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Notes and Comments

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NOTES AND COMMENTS

Evidence of Other Crimes to Prove Intent on Trial for Larceny

In the case of *State* v. *Voss*,[1] the conviction of the defendant for the larceny of several hogs was sustained by the Supreme Court of Minnesota. At the trial it appeared that the defendant had confessed that, on the evening in question, he and two accomplices had penned up the hogs in question; that subsequently, that same evening the three had gone to a nearby granary and stolen some barley; that the following morning the hogs were sold. One of the accomplices testified to the foregoing facts and on appeal one of the assignments of error was the admission by the court of the evidence relating to the theft of the barley. The reviewing court held that "the stealing of the barley was so closely related to the stealing of the hogs as to permit introduction of evidence thereof for the purpose of showing criminal intent, and to show that defendant was a participant in all that was done that evening, night, and the next morning." Such a divergence of views exists on the admissibility of evidence of other crimes that it might well be that in another state the admission of evidence of the theft of the barley would be held to be prejudicial error.

The general principle, to which the courts of England and the United States have generally subscribed,[2] is that evidence of other crimes is not admissible. The fundamental soundness of the principle and its general application is aptly described in this excerpt from an opinion of the New York court: "This rule, so universally recognized and so firmly established in all English-speaking lands, is rooted in that jealous regard for the liberty of the individual which has distinguished our jurisprudence from all others, at least from the birth of Magna Charta."[3]

The practical reasons for the existence of the principle were summarized, in an opinion rendered by the Supreme Court of Washington, as follows: "The defendant comes to the trial pre-

[1] 192 Minn. 127, 255 N. W. 843 (1934).

[2] Boyd v. U. S., 142 U. S. 450, 12 S. Ct. 292, 35 L. Ed. 1077 (1892); Miller v. State, 120 Ark. 492, 179 S. W. 1001 (1915); Youree v. Territory, 3 Ariz. 346, 29 P. 894 (1892); People v. King, 276 Ill. 138, 114 N. E. 601 (1916); People v. Grutz, 212 N. Y. 72, 105 N. E. 843 (1914); Rex v. Bond, [1906] 2 K. B. 389. And see 39 Law Q. Rev. 212; 33 Law Q. Rev. 28; 49 Law Q. Rev. 473; 50 Law Q. Rev. 386; 35 Harv. L. Rev. 434-7; 20 Ill. L. Rev. 182.

[3] People v. Molineux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193 (1901).

pared to meet only the crime with which he is accused, and he cannot from the nature of things be prepared to defend against other crimes that may be charged against him. Moreover, it is not the policy of the law to convict a man of one crime by showing that he has at some time been guilty of another. As testimony of the kind mentioned established the bad character of the defendant, its inevitable effect is to prejudice the minds of the jury against him, causing them to find him guilty of the crime charged on doubtful evidence, or evidence that would not otherwise produce a conviction. It violates, also, another well settled rule of criminal jurisprudence, namely, it permits the state to attack the character of the defendant when he does not himself put his character in issue.''[4]

In the face of the basic soundness of the principle and the ponderous practical reasons for its existence the courts have been loath to admit exceptions to its application. The earliest cases in which the English courts admitted evidence of other crimes were those of forgeries. In 1851, the English court, in the case of an indictment charging larceny and receiving stolen goods, held that the evidence that the defendant had in his possession goods which had been stolen three months previous to the crimes charged was inadmissible, saying, ''The cases of uttering [forgeries] with a guilty knowledge, certainly go very far, and I should be very unwilling to apply their principle generally to the criminal law.''[5] Although in time the English courts came to recognize certain exceptions to the general principle, the original reluctance and caution in doing so remained.[6] As the courts originally made an exception to prove the mental state—knowledge in case of forgeries—it is not strange that a similar exception was made where the intent, with which the alleged criminal act was done, was in issue.[7] When exceptions were made, the

[4] State v. Eder, 36 Wash. 482, 78 P. 1023 (1904).

