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Part II*

THE MANNER of bringing the decision of the Industrial Commission before the appropriate circuit court for review has already been discussed at length. If the proper steps have been taken within the allotted time, that court is now ready to perform its function in the process of reviewing the administrative determination. Before it is possible to consider how that function is to be performed, however, it is necessary to digress sufficiently to cover the question of the jurisdictional power of the courts to grant review in such cases.

HISTORICAL DEVELOPMENT OF POWER

The first Workmen's Compensation Act of Illinois, enacted in 1913, confined review of the commission's decision to the Supreme Court[1] so that authority to act was lacking in the several circuit courts. A test of the jurisdiction so conferred was made in the landmark case of *Courter* v. *Simpson Construction Company*[2] wherein the employer sued out a writ of certiorari to review the decision of the commission. The

* Part I of this article appeared in 23 CHICAGO-KENT LAW REVIEW pp. 205 et seq.

1 Laws 1913, p. 349, being Section 19(f) of the statute, provided: "The decision of the Industrial Board . . . and of the committee of arbitration, where no review is had and its decision becomes the decision of the Industrial Board . . . shall, in the absence of fraud, be conclusive, but the Supreme Court shall have power to review questions of law involved in any such decision . . . by *certiorari, mandamus* or by any other method permissible under the rules and practices of said court or the laws of this State."

2 264 Ill. 488, 106 N. E. 350 (1914).

guardian of the minor in whose favor the award had been made challenged the constitutionality of the section under which such review was sought on the ground that the statute purported to confer original jurisdiction upon the Supreme Court in violation of Article VI, Section 2, of the state constitution.[3] That contention was sustained and the provision declared invalid for the reason that the legislature was without power to enlarge the original jurisdiction of the court and the writ in question was not sought "in aid of or to protect"[4] the appellate jurisdiction thereof. The recognized importance of an early determination as to whether or not the parties to an award were entitled to judicial review and, if so, under what circumstances, led the court to make a careful examination of the controlling principles and to indicate that there would be no doubt that the circuit courts could issue the common-law writ of certiorari otherwise the whole scheme for workmen's compensation would be invalid.[5] The method pursued, however, was held to be an improper one.

Following that decision, the legislature enacted the 1915 amendment to Section 19 so as to provide, for the first time, for review of all questions of law presented by the record before the circuit court on writ of certiorari.[6] That amend-

[3] Ill. Const. 1870, Art. VI, § 2, declares: "The supreme court . . . shall have original jurisdiction in cases relating to the revenue, in *mandamus* and *habeas corpus* and appellate jurisdiction in all other cases."

[4] 264 Ill. 488 at 494, 106 N. E. 350 at 353.

[5] In that regard, the court stated: "It seems clear the legislature would have no power to deprive the parties of the right to have a court review the action of the board to the extent of determining whether the board had acted illegally or without jurisdiction. To deny a court review of those questions would violate the due process of law provision of the Constitution. Where the parties voluntarily elect to come within and be governed by the provisions of the act, it may well be they waive any constitutional right to trial by jury . . . The industrial board has no jurisdiction to apply the act to persons or corporations who are not subject to its provisions nor to an accident not within the provisions of the act. If it did so it would not be acting within its powers,' and it would seem essential that there must be some remedy for a review by some proper court of the question whether the board acted within its powers. No valid provision having been made in the act for such review, it does not follow that none can be had. We have no doubt the circuit courts have jurisdiction to issue the common-law writ of certiorari to review the decisions of the board for the purpose of determining whether it had jurisdiction or whether it had exceeded its powers and acted illegally . . . It may also be that when application is made to the circuit court to have judgment entered on the award that court would have power to inquire whether the board acted within its powers, but whether it would or not, this question may be reviewed by the circuit courts by the common-law writ of certiorari." See 264 Ill. 488 at 494-5, 106 N. E. 350 at 353.

[6] Laws 1915, p. 400 at 410.

ment, like the earlier statute, made the decision of the commission final unless reviewed in the manner provided, but authorized review of questions of law in the circuit court by either writ of certiorari or by suit in chancery. The decision of the circuit court was declared to be subject to review only by the Supreme Court upon writ of error which writ was to issue automatically if the trial court certified that the case was one that should be reviewed by the higher tribunal. The Supreme Court, despite the absence of such certificate, was empowered to grant a writ of error if it saw fit so to do. Such writ, when issued, operated as a supersedeas.

Challenge of such amendment upon constitutional grounds came quite early after its enactment for the case of *People ex rel. Munn* v. *McGoorty*[7] was already in progress when the statute was passed. The award there concerned had been entered in March 1915, prior to the effective date of the amendment, and the employer had promptly sought recourse to a common-law writ of certiorari which, in August, was quashed on motion of the claimant. The employer then prayed an appeal from such ruling to the Appellate Court but that prayer was denied by the trial court. A motion to vacate the order denying leave to appeal was likewise denied. The employer then sought an original writ of mandamus from the Supreme Court to compel the respondent, judge of the circuit court, to grant appeal on the theory that the certiorari proceeding was a common-law action on which appeal appropriately lay to the Appellate Court in the absence of any question which would require direct appeal to the Supreme Court.[8] Application of the 1915 amendment to the case was questioned on constitutional grounds as violating the requirement that all laws relating to courts should "be general, and of uniform operation,"[9] since it denied appeal to the Appellate Court in proceedings arising under the Workmen's Compensation Act but permitted such review in all matters arising before other inferior tribunals. The court acknowledged that there would be great force in the contention if any attempt was made to discriminate between any of several common-law

[7] 270 Ill. 610, 110 N. E. 791 (1915).
[8] Hurd Rev. Stat. 1913, Ch. 37, § 25.
[9] Ill. Const. 1870, Art. VI. § 29.

writs of certiorari which might be issued to the various tribunals, but concluded that the writ of certiorari permitted by the 1915 amendment was a statutory rather than a common-law writ,[10] hence legislative regulation of review thereon was permissible even to the extent of requiring that such review be conducted in the Supreme Court.[11] Comprehensive distinctions, therefore, exist between the common-law and the statutory writ of certiorari.

Another interesting situation was presented in *Suburban Ice Company* v. *Industrial Board*[12] where the decision of the administrative tribunal, rendered before the 1915 amendment, was affirmed on common-law certiorari sixteen days after the amendment became operative. The employer, apparently unaware of the change in the law, prayed for an appeal to the Appellate Court, which prayer was granted. After the decision in the McGoorty case, the employer voluntarily moved to dismiss the appeal and, upon return of the record to the trial court, asked for vacation of the original order quashing the writ of certiorari as not being in compliance with the amended statute. Action as requested was taken by the trial court although it still affirmed the decision of the board. On writ of error to the Supreme Court from the last order, the claimant urged that the trial court was without power to vacate the original decision since the term had expired, hence the writ of error had been issued improvidently. It was held, however, that the change in the law while the case was in progress was binding on the trial court so that no error had occurred in vacating the first erroneous judgment and substituting, in lieu thereof, a judgment in conformity with the amended statute. The effect of that holding, therefore, was

[10] Although the proceeding had been begun by use of a common-law writ, the Supreme Court found that the change in the statute prior to decision in the trial court governed the situation on the ground that there was no vested right in any particular remedy so that the case had to proceed as if the writ had been issued subsequent thereto.

[11] 270 Ill. 610 at 618, 110 N. E. 791 at 794. Even after the decision in the McGoorty case, appeals in workmen's compensation cases were heard in the Appellate Court in Schwartz v. Hartman Furn. & Carpet Co., 205 Ill. App. 330 (1917), and Delscamp v. Hahnemann Hospital, 205 Ill. App. 498 (1917), reversed in 282 Ill. 316, 118 N. E. 767 (1918), although no consideration seems to have been given to jurisdictional questions.

[12] 274 Ill. 630, 113 N. E. 979 (1916).

to make the amendment apply retroactively to all cases then pending.

JURISDICTION UNDER THE 1915 AMENDMENT

A. As to Questions of Fact

For many years the several circuit courts were limited, upon review of the decisions of the Industrial Commission, to the consideration solely of questions of law presented by the record and had no power to examine questions of fact. That limitation, even as applied to the Supreme Court, had been written into the original statute[13] and had been carried over into the 1915 amendment as an express qualification on the powers of the circuit courts.[14] Even when the matter reached the Supreme Court on writ of error to the circuit court pursuant to the amended statute, the provision was construed so as to confine the Supreme Court to questions of law only although the grant of jurisdiction in that regard was not expressly circumscribed.[15] It must be remembered, therefore, that in all compensation cases passed upon by the Illinois Supreme Court, prior to the 1921 amendment, as well in all cases arising in the circuit courts during such period, the courts were bound by the decisions of the Industrial Commission, if the same were supported by any legal evidence, in the absence of any error of law.

As the findings of fact made by the Commission were conclusive if supported by competent legal evidence, it became necessary for the courts, after 1915 and prior to 1921, to define and establish a clear-cut dividing line between questions of fact and questions of law. Such line was rather definitely fixed by developments under the 1915 amendment which furnish a background for subsequent procedural changes. A clearer understanding of such changes and the decisions

[13] Laws 1913, p. 349, § 19(f), stated: ". . . but the Supreme Court shall have power to review questions of law involved in any such decision. . . ."

[14] Laws 1915, p. 410, § 19(f)(1).

[15] Ibid. In that regard, the statute merely stated: "Judgments, orders and decrees of the circuit court under this Act shall be reviewed only by the Supreme Court upon writ of error." It is fundamental law that the common-law writ of error was confined in scope to a review of legal errors appearing on the face of the record: Anderson v. Steger, 173 Ill. 112, 50 N. E. 665 (1898).

under later amendments requires a brief survey of the earlier decisions as they relate to questions of fact.

At the start, the Supreme Court merely called attention to the limitation upon its power to review by stating: "The circuit court and this court are bound by the decision of the Industrial Board if there is any legal evidence to support it."[16] Such court also observed that it was not within the province of the court to pass upon the weight or sufficiency of such evidence so long as competent or legal evidence was found in the record to support the decision of the board or commission.[17] The tenor of those remarks was reiterated in several other cases except for the embellishment that the conclusive determination of the commission on questions of fact was subject to the statutory proviso that there be no fraud present,[18] and that the evidence in the record "fairly tends to prove that the accident arose out of and in the course of the employment."[19]

As if to re-emphasize the doctrine that the courts, on certiorari or writ of error, were limited to reviewing questions of law and could not pass on the weight of competent evidence even though contradictory evidence was present, later decisions used the significant word "repeatedly" in connection with restatements of that doctrine,[20] the court pointing out that its repeated holdings prevented a change on its part even though it might think change desirable. In more and more cases, however, the employers sought to question the findings of the commission on matters of fact thereby reflecting a general dissatisfaction against the legislative limitations imposed upon the courts by Section 19(f) of the statute. Such dissatisfaction might never have arisen, in the judgment of many persons, had there been more concern for public welfare than

[16] Munn v. Industrial Board, 274 Ill. 70 at 76, 113 N. E. 110 at 113 (1916).

[17] Chicago Dry Kiln Co. v. Industrial Board, 276 Ill. 556 at 562, 114 N. E. 1009 at 1011 (1917).

[18] See, for example, Parker-Washington Co. v. Industrial Board, 274 Ill. 498 at 501, 113 N. E. 976 at 978 (1916); Victor Chemical Works v. Industrial Board, 274 Ill. 11 at 22, 113 N. E. 173 at 178 (1916).

[19] Northern Illinois Light & Traction Co. v. Industrial Board, 279 Ill. 565 at 569, 117 N. E. 95 at 97 (1917).

[20] Schwarm v. George Thomson & Sons Co., 281 Ill. 486 at 489, 118 N. E. 95 at 96 (1917); Swift & Co. v. Industrial Commission, 288 Ill. 132 at 136, 123 N. E. 267 at 268 (1919); O'Callaghan v. Industrial Commission, 290 Ill. 222 at 226, 124 N. E. 811 at 813 (1919).

for partisan politics in the appointment of members to the commission and had there been more intelligence displayed and less prejudice and bias shown in the administration of the Workmen's Compensation Act. It is a fair conclusion, drawn from a study of the reported cases during the period while the 1915 amendment remained in effect, that the commission in those early years unfortunately failed to accord to its work the degree of sincerity and intelligence necessary to proper administration of the wide powers granted to it.

