justification for the holding becomes more nearly apparent.

J. F. PARTRIDGE

MUNICIPAL CORPORATIONS — POLICE POWER AND REGULATIONS — WHETHER OR NOT PROVISION IN ZONING ORDINANCE RESTRICTING EXTENSION OF NONCONFORMING USES IS ARBITRARY AND UNREASONABLE—In *Mercer Lumber Companies* v. *Village of Glencoe*,[1] the plaintiff filed suit to enjoin the enforcement of a zoning ordinance as applied to its property and prayed that the same be declared void. Plaintiff's property had been used as a lumber yard for more than twenty-five years, which yard was in existence before the original zoning ordinance had been adopted. Such use amounted to a nonconforming use under the original ordinance and was so treated under the revised ordinance here concerned which placed the property in three different zones or classifications, none of which included lumber yards among permitted uses. The particular provision complained of, however, stipulated that nonconforming uses in existence at the time the ordi-

[11] Thompson v. Thompson, 148 La. 499, 87 So. 250 (1921); Owings v. Owings, 141 Md. 416, 118 A. 858 (1922).

[12] Short v. Short, 265 Ill. App. 133 (1932).

[13] Shepherd v. Shepherd, 174 Ky. 615, 192 S. W. 658 (1917); Fratello v. Fratello, 193 N. Y. S. 865, 118 Misc. 584 (1922); Sherman v. Sherman, 20 N. Y. S. 414 (1892); Campbell v. Moore, 189 S. C. 497, 1 S. E. (2d) 784 (1939).

[14] Marks v. Crume, 16 Ky. L. 707, 29 S. W. 436 (1895).

[15] Lee v. Lee, 176 Ark. 636, 3 S. W. (2d) 672 (1928); Schwartz v. Schwartz, 29 Ill. App. 516 (1889).

[1] 390 Ill. 138, 60 N. E. (2d) 913 (1945).

nance was passed could be continued and even altered but could not be extended to exceed thirty percent. of the cubic contents of nonconforming buildings as they existed on the day the original ordinance was adopted[2] although change to conforming uses was permitted. Although a master in chancery found in favor of the plaintiff and recommended that a whole new zoning ordinance be adopted, the chancellor decreed that the ordinance was valid and reasonable and dismissed the suit. On appeal taken directly to the Illinois Supreme Court because the trial court certified that the validity of a municipal ordinance was in question, such decree was affirmed, thereby deciding for the first time in this state that reasonable regulation of the extension of nonconforming uses was permissible under zoning laws.

Attack on the validity of the ordinance involved in the instant case, as in all cases of its type, was made on the ground that the same was unnecessary, unreasonable and arbitrary. The reason for such a regulation can, however, readily be seen. When a municipal council decides that, in order to keep the growth of the particular city under control, it is advisable to enact some sort of zoning ordinance and it takes advantage of the enabling act, the council adopts such regulation as it deems desirable for the particular situation before it.[3] The validity of such comprehensive zoning ordinances has been upheld innumerable times as a proper exercise of the police power[4] provided the operation thereof is reasonable and not arbitrary.[5] It is likely that, before the adoption of such regulation, different types of property uses have been in existence for some time and may be spread irregularly throughout the municipality. When a zoning plan is adopted, such existing uses will probably not conform to planned restrictions applicable to the particular use district developed thereby but, under normal conditions, such zoning ordinances do not operate retroactively hence the nonconforming uses then in existence must be allowed to remain.[6] Exemption thereof from the zoning scheme is said to rest on the theory that too great a hardship would be inflicted and unnecessary destruction of property would

[2] Ill. Rev. Stat. 1943, Ch. 24, § 73-1(8), gives the municipality power to regulate and prevent additions, alterations, or remodeling of existing buildings.

[3] The enabling statute in this state is Ill. Rev. Stat. 1943, Ch. 24, § 73-1, et seq.