[5] Reg. v. Oddy, 2 Den. 264, 169 Eng. Rep. 499 (1851). Previous to this, evidence of other crimes had been admitted to rebut a defense of accident in at least two other types of cases: Reg. v. Geering, 18 L. J. (M. C.) 215 (1849), a case of murder; Rex v. Voke, Russ and Ry. 531, 168 Eng. Rep. 934 (1823), a case of assault with intent to kill.

[6] "Therefore, if, as is plain, we have to recognize the existence of certain circumstances in which justice cannot be attained at the trial without a disclosure of prior offenses, the utmost vigilance at least should be maintained in restricting the number of such cases, and in seeing that the general rule . . . which . . . excludes evidence of prior offenses, is not broken or frittered away by the creation of novel and anomalous exceptions." Rex v. Bond, [1906] 2 K. B. 389.

[7] Reg. v. Geering, 18 L. J. (M. C.) 215 (1849); Rex v. Voke, Russ. and Ry. 531, 168 Eng. Rep. 934 (1823).

courts hedged them in with various restrictions; these restrictions often varied in the various state courts of the United States. On some of the propositions involved there is agreement, on others it will be readily seen that the courts are in hopeless conflict as will be evidenced by the conclusions reached.[8]

A frequently occurring type of case in which evidence of other crimes is admitted to prove a larcenous intent, that is, the intent to deprive the owner of his property, is that in which the defendant expressly relies on the defense of no knowledge, or of a taking in good faith under an honest belief that a right to the goods existed in the defendant. In a case where the defendant was charged with the larceny of horses, evidence was introduced by the defendant to show that he had paid for the horses, and it was held proper to admit evidence that the defendant had paid certain persons money to bring to him unbranded horses which they could pick up, the latter larcenies not being included in the indictment.[9] Where a defendant was charged with stealing a certain hog, it was held proper on the question of intent, where the defendant claimed he only intended to impound the hog, to prove that the defendant had penned up at a previous time ten other hogs.[10] In a prosecution for larceny of wheat, the defendant, who owned the truck used to carry away the wheat, claimed he had no knowledge that his two co-defendants were stealing the wheat. To prove knowledge, evidence that the defendant had accompanied the co-defendants on another trip and split the proceeds of a sale of the wheat stolen at that time was held properly admitted.[11]

A modification of this doctrine is found in a Vermont decision. The indictment charged the defendant with stealing two lap-robes. Evidence was admitted by the trial court to prove that the defendant and an accomplice went out to steal some phosphate, that they entered fourteen places and found no phosphate but stole articles from each place. When the lap-robes were stolen the defendant claimed he waited outside while his accomplice went to get the robes. The defendant and his accomplice

[8] ". . . the general doctrine has been varied, or there has been a departure therefrom to a greater or lesser degree, in cases of a particular or peculiar nature in some, if not all, jurisdictions. In some courts and in some cases the departure has been quite marked in extent and degree, while in others there has been exhibited a decided hesitancy to indulge in a modification of the general rule." Davis v. State, 54 Neb. 177, 74 N. W. 599 (1898).

[9] Tinsley v. U. S., 43 F. (2d) 890 (1930).

[10] Garcia v. State, 108 Tex. Cr. R. 245, 299 S. W. 909 (1927).

[11] State v. Chitwood, 34 N. M. 505, 285 P. 499 (1930).

then went to the defendant's home and had lunch, after which they again went out to steal the phosphate which they had not yet succeeded in finding, and on this trip another larceny occurred. The court held that the evidence of the first fourteen larcenies was admissible to show knowledge on the part of the defendant that the lap-robes were being stolen, but the court held it error to admit evidence of the subsequent larceny, since that one was "independent and separate."[12]

The last mentioned decision might be compared with those of the Arkansas court which holds that, where the defendant was charged with the larceny of a horse and where the defense was that at the time the horses were taken there was no intent to steal them, it was improper to admit evidence that at another time the defendant had stolen a bridle from another person and used it on the horse alleged to have been stolen, on the ground that the theft of the bridle was a separate and distinct offense.[13]