The inability of the court, under the then existing legislative limitations, to curb the spreading dissatisfaction over the arbitrary findings of the commission was pointedly expressed by the Illinois Supreme Court in its opinions. In *McGarry* v. *Industrial Commission*,[21] for example, the court declared:

> There is much conflict in the evidence concerning the cause and extent of Vail's disability. While we think a clear preponderance of the evidence shows that the present condition of defendant in error is due largely, if not entirely, to an organic disease, caused, in part at least, by the habitual use of intoxicating liquors, we cannot disturb the holding on this ground . . . It is the duty of the Industrial Commission to consider all the evidence in a hearing of this kind, and to render its decision in accordance with the preponderance of the evidence. It should not grant an award merely because there is evidence in the record which tends to support that award, nor should it speculate upon a possible state of facts which does not reasonably appear to exist from the evidence. We have said with tiresome regularity that we cannot weigh the evidence, but must confirm the decision of the Industrial Commission if there is any competent evidence in the record which justifies its finding.[22]

Again, in *Joseph Halsted Company* v. *Industrial Commission*,[23] it was urged that certain testimony before the commission was improbable and incredible and that, as a consequence, the court should determine whether or not the evidence as a whole fairly tended to support the finding. But the court patiently remarked:

> We have held many times that where there is legal evidence tending to sustain the commission's finding its decision is conclusive. Whether

[21] 290 Ill. 577, 125 N. E. 318 (1919).
[22] 290 Ill. 577 at 578, 125 N. E. 318 at 319.
[23] 287 Ill. 509, 122 N. E. 822 (1919).

the commission has fallen into error or not in determining the weight of evidence, its decision is not subject to review by the courts. No mistake, however gross it may seem, in deciding upon the preponderance of the evidence, can be corrected by the courts, for the reason that no jurisdiction has been conferred upon the courts for that purpose, but, on the contrary, that power has been expressly denied. The testimony of a witness which is contrary to a known natural law will be rejected, but the mere improbability of its truth or its repugnance to other evidence does not authorize us to say that the commission should have disregarded it, when the Legislature has conferred the power to decide that question upon the commission and has denied it to us. The fact that there is some legal evidence sustaining the issue on the part of the claimant is not sufficient to justify an award by the commission unless the greater weight of all the evidence is in his favor, for the burden of proof is on the claimant, and it is the duty of the commission to consider and weigh all the evidence produced and decide according to its preponderance. The court, however, can consider only the evidence favorable to the claimant, and if the record contains evidence which fairly tends to support his claim the finding in his favor is conclusive.[24]

Similar expressions might be quoted, but enough has been said to show that the court was careful, during this period, to observe the limitations placed upon it as to matters of fact involved in the workmen's compensation proceeding.[25]

B. As to Questions of Law

The courts were not powerless, though, under the 1915 amendment to pass upon questions of law presented in the records of the Industrial Commission. Even if not permitted to weigh the evidence, they could determine, as a matter of law, whether there was any legal evidence to support the commission's decision and they indicated at quite an early date that whether the evidence submitted was competent or not was a question open to judicial investigation.[26] If the finding of the commission was based on hearsay or other improper evidence, for example, it was held proper for the court, on certiorari, to remand the proceeding,[27] or to quash the record.[28] In like fashion, if the evidence showed that the

[24] 287 Ill. 509 at 511-2, 122 N. E. 822 at 823.

[25] Such limitations were held not to violate the "due process" clause of the federal constitution in Nega v. Chicago Rys. Co., 317 Ill. 482, 148 N. E. 250 (1925).

[26] Victor Chemical Works v. Industrial Board, 274 Ill. 11, 113 N. E. 173 (1916).

[27] Peabody Coal Co. v. Industrial Commission, 287 Ill. 407, 122 N. E. 843 (1919).

[28] Chicago & A. R. Co. v. Industrial Board, 274 Ill. 336, 113 N. E. 629 (1916).

employee was engaged in interstate commerce at the time of injury or death, so as not to be entitled to the benefits of the state statute, the decision of the commission was a nullity for lack of jurisdiction.[29] Other jurisdictional questions growing out of the evidence were also open for review by the courts. In *F. W. Hochspeier, Incorporated* v. *Industrial Board*,[30] for example, wherein an employee of an undertaker was killed while driving the employer's car on return from a funeral, it was argued that the determination of the commission that the employer was engaged in the busines of "carriage by land,"[31] hence within the scope of the act, was conclusive on the court, but it was decided that the finding was not binding because it went, as a matter of law, to the existence of jurisdiction. When the court concluded that the employer was not engaged in a busines of the type named it set the award aside.

The most frequently litigated question in compensation cases is whether or not the accidental injury for which compensation is sought arose out of and in the course of the employment. It was often argued that a finding by the commission that the injury did so arise, if based on competent evidence in the record, was binding on the courts while the 1915 amendment continued in effect. That question was settled in the landmark and oft-cited case of *Eugene Dietzgen Company* v. *Industrial Board*[32] wherein the court pointed out, on reversing a decision which had affirmed an award of compensation, that while the findings of fact were conclusive, yet "the legal conclusions . . . based on such findings are subject to the supervision of this court."[33] As a consequence, if it is clear upon the facts that as a legal conclusion an injury is not "accidental" or does not arise in the course of employment, a contrary conclusion by the commission will not be allowed to stand as the same amounts to an error of law.

[29] Chicago & A. R. Co. v. Industrial Commission, 288 Ill. 603, 124 N. E. 344 (1919).

[30] 278 Ill. 523, 116 N. E. 121 (1917).

[31] Laws 1915, p. 401, § 3(b).

[32] 279 Ill. 11, 116 N. E. 684 (1917).

[33] 279 Ill. 11 at 22, 116 N. E. 684 at 688.

In *Stubbs* v. *Industrial Board*,[34] the commission awarded compensation for disfigurement in an amount which, if considered alone, would have been excessive. When taken in conjunction with other disabilities suffered, however, the award was not improper in the judgment of the commission and its holding was affirmed by the circuit court. The Workmen's Compensation Act then, and now, provides that an award for mere disfigurement is proper provided no other disability is suffered but if other specific injury occurs the maximum recovery shall be confined to that payable for the other specific injury.[35] It was held that the award was erroneous as being based on a claim of disfigurement only and that the administrative tribunal had acted contrary to law in considering "the other disabilities specified by the applicant" which, though based on matters of fact, presented a question of law subject to judicial review.

Undoubtedly, the question of whether or not the commission has jurisdiction of a particular application for compensation presents a question of law open, at all times, to review. That rule, enunciated under the 1915 amendment,[36] still obtains in this state so that an attempt by the commission to apply the statute to persons or corporations not subject to its provisions or to an accident not covered thereby clearly presents a question of law which may be reviewed by the courts.[37]

C. Other Incidents

Before concluding consideration of the power of the courts under the 1915 amendment, attention may well be directed to an incidental development which led the Illinois Supreme Court to reject a rule of evidence which had been observed for many years. It was, without doubt, helped to take that action by the fact that it was concluded by the find-

[34] 280 Ill. 208, 117 N. E. 419 (1917).

[35] Ill. Rev. Stat. 1943, Ch. 48, § 145(c).

[36] Hahnemann Hospital v. Industrial Board, 282 Ill. 316, 118 N. E. 767 (1918); Mede Bros. v. Industrial Commission, 285 Ill. 483, 121 N. E. 172 (1918); Paul v. Industrial Commission, 288 Ill. 532, 123 N. E. 541 (1919); Ellsworth v. Industrial Commission, 290 Ill. 514, 125 N. E. 246 (1919).

[37] Chicago Circular Adv. Service v. Industrial Com'n, 332 Ill. 156, 163 N. E. 408 (1928).

ings of fact drawn by the Industrial Commission provided the same were based on competent legal evidence.

Since 1889, it had been regarded as proper to receive the verdict of a coroner's jury into evidence in a civil suit, on behalf of either party, for the purpose of providing prima facie proof of some fact found by the coroner's jury and appearing on the face of the verdict, so long as the same was pertinent to a material issue in the civil suit.[38] Such verdicts had been used to prove suicide in suits on life insurance policies,[39] to establish insanity in will contest cases,[40] to verify that the defendant's conduct in tort cases was wilful and wanton,[41] or even to disclose blamelessness in negligence cases.[42]

So, too, in numerous workmen's compensation cases during the period where death benefits were claimed, certified copies of coroner's verdicts had been introduced in evidence. The commission, as has been noted, was not required to weigh or even to consider the preponderance of the evidence introduced but, so far as judicial review was concerned, could decide claims regardless of established rules just so long as the decision had some support in competent evidence. Verdicts of coroner's juries, being then admissible in civil suits, were likewise admissible in compensation cases as prima facie evidence not only of the cause of death but also to establish that the deceased employee received his injury in the course of his employment. Such verdicts, therefore, provided some competent evidence upon which the commission could base its findings. The courts were powerless to reverse such findings no matter how contrary the same might be to the manifest weight of the evidence. Although in other types of civil cases such verdicts, while admissible, were not conclusive, the effect in workmen's compensation cases was to make the same absolutely conclusive evidence for the courts could do nothing

[38] Criticism of the doctrine was announced by Judge Bailey as early as 1887. See Zacharias, "Joseph Meade Bailey, 1833-1895," 16 CHICAGO-KENT REVIEW 1, at p. 15, and the opinion in U. S. Life Ins. Co. v. Kielgast, 26 Ill. App. 567 (1888). The holding was reversed, however, in 129 Ill. 557, 22 N. E. 467 (1889).

[39] United States Life Ins. Co. v. Kielgast, 129 Ill. 557, 22 N. E. 467 (1889).

[40] Pyle v. Pyle, 158 Ill. 289, 41 N. E. 999 (1895).

[41] Foster v. Shepherd, 258 Ill. 164, 101 N. E. 411 (1913).

[42] Devine v. Brunswick-Balke-Collender Co., 270 Ill. 504, 110 N. E. 780 (1915).

except affirm the award.[43] In *Morris & Company* v. *Industrial Board*,[44] in fact, all of the evidence before the commission was based on hearsay save for the certified copy of the coroner's verdict, while all of the testimony at the inquest which produced that verdict was likewise based on hearsay, yet an award therein had to be affirmed.[45]

The first evidence of dissatisfaction with that result was indicated in *Peoria Cordage Company* v. *Industrial Board*[46] where the circuit court had affirmed an award based upon a coroner's verdict which, in turn, rested wholly on incompetent and hearsay testimony. The practice of basing awards on such evidence had, by then, become so definitely established that the circuit court refused to certify the case to the Supreme Court. That court, however, granted a writ of error and later reversed the judgment.[47] Official announcement of the change in the rule of evidence that permitted the introduction of coroner's verdicts in civil cases did not come, however, until the decision in *Spiegel's House Furnishing Company* v. *Industrial Commission*.[48] There the court, after reviewing the origin of the rule and the extent of its application, declared its abandonment thereof by stating:

> The decisions of this court prior to the Peoria Cordage Co. case have been uniform in their holdings. The departure in that case from those holdings resulted by reason of the conclusion of this court that our former decisions were wrong in principle although uniform and consistent with the views of the court therein announced. The court is of the opinion that it should be no longer the policy of this State

[43] Armour & Co. v. Industrial Board, 273 Ill. 590, 113 N. E. 138 (1916); Victor Chemical Works v. Industrial Board, 274 Ill. 11, 113 N. E. 173 (1916); Ohio Building Safety Vault Co. v. Industrial Board, 277 Ill. 96, 115 N. E. 149 (1917).

[44] 284 Ill. 67, 119 N. E. 944 (1918).

[45] Cartwright, Dunn, and Cooke, JJ., dissented vigorously on the ground that for the verdict of the coroner's jury to fix civil liability upon one not a party to the proceeding before the coroner was to "condemn him unheard and to violate the most elementary rules for the administration of justice between individuals." See 284 Ill. 67 at 76, 119 N. E. 944 at 948.

[46] 284 Ill. 90, 119 N. E. 996 (1918).

[47] The opinions in the Morris & Co. case and in the Peoria Cordage Co. case bear the same date. A petition for rehearing was granted in the latter case, however, and on rehearing the dissenting judges in the Morris & Co. case succeeded in obtaining a change of opinion so as to induce the court, by a vote of four to three, to revise its original opinion. Justice Farmer, who wrote the opinion in the Morris & Co. case, as well as Carter and Craig, JJ., dissented without opinion to the final statement in the Peoria Cordage Co. case.