[4] Euclid v. Ambler Realty Co., 272 U. S. 365, 47 S. Ct. 114, 71 L. Ed. 303, 54 A. L. R. 1016 (1926); Neef v. City of Springfield, 380 Ill. 275, 43 N. E. (2d) 947 (1942). For other cases, see annotation in 117 A. L. R. 1117.

[5] Taylor v. Village of Glencoe, 372 Ill. 507, 25 N. E. (2d) 62 (1939); Western Theological Seminary v. City of Evanston, 331 Ill. 257, 162 N. E. 863 (1928). See also cases cited in 117 A. L. R. 1123.

[6] Ill. Rev. Stat. 1943, Ch. 24, § 73-1, expressly exempts existing nonconforming uses. The validity of such provisions is dealt with in City of Aurora v. Burns, 319 Ill. 84, 149 N. E. 784 (1925), and Illinois Life Ins. Co. v. City of Chicago, 244 Ill. App. 185 (1927). Cases involving the absence of specific provision exempting nonconforming uses are noted in 86 A. L. R. 684.

result if such nonconforming uses were made to conform[7] whereas "zoning seeks to stabilize and not to destroy."[8] Municipal councils, therefore, usually look to the future and to the eventual confinement of specified uses into districts created for such purpose.[9]

To that end, it is necessary to see to it that existing uses which do not conform are not given an opportunity to expand or to become even more serious nonconforming uses than they originally were, for new construction "might destroy a residence district where the continuation of the original building would be comparatively harmless."[10] The perpetual existence of these nonconforming uses violates the eventual plan of the municipality[11] but, by regulating them, they can be kept under control and may, in the end, be eliminated.[12] Such regulation would seem to be a legitimate exercise of the police power, for that power can be used not merely to maintain the status quo but also to plan for the future.[13] Regulatory provisions of this nature have been upheld elsewhere if they take the form of (1) forbidding the owner of the nonconforming use from substituting another nonconforming use therefor;[14] (2) denying him the right to enlarge or change the same structurally;[15] (3) forbidding rebuilding if the existing building or more than half of it is destroyed unless change is

[7] James. Metzenbaum, The Law of Zoning (Baker Voorhis & Co., New York, 1930), p. 287.

[8] Edward M. Bassett, Zoning (The Russell Sage Foundation, New York, 1926), p. 105.

[9] Thayer v. Board of Appeals of City of Hartford, 114 Conn. 15, 157 A. 273 (1931); Town of Darien v. Webb, 115 Conn. 581, 162 A. 690 (1932); Austin v. Older, 283 Mich. 667, 278 N. W. 727 (1938).

[10] Bassett, op. cit., p. 109.

[11] Piccolo v. Town of West Haven, 120 Conn. 449, 181 A. 615 (1935); Conway v. Atlantic City, 107 N. J. L. 404, 154 A. 6 (1931).

[12] Ill. Rev. Stat. 1943, Ch. 24, § 73-1, contemplates the gradual elimination of nonconforming uses which existed before the ordinance was passed. Metzenbaum, op. cit., p. 288, declares: "Within a period of another twenty years, a large number of such 'non-conforming uses' will have disappeared, either through the necessity of enlargement and expansion which invariably is forbidden by ordinance, or by the owners realizing that it is unwise and uneconomic to be located in a district which probably is not suitable for the non-conforming purpose, or by obsolescence, destruction by fire or by the elements, or similar inability to be used; so that many of these non-conforming uses will 'fade out,' with a resulting substantial benefit to all communities."

[13] Zahn v. Board of Public Works, 195 Cal. 497, 234 P. 388 (1925), affirmed in 274 U. S. 325, 47 S. Ct. 549, 71 L. Ed. 1074 (1927).

[14] Wilson v. Edgar, 64 Cal. App. 654, 222 P. 623 (1923); Collins v. Moore, 211 N. Y. S. 437, 125 Misc. 777 (1925).