It has been held that the admissibility of evidence of other crimes to prove intent is not dependent on the introduction by the defendant of evidence tending to show a lack of criminal intent; it is admissible to meet the "possible contention" of defendant that there was no criminal intent.[14] In an early case in Indiana, involving an indictment for larceny, it was stated by the court that "wherever the intent with which an alleged offense was committed is equivocal, and such intent becomes an issue at the trial, proof of other similar offenses is admissible . . . but where, from the nature of the offense under investigation, proof of its commission as charged . . . carries with it the evident implication of a criminal intent, evidence . . . of other offenses ought not to be admitted."[15] In a recent case decided by the same court the latter qualification was expressly abrogated, and the court held that evidence of other offenses was competent to prove intent whether or not intent might be inferred prima facie

[12] State v. Kelley, 65 Vt. 531, 27 A. 203 (1893).

[13] Dove v. State, 37 Ark. 261 (1881); Endaily v. State, 39 Ark. 278 (1882). In Yelvington v. State, 169 Ark. 359, 275 S. W. 701 (1925), under an indictment charging the theft of two mules, evidence that the defendant had in his possession harness stolen at a different time and place was held inadmissible, though it was said that proof of other crimes of a similar nature, shown to have been committed about the same time may be admitted as disclosing criminal intent. See also People v. Nagle, 137 Mich. 88, 100 N. W. 273 (1904); People v. Gawlick, 350 Ill. 359, 183 N. E. 217 (1932).

[14] State v. Miller, 154 La. 138, 97 So. 342 (1923); State v. Hughes, 76 Mont. 421, 246 P. 959 (1926).

[15] Shears v. State, 147 Ind. 51, 46 N. E. 331 (1897).

from proof of the commission of the crime of which the defendant stood charged.[16]

As indicative of the divergent attitude of the courts in regard to admitting evidence to prove intent, the following decisions are significant. In an indictment against the defendant for grand larceny, it was charged that the defendant conducted an employment agency and procured a position for one C. The defendant requested C to put up a one-hundred-dollar deposit as security for C's good conduct. After three months, the defendant told C that his employer no longer needed his (C's) services and the defendant attempted to induce C to give up a note which the employer had given him for the hundred dollars. In this case evidence of a similar transaction in which the defendant was a party was held admissible.[17] In another case, on the trial of the defendant on a charge of conspiracy to steal, the evidence showed that the defendant agreed with the complaining witness to purchase a business, each party to pay a certain amount of cash. While the two were in a room counting their money, two men broke in, claimed to be detectives, and seized the money claiming it was counterfeit. The trial court admitted evidence of a similar scheme in which the defendant was involved on the ground that it was admissible under one of these exceptions to the general rule: first, from the necessity of the case; second, when the intent is to be proved from circumstances; third, where the identity of the accused is expressly in issue. The reviewing court held the evidence was inadmissible, saying, "Decisions on the general rule are more frequent than upon the exceptions, and it will be observed . . . that the exceptions are permitted from absolute necessity to aid in the detection and punishment of crime and they should be carefully limited, and guarded by the courts."[18] In another case, involving the charge of larceny of three hundred dollars which the complaining witness gave to the defendant to purchase potatoes, pursuant to an agreement of the parties to enter into the produce business, the defendant failed to buy the potatoes, and the court held that evidence of similar transactions by the defendant was admissible on the question of intent.[19] In a fourth case, an indictment charged larceny by bailee, and the evidence relevant to the charge showed

[16] ". . . we do not recognize any qualifications of this rule [admissibility] in case of offenses where intent may be inferred from the act itself." Huffman v. State, 205 Ind. 75, 185 N. E. 131 (1933).

[17] People v. Fehrenbach, 102 Cal. 394, 36 P. 678 (1894).

[18] Effler v. State, 27 Del. 62, 85 A. 731 (1913).