[48] 288 Ill. 422, 123 N. E. 606 (1919).

and the holding of this court that a coroner's verdict or inquest should be admissible as evidence in civil suits for the purpose of establishing personal liability against any individual in cases where the death of any person is charged or to establish a defense to such a suit, or for the purpose of establishing other issues between private litigants of the nature indicated in the cases just reviewed. Therefore all of the foregoing cases, and all other cases of this court containing similar holdings, are as to such holdings expressly overruled. We are moved to do this for several reasons. A review of the above cases clearly discloses that many of the cases, if not all of them, have been largely controlled by the admission in evidence of the verdicts of the coroner's jury, and in many of them such verdicts have furnished the sole evidence to establish liability. As a consequence of such practice there has resulted in this State a race and scramble by litigants to secure a favorable coroner's verdict that would influence or control in case a civil suit should be brought to establish a claim by reason of death . . . It cannot be questioned that as a result of such practice the coroner's verdict in many cases has been, and will continue to be, a mere trap or device for the purpose of catching the unwary in such suits and that public interests intended to be served by coroner's inquests may not be so well guarded as they otherwise would be.
No court, we believe, has gone farther than this court to maintain the maxim or doctrine of *stare decisis* when the questions decided affect the validity and control the construction of contracts or where the rules announced have become rules of property. Rulings on the admissibility of certain documents as evidence of the character here considered, or mere questions of procedure, ought to be followed unless they are manifestly wrong, but may, and should, be changed when the ends of justice and the public good will be served.[49]

JURISDICTION UNDER 1921 AMENDMENT

A. Changes in Statute

Although some change was made in Section 19(f) of the Workmen's Compensation Act in 1917, so as to require the filing of a bond with the praecipe for writ of certiorari in case review was sought of an award for the payment of money,[50] and again in 1919 to change the name of the administrative tribunal from Industrial Board to Industrial Commission,[51] really significant changes regarding the jurisdiction of the courts did not occur until 1921. By an amendment of that

[49] 288 Ill. 422 at 430-1 and 433, 123 N. E. 606 at 609-10.
[50] Laws 1917, p. 502.
[51] Laws 1919, p. 547.

year two words, to-wit: "and fact," were added so as to make the completed sentence read:

> The Circuit Court of the county 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: Provided, that no additional evidence shall be heard in the Circuit Court, and the findings of fact made by the commission shall not be set aside unless contrary to the manifest weight of the evidence, except such as arise in a proceeding in which under paragraph (b) of this section a decision of the arbitrator or committee of arbitration has become the decision of the industrial commission.[52]

While the jurisdiction of the circuit court was greatly enlarged by that change, there was one sharp curtailment, for the provision which gave it the right to certify that the cause was or was not one proper to be reviewed by the Supreme Court was omitted. Formerly, a writ of error issued from the Supreme Court upon the filing of a favorable certificate as a matter of right,[53] although the court was still free to grant the writ on petition even against an adverse certification. Following the 1921 amendment, all writs of error became discretionary and were granted only upon petition duly filed.[54]

Express prohibition in the 1921 amendment purported to direct that the findings of fact made by the commission should not "be set aside unless contrary to the manifest weight of the evidence."[55] That limitation was rejected, in *Otis Elevator Company* v. *Industrial Commission*,[56] as being an attempt to pass a special statute regulating practice in courts of justice in violation of the state constitution.[57] The court there stated:

> Under that section it is plainly not within the power of the Legislature to select a class of cases and by a special act provide for them a different rule of decision from that which is applicable in other cases. It will not be presumed that the Legislature would not have amended the statute so as to give a review on the law and facts without also

[52] Laws 1921, p. 457-8.

[53] Laws 1915, p. 410.

[54] Ill. Rev. Stat. 1943, Ch. 48, § 156 (f)(2), directs that judgments of the circuit or city courts under the act shall be reviewed only by the Supreme Court "upon a writ of error which the Supreme Court in its discretion may order to issue if applied for within sixty days after the . . . judgment sought to be reviewed."

[55] Laws 1921, p. 457.

[56] 302 Ill. 90, 134 N. E. 19 (1922).

[57] Ill. Const. 1870, Art. IV, § 22.

transgressing the constitutional limitation by infringing on the powers of the judiciary in the particular class of cases. The limitation is in a proviso as an attempted qualification of the statute, and not as a part of the substantive law. Whether the limitation states the same rule adopted by courts in deciding upon questions of fact or not is of no importance, because, whether it is or not, the legislature cannot give such direction. The statute giving a right to a review of the law and facts is valid without the void limitation.[58]

In such fashion, the court was able to save the beneficial portions of the 1921 amendment without being obliged to reject the whole.

Although not so stated, the amendment was held to be retroactive in operation so as to apply to all cases in which review was sought after its enactment even though instituted prior thereto.[59]

B. Scope of Jurisdiction

It should be noted, at the outset, that although the jurisdiction of the Illinois Supreme Court to review the decisions of the several circuit courts upon certiorari to the Industrial Commission is said to be by writ of error,[60] it does not necessarily follow that such court is confined solely to errors of law. That court regarded the limitation under the 1915 amendment, which denied to the circuit courts the power to pass on questions of fact, as applicable alike to the Supreme Court when the case came before it on writ of error. When, however, the inferior courts were given the power, by the 1921 amendment, to review questions of fact as well as of law, the same prerogative was assumed to be possessed by the Supreme Court even though no express grant to that effect was made. It may be said, therefore, that both the circuit courts and the Supreme Court possess identical jurisdiction, *i. e.* to pass upon all questions presented by the record, except that the Supreme Court does not obtain that right until review has been had by certiorari in the circuit court. It is

[58] 302 Ill. 90 at 95, 134 N. E. 19 at 21. Without the attempted legislative prohibition, the court has consistently held that it would not set aside the findings of fact made by the commission unless manifestly against the weight of the evidence: Marshall Field & Co. v. Industrial Commission, 305 Ill. 134, 137 N. E. 121 (1922).

[59] Otis Elevator Co. v. Industrial Commission, 302 Ill. 90, 134 N. E. 19 (1922); Keeler v. Industrial Commission, 302 Ill. 610, 135 N. E. 98 (1922).

[60] Ill. Rev. Stat. 1943, Ch. 48, § 156 (f) (2).

true, though, that the higher court will not usually substitute its judgment on the facts for that of the commission particularly if the decision of the administrative tribunal has received the endorsement of the circuit court.[61] The statute, in this regard, has not been changed since that amendment hence the reported decisions from the time that amendment became effective may be deemed applicable to any cases now or hereafter pending in the absence of any further amendment or the even more remote possibility of a change in the court's views as to established rules of law.

From those decisions there may be extracted a series of rules or propositions which may have bearing on the scope of appellate review possible in workmen's compensation cases or upon which it might be possible to predict the likelihood of a particular award being upset. The following list is not intended to be comprehensive, and may be found expressed in slightly varied form in other cases than those cited. The list is, however, reasonably complete. Such principles are:

First: The Industrial Commission is an administrative body created by legislative enactment for the purpose of administering the Workmen's Compensation Act. It is not a court and has not the inherent powers of courts. There are no intendments in favor of its jurisdiction.[62]

Second: The rules respecting the admissibility of evidence and the burden of proof are the same in proceedings under the compensation act as those that prevail in common-law actions for personal injury.[63]

Third: It is incumbent upon the claimant to prove by direct and positive evidence, or by evidence from which the inference can be fairly and reasonably drawn, that the accidental injury arose out of and in the course of employment.[64]

Fourth: The act does not intend that the employer who comes within its provisions shall be an insurer of safety of his employees at all times during the period of employment.[65]

[61] Fransen Const. Co. v. Industrial Commission, 384 Ill. 616, 52 N. E. (2d) 241 (1944). But see American Smelting & Refining Co. v. Industrial Com'n, 353 Ill. 324, 187 N. E. 495 (1933).

[62] Michelson v. Industrial Commission, 375 Ill. 462, 31 N. E. (2d) 940 (1941); Trigg v. Industrial Commission, 364 Ill. 581, 5 N. E. (2d) 394 (1936).

[63] Mehay v. Industrial Commission, 316 Ill. 97, 146 N. E. 494 (1925).

[64] Boyer Chemical Laboratory Co. v. Industrial Com'n, 366 Ill. 635, 10 N. E. (2d) 389 (1937).

[65] Illinois Country Club v. Industrial Commission, 387 Ill. 484, 56 N. E. (2d) 786 (1944); City of Chicago v. Industrial Commission, 376 Ill. 207, 33 N. E. (2d) 428 (1941).

Fifth: The burden of proof is always on the applicant for compensation to prove by legally competent evidence the facts which establish his claim, and the proof, whether by direct and positive or circumstantial evidence, must be such as by its preponderance justifies an inference of liability without the necessity of a resort to speculation, conjecture or surmise or a choice between two views equally compatible with the evidence.[66]

Sixth: It is the duty of the commission to weigh the whole evidence, and it is not justified in finding for one party merely because there is some testimony which, standing undisputed, would justify the finding, when the facts and circumstances in evidence preponderate in favor of the opposite conclusion.[67]

Seventh: The commission should weigh the evidence heard by it and make its finding in favor of the party in whose favor the evidence preponderates.[68]

Eighth: An award must be based upon facts in evidence and cannot rest upon conjecture, speculation or surmise.[69]

Ninth: The Industrial Commission may act on reasonable inferences arising from undisputed or established facts.[70]

Tenth: Liability under the Workmen's Compensation Act may not be based upon imagination, speculation or conjecture, but must have a foundation of facts established by a preponderance of evidence, and where such facts are not so established the judgment must be reversed.[71]

Eleventh: It is the province of the commission to draw reasonable conclusions and inferences from the evidence and neither the Supreme Court nor the circuit courts may set aside such findings of fact unless they are manifestly against the weight of the evidence.[72]

Twelfth: It is the duty of the court to weigh and consider the evidence in the record, and if it is found that the decision of the commission is without substantial foundation in the end, the award must be set aside.[73]

[66] Liquid Carbonic Co. v. Industrial Commission, 352 Ill. 405, 186 N. E. 140 (1933).

[67] Mirific Products Co. v. Industrial Commission, 356 Ill. 645, 191 N. E. 203 (1934).

[68] Camp Spring Mill Co. v. Industrial Commission, 302 Ill. 136, 134 N. E. 30 (1922).

[69] Bauer & Black v. Industrial Commission, 322 Ill. 165, 152 N. E. 590 (1926).

[70] Fransen Const. Co. v. Industrial Commission, 384 Ill. 616, 52 N. E. (2d) 241 (1944).

[71] Shell Petroleum Corp. v. Industrial Commission, 366 Ill. 642, 10 N. E. (2d) 352 (1937).

[72] DeBartolo v. Industrial Commission, 375 Ill. 103, 30 N. E. (2d) 677 (1940).

[73] Inland Rubber Co. v. Industrial Commission, 309 Ill. 43, 140 N. E. 26 (1923).

Thirteenth: Where the evidence is merely conflicting and the award is not contrary to the manifest weight of the evidence, the decision of the commission will not be disturbed.[74]

Fourteenth: Where the facts are not in dispute, the question presented is one of law as to whether the facts support the award.[75]

Fifteenth: Even though an award for compensation has been affirmed by the circuit court, it will be reversed by the Supreme Court if not supported by competent evidence.[76]

There has been an almost obvious reluctance on the part of the Supreme Court, however, since the 1921 amendment to displace the judgment of the commission with its own judgment as to questions of fact even though it is now the duty of the courts to weigh and consider the evidence. Due weight has been and is being given to the factual findings of the commission at least in cases where that body has not been guilty of obvious error. In *Inland Rubber Company* v. *Industrial Commission*,[77] for example, the court stated it would follow such practice because the commission was "qualified by experience and special study to weigh facts applicable to cases within its jurisdiction."[78] That attitude was restated in *Swift & Company* v. *Industrial Commission*,[79] and in *Carrion* v. *Industrial Commission*[80] the court amplified the same by adding:

The determination of questions of fact is a primary function of the Industrial Commission . . . The arbitrator and the commission had an opportunity to hear and see the witnesses and to judge their credibility. The courts will not interfere with a finding of fact made by the Industrial Commission which is not clearly and manifestly against the weight of the evidence . . . The arbitrator and the commission found that the petitioner had failed to sustain the burden of proving dependency upon the deceased. Under the rules announced, the circuit court was not justified in interfering with that finding which, in this case, is not contrary to the manifest weight of the evidence.[81]

[74] Weil-Kalter Mfg. Co. v. Industrial Commission, 376 Ill. 48, 32 N. E. (2d) 889 (1941).