[15] Rehfeld v. City and County of San Francisco, 218 Cal. 83, 21 P. (2d) 419 (1933); Selligman v. Von Allman Bros., 297 Ky. 121, 179 S. W. (2d) 207 (1944); State v. City of New Orleans, 171 La. 1053, 132 So. 786 (1931); Austin v. Odler, 283 Mich. 667, 278 N. W. 727 (1938); Green v. Board of Com'rs of City of Newark, 131, N. J. L. 336, 36 A. (2d) 610 (1944); Meixner v. Board of Adjustment of City of Newark, 131 N. J. L. 599, 37 A. (2d) 678 (1944); Ventres v. Walsh, 201 N. Y. S. 226, 121 Misc. 494 (1923).

made to a conforming use;[16] or (4) directing that where there has been a discontinuance of the nonconforming use, whether involving change to a conforming one or not, the property can never again be used in the nonconforming fashion.[17] The instant provision is not unlike these in character.

It is obvious that as regulations of the types mentioned are but part and parcel of comprehensive zoning ordinances, they must be enacted under the same power as the more general ones, to-wit: the police power. Such power has always been subject to the limitation that it must be reasonably and not arbitrarily exercised.[18] The complainant in the instant case contended that the provision involved was not a proper and legitimate exercise of that power for it depreciated the value of property in that, by limiting any extension to thirty per cent. of the existing use, it would prevent the owner from getting the maximum value out of the same. When determining the relative reasonableness or unreasonableness of a provision of this kind, the court may take into consideration the damage done to property values,[19] but that is but one factor to be recognized and is never controlling by itself.[20] If the courts were to allow that factor alone to determine the validity of such regulations, reason dictates that no zoning ordinance could ever be upheld as "every exercise of the police power is apt to affect adversely the property interests of somebody."[21]

Comparing the provision in the instant case with like provisions under other ordinances which have been declared to be reasonable, the inevitable conclusion is reached that the instant provision creates no such extreme hardship as to warrant calling it unreasonable. In fact, it is far more generous in its provisions than was the case in the following illustrations. In two Louisiana cases, for example, the owners of nonconforming uses in existence before the ordinance was passed were forced to liquidate within one year, but such provision was upheld.[22] *Hadachek* v. *Sebastian*[23] provides an example of even more

[16] State v. Hillman, 110 Conn. 92, 147 A. 294 (1929); Koeber v. Bedell, 3 N. Y. S. (2d) 108, 254 App. Div. 584 (1938).

[17] State v. Baumauer, 234 Ala. 286, 174 So. 514 (1937); Town of Darien v. Webb, 115 Conn. 581, 162 A. 690 (1932).

[18] See cases cited in note 4, ante.

[19] Reschke v. Village of Winnetka, 363 Ill. 478, 2 N. E. (2d) 718 (1936); Taylor v. Village of Glencoe, 372 Ill. 507, 25 N. E. (2d) 62 (1939).

[20] In Geneva Inv. Co. v. City of St. Louis, 87 F. (2d) 83 at 90 (1937), the court said: "The loss sustained by appellant through depreciation in value, if the ordinance is sustained, while proper for the consideration of the court, is not controlling, for if the police power is properly exercised, loss to the individual is a misfortune which he must undergo as a member of society." To the same effect are Delano v. City of Tulsa, 26 F. (2d) 640 (1928), and Marblehead Land Co. v. City of Los Angeles, 47 F. (2d) 528 (1931).

[21] Zahn v. Board of Public Works, 195 Cal. 497 at 512, 234 P. 388 at 394 (1925).

[22] State v. Jacoby, 168 La. 752, 123 So. 314 (1929); State v. McDonald, 168 La. 172, 121 So. 613 (1929), cert. den. 280 U. S. 556, 50 S. Ct. 16, 74 L. Ed. 612 (1929).

[23] 239 U. S. 394, 36 S. Ct. 143, 60 L. Ed. 348, Ann. Cas. 1917B 927 (1915).

extreme hardship. There, a brickyard had been operated before the zoning ordinance was enacted but the owner was forced to abandon the property, worth approximately $800,000 and which could be used only as a brickyard because of the clay pits there present, by reason of the new ordinance. The court said, in substance, that if private interests stood in the way of community development, they must give way or else the municipality could not properly expand. In still another case, that of *Cole* v. *City of Battle Creek*,[24] no structural change whatsoever was permitted even though such change might decrease the cubical content of the nonconforming use. The court said any change which would prolong the life of such a use would violate the spirit of the zoning ordinance and should be prohibited. Any increase in either the cubic contents or size of existing nonconforming uses has also been forbidden under other decisions.[25] In the light of such decisions, the ordinance here concerned was far from unreasonable.