[19] People v. Hughes, 36 N. Y. S. 493 (1895).

that the defendant told a livery stable owner that he was a circus advance agent and wished to hire a rig which he would return in an hour. Instead, the defendant took the rig and left the state. The court held that it was error to admit evidence that on the same day the defendant had told the same story to a bakery clerk and had obtained a five dollar "loan." The court said, "There were no forcible reasons . . . for a departure or exception from the general rule."[20]

Although some courts will admit evidence of subsequent acts,[21] committed within a reasonable time, there is reputable authority holding that such evidence is not admissible.[22] At least two of the jurisdictions which hold generally that evidence of subsequent similar acts is admissible have held that in case of receiving stolen goods evidence of subsequent receivings is not admissible to prove knowledge.[23] In respect to this phase of the problem, Illinois draws a distinction which appears to be unique. In two cases where the only evidence of similar offences offered related to subsequent offenses, the court held that they were inadmissible to prove intent.[24] In a subsequent case involving a charge of criminal abortion, it was held that unless there was also evidence of prior similar acts, the evidence relating to the subsequent acts was inadmissible. The reasoning of the court seems sound: "It is contrary to the theory of our criminal law to presume that a defendant has been a criminal from his birth or from any former period of time or that he has a guilty intent, in the absence of proof that he has formerly committed a criminal act. His first offense must be held to be the beginning of his criminal career, and in every such case every element of the crime must be proved and not presumed from subsequent acts alone."[25] The same principle was given by the court as controlling in a subsequent case involving a charge of forging a

[20] Davis v. State, 54 Neb. 177, 74 N. W. 599 (1898).

[21] State v. Siddoway, 61 Utah 189, 211 P. 968 (1922); Baldwin v. State, 46 Fla. 115, 35 So. 220 (1903); Suarez v. State, 95 Fla. 42, 115 So. 519 (1928); Cooper v. State, 193 Ind. 144, 139 N. E. 184 (1923); People v. Hughes, 36 N. Y. S. 493 (1895); People v. Fehrenbach, 102 Cal. 394, 36 P. 678 (1894).

[22] Coblentz v. State, 84 Ohio St. 235, 95 N. E. 768 (1911); State v. Moxley, 41 Mont. 402, 110 P. 83 (1910); Poon v. State, 120 Tex. Cr. R. 522, 48 S. W. (2d) 307 (1932).

[23] People v. Willard, 92 Cal. 482, 28 P. 585 (1891); Dampier v. State, 191 Ind. 334, 132 N. E. 590 (1921).

[24] People v. Baskin, 254 Ill. 509, 98 N. E. 957 (1912); People v. Lindley, 282 Ill. 377, 118 N. E. 719 (1918).

[25] People v. Hobbs, 297 Ill. 399, 130 N. E. 779 (1921).

check;[26] so it appears that subsequent similar acts are not admissible in evidence in Illinois unless accompanied by evidence of prior similar acts.

A prerequisite to the admission of evidence of other similar acts to prove intent is the presentation of some proof that the defendant committed the act charged in the indictment.[27] And such prerequisite is even more necessary where it is not shown that the accused, charged with embezzlement, even had knowledge, or reason to know, that funds were missing.[28]

A factor which has sometimes been the grounds for a reversal of a conviction is the length of time between the principal crime charged and that admitted in evidence to prove intent. Although the general propositions as stated by the courts are to the effect that the length of time over which evidence of other crimes may be given to prove intent is largely within the sound legal discretion of the trial court,[29] there may be such an abuse of that discretion as amounts to reversible error.[30] In Texas, in cases involving the receiving of stolen goods, evidence of a receiving of other stolen goods, which occurred two weeks after the receiving charged, was held inadmissible, the court saying that the latter act was not "sufficiently contemporaneous."[31] In a case involving the passing of forged checks, the Indiana court held that it was proper to admit evidence of another transaction which occurred five days later but reversed the conviction on the ground that evidence of another unrelated similar transaction which occurred four and a half years before was improperly admitted.[32] In this case the court stated the principle that to be admissible in evidence, the act must have occurred within such a period of time before or after the commission of the particular offense as to afford some basis for an inference that the same intent which accompanied one of the alleged acts was present

[26] People v. Moshiek, 323 Ill. 11, 153 N. E. 720 (1926).

