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Recent Illinois Decisions

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AUTOMOBILES—INJURIES FROM OPERATION, OR USE OF HIGHWAY—WHETHER OR NOT OWNER OF PARKED AUTOMOBILE WHO LEAVES KEY IN IGNITION IS RESPONSIBLE FOR INJURIES INFLICTED BY THIEF WHO STEALS CAR—The Appellate Court for the Third District of Illinois, in the case of *Cockrell* v. *Sullivan*,[1] considered whether or not an automobile owner who fails to comply with the Illinois Motor Vehicle Act[2] by permitting his car to stand unattended without first stopping the engine, locking the ignition, and removing the key, is civilly liable for injuries inflicted on another by a thief fleeing therein. Plaintiff therein, basing her property damage suit on defendant's violation of the statute mentioned and under pleadings drawn to exploit views expressed in an earlier Illinois case, obtained a verdict and judgment in her favor. On appeal therefrom, the judgment was reversed when the court in question refused to follow the decision of the majority of the Appellate Court for the First District in the case of *Ostergard* v. *Frisch*.[3]

Since the holding in the instant case is directly contrary to the result attained in the Ostergard case, it is desirable to review the bases for the earlier decision. That case had relied on views expressed in the Massachusetts case of *Malloy* v. *Newman*[4] and a holding of a court of the District of Columbia in *Schaff* v. *R. W. Claxton, Inc.*,[5] which cases took the view that a violation of a statute of the kind in question was negligence as a matter of law, making it unnecessary to inquire into the element of proximate causation. The first of these cases, however, was overruled not long after the decision in the Ostergard case when the Massachusetts court, in *Galbraith* v. *Levin*,[6] rejected the concept that a penal violation of a statute regulating motor vehicles was to be deemed negligence *per se* and the conclusive proximate cause of an injury. The last expression on the point emanating from Massachusetts accords, in substance or effect, with similar holdings in New York,[7] Minnesota,[8] and Louisiana.[9] It would also appear to coincide with the available legislative history relating to the Illinois statute, a history tending to indicate that the underlying legislative purpose

1 344 Ill. App. 620, 101 N. E. (2d) 878 (1951).

2 Ill. Rev. Stat. 1951, Vol. 2, Ch. 95½, § 189(a).

3 333 Ill. App. 359, 77 N. E. (2d) 537 (1948), noted in 27 CHICAGO-KENT LAW REVIEW 225. Niemeyer, P. J., wrote a dissenting opinion.

4 310 Mass. 269, 37 N. E. (2d) 1001 (1941).

5 79 U. S. App. D. C. 207, 144 F. (2d) 532 (1944).

6 323 Mass. 255, 81 N. E. (2d) 560 (1948).

7 Wolfson v. Harrington, 295 N. Y. 667, 65 N. E. (2d) 101 (1946).

8 Anderson v. Thiesen, 231 Minn. 369, 43 N. W. (2d) 272 (1950).

9 Maggiore v. Laundry and Dry Cleaning Service, 150 So. 394 (La. App. 1933).

was one toward traffic regulation rather than to design an anti-theft measure.[10]

It is understood that the Appellate Court for the First District will have an opportunity to reconsider the holding in the Ostergard case when it passes on the appeal taken in the case of *Ney* v. *Yellow Cab Company*.[11] It may, and probably should, overrule its earlier holding in the light of the instant decision and the changes which have occurred in the precedents previously relied on. If so, the law of Illinois on the point will once again become uniform throughout the state. If it does not, and prefers to reason from the premise that the injured person should be permitted to recover from the most accessible of the persons involved, even though that person's conduct can hardly be said to amount to actionable negligence within customary concepts relating to negligence and proximate cause, there would be every reason to support the issuance of a certificate of importance so as to get the problem before the Illinois Supreme Court for a conclusive settlement of the issue.