[75] Northwestern Yeast Co. v. Industrial Commission, 378 Ill. 195, 37 N. E. (2d) 806 (1941).

[76] Sidney Wanzer & Sons, Inc. v. Industrial Commission, 380 Ill. 409, 44 N. E. (2d) 40 (1942).

[77] 309 Ill. 43, 140 N. E. 26 (1923).

[78] 309 Ill. 43 at 49, 140 N. E. 26 at 28.

[79] 350 Ill. 413 at 418, 183 N. E. 476 at 478 (1932).

[80] 370 Ill. 474, 19 N. E. (2d) 329 (1939).

[81] 370 Ill. 474 at 477, 19 N. E. (2d) 329 at 330.

1. Province of Circuit Courts

Far back in this article the procedural details necessary to get the record of the Industrial Commission before the circuit court for review on writ of certiorari were discussed at length.[82] The long detour which has occurred since then was necessary in order to lay foundation for an understanding of the origin and development of the powers and duties of such courts. As presently constituted, the statute directs that such power shall extend to a "review of all questions of law and fact presented by such record."[83] The statute obviously does not contemplate a trial *de novo* such as would be the case, for example, on appeals from judgments rendered by justices of the peace,[84] or from decisions of the county courts.[85] As a consequence, the hearing on the writ of certiorari before the circuit court is conducted much like an oral argument on an ordinary appeal.

It is, of course, the duty of the circuit court to weigh the evidence in the record so as to determine whether the findings of the Industrial Commission are supported by legally competent evidence or are manifestly against the weight thereof, and when so doing it should exercise "its own independent judgment as to both law and facts according to the settled rules governing judicial action and decision."[86] When so doing, however, it may not go outside of the record, for additional evidence may not be received even by stipulation of the parties.[87] In this connection, it may be well to note that the 1921 amendment expressly directed that "no additional evidence shall be heard in the circuit court,"[88] but that such language was omitted at the time of its revision in 1933 and has not reappeared since then.[89] Any inference that such repeal

[82] See 23 CHICAGO-KENT LAW REVIEW 205 et seq.

[83] Ill. Rev. Stat. 1943, Ch. 48, § 156 (f)(1).

[84] North American Provision Co. v. Kinman, 288 Ill. App. 414, 6 N. E. (2d) 235 (1937). See also Ill. Rev. Stat. 1943, Ch. 38, § 128.

[85] Ill. Rev. Stat. 1943, Ch. 37, § 294.

[86] Inland Rubber Co. v. Industrial Commission, 309 Ill. 43 at 48, 140 N. E. 26 at 28 (1923).

[87] Lumbermen's Mut. Casualty Co. v. Industrial Commission, 303 Ill. 364, 135 N. E. 756 (1922).

[88] Laws 1921, p. 457.

[89] Laws 1933, p. 592. Compare Ill. Rev. Stat. 1943, Ch. 48, § 156(f)(1), with Cahill, Ill. Rev. Stat. 1931, Ch. 48, § 219 (f)(1).

has made it possible for the court to entertain original evidence would seem clearly negatived by the fact that the present statute limits the review solely to questions "presented by such record," hence the same would seem to operate as an express statutory prohibition against the use of extrinsic evidence.

After hearing has been granted in the fashion indicated, the court is then empowered to "confirm or set aside the decision of the industrial commission."[90] No further direction is given as to what should occur in the event the decision is confirmed and none is necessary for the court's power is then exhausted, but in case it is set aside the statute then directs: "If the decision is set aside and the facts found in the proceedings before the commission are sufficient, the court may enter such decision as is justified by law, or may remand the cause to the industrial commission for further proceedings and may state the questions requiring further hearing, and give such other instructions as may be proper."[91]

The duty of the circuit court, under the statute, seems to be reasonably clear so there should be little ground for any misunderstanding. A review of the cases taken to the Illinois Supreme Court on writs of error, however, discloses that the several circuit courts have frequently exceeded their authority not alone on questions relating to the weight or competency of evidence, or as to the fundamental jurisdiction of the commission, but also over questions as to their own power in such cases. The most common of such errors occurs in entering judgment for the amount of the award and issuing execution thereon,[92] or in taxing costs against the unsuccessful peti-

[90] Ill. Rev. Stat. 1943, Ch. 48, § 156(f)(2).

[91] Ibid.

[92] Baum v. Industrial Commission, 288 Ill. 516, 123 N. E. 625, 6 A. L. R. 1242 (1919). Laws 1919, p. 549, provided that: ". . . no judgment shall be entered in the event the employer shall file with the said commission its bond, with good and sufficient surety in double the amount of the award, conditioned upon the payment of said award in the event . . . the said decision, upon review, shall be affirmed," That provision was omitted in 1929, but prior thereto the provision for filing bond on review with the circuit court had been incorporated in Ill. Rev. Stat. 1943, Ch. 48, § 156(f)(2), by Laws 1919, p. 548. The same reasons for making judgment unnecessary still prevail: Nierman v. Industrial Commission, 329 Ill. 623, 161 N. E. 115 (1928). That issuance of execution is improper, see Otis Elevator Co. v. Industrial Commission, 288 Ill. 396, 123 N. E. 600 (1919); O. W. Rosenthal Co. v. Industrial Commission, 290 Ill. 323, 125 N. E. 250 (1919); Tribune Co. v. Industrial Commission, 290 Ill. 402, 125 N. E. 351 (1919).

tioner,[93] both of which acts are clearly in excess of the court's authority.[94] Other errors arise in making lump-sum awards,[95] in attempting to retain jurisdiction of the case although at the same time remanding it to the Industrial Commission for purpose of taking additional evidence,[96] by attempting to limit the original jurisdiction of commission when reviewing an arbitrator's award,[97] or by attempting to confer jurisdiction on the commission through the use of mandamus.[98]

When it is remembered that the authority of the several circuit courts in workmen's compensation cases is purely statutory, there is no question but what such courts, in attempting to exercise jurisdiction beyond statutory limits, clearly commit error although their acts, in other cases and under other circumstances, would be perfectly proper. The final decision of the circuit court when reviewing a compensation case, therefore, should be limited to (1) affirming the findings and the award based thereon; (2) setting aside the award and entering such decision as is justified by law; or (3) remanding the cause to the commission for further proceedings.[99]

2. Review before Supreme Court

One last step remains in the process of securing review of an award in a workmen's compensation case, and that is to procure consideration of the decision by the Illinois Supreme Court. The pertinent statute states:

Judgments and orders of the Circuit or City Court under this Act shall be reviewed only by the Supreme Court upon a writ of error which the Supreme Court in its discretion may order to issue, if

[93] J. E. Crowder Seed Co. v. Industrial Commission, 347 Ill. 86, 179 N. E. 518 (1932); American Car & Foundry Co. v. Industrial Commission, 335 Ill. 322, 167 N. E. 80 (1929).

[94] It should be noted that while the court has express authority, under Ill. Rev. Stat. 1943, Ch. 48, § 156(g), to enter judgment on the award and also to tax the costs, including a reasonable attorney's fee, against the employer, such provision is confined to cases where the employer has (a) refused to pay compensation awarded, and (b) has taken no steps to procure review pursuant to Section 156(f)(1).

[95] Cobine v. Industrial Commission, 350 Ill. 384, 183 N. E. 220 (1932).

[96] Kudla v. Industrial Commission, 336 Ill. 279, 168 N. E. 298 (1929); Western Shade Cloth Co. v. Industrial Commission, 325 Ill. 570, 156 N. E. 796 (1927).

[97] Rodriguez v. Industrial Commission, 371 Ill. 590, 21 N. E. (2d) 741 (1939).

[98] Cooke v. Industrial Commission, 340 Ill. 309, 172 N. E. 761 (1930).

[99] Ill. Rev. Stat. 1943, Ch. 48, § 156(f)(2).

applied for within sixty days after the rendition of the Circuit or City Court judgment or order sought to be reviewed. The writ of error when issued shall operate as a supersedeas.[100]

At one time, as has been pointed out, the circuit court was permitted to certify whether or not, in its opinion, the cause was one proper to be reviewed by the Supreme Court but that court was not concluded by an adverse certificate. Since 1921, the circuit court has been lacking the power to issue such a certificate and the higher court has been vested with a discretion to determine whether a writ of error should or should not issue.

Before that discretion will be exercised, a petition for writ of error must be filed with the higher court within the time fixed by the statute, to-wit: sixty days after rendition of the judgment or order sought to be reviewed, which petition should comply with appropriate rules regulating the form thereof.[101] No new bond is necessary for, by express provision, the bond filed with the praecipe for the writ of certiorari operates to stay the judgment or order of the inferior court "until the time shall have passed within which an application for a writ of error can be made, and until the Supreme Court has acted upon the application for a writ of error, if such application is made."[102] Should the petition be granted, the cause proceeds in the same fashion as ordinary writs of error and the parties may submit the same on the petition and answer filed on the application for the writ, or either party may file a further brief just as in cases of leave to appeal.[103]

Care should be taken, however, before filing such a petition, to insure that the judgment or order sought to be reviewed is a final one. The Supreme Court, in its interpretation of the statutory provision, has quite properly restricted its jurisdiction to review only to cases where the order of the inferior court satisfies the requirements of a "final judgment" as that term is used in other situations. Mere interlocutory

[100] Ibid.

[101] Ill. Rev. Stat. 1943, Ch. 110, § 259.60.

[102] Ill. Rev. Stat. 1943, Ch. 48, § 156(f)(2).

[103] That practice is not only sanctioned by rule but, at least in other types of cases, has received approval of the court: People ex rel. Markee v. Barrett, 383 Ill. 207, 48 N. E. (2d) 928 (1943).

orders, such as orders remanding the cause to the Industrial Commission for the purpose of taking further testimony, are not "final" and will not be reviewed by the Supreme Court on writ of error,[104] even though the parties consent thereto, for "consent or acquiescence . . . cannot confer jurisdiction of the subject matter."[105]

Even when the circuit courts had power to certify that the cause was one proper for review by the Supreme Court, an affirmative certificate to that effect was held insufficient to confer jurisdiction over an interlocutory order despite the fact that the same was, at least partly, in the form of a final order. Thus, in *Peabody Coal Company* v. *Industrial Commission*,[106] the circuit court found that there was no competent legal evidence of dependency to support the award so it ordered that the record should be quashed but remanded the cause to the commission for the purpose of taking additional evidence. At the same time it gave a certificate to the effect that, in its opinion, the cause was one in which review by the Supreme Court was proper. Writ of error, issued upon such certificate, was made the subject of a motion to quash by the defendant in error. The writ was dismissed when the Supreme Court found that the order was only an interlocutory one, and pointed out that the certificate of the circuit court could not confer a jurisdiction not otherwise possessed. Despite the apparent finality of the order, the court drew important distinctions which should be observed by persons seeking review by writ of error. It said:

> An order of the circuit court quashing the entire record of an inferior tribunal is a final judgment. The whole proceedings of the inferior tribunal fall, and with them all incidental proceedings thereon . . . It is evident upon reading said written order, however, that the circuit court did not quash the entire record, but did so only insofar as that record related to the matter of the evidence before the Industrial Board which was treated in the stipulation as a deposition. The order of that court directing the taking of further proceedings by said board makes it evident that the court did not quash the entire

[104] Raffaelle v. Industrial Commission, 326 Ill. 166, 157 N. E. 206 (1927); Thompson v. Industrial Commission, 377 Ill. 587, 37 N. E. (2d) 350 (1941).

[105] Dunaven v. Industrial Commission, 355 Ill. 444 at 446, 189 N. E. 283 at 284 (1934).

[106] 287 Ill. 407, 122 N. E. 843 (1919).

record, and the use of those terms in the written order is not controlling, where it is evident from the entire order that something else was intended. The order of the circuit court, in effect, sustained the objection of the plaintiff in error to the competency of the evidence offered and found there was no legal evidence of dependency. The cause was thereupon in and by said order remanded for further proceedings by said board. This was the only remanding order authorized by the statute . . .