[27] Suarez v. State, 95 Fla. 42, 115 So. 519 (1928); Cude v. State, 42 Okla. Cr. 357, 276 P. 240 (1929).

[28] People v. Toohill, 203 N. Y. S. 457 (1924); Prettyman v. U. S., 180 F. 30 (1910).

[29] "No exact limitation of time can be fixed as to when another offense tending to prove the intent of the act charged is remote. The decision of that question must depend upon the circumstances of the particular case. . . ." State v. Siddoway, 61 Utah 189, 211 P. 968 (1922); State v. Hall, 45 Mont. 498, 125 P. 639 (1912).

[30] Cooper v. State, 193 Ind. 144, 139 N. E. 184 (1923).

[31] Bismarck v. State, 45 Tex. Cr. R. 54, 73 S. W. 965 (1903). See also Poon v. State, 120 Tex. Cr. R. 522, 48 S. W. (2d) 307 (1932).

[32] Cooper v. State, 193 Ind. 144, 139 N. E. 184 (1923).

when the other was committed. Where some connection between the acts is shown other than the mere element of time, the period of time may be longer than where the acts are disconnected. This is aptly illustrated by a case in which the defendant was charged with a malicious wounding of his cousin. The defendant claimed that the shooting was accidental. Evidence that, eleven years before, the defendant had intentionally shot and wounded his brother-in-law, was held properly admitted after evidence had been given that the latter was present at the time of the shooting of the cousin, that, immediately prior to the shooting, the defendant had quarreled with his brother-in-law and stated that he would "get him this time sure," and that the accused had been quoted as saying that he "got the wrong man."[33]

Where evidence of other similar crimes is admitted in evidence, most courts agree that ordinarily the court should restrict the jury in their consideration of such evidence to the sole purpose for which it was admitted.[34] This rule applies where there is any danger that the jury might convict on the ground that the defendant was guilty of another crime. Where there is no such danger, it is not necessary to instruct the jury as to the restricted purpose.[35] It has ben held in Illinois and California that where the defendant does not ask for an instruction relative to the restricted purpose of the evidence, even though such an instruction, if requested, would have been proper, the failure of the court to give such an instruction is not error.[36] However, in Texas, it has been held that it was the duty of the court to limit the consideration of the evidence to its proper purpose, without any request or exception by the defendant.[37]

Because the effect which evidence of other crimes has on the defendant's case is almost always damaging, improperly admitted evidence of such other crimes is an impelling reason, on review of the case, for a reversal. When this error is committed, the reviewing court should not dismiss it as unprejudicial without full consideration. Evidence of other crimes committed by the defendant is very likely to influence the jury in their view

[33] Colvin v. Commonwealth, 147 Va. 663, 137 S. E. 476 (1927).

[34] Hanley v. State, 28 Tex. App. 375, 13 S. W. 142 (1890); State v. Reynolds, 5 Kan. App. 515, 47 P. 573 (1896).

[35] Moseley v. State, 36 Tex. Cr. R. 578, 38 S. W. 197 (1896); Carroll v. State, 58 S. W. 340 (Tex. Cr. App., 1900).

[36] Glover v. People, 204 Ill. 170, 68 N. E. 464 (1903); People v. Fultz, 109 Cal. 258, 41 P. 1040 (1895).