A further argument was presented on the ground that, in order to be a proper exercise of the police power, the regulation had to bear some substantial relation to the health, safety, or general welfare of the people.[26] It was claimed that the limitation on extension to thirty percent. was arbitrarily arrived at and that if an extension of that size would do no harm then one amounting to fifty or sixty percent. would present no such widespread difference as to create a condition which would result in an adverse effect. It is clear, though, that courts will not disturb the judgment of the council and will treat its findings as conclusive unless there is definite demonstration that there is no relation between the ordinance and the public safety, health, or general welfare sought to be subserved thereby.[27] For that matter, even where there is doubt either way as to the reasonableness or unreasonableness of the provision, the court will not substitute its judgment for that of the council.[28] There was a difference of opinion, in the instant case, between the findings of the chancellor and those of the master in chancery on the question of the reasonableness of the provision. The upper court seized upon this as a basis for holding

[24] 298 Mich. 98, 298 N. W. 466 (1941).

[25] City of Lewiston v. Grant, 120 Me. 194, 113 A. 181 (1921); DeVito v. Pearsall, 115 N. J. L. 323, 180 A. 202 (1935); State v. Stegner, 120 Ohio St. 418, 166 N. E. 226, 64 A. L. R. 916 (1929). See also American Wood Products Co. v. City of Minneapolis, 21 F. (2d) 440 (1927). Other comparisons are provided by the cases cited in footnote 15, ante, where the provisions involved were similar to the one in the instant case.

[26] Forbes v. Hubbard, 348 Ill. 166, 180 N. E. 767 (1932); Harmon v. City of Peoria, 373 Ill. 594, 27 N. E. (2d) 525 (1940). See also 117 A. L. R. 1123.

[27] Neef v. City of Springfield, 380 Ill. 275, 43 N. E. (2d) 947 (1942); Speroni v. Board of Appeals of City of Sterling, 368 Ill. 568, 15 N. E. (2d) 302 (1938).

[28] Avery v. Village of LaGrange, 381 Ill. 432, 45 N. E. (2d) 647 (1942); Burkholder v. City of Sterling, 381 Ill. 564, 46 N. E. (2d) 45 (1943).

that, because of the doubt engendered, it would not overrule the judgment of the municipal council.

In considering whether or not any relationship exists between a regulation of this type and the police power, the court should be careful as to the way in which it approaches the problem. It could easily find that no such relationship exists, for an extension or change in a nonconforming use might not immediately or directly affect the neighbors or the general public in any detrimental fashion at the particular time. That fact was noted by the California court in *Rehfield* v. *City and County of San Francisco*[29] when it stated: "The finding that the public welfare would not be in danger is beside the point. Obviously, a *rezoning* would not cause injury to the public, but the whole value of zoning lies in the establishment of more or less permanent districts, well planned and arranged. If, upon the complaint of the owner, the courts are to re-examine each instance of inclusion or exclusion of property from a district, solely with regard to the dangerous or non-dangerous character of the particular structure, and irrespective of the general scheme of the ordinance, then there is, of course, no possibility of ever achieving successful zoning."[30] The court should, therefore, take the whole zoning scheme into consideration along with the immediate problem as it affects the complainant's property in order to determine whether the extension or change would be detrimental to the people not alone at present but also in the future. That reasoning, at least, has been followed in some cases. In one of them, for example, a dairy was denied a permit to put up brick walls to take the place of the rotted wooden ones.[31] Constructing brick walls would not immediately and directly be injurious to the public health, safety, or general welfare but rather would promote safety. Nevertheless, it was said that by putting up brick walls the life of the nonconforming use would be prolonged, thereby defeating the general scheme of zoning, so that the ultimate good would have to outweigh the immediate benefit.[32]

The principles involved in zoning problems of this character are simple and can easily be stated. Everyone holds his property subject to the reasonable and proper operation of the police power.[33] The court, in determining whether that power has been used in a reasonable and proper manner, must examine the facts involved in each case. What is reasonable and what is capricious in a given situation is generally reflected in contemporary thought. As people come more

[29] 218 Cal. 83, 21 P. (2d) 419 (1933).