A judgment or decree is final and appealable only when it terminates the litigation between the parties on the merits of the case, so that, when affirmed, the court below has only to proceed with the execution of the judgment or decree . . .

As the order of the circuit court did not in any manner attempt to fix the rights of the parties to said proceeding, it was not a final order, and this court is without jurisdiction to review any other question.[107]

Absence of protest by opposing counsel that jurisdiction is lacking will not serve to induce the court to rule on purported errors for the Supreme Court is watchful of its jurisdiction and will act on its own motion by denying the petition or dismissing the writ of error if one should be improvidently issued.[108] Action in dismissing such a writ does not, however, operate to prevent an eventual review of the claimed error when the question finally reaches the Supreme Court in a proper fashion. In *Thompson* v. *Industrial Commission*,[109] for example, the principal question was whether or not the injured employee was engaged in interstate commerce. The commission found that he was so engaged and denied compensation but the circuit court, on certiorari, concluded otherwise and remanded the cause with directions to determine the nature and extent of liability. Writ of error was obtained upon such order, which the Supreme Court properly held should be dismissed as the order was clearly not a final one. It said, in passing, that the right of the parties "to have the question whether plaintiff in error [the employee] was under the Workmen's Compensation Act or the Federal Employer's Liability act reviewed by writ of error, if and when a final judgment has been entered in this cause, is not affected by this holding."[110]

[107] 287 Ill. 407 at 410-11, 122 N. E. 843 at 844-5.
[108] Brown Shoe Co. v. Industrial Commission, 371 Ill. 273, 20 N. E. (2d) 566 (1939).
[109] 377 Ill. 587, 37 N. E. (2d) 350 (1941).
[110] 377 Ill. 587 at 590, 37 N. E. (2d) 350 at 351.

It is likewise clear that the Supreme Court is not bound by the factual findings of the commission, made pursuant to a remanding order entered by the circuit court on certiorari, when the cause finally reaches the highest tribunal. Although the administrative tribunal, as an inferior body, is bound to comply with the directions of the circuit court made at the time of remandment, the Supreme Court will later use its own judgment in determining questions of law and fact presented by the record. In *Gray Knox Marble Company* v. *Industrial Commission*,[111] the commission had decided, on appeal from an award made by the arbitrator, that notice of the accident had not been given within the time required so it set the award aside. The circuit court, on certiorari, remanded with directions to find that notice had been properly given. The commission, pursuant to such direction, so found and its award was confirmed when the case again came before the circuit court. Writ of error having been granted by the Supreme Court, it was urged that such finding was conclusive. The court, however, stated that while it would not disturb findings of fact made by the commission unless manifestly against the weight of the evidence, still it was not bound by the directions of the circuit court and could "determine the questions of law and fact according to our own judgment."[112] As the Supreme Court, on writ of error, sits not only for the purpose of reviewing errors of the commission but also those which may have been committed by the circuit court on certiorari, it is manifestly proper that such court should not be precluded by any direction of the circuit court whether based on error of law or fact.[113]

Before concluding, attention is again directed to the fact that the only method of securing review by the Supreme Court in workmen's compensation cases is by writ of error; that such writ is a discretionary one and is not granted as a matter of course; and will issue, if at all, only on a proper petition duly filed in apt time. Preparation of such petitions

[111] 363 Ill. 210, 2 N. E. (2d) 60 (1936).

[112] 363 Ill. 210 at 216, 2 N. E. (2d) 60 at 62.

[113] Brown Shoe Co. v. Industrial Commission, 374 Ill. 500, 30 N. E. (2d) 4 (1940); Olympic Commissary Co. v. Industrial Commission, 371 Ill. 164, 20 N. E. (2d) 86 (1939); Raffaelle v. Industrial Commission, 326 Ill. 166, 157 N. E. 206 (1927).

requires as much or even greater care than would be devoted to an appellate brief, for the mortality rate of such petitions, unfortunately, is very high. While actual statistics are not available, a guess could be hazarded that more than fifty per cent. of such petitions are denied. Above all, the petition should clearly disclose that the judgment or order on which review is sought is, without question, a final one,[114] for even if the writ should, by chance, be granted it will later be dismissed without compunction if the order develops to be interlocutory in effect even though not so in form.

It has been impossible to treat all phases of appellate procedure in workmen's compensation cases as thoroughly as might be desired. Enough has been said, however, to indicate the tremendous scope and the technical complexities of this intricate subject and, perhaps, to point the way toward some urgently needed procedural reforms. If nothing else has been accomplished, it is hoped that the idea that the administration of compensation laws is a matter of the utmost simplicity has been exploded. The impression has been created, not alone in the minds of the public but also in those of many lawyers, that compensation acts and the enforcement of rights thereunder represent a simple and relatively unimportant branch of jurisprudence. Such is far from the actual case.

[114] In Boston Store of Chicago v. Industrial Commission, 386 Ill. 17, 53 N. E. (2d) 455 (1944), the abstract of record, filed pursuant to writ of error granted, failed to set forth the judgment of the circuit order or the nature of the decision of the Industrial Commission. The Supreme Court refused to search the record and dismissed the writ of error, saying: "Everything necessary to decide the questions raised must appear in the abstract."

NOTES AND COMMENTS

The Ex-spouse and Section 19

Legislative bodies have many times enacted laws which have seemed, on the surface, to be clear and concise. When questions have arisen as to the particular meaning of certain words or phrases used therein, courts have been forced to interpret such terms in a manner designed to give effect to the legislative intent. In so doing, they have often provided definitions which, on the face of such statutes, could scarcely be said to be encompassed within the terms used. By so doing, courts have often laid themselves open to the accusation that they were engaged in the process of legislating no matter how much they concealed their attempts under the cloak of judicial interpretation.

The Illinois Supreme Court, by its action in *Classen* v. *Heath*,[1] seems to have likewise so exposed itself when it expanded the phrase "surviving spouse" as used in Section 19 of the Probate Act[2] so as to include a surviving divorced ex-spouse. The facts of that case show that the defendant therein obtained a divorce from her husband in 1937 upon the ground of his desertion. At that time he owned two parcels of real estate but no stipulation was entered into with regard to the property rights of the parties. The ex-husband died in 1942 and his estate, including such realty, was duly probated. In 1944 the plaintiff, as administrator de bonis non with the will annexed,[3] filed a petition to sell the two parcels of real property for the purpose of paying the decedent's debts. The divorced wife was made a party thereto. She claimed a dower right in the land, but such claim was resisted on the ground that, by her failure to assert her dower in the manner and within the time fixed by Section 19 of the act, she had lost the right thereto. From an adverse decree, the ex-spouse appealed directly to the Illinois Supreme Court as a freehold was involved. That court, affirming the decree of the trial court, held the phrase "surviving spouse" as used in the statute in question was broad enough to apply to an ex-spouse so as to require the latter to act to claim dower within the same time and in the same manner as would be required of a widow or widower.

[1] 389 Ill. 183, 58 N. E. (2d) 889 (1945).

[2] Ill. Rev. Stat. 1943, Ch. 3, § 171, provides: "The surviving spouse of a decedent who dies after the effective date of this Act is barred of dower unless he perfects his right thereto by filing during his lifetime at the time and place provided for herein a written instrument describing the real estate, signed by the surviving spouse and declaring his intention to take dower therein."

[3] The will made no provision for the ex-spouse. Her failure to renounce would not have been regarded as an acceptance of the provisions of the will in lieu of dower since no choice was provided: Ward v. Ward, 134 Ill. 417, 25 N. E. 1012 (1890). The rule is different today, at least as to the surviving spouse, by reason of Ill. Rev. Stat. 1943, Ch. 3, § 172.

No one can dispute the fact that, if the legislature has employed language capable of two or more constructions, it is the duty of the courts to resolve the ambiguity by ascertaining the legislative intention[4] and applying the construction which renders the statute reasonable rather than to adopt one which leads to absurd results.[5] It is likewise true, though, that in the absence of ambiguity there is no occasion for construction of the statute hence the courts should apply the same as written by the legislature.[6] There is scarcely room for more than one construction for the term "spouse," for that term is universally defined by the lexicographers as meaning a man or woman who is "engaged or joined in wedlock,"[7] while the modifying adjective "surviving" connotes a spouse who outlives the other. It is only when the prefix "ex-" is added to the word "spouse," so as to obtain the meaning of a person who was "formerly but not now" a spouse, that the legislative language could possibly be broad enough to apply to the defendant in the Classen case. Despite this, the court concluded that ambiguity was present which required construction.

From that point, the court progressed to the idea that it would be an absurd result to grant tht ex-spouse a right of dower in the divorced spouse's property in the absence of compliance with Section 19 while at the same time denying such right to the surviving wife or husband. To adopt such view, the court indicated, would be fraught with mischievious consequences since titles might be clouded by many dower claims in case the property owner, because of his or her fault, was divorced more than once unless such potential clouds could be removed within a reasonable time or were eliminated by suitable adjustment at the time divorce was granted. The enormity of that situation, together with the fact that to hold otherwise would result, in the mind of the court, in giving the divorced spouse greater rights than the surviving wife or husband, dictated a construction that the legislature intended both to be within the comprehension of the statutory provision. Had the legislature meant otherwise, the court said,

[4] Moriarty, Inc. v. Murphy, 387 Ill. 119, 55 N. E. (2d) 281 (1944); People ex rel. Shriver v. Frazier, 386 Ill. 615, 55 N. E. (2d) 159 (1944).

[5] Moweaqua Coal Corp. v. Industrial Commission, 360 Ill. 194, 195 N. E. 607 (1935).

[6] People v. Lund, 382 Ill. 213, 46 N. E. (2d) 929 (1943). To determine whether there is ambiguity, according to Trustees of Schools v. Berryman, 325 Ill. 72 at 76, 155 N. E. 850 at 851 (1927), the language used "should be given its ordinary meaning."

[7] Webster's New Int. Dict. See also Ballentine, Law Dict., p. 1225; 58 C. J., Spouse, p. 1307; Oxford Eng. Dict. on Hist. Principles, Vol. IX, p. 674. Cent. Dict. and Encyclo., Vol. IX, p. 5859, gives as a variant: "A married person, husband or wife; either one of a married pair." In Rossell v. State Industrial Accident Commission, 164 Ore. 173, 95 P. (2d) 726 (1939), it was stated that the legal, as well as the ordinary meaning of spouse is "one's wife or husband," hence a "surviving spouse" must be the one, of a married pair, who outlives the other.

it would no doubt have used "appropriate language" to express such intent,[8] hence the conclusion reached appeared inevitable.

The clarification of titles to land is, undoubtedly, a matter of serious concern and one worthy of every attention. The inherent fear indicated by the court that a parcel of land might, for a period of time, be encumbered by a series of dower estates, brought about by the tendency of certain modern humans to engage in "licensed polygamy," is not unwarranted. But there is scarcely justification for such a decision either in precedent[9] or logic and had more thought been given to underlying principles the fallacies inherent therein might have been recognized. The question goes much deeper than one as to the manner of splitting hairs over the meaning of words. It really grows out of the many changes made, in recent years, in an endeavor to provide a suitable substitute for the common-law right of dower.

That common-law right gave to the widow, upon her husband's death, an interest in one-third of the lands and tenements of which he was seized in fee simple or fee tail for the remainder of her life.[10] It was a right of such antiquity that its origin is difficult to trace, but in this country, except where changed by statute, it remains the same or substantially the same as at common law. The husband, on the other hand, obtained no such right in his wife's property although he did receive something comparable thereto. With the enactment of the Married Women's Acts, it was felt that there was no just basis for discriminating between the spouses, so the husband's estate of curtesy

[8] The courts developed and applied the maxim *expressio unius est exclusio alterius* to fit such situations: People ex rel. Hansen v. Collins, 351 Ill. 551, 184 N. E. 641 (1933). In the light thereof, it is hardly to be expected that the legislature, when using the term "spouse," would be expected to add "and we don't mean 'ex-spouse'!"