[37] Martin v. State, 36 Tex. Cr. R. 125, 35 S. W. 976 (1896).

of the balance of the evidence in the case and thereby place the defendant under an unfair handicap.[38] In one case, the Federal court said that although there probably was competent evidence warranting conviction, it would be going far to say that the defendant was not prejudiced by the admission of such incompetent evidence; also that the defendant was entitled to a fair trial which he could not have after incompetent evidence of the commission of another crime was admitted.[39] This proposition was somewhat modified in a later case decided by a Federal court which held that, where there was overwhelming evidence of the guilt of the defendant, the admission by the trial court of incompetent evidence of other crimes did not constitute reversible error.[40] But, at least in some states, a conviction will be reversed despite the existence of competent evidence of guilt if evidence of other crimes is improperly admitted.[41]

In the light of the conflict in the decisions of the courts on some of the questions considered, it is impossible to formulate any general proposition which would cover the law on the subject in every state. The most that can be done in the way of generalization is to recognize that to the general proposition of the inadmissibility of evidence of other crimes there are exceptions, one of which is that such evidence is admissible where from its nature it is relevant to the question of intent. Beyond this, only by reference to the decisions in the particular state can it be definitely decided whether a particular crime is relevant and admissible in evidence to prove intent. This reference should include the consideration of factors which are held to be material, as shown by the decisions above noted. The more important of these factors are: (1) The relative order in which the collateral crime and the particular charged crime occurred, that is, whether the collateral crime preceded or followed the particular crime; (2) The remoteness in time of the collateral crime; (3) The connection between the collateral crime and the particular crime charged, or in other words whether the collateral crime was connected or "separate and independent"; (4) The similarity between the two crimes.

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[38] People v. Buffom, 214 N. Y. 53, 108 N. E. 184 (1915).

[39] Hatchet v. U. S., 54 App. D. C. 43, 293 F. 1010 (1923).

[40] Heglin v. U. S., 27 F. (2d) 310 (1928).

[41] State v. Kelley, 65 Vt. 531, 27 A. 203 (1893); Cooper v. State, 193 Ind. 144, 139 N. E. 184 (1923).

Validity of Split Mortgage Securities for the Investments of Guardians and Conservators With or Without Prior Judicial Approval

In February, 1936, the Supreme Court of Illinois delivered a decision[1] which finally rules on the legality of "split" mortgage securities as investments for guardians and conservators. The respective statutes[2] were construed to authorize investments in existing notes or bonds, which were part of issues being secured by a first mortgage or trust deed, where they were prior to or on a parity with all other portions of the debt secured by the same instrument.

The decision involved three cases which were treated as consolidated, because each case related to the right of a conservator or guardian to invest the funds of his ward in "split" mortgage securities. The proceedings evolved from the objection by the guardians *ad litem* of the various wards to the approval of the final accounts because of the inclusion of bonds or notes which were part of an issue of similar notes or bonds secured by a single mortgage. None of the trust deeds in the nature of a mortgage securing the notes purchased contained a parity clause although each provided for acceleration of the whole debt in case of any default. Some of the notes were purchased without prior authority, and the guardian in one case afterwards procured an order purporting to authorize one of the purchases. The purchases of the other notes were submitted in subsequent current accounts and were approved.

The question argued was whether or not a "split" mortgage investment was a proper loan upon the security of real estate as provided by the statutes. There was no argument advanced as to the extent of the protection secured by obtaining a court order authorizing the investment. Before contemplating, however, whether such an order should be an absolute safeguard to the conservator or guardian, we should first consider the question of investment decided by this case.

When the investment provisions of the respective acts relating to guardians and conservators[3] are compared it is observed that both require the ward's money to be kept at interest upon security to be approved by the court and both provide for investment on approval of the court in certain bonds and for loans not

[1] In re Lalla's Estate, 362 Ill. 621, 1 N. E. (2d) 50 (1936).
[2] Guardians, Smith-Hurd Ill. Rev. Stat. (1935), Ch. 64, sec. 22; Conservators, (Lunatics et al.), Ibid., Ch. 86, sec. 18.
[3] Ibid.

exceeding $100 on personal security. The Guardian and Ward Act requires that loans upon real estate be secured by first mortgage, whereas a conservator may loan upon real estate secured by first mortgage or trust deed thereon. Section 25, however, of the Guardian and Ward Act does provide that "the word mortgage as used in this act shall include a trust deed in the nature of a mortgage." Although this section concerns the mortgaging of the ward's property and not the investment thereof, probably the legislative intent was to treat a mortgage and a trust deed mortgage as identical. In the instant case this point was not discussed as the parties stipulated that there was no substantial difference between the two acts. From the decision it is apparent that the court agreed with them; indeed, another holding would appear to be only a quibble on words. A respected authority on Illinois real property law[4] states that the ordinary mortgage and the trust deed are forms of borrowing on the security of real estate and are identical so far as security is concerned; the difference is only a matter of convenience to the lender.