[30] 218 Cal. 83 at 86, 21 P. (2d) 419 at 420.

[31] Selligman v. Von Allman Bros., 297 Ky. 121, 179 S. W. (2d) 207 (1944).

[32] Refusal to permit extension of a dairy has been sustained on the same ground: State v. Harper, 182 Wis. 148, 196 N. W. 451 (1923).

[33] Zadworny v. City of Chicago, 380 Ill. 470, 44 N. E. (2d) 426 (1942).

and more to the realization that it is better to segregate industrial and marketing districts from residential ones, they will regard as reasonable that which previously might have been deemed arbitrary restraint. It can be expected, therefore, that even more rigid and still harsher regulations than those here concerned will be upheld as being reasonable and proper. The Illinois Supreme Court, at least, has set its foot in the right direction.

W. HEINDL

WORKMEN'S COMPENSATION—ACTION AGAINST THIRD PERSONS FOR EMPLOYEE'S INJURY OR DEATH—WHETHER NOTICE OF REJECTION OF BENEFITS OF WORKMEN'S COMPENSATION ACT IS REQUIRED OF AN ILLEGALLY EMPLOYED MINOR—In *Oran* v. *Kraft-Phenix Cheese Corporation*[1] the plaintiff, an illegally employed minor not quite sixteen years of age, brought suit by next friend to recover for injuries sustained while making a delivery when crowded against a parked car by the defendant's truck. The defendant's answer set forth the fact that the parties concerned were all subject to and operating under the Workmen's Compensation Act.[2] Plaintiff's reply did not deny such fact but alleged that, as he was illegally employed, he had a right to bring his own action at law. Without notice or leave of court,[3] defendant filed a further pleading in which it was alleged that plaintiff had not, within six months of the accident,[4] filed a rejection of his right to claim benefits under the compensation law. After verdict for plaintiff at a trial on such issues, the trial court granted the defendant's motion for judgment notwithstanding the verdict. On appeal by plaintiff, the Appellate Court for the First District reversed such decision on the ground that the time limitation contained in Section 6 of the Workmen's Compensation Act did not run against a minor until a legal representative had been appointed for him.

Although that holding had been indicated as probably being the law of this state,[5] the instant case presents the first clear-cut answer to a query propounded in the columns of the Chicago-Kent Law

[1] 324 Ill. App. 463, 58 N. E. (2d) 731 (1944).

[2] Such defense proceeded on the theory that any cause of action was transferred to the plaintiff's employer: Ill. Rev. Stat. 1943, Ch. 48, § 166.

[3] Ill. Rev. Stat. 1943, Ch. 110, § 156, contemplates that further pleading after the reply may be permitted only "as ordered by the court."

[4] Ill. Rev. Stat. 1943, Ch. 48 § 143, as amended in 1931, states in part: ". . . Provided, further, that any illegally employed minor or his legal representatives shall, except as hereinafter provided, have the right, within six months after the time of injury or death, to file with the commission a rejection of his right to the benefits under this Act, in which case such illegally employed minor or his legal representatives shall have the right to pursue his or their common law or statutory remedies to recover damages for such injury or death. . . ."

[5] Kijowski v. Times Publishing Corp., 298 Ill. App. 236, 18 N. E. (2d) 754 (1939). Judgment therein was affirmed by the Illinois Supreme Court on other grounds: 372 Ill. 311, 23 N. E. (2d) 703 (1939). The precise question concerned was not discussed in the Supreme Court opinion.