[9] In Wait v. Wait, 4 N. Y. 95 (1850), a woman who had obtained an absolute divorce on the ground of her husband's adultery was allowed a dower right in his property such as was given to the "widow" by statute on the ground that there was no just basis for denying the same to the innocent spouse although the statute expressly denied such right to a guilty one. The court said, at p. 107, that whether or not a woman divorced from her husband, upon his subsequent death, was to be called his "widow" might "furnish a curious question in philology," but concluded that the language used was sufficient to describe the person intended. In a later case, People v. Faber, 92 N. Y. 146, 44 Am. Rep. 357 (1883), the court indicated that the New York legislature sometimes used the terms "husband" and "wife" to refer to persons actually divorced. In Illinois, however, as was noted by the court in the instant case, the phrase "husband or wife surviving," used in Ill. Rev. Stat. 1943, Ch. 52, § 2, dealing with homestead rights, has been held not to apply to divorced persons: Krusemark v. Stroh, 385 Ill. 64, 52 N. E. (2d) 156 (1944); Claussen v. Claussen, 279 Ill. 99, 116 N. E. 693 (1917); Stahl v. Stahl, 114 Ill. 375, 2 N. E. 160 (1885). So, too, in Indiana, the surviving ex-spouse has been denied the right to a statutory share in the estate of the deceased property owner on the ground that she was neither "widow" nor "surviving wife" within the contemplation thereof: Fletcher v. Monroe, 145 Ind. 56, 43 N. E. 1053 (1896).

[10] Stribling v. Ross, 16 Ill. 121 (1854). See also Tiffany, Real Property, 3d ed., § 487; Kent, Comm., IV, *35; Blackstone, Comm., II, 129.

was abolished[11] and each spouse was given a like estate, denominated "dower," in the other's property. That estate, which might be designated as statutory dower, was still only a life estate and of uncertain value until still later statutory modifications resulted in treating the surviving spouse as an heir and entitled to an interest in the fee.[12] The statutory estate thus created, however, was given to the surviving spouse only after the debts of the deceased spouse had been paid so the legislature saw fit to perpetuate the estate of dower, with its freedom from claims of creditors, in case the surviving spouse preferred to receive it in lieu of the statutory estate of inheritance. There being a choice open to the surviving spouse, it was not unreasonable to force an election between the two types of estates. That was the evident purpose of the legislature in enacting Section 19 of the Probate Act for through it the surviving spouse is forced to take the statutory estate of inheritance with its attendant consequences unless he or she takes affirmative action to obtain the common-law interest.

There is a vast difference, however, between compelling an election among two or more beneficial interests on the one hand, as in the case of the surviving spouse, and the situation presented in cases where the parties were once married but were subsequently divorced. As dower originally arose out of the marital relationship and required a legally recognized ceremony for its existence, it naturally disappeared upon an absolute divorce.[13] Such would be the rule today but for the fact that the legislature has provided by another section of the Probate Act that a spouse who is divorced for the fault of the other does not forfeit the right of dower which grew out of the marriage which once existed.[14] The "dower" there referred to is the ancient common-law estate and is not a privilege to take an interest in the fee. The innocent ex-spouse is not made an heir thereby but, on the other hand, is not entirely penalized because the marriage has failed. True such right is inchoate while the former spouses both live. It is a mere expectation of property and may be changed, modi-

[11] R. S. 1874, p. 423, § 1. The same idea is expressed in Ill. Rev. Stat. 1943, Ch. 3, § 170.

[12] Ill. Rev. Stat. 1943, Ch. 3, § 162.

[13] Co. Litt., Liber II, Ch. XIX, *33b, states: "But if they were divorced *a vinculo matrimonii* in the life of her husband, she loseth her dower." See also Vernier, American Family Laws, Vol. II, p. 215. Provision in lieu of dower is destroyed by divorce for the fault of the wife according to Jordan v. Clark, 81 Ill. 465 (1876), but not if the decree is obtained by her: Seuss v. Schukat, 358 Ill. 27, 192 N. E. 668, 95 A. L. R. 1461 (1934). The same rule applied to the husband's estate of curtesy: Howey v. Goings, 13 Ill. 95 (1851).

[14] Ill. Rev. Stat. 1943, Ch. 3, § 173. That statute has its origin in R. L. 1827, p. 185.

fied, or abolished by legislative action at any time.[15] It may be regulated by law, and will be governed by the law in force at the time of the death of the property owner.[16] The defendant in the instant case had procured her divorce in 1937, but between the date of the decree and the death of the husband, the legislature had enacted Section 19 of the Probate Act. Undoubtedly, if such statute applied to the defendant, she would have to comply with its provisions respecting the filing of a claim for dower within the period allotted. But wherein would lie the sense of compelling the innocent divorced spouse to make a choice such as is contemplated by that section when there are no alternatives to choose between?

If the legislature wished to prevent the ex-spouse, no matter how innocent, from claiming dower at all, then the thing to do was not to enact Section 19 of the Probate Act but rather to repeal Section 21 from which that right stems. If any qualification ought to be placed thereon, it should be done by modifying that section rather than by misappropriating the sense of another provision having no real relation thereto. It well may be that, for the safety of titles, the ex-spouse who is entitled to claim dower should be barred from the same unless the right thereto is asserted in a positive and prompt manner. That, however, as the courts have often said, is an "argument to be addressed to the legislature." That objective could be simply and quickly attained if the legislature felt it was a desirable one. Its accomplishment in the manner laid down by the Illinois Supreme Court in the Classen case, though, is neither sound nor sensible.

H. H. FLENTYE

A YEAR OF S. E. U. A.

The decision in *United States* v. *South-Eastern Underwriters Association*[1] has been generally recognized as the most important opinion handed down by the United States Supreme Court during its 1943-4 term.[2] One can well agree that such decision has far-reaching consequences for it upset a constitutional law doctrine of seventy-five years' standing,[3] has required legislative attention by every state in the Union, has produced Congressional action, and in

[15] Sutherland v. Sutherland, 69 Ill. 481 (1873); Kauffman v. Peacock, 115 Ill. 212, 3 N. E. 749 (1885); Virgin v. Virgin, 189 Ill. 144, 59 N. E. 586 (1901); Mettler v. Warner, 243 Ill. 600, 90 N. E. 1099, 134 Am. St. Rep. 388 (1910); Bennett v. Bennett, 318 Ill. 193, 149 N. E. 292 (1925); Kilgore v. Kilgore, 319 Ill. 298, 149 N. E. 754 (1925); Steinhagen v. Trull, 320 Ill. 382, 151 N. E. 250 (1926); Mitchell v. Mitchell, 328 Ill. 136, 159 N. E. 274 (1927).

[16] Dial v. Dial, 378 Ill. 276, 38 N. E. (2d) 43 (1941).

[1] 322 U. S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440 (1944). A related issue is treated in Polish Nat. Alliance, etc. v. National Labor Rel. Board, 322 U. S. 643, 64 S. Ct. 1196, 88 L. Ed. 1509 (1944).

[2] "Supreme Court, 1943-4 A Significant Term" (The Bureau of Nat. Affairs, Inc.) p. 18.

[3] Paul v. Virginia, 75 U. S. 168, 19 L. Ed. 357 (1869).

general has left the insurance business as a whole in an unsettled state of affairs. In the light thereof, a survey of some of the specific effects of the decision, one year after its pronouncement, may be warranted.

So far as the case itself is concerned, the federal grand jury for the Northern District of Georgia indicted the South-Eastern Underwriters Association upon a charge of violating the Sherman Anti-trust Act.[4] That association was composed of two hundred private stock fire insurance companies and twenty-seven officers. The indictment alleged that the association fixed premium rates and agent's commissions, employed various types of coercion to force non-member companies into the conspiracy, and attempted to compel those seeking insurance to buy from the association members only. The government contended that the Sherman Act was violated by such conduct as the same amounted to a restraint of interstate trade and commerce and also created a monopoly in at least six of the states. The association demurred on the ground that the fire insurance business was not, and never had been, commerce. That demurrer was sustained by the district court upon the ground advanced.[5] A writ of error was granted to the prosecution by the United States Supreme Court.[6] Some thirty-five of the states filed briefs as *amici curiae* seeking affirmance of the lower court decision, but the Supreme Court, by a four-to-three decision,[7] reversed the trial court and held that the business of insurance is a form of commerce and, when conducted across state lines, is the proper subject of federal regulation.[8]

By such decision, the nation's largest business was rendered subject to federal jurisdiction although the regulation thereof had hitherto been handled by the states. The implications of numerous decisions, beginning with *Paul* v. *Virginia*,[9] were necessarily over-

[4] 15 U. S. C. A. § 1 declares: "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." Section 2 thereof states: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be guilty of a misdemeanor."

[5] United States v. South-Eastern Underwriters Ass'n, 51 F. Supp. 712 (1943).

[6] Authority for such action, in criminal cases, is to be found in 18 U. S. C. A. § 682.

[7] Justices Roberts and Reed did not participate in the decision of the case.

[8] Mr. Justice Black wrote the majority opinion, concurred in by Justices Douglas, Murphy and Rutledge.

[9] 75 U. S. 168, 19 L. Ed. 357 (1869). The principles thereof were applied in Ducat v. Chicago, 77 U. S. 410, 19 L. Ed. 972 (1871); Liverpool & London Life & Fire Ins. Co. v. Oliver, 77 U. S. 566, 19 L. Ed. 1029 (1871); Fire Association of Philadelphia v. New York, 119 U. S. 110, 7 S. Ct. 108, 30 L. Ed. 342 (1886); Hooper v. California, 155 U. S. 648, 15 S. Ct. 207, 39 L. Ed. 297 (1895); Noble v. Mitchell, 164 U. S. 367, 17 S. Ct. 110, 41 L. Ed. 472 (1896); Nutting v. Massachusetts, 183 U. S. 553, 22 S. Ct. 238, 46 L. Ed. 324 (1902); Northwestern Mutual Life Ins. Co. v. Wisconsin, 247 U. S. 132, 38 S. Ct. 444, 62 L. Ed. 1025 (1918); Bothwell v. Buckbee-Mears Co., 274 U. S. 274, 48 S. Ct. 124, 72 L. Ed. 277 (1927); Colgate v. Harvey, 296 U. S. 404, 56 S. Ct. 252, 80 L. Ed. 299 (1935).

ruled although not specifically rejected. In that regard, one factor should be noted and that is that such earlier decisions had all involved the validity of state statutes. The court may have felt that it did not wish to invalidate such statutes inasmuch as Congress had fashioned no regulation for the insurance business. To deny validity to such statutes in retrospect would have given insurance companies, conducting a business inherently affected with a public interest, a free hand to do as they pleased. Such prior opinions, moreover, were based on the doctrine that each state could decide just what qualifications a foreign company must meet in order to do business within the state, for while corporations were "persons" under the due-process clause they were not "citizens" within the privileges and immunities clause of the Fourteenth Amendment. That doctrine, doubtless, the court did not wish to overthrow. The instant case, though, does constitute the first wherein the United States Supreme Court was asked to rule on the insurance business as it might be affected by an act of Congress, and the majority opinion has now made such business subject to federal regulation whereas the states, prior thereto, had regulated it exclusively.

What, then, did the decision do to the insurance business? It was, apparently, placed in a sort of no-man's land subject to attack from both fronts. If it continued to abide by state regulations, it was open to attack for such regulations, in many cases, could be said to tend in the direction of a monopoly of trade so as to burden the free flow of commerce. On the other hand, companies doing business in foreign states might refuse to comply with all forms of state regulation on the ground that they were subject only to federal control.[10] Practical considerations regarding the uncertain status of the insurance business with respect to regulation may have been the basic reason for the strong dissents written by Justices Stone, Frankfurter and Jackson.