The court decided that a first mortgage was a lien which had priority over all other mortgages and the fact that the debt was divided among many persons did not affect the quality of the lien. If, however, the priority of the notes is different, the notes are regarded as so many successive mortgages, each having priority according to maturity[5] and the acceleration clause in case of default would not affect such priority.[6] Therefore, the investments in two of the estates were approved, because all the notes in the issue were payable without priority. Only one note in the other estate was approved as such note matured before any other note of its series. The other notes were denied approval as they were subject to the priority of notes maturing earlier.

This decision seems more sound than the recent appellate case[7] wherein the court decided that the investment by a conservator in notes secured by a first mortgage securing other notes on a parity does not conform with the statute, since there are other notes of an equal lien. The court supported its finding by a reference to *People* v. *Mitchell*,[8] an Appellate Court decision ren-

[4] Nathan William MacChesney, Principles of Real Estate Law (Macmillan Co., 1927), p. 283.

[5] Schultz v. Plankinton Bank, 141 Ill. 116, 30 N. E. 346 (1892).

[6] Koester v. Burke, 81 Ill. 436 (1876); Horn v. Bennett, 135 Ind. 158, 34 N. E. 321 (1893).

[7] In re Estate of Sargent, 276 Ill. App. 312 (1934).

[8] 223 Ill. App. 8 (1921).

dered in 1921, which case, however, is of doubtful substantiation as it involved notes due serially.

It is clear that the statutes propose to specify the kind and quality of the mortgage, and a note which by reason of its earlier maturity has priority over all other notes secured by a first mortgage is a prior lien as effectually as if it were the only note secured. If the note is on a parity with the others, it remains a first mortgage security, and there is no lien which has a prior right to be satisfied from the property. The rule then is that a guardian or a conservator may invest the funds of the ward in "split" mortgage securities if the note purchased is on a parity with the notes of the earliest maturity.

In the decision, the court said, referring to the investments allowed, that they also complied with the statutes in that they were approved by the probate court prior to their purchase or in subsequent current accounts before default. This statement is important in a determination of Illinois law relating to the ambiguity in the Guardian and Ward Act relating to investments.[9] That act does not contain the provision of the act governing conservators' investments that "all loans shall be subject to the approval of the court," but in *McIntyre* v. *People*[10] the court held that by necessary implication the original loan must be made with the court's approval. In would appear now, that such approval is necessary on the guardian's behalf but it need not be obtained in advance of the purchase of the investment.

In view of the fact that the illegal investments which had been subsequently approved were disallowed, however, how is the guardian or conservator protected by obtaining court approval? Probably this approval is conclusive only to prove that the guardian used proper business judgment in selecting one of many "legal" investments. No Illinois case has been found involving the protection afforded a guardian by the court's approval of an illegal investment although the Supreme Court has held that the approval of a current report containing a previously unauthorized investment would be presumed correct in the absence of a contrary showing.[11]

It seems that the guardian assumes the risk of the court's reversing an approval of an investment. Certainly the subsequent approval of an illegal investment should not afford more protec-

[9] See 14 CHICAGO-KENT REVIEW 111, "Defects in the Illinois Probate Statutes," Geo. S. Stansell.

[10] 103 Ill. 142 (1882).