Review a short time ago[6] and confirms the judgment of that writer to the effect that the time limitation imposed by Section 6 would not operate against the minor prior to the appointment of a guardian.[7] To reach that result, the court relied on earlier Illinois cases[8] indicating it to be the pronounced public policy of the state to guard the rights of minors, from which premise it was reasoned that it would not be safeguarding the rights of minors to construe the statute so as to require the minor to do that which could not validly be done. Strict enforcement of Section 6, as written, would work a contradiction by requiring the minor to give notice of rejection within six months after injury, but at the same time not allowing him to give such notice except through a duly appointed representative. The court, therefore, seems to have arrived at the only logical and practical solution.

Illinois appears to be the only state to enact legislation requiring an illegally employed minor to file notice of rejection before permitting him to pursue common law remedies and, in view of the decision in the instant case, it would appear unlikely that similar legislation would be promulgated in other states. In contrast, many states have expressly provided that any time limitations specified in their compensation laws are not to apply to or operate against minors until after a guardian or other legal representative has been appointed to act in the minor's behalf.[9] While some state statutes stipulate that a minor, for all purposes, stands in the same relation to the compensation laws as do adults,[10] such statutes reflect a definite minority view. In the other states, although no specific mention of the point is made in the state statute, it is likely that the same result as that

[6] See Angerstein, "The Child Labor Act and the Workmen's Compensation Act of Illinois," 20 CHICAGO-KENT LAW REVIEW 193, particularly p. 202 (1942).

[7] Judicial notice of Mr. Angerstein's analysis of the problem was given: 324 Ill. App. 463 at 476, 58 N. E. (2d) 731 at 736.

[8] Waechter v. Industrial Commission, 367 Ill. 256, 11 N. E. (2d) 378 (1937); Wallgreen Co. v. Industrial Commission, 323 Ill. 194, 153 N. E. 831, 48 A. L. R. 1199 (1926); Maskaliunas v. Chicago and Western Indiana R. Co., 318 Ill. 342, 149 N. E. 23 (1925); Hasterlik v. Hasterlik, 316 Ill. 72, 146 N. E. 498 (1925); McDonald v. City of Spring Valley, 285 Ill. 52, 120 N. E. 476, 2 A. L. R. 1359 (1918).

[9] Ark. Laws 1939, p. 777, § 18(c); Cal. Deering Code, Labor, Part IV, Ch. 2, § 5408; Ida. Code Anno. 1932, Ch. 12, § 43-1206; Ind. Burns Stat. Anno. 1933, § 40-1413; Kas. Gen. Stat. 1935, Ch. 44, § 509; Ky. Rev. Stat. 1944, § 342.210; Me. Rev. Stat. 1930, Ch. 55, § 22; Mo. Rev. Stat. 1939, Vol. I, § 3695a; Mont. Rev. Code 1935, Ch. 256, § 2900; N. J. Rev. Stat. 1937, Vol. II, Ch. 34:15, § 51; N. Y. Baldwin Cons. Laws 1938, Vol. VII, Work. Comp. Law, Art. 7, § 115; N. Car. Gen. Stat. 1943, Vol. II, Ch. 97, § 50; Okla. Stat. 1941, Tit. 85, § 106; S. Car. Code 1942, § 7035-52; Tex. Vernon's Civ. Stat. Anno., Art. 8306, § 13; Vt. Pub. Laws 1933, Tit. 30, § 6540; Va. Code Anno. 1942, Ch. 76A, § 1887(50); Wyo. Rev. Stat. 1931, Ch. 124, § 108.

[10] Ala. Code 1940, Tit. 26, § 296; Ariz. Code Anno. 1939, Ch. 56, § 56-974; Colo. Stat. Anno. 1935, Ch. 97, § 288(b); Minn. Stat. 1941, Vol. I, Ch. 176, § 18.

achieved in the instant case would be obtained, particularly when it is borne in mind that a minor is incompetent to act for himself and, being presumed to be without knowledge of his legal rights or obligations, is under special protection from the law until a guardian or other competent person has been chosen to represent him.

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