Chief Justice Stone, one of the dissenters, although admitting that Congress could regulate many aspects of the insurance business, forecast that the effect of the decision would be to take away from the states and to confer on the federal government the regulation of a business already well-regulated under state laws and subject it to the uncertainties of Congressional action. Justice Jackson, agreeing that the conduct of insurance business across state lines actually amounts to interstate commerce, nevertheless advanced the theory that a fiction had been established to the effect that insurance should

[10] See Keehn v. Hi-Grade Coal & Fuel Co., 23 N. J. Misc. 102, 41 A. (2d) 525 (1945), where it was argued that the S. E. U. A. decision had rendered invalid certain provisions of the New Jersey insurance law, but the same were upheld as not amounting to a violation of the commerce clause of the Federal Constitution. Other aspects of the situation are dealt with in Brown v. Utica Mut. Ins. Co., 53 N. Y. S. (2d) 760 (1945), and McCarthy v. American Surety Co., 52 N. Y. S. (2d) 601, 183 Misc. 983 (1944).

not be considered as ordinary commerce. In his desire to maintain that theory so as to avoid the practical consequences of the decision, Mr. Justice Jackson declared: "The states began nearly a century ago to regulate insurance, and state regulation, while no doubt of uneven quality, today is a successful going concern. Several of the states, where the greatest volume of business is transacted, have rigorous and enlightened legislation, with enforcement and supervision in the hands of experienced and competent officials. Such state departments, through trial and error, have accumulated that body of institutional experience and wisdom so indispensable to good administration. The Court's decision at very least will require an extensive overhauling of state legislation relating to taxation and supervision. The whole legal basis will have to be reconsidered. What will be irretrievably lost and what may be salvaged no one now can say, and it will take a generation of litigation to determine. Certainly the states lose very important controls and very considerable revenues."[11] Justice Frankfurter also expressed agreement with his dissenting brethren, for he too did not want to ". . . wipe out elaborate and long-established state systems for regulating and taxing insurance companies."[12]

As could be anticipated from a reading of the dissenting opinions, the decision was not generally well received either in the insurance field or in the public press. One editorial stated that "Insurance D Day fell just a few hours before Eisenhower's D Day . . . the mental commotion of insurance men was pitiable, as their attention was torn between invasion headlines and their efforts to apprehend the consequences of the epochal, adverse U. S. Supreme Court decision . . . Decisions upon which the whole system of state supervision of insurance has been founded and under which the business has operated apparently are juridical museum pieces."[13] The Insurance Commissioner for Massachusetts[14] likewise expressed the sentiment of state insurance officials when he commented that "a discussion of the decision . . . should be periodically revised as the mischief which flows from [it] manifests itself from time to time . . . If Mr. Justice Black and his associates could have seen their way clear to accept Mr. Justice Jackson's view, insurance supervisory officials and insurance executives would have been spared much grief and the public would have been saved the increased cost of insurance which flows from costly litigation."[15]

[11] 322 U. S. 533 at 590, 64 S. Ct. 1162 at 1192, 88 L. Ed. 1440 at 1478.

[12] Charles Stuart Lyon, "Old Statutes and New Constitution," 44 Col. L. Rev. 599 at 634 (1944).

[13] The Nat. Underwriter, Life Ins. Ed., June 9, 1944, p. 1.

[14] Charles F. J. Harrington, past president (1943-4) of the National Association of Insurance Commissioners and chairman of its Federal Legislation Committee.

[15] Harrington, "An Exploration of the Effects of the S. E. U. A. Decision," 261 Ins. L. J. 590 at 590-1 (1944).

Although such comments came from those primarily interested in the insurance business, many constitutional lawyers of note were of the same frame of mind. Professor Powell, as if speaking for them, attacked the majority opinion with fine astuteness. After deducing that Mr. Justice Black's decision was based on the major premise that most people would hold insurance to be a form of trade and commerce, he pointed out that it was "a little less than shocking to have a Justice of the Supreme Court invoke the mere supposition of common knowledge among lesser breeds without the law as worthy of consideration against the conclusion of a district court which preferred to respect its obligation to be faithful to superior controlling precedents rather than to traduce them by resort to vaguely indicated ancient locutions and to unspecified contemporary supposed common knowledge of supposed most persons."[16]

There were those, however, who approved. Hugh Evader Willis, long an advocate of the belief that insurance is interstate commerce and a severe critic of *Paul* v. *Virginia,* rejoiced in the decision and stated that: "The present United States Supreme Court has overruled another prior Supreme Court decision . . . and in doing so has done a fine piece of work."[17]

The S. E. U. A. decision brought forth a volley of comments pro and con, mostly con, which indicated the seriousness of the situation created thereby. Meanwhile, what about the subject of all this discussion? What was the insurance business doing to remove itself from the horns of the dilemma? Action was obviously necessary to clarify the status of the business and it was not long before action made its appearance. The general set-up became apparent almost immediately. The fire and casualty companies indicated they would work with the National Association of Insurance Commissioners in an attempt to persuade Congress to take action granting relief from the effects of the decision. A few days after the decision had been handed down, several hundred representatives of the insurance business met in Chicago to discuss the new situation. They recommended that a special committee should consult all interested persons, should hold executive sessions as well as public hearings throughout the country, and should submit specific recommendations to the executive committee of that association before September 1st. Life insurance companies, on the other hand, appeared to remain aloof, probably on the ground that they had nothing to fear from antitrust regulations.

Even before the decision had been announced, duplicate bills had been introduced in the Senate and the House of Representatives on September 20, 1943, designed to exempt insurance from the operation

[16] See Powell, "Insurance as Commerce," 57 Harv. L. Rev. 937 at 988 (1944).

[17] Willis, "United States of America v. South-Eastern Underwriters Association," 258 Ins. L. J. 390 (1944).

of the Sherman and Clayton Acts.[18] These measures had been discussed in committee and representatives of the various insurance interests had been heard, but the popular impression was that the administration was holding up serious consideration. The S. E. U. A. decision brought action, however, and the Walter-Hancock bill was passed in the House by a vote of 283 to 54. The Senate bill, discussed in committee and before the insurance subcommittee during the same week, was not reported out, no doubt because of the announcement by the Attorney General that neither he nor the Department of Justice were considering action against the insurance business until both the states and Congress had had an opportunity to take appropriate action.[19] At that time, Congress recessed and it appeared certain that Senate action, either on its own or the House bill, would not be taken until after election.

Beginning in July, 1944, the federal legislation committee of the National Association of Insurance Commissioners conducted meetings with the committees chosen by the varied insurance interests.[20] All interested organizations or persons were invited to make suggestions, and recommendations agreed upon by that committee were to be submitted to the executive committee of the N. A. I. C. for consideration. The programs offered were many and varied. Predominant, however, was the idea that in lieu of pressure for the passage of the Senate Bailey-Van Nuys bill, passage thereof becoming less likely every day, there should be substituted a plan for a moratorium on the application of federal statutes regulating interstate commerce as applied to the insurance business. In particular, the Sherman and Clayton acts, the Federal Trade Commission act, and the Robinson-Patman acts were to be suspended, for the time being, as they might relate to insurance matters. The suggestion particularly appealed to the life insurance interests and was one on which they found a common ground with the others for the president of one of the larger life insurance companies asserted that his company's sole concern was only over the possible application of the Federal Trade Commission Act.[21] Concern over the possibility that that Commission, possessed of a seemingly unlimited power to enter any field and say what is unfair competition and what is a deceptive act or practice, might undertake to test insurance practices can well be understood.

[18] S. 1362 is frequently referred to as the Bailey-Van Nuys bill, while H. R. 3270 has been designated the Walter-Hancock bill.

[19] 90 Cong., Rec., June 23, 1944, p. 6694. The statement of the Attorney General appears in the appendix to that issue at pp. A3632-3.

[20] As, for example, the Association of Life Insurance Presidents, Insurance Executives Association, Eastern Underwriters Association, Association of Casualty and Surety Executives, National Bureau of Casualty and Surety Underwriters, and others.

[21] See statement by Leroy A. Lincoln, president of Metropolitan Life Ins. Co., in The Nat. Underwriter, Life Ins. Ed., Aug. 25, 1944, p. 2.

Following such meetings, the executive committee of the N. A. I. C. adopted four of the recommendations of its legislation committee. Those recommendations called for (1) a declaration by Congress that the regulation and taxation of the insurance business should continue in the several states; (2) the complete elimination of the insurance business from the scope of the Federal Trade Commission Act; (3) the total elimination thereof from the operation of the Robinson-Patman Act; and (4) the partial elimination of restraints imposed by the Sherman and Clayton Acts.[22] That body also directed its legislation committee to work with representatives of the industry in sponsoring federal legislation.

Shortly thereafter, the Bailey-Van Nuys bill was given favorable recommendation by the Senate judiciary committee and was submitted to the Senate, but as a recess was about due it was uncertain as to just when the bill would receive consideration. A minority report of the judiciary committee contained a motion by Senator O'Mahoney requesting that no action be taken until after the September meeting of the insurance commissioners. Senator O'Mahoney there stressed the fact that the Bailey-Van Nuys bill, while it would exempt the insurance business from the antitrust laws, would not relieve the industry from the operation of other federal statutes which were likewise based on the commerce clause. He urged, instead, that the state commissioners' recommendations be made the basis for legislation.[23]

State officials and insurance concerns, fire and casualty companies in particular, had been hoping that a rehearing in the Supreme Court would prove more favorable to their cause than the original decision. Such hopes were blasted, however, when the United States Supreme Court, on October 9, 1944, denied the petition for rehearing. For a while, some hope was fastened on the idea of a constitutional amendment by which the insurance business might be declared exempt from the effect of the commerce clause. For all practical purposes, though, any solution of the problem would have to come from Congress in whose lap the matter now rested.

Meanwhile, the legislation committee of the N. A. I. C. met again in early November and drafted a proposed statute similar to the one it had recommended earlier but with an additional provision calling for a moratorium, until July 1, 1948, on the Sherman and Clayton anti-trust laws except as the same related to coercion and boycotts. It was planned, thereby, to give the states an opportunity to make whatever changes might be necessary in the light of the S. E. U. A. decision. That draft was drawn with comparatively little opposition

[22] John M. McFall, "A Calendar of the 'S. E. U. A.' Case," 265 Ins. L. J. 72 at 73 (1945).

[23] As reported in The Nat. Underwriter, Life Ins. Ed., Sept. 22, 1944, p. 1.

and was approved at the midyear meeting held on December 4, 1944, between the representative insurance and state associations.[24]

The Senate had remained quiescent in the matter from the time when the Bailey-Van Nuys bill had been reported out of the judiciary committee, perhaps for the reason that all insurance interests had not agreed on a legislative proposal by which the industry might be governed.[25] The companies and the insurance commissioners realized that a united front was necessary if they were to convince the Senate of the appropriateness of their recommendations and they strove to provide one. By December 13th all insurance interests agreed that the proposed legislation should stand except that a portion of it, exempting application of the Sherman Act after the moratorium, should be deleted. Senators McCarron and Ferguson introduced this amended proposal as a substitute for the Bailey-Van Nuys bill three days later.[26] At the same time, Senators O'Mahoney and Hatch submitted a proposal, carrying the endorsement of the N. A. I. C. and the insurance industry with the exception of the stock fire companies, limiting the moratorium from the antitrust laws to March 1, 1946. The following day Congress adjourned, having failed to take action on the several proposals. The 79th Congress was due to convene in January, however, and the ball would start rolling anew.

The new year began with a letter from the President to Senator Radcliffe wherein the policy of the administration was declared to be one not to interfere with state regulation and taxation, but to insist that insurance should not be immune from antitrust legislation. The O'Mahoney-Hatch bill, introduced in the prior Congress, was openly approved.[27] On January 6, 1945, Senator O'Mahoney introduced substantially the same bill as he had offered earlier. Shortly thereafter, Senators McCarron and Ferguson introduced S. B. 340 which was similar to their former proposal. Their bill called for a moratorium on the operation of the Sherman Act until June 1, 1947, and a more extended one on the Clayton Act to January 1, 1948. It was submitted more or less as a compromise substitute for the O'Mahoney-Hatch bill, and had the approval of the N. A. I. C. and the insurance industry as a whole. The Senate judiciary committee reported a recommendation that the bill pass and it was passed on January 25th

[24] At that meeting the N. A. I. C., the state commissioners, the American Life Convention, the Life Insurance Association of America, the Association of Mutual Casualty Companies and others were represented. See The Nat. Underwriter, Life Ins. Ed., Dec. 8, 1944, p. 6.

[25] Stock fire insurance companies had not approved the N. A. I. C. legislative draft.

[26] McFall, op. cit., p. 73.