[11] In re Guardianship of Lutz, 362 Ill. 631, 1 N. E. (2d) 55 (1936).

tion than the subsequent approval of a legal investment. Illinois decisions in point are conflicting, but some have held that the direction in the Guardian and Ward Act "to keep his ward's money at interest on security to be approved by the court" is mandatory and an investment made without approval is made at the guardian's peril, and the subsequent approval of such investment would be unimportant, as the court has no power to render an illegal act valid.[12] Other jurisdictions are in accord in holding that the court's approval of a guardian's annual report, which disclosed investments made without a previous court order, does not amount to a ratification of his acts in making such investments, so as to protect him from liability with reference thereto.[13]

However, in the case of *Bruner* v. *Wolford's Estate*,[14] which should be considered as the authoritative Illinois view, since it was decided in 1934, the act relating to conservators was held not to require approval in advance of an investment, although the conservator would be personally liable if the loan were not approved. If his current reports, listing the investment, are approved, the conservator is not chargeable with having caused a loss through mismanagement of the estate. There are some southern cases[15] which go even further and hold that if any investment is sanctioned by the court, the guardian is not liable for loss occurring thereon unless caused by his subsequent default.

From the foregoing survey it appears that the Illinois view is that neither the guardian nor the conservator is protected by a court order against an objection by the ward to an illegal investment. As to a legal investment, the guardian or conservator assumes the position of guarantor if such investment is made without a prior court order; if the loan is later approved in a current report of the guardian or conservator, the latter are released from any liability because of a loss incurred after such approval.

J. L. PORTER

[12] Winslow v. People, 117 Ill. 152, 7 N. E. 135 (1886); Chapman v. American Surety Co., 261 Ill. 594, 104 N. E. 247 (1914); Kattelman v. Estate of Guthrie, 142 Ill. 357, 31 N. E. 589 (1892).

[13] In re O'Brien's Estate, 80 Neb. 125, 113 N. W. 1001 (1907); Mumford v. Rood, 36 S. D. 80, 153 N. W. 921 (1915).

[14] 356 Ill. 514, 191 N. E. 70 (1934).

[15] Bryant v. Craig, 12 Ala. 354 (1847); Newman v. Reed, 50 Ala. 297 (1874); O'Hara v. Shepherd, 3 Md. Ch. 306 (1851); Carlysle v. Carlysle, 10 Md. 440 (1857).

CONSTITUTIONALITY OF CIVIL PRACTICE ACT AS TO APPEALS FROM INTERLOCUTORY ORDERS CONCERNING INJUNCTIONS AND RECEIVERS

The Supreme Court of Illinois has concluded in *Hallberg* v. *Goldblatt Bros., Inc.*[1] that section 78 of the Civil Practice Act is constitutional and affords to appellees, on appeal from interlocutory orders dealing with injunctions or receivers, due process of law.[2] The Superior Court of Cook County, in this case, had granted a temporary injunction forbidding distribution of advertising matter on Chicago's streets unless the papers were securely fastened. The defendants gave notice of appeal, filed the record, abstract, briefs, and appeal bond with the clerk of the Appellate Court, filed a motion to stay the injunction, and gave the plaintiff notice of the latter. The motion was argued the following day, and the plaintiff was given three days to file a brief, which he did. Thereupon the motion was allowed, and the injunction order was stayed pending the appeal therefrom. The plaintiff then filed a motion to vacate the stay order, alleging that it had been issued without a hearing, and that section 78, not requiring notice or a hearing on such application for a stay, denies due process and is therefore invalid.

The Supreme Court, however, held that the plaintiff was in no position to complain as he had had his day in court and was not aggrieved in either respect. Nevertheless, the court went on to say that even if this section were deficient in failing to provide for notice and a hearing, Rule 31 of the Supreme Court expressly supplies the omission and may be incorporated therein. Mr. Justice Orr, however, dissented.

J. M. HADSALL

[1] 363 Ill. 25, 1 N. E. (2d) 220 (1936).

[2] The sentence in this section which formed the hub of the controversy is, "The force and effect of such interlocutory order or decree and the proceedings in the court below shall not be stayed during the pendency of such appeal, except upon order of the Appellate Court or a judge thereof in vacation." The latter clause was claimed to permit a stay order without notice or hearing.