[27] See letter from President Roosevelt to Senator Radcliffe, dated Jan. 2, 1945, quoted in full in 264 Ins. L. J. 22 (1945).

with but one change, namely: that the antitrust laws should not be excepted under Section 2(B) of the statute.[28]

No action of any kind had been taken in the House, perhaps because its membership was waiting to see what took place in the Senate. A few days after the Senate had voted on its bill, the subcommittee of the House judiciary committee recommended the passage thereof without the change made on the Senate floor, and without the declaration of the intent of Congress to provide a moratorium. Such bill was not favorably received by the Senate or the insurance industry. Senator O'Mahoney, in fact, protested that the House amendments would "kill the bill" if attempt was made to exempt insurance completely from the antitrust laws.[29] Nevertheless, the bill did pass the House on February 14th by a vote of 315 to 57.

Because of the absence of agreement between House and Senate measures, the matter went before a joint conference committee which eventually agreed upon a conference report. That report was different from the House bill chiefly because it included the Federal Trade Commission Act and the Robinson-Patman Acts within the moratorium period, and expressly stipulated that there was to be no exemption for acts of boycott, coercion or intimidation. The report received approval in both branches of Congress and the amended measure was sent to the White House where, on March 9th, it was signed and became law.[30] It is the only measure thus far which has been enacted into law but it is obviously not a solution to the problems created by the S. E. A. U. decision. It merely postpones the necessity for present affirmative action by Congress for almost three years in order that the states might change existing laws to conform to the decision.

[28] Before amendment from the Senate floor, that section read: "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any state for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such act specifically so provides." The amendment placed the words "except the Act of July 2, 1890, as amended, known as the Clayton Act" after the words "No Act of Congress" at the beginning of the section.

[29] As quoted in The Nat. Underwriter, Life Ins. Ed., Feb. 9, 1945, pp. 1 and 22.

[30] 59 Stat. 33, 15 U. S. C. A. § 1011 et seq. Section 1 of the statute declares the Congressional purpose that continued regulation and taxation of the business of insurance by the states is in the public interest and Congressional silence is not to be construed to impose barriers on state regulation. Section 2(a) expressly states that existing state laws remain in operation. Section 2(b) indicates that state laws are to continue in effect unless a federal statute is enacted which specifically relates to the insurance business. It, and Section 3(a), contain moratorium provisions. The moratorium on the Sherman Act, the Clayton Act, the Robinson-Patman Act and the Federal Trade Commission Act, extends to January 1, 1948, except that there is no moratorium on the provisions of the Sherman Act relating to boycotts, coercion or intimidation. Section 4 states that existing federal legislation on labor matters has full application to the insurance business. A definition of the term "state" is furnished in Section 5, and Section 6 contains the customary separability clause.

The burden, therefore, is now on the states. The bill granted the premise that regulation by the states is in the public interest. The states, however, are to retain control only if they can prove their ability to control before January 1, 1948. Before that date, it is expected that state action of all kinds will occur. Hasty legislation, radical changes, refusal to change, good measures and bad will likely appear. It appears too much to hope that forty-eight states will pass legislation adequate, in Congressional judgment, to free the insurance industry from imminent federal control. Test cases of various state measures will undoubtedly arise, but the present prospect seems to be that lack of uniformity of action will eventually give Congress sufficient excuse to take over all-out regulation of the insurance business. State failure to provide adequate regulation for transportation led to the Interstate Commerce Commission. A federal Insurance Commission appears looming on the horizon.

R. K. POWERS

CIVIL PRACTICE ACT CASES

APPEAL AND ERROR—REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE—WHETHER OR NOT FILING OF MOTION IN TRIAL COURT TO VACATE JUDGMENT OR DECREE OPERATES TO STAY RUNNING OF TIME FOR FILING OF NOTICE OF APPEAL—A motion was made, in *Corwin* v. *Rheims*,[1] to dismiss an appeal on the ground that the same had not been taken in apt time. The original decree from which relief was sought had been entered on February 2, 1944. Six days later, the unsuccessful plaintiff moved to vacate such decree which motion was continued generally and was not passed upon until May 19, 1944, when it was overruled. Three days after the order overruling the motion to vacate the decree, notice of appeal was filed in the trial court. It was urged that since such notice was not filed within ninety days next following the date of the original decree, as provided in Section 76 of the Civil Practice Act,[2] the appeal was taken too late to warrant consideration thereof. Held: motion to dismiss the appeal denied.

The intimation contained in *Deibler* v. *Bernard Brothers, Incorporated*,[3] to the effect that a motion to vacate a judgment does not operate to stay the running of time within which to file notice of appeal, was clarified in the instant case when it was pointed out that the rule therein announced was proper in view of the fact that, subsequent to the filing of such motion and before the same had been determined, the appellant had filed a notice of appeal. Such action

[1] 390 Ill. 205, 61 N. E. (2d) 40 (1945). Gunn, J., dissented over questions not involved herein.

[2] Ill. Rev. Stat. 1943, Ch. 110, § 200.

[3] 385 Ill. 610, 53 N. E. (2d) 450 (1944), affirming 319 Ill. App. 504, 48 N. E. (2d) 422 (1943).

was deemed to amount to a waiver of the motion to vacate the judgment so as to make the judgment a final and appealable one from the date of its original rendition.[4] The same result does not follow when the moving party refrains from filing notice of appeal, as in the instant case, until his motion has been decided for such a judgment or decree, in effect, has been suspended until the court can act on the motion.[5]

It is true that Section 76 of the Civil Practice Act directs that no appeal shall be taken after the expiration of ninety days "from the entry of the order, decree, judgment or other determination complained of."[6] The term "entry," as used therein, must be understood to mean the original date of entry in case no motion to vacate is presented or, being presented, is withdrawn; but otherwise must be read as meaning the date on which such motion was finally determined.[7] To hold otherwise would be to provide a snare for the litigant who unsuccessfully endeavors to have the trial court correct its own errors before seeking the aid of a higher court.

DISMISSAL AND NONSUIT—VOLUNTARY DISMISSAL—WHETHER OR NOT ORDER OF DISMISSAL MAY BE VACATED AND CASE REINSTATED AGAINST A DEFENDANT WHOM PLAINTIFF HAS VOLUNTARILY CAUSED TO BE DISMISSED FROM SUIT—The series of errors made by plaintiff in *Fulton* v. *Yondorf*[1] precipitated a chain of events that led to disastrous consequences. The plaintiff there had brought an action against a single defendant, both as trustee and in his individual capacity, seeking damages for personal injuries alleged to have been sustained while on certain premises owned by such defendant as trustee. At the close of all the evidence, plaintiff voluntarily moved to dismiss the suit as to the individual defendant and the case proceeded against the trustee. After verdict against him in that capacity, he moved for judgment in his favor notwithstanding the verdict.[2] While that motion was pending, plaintiff moved the court to vacate the order of voluntary dismissal, to reinstate the case as to the individual defendant, and to amend the verdict by deleting the reference to the trustee so as to make the same read as if it were a personal one. The trial court granted the motion of defendant, in his trust capacity, for judgment notwithstanding the verdict but at the same time also granted plaintiff's motions to vacate the order of dismissal and to reinstate the

[4] See also Marks v. Pope, 370 Ill. 597, 19 N. E. (2d) 616 (1939).

[5] Lenhart v. Miller, 375 Ill. 346, 31 N. E. (2d) 781 (1941); Hosking v. Southern Pac. Co., 243 Ill. 320, 90 N. E. 669 (1910).

[6] Ill. Rev. Stat. 1943, Ch. 110, § 200(1).

[7] As to just what constitutes "entry" of the judgment or decree, see Snook v. Shaw, 315 Ill. App. 594, 43 N. E. (2d) 417 (1942), noted in 21 CHICAGO-KENT LAW REVIEW 98.

[1] 324 Ill. App. 452, 58 N. E. (2d) 640 (1944).

[2] The liability of a trustee for tort growing out of the management of trust premises is discussed in Bogert, Trusts and Trustees, Vol. 3, § 731 et seq.

case as to the individual defendant. The court did, though, on its own motion order a retrial of the cause.[3] Upon appeal by the defendant in his individual right, the Appellate Court held that after the plaintiff had once voluntarily dismissed the defendant out of the case, the trial court lacked jurisdiction to reinstate the cause as to him and that plaintiff's remedy lay in instituting a new suit. The statute of limitations had, however, run in the meantime so it was worthless for plaintiff to begin the case anew.

The instant case appears to be the first one since the adoption of the Civil Practice Act wherein an opinion has been reported in full covering the precise question here involved.[4] The question had arisen before that time, however, for in *Weisguth* v. *Supreme Tribe of Ben Hur*[5] the controlling rule was stated as follows: "In case of a voluntary nonsuit upon motion of a plaintiff the court has no power to set aside the order of dismissal and reinstate the cause unless at the time the nonsuit is taken leave is given the plaintiff to move to set it aside."[6] The reason given for such view is based on the fact that if a plaintiff by his deliberate and voluntary act secures the dismissal of his suit, he must be held to have anticipated the effect and necessary results of this action, and should not be restored to the position and rights which he voluntarily abandoned. His only remedy, after dismissal, is to commence new proceedings and acquire jurisdiction again in the usual fashion.[7] A contrary result can be obtained, however, in case the order of dismissal is obtained by the defendant over plaintiff's protest.[8]

The common-law rule announced in the Weisguth case has not been specifically changed by any provision in the Civil Practice Act although the practice of taking a voluntary nonsuit has been subjected

[3] It was urged that, as defendant was appealing from an order granting a new trial, he should have filed a petition for leave to appeal pursuant to Ill. Rev. Stat. 1943, Ch. 110, § 201. The court distinguished this case from those covered by the statute on the ground that the provision thereof was restricted to cases wherein a trial had, in fact, been had whereas in the instant case the defendant, in his individual capacity, had never been granted a trial.

[4] Becker v. Loebs Ins. Agency Co., 304 Ill. App. 575, 26 N. E. (2d) 653 (1940), abstract opinion, and Moist v. Jones, 323 Ill. App. 286, 55 N. E. (2d) 556 (1944), abstract opinion, in fact both reached the same result.

[5] 272 Ill. 541, 112 N. E. 350 (1916).

[6] 272 Ill. 541 at 543, 112 N. E. 350 at 351.

[7] Thompson v. Otis, 285 Ill. App. 523, 2 N. E. (2d) 370 (1936), held that where several defendants were involved in the original proceeding and one was dismissed voluntarily, the plaintiff might, by filing an amended complaint and causing a new summons to issue against the defendant so dismissed, avoid the effect of the dismissal order since the action taken was the equivalent of bringing a new suit. That method would be unavailing where a voluntary nonsuit is taken against the sole defendant in the case.

[8] See Watson v. Trinz, 274 Ill. App. 379 (1934).

to some restrictions.[9] Section 50(7) of that statute provides for the setting aside of judgments or decrees within thirty days after the entry thereof[10] but that provision has been held inapplicable to voluntary nonsuits,[11] so no benefit can be gained therefrom. Interlocutory orders may, of course, be amended or vacated at any time prior to final judgment, but an order of dismissal is a final one so cannot be included in any such category. It must be deduced, therefore, that the intent of the legislature was not to change the law relating to the rights of the parties growing out of voluntary nonsuits when the Civil Practice Act was adopted.

Although the rule, as applied in the instant case, could well be said to work a hardship on the particular litigant, it does not seem unreasonable to force a plaintiff to take the foreseeable consequences of his voluntary acts. The holding should serve, however, as a warning to any plaintiff to exercise extreme caution before making a motion to dismiss a defendant from a case.

P. E. MONTGOMERY

[9] Ill. Rev. Stat. 1943, Ch. 110, § 176. See also Flassig v. Newman, 317 Ill. App. 635, 47 N. E. (2d) 527 (1943), noted in 21 CHICAGO-KENT LAW REVIEW 348. In Bernick v. Chicago Title and Trust Co., 325 Ill. App. 495, 60 N. E. (2d) 442 (1945), it was held that a voluntary nonsuit should be denied where defendant had filed a motion under Ill. Rev. Stat. 1943, Ch. 110, § 172, based on the ground that the cause of action asserted therein had been previously adjudicated.

[10] Ill. Rev. Stat. 1943, Ch. 110, § 174(7). The plaintiff in Becker v. Loebs Ins. Agency Co., 304 Ill. App. 575, 26 N. E. (2d) 653 (1940), abst. opin., relied on a comparable provision in Ill. Rev. Stat. 1943, Ch. 77, § 83, to no avail.

[11] Moist v. Jones, 323 Ill. App. 286, 55 N. E. (2d) 556 (1944), abst. opin.

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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.

RUTH MARKMAN

[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.

R. K. POWERS

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