BURGLARY — OFFENSES AND RESPONSIBILITY THEREFOR — ELEMENTS INVOLVED IN THE CRIMINAL OFFENSE OF POSSESSION OF BURGLAR TOOLS— The recent case of *People* v. *Taylor*[1] afforded the Illinois Supreme Court with its first opportunity to construe a section of the Illinois Criminal Code enacted over seventy-five years ago. The case was one in which the defendant, found strolling at night in a neighborhood where a series of burglaries had been recently committed, was stopped by police officers for questioning and, upon search, was found to have in his possession certain tools which could have been used to break and enter.[2] Defendant was thereupon arrested and indicted on a charge of violating a statute making it unlawful to have possession of tools of that character with the felonious intent to break and enter.[3] Upon trial before a court acting without a jury, defendant admitted that he had been convicted of burglary over seventeen years prior to the trial, had served a term therefor, and had been out of regular employment for the past two years. He explained, however, that he had been using the tools on a temporary job and was returning home

[10] See Legislative Reference Notes re H. B. No. 474, 1919, p. 623, and re Uniform Traffic Act, 1935. It should be noted that Ill. Rev. Stat. 1951, Vol. 2, Ch. 95½, § 189(a), is not identical with the proposed Uniform Act Regulating Traffic on Highways, 11 U. L. A., § 52, p. 50, although it embodies some of the ideas expressed in the uniform statute.

[11] Case No. 45580, Appellate Court for the First District, now pending on appeal.

[1] 410 Ill. 469, 102 N. E. (2d) 529 (1951).

[2] The tools consisted of a screw driver, a pair of pliers with the handles filed down so they could be used as a pry, and a pencil flashlight, the glass lens of which was covered with black tape so that it could throw only a pin-point beam of light.

[3] Ill. Rev. Stat. 1951, Vol. 1, Ch. 38, § 87.

therefrom at the time of his apprehension. The defendant's evidence was corroborated by the testimony of other witnesses. The prosecution relied principally on evidence that the tools in question were of the type used by burglars. Upon conviction and sentence for violation of the statute, defendant prosecuted a writ of error to review the judgment and convinced the Supreme Court, as a matter of law, that the judgment should be reversed without remandment.

Noting that the statute had not been considered in any prior proceeding coming before it, the court indicated the necessary elements of the crime in question to be (1) the adaptation and design of the tool or implement for breaking and entering, (2) the possession thereof by one with knowledge of its character, and (3) the intent to use or employ such tool or implement in breaking and entering.[4] The first and second of these elements were said to be apparent from the evidence in the case. The first because it was not necessary that the tools be peculiar to the trade of burglary, for even common and lawful tools, adaptable for legitimate use, would suffice if possessed with an intent to use them unlawfully for the purpose of burglary;[5] the second because the articles were found on the defendant's person. The difficult point came in relation to the third element, the one dealing with the intent.

In that regard, the court pointed out that an intent to break into a particular building was not necessary as an intent to utilize the tools in any burglarious entry would be sufficient.[6] In the absence of direct evidence on the point, it was said that circumstantial evidence would be admissible,[7] and that no distinction would be made between direct and circumstantial evidence insofar as the weight and effect thereof was concerned.[8] By way of illustrating the types of circumstantial evidence which might be sufficient to support a conviction, the court designated such matters as the fact that the defendant had been a burglar by occupation for many years;[9] had been known to be associated with burglars;[10] had resisted arrest or attempted to flee;[11] or had been apprehended with the tools secreted in his clothing,[12] any of which might tend to establish the

4 The court quoted from 12 C. J. S., Burglary, § 69, p. 754. It cites People v. Dorington, 221 Mich. 571, 191 N. W. 831 (1923).

5 State v. Widenski, 50 R. I. 148, 146 A. 407 (1929).

6 9 Am. Jur., Burglary, § 86, p. 281, quoting from Commonwealth v. Tivnon, 74 Mass. (8 Gray) 375, 69 Am. Dec. 248 (1857).

7 On the point of the use of circumstantial evidence to demonstrate the presence of intent, see People v. Weiss, 367 Ill. 580, 12 N. E. (2d) 652 (1938).

8 People v. Buskievich, 330 Ill. 532, 162 N. E. 196 (1928).

9 People v. Jefferson, 161 Mich. 621, 126 N. W. 829 (1910).

10 People v. Howard, 73 Mich. 10, 40 N. W. 789 (1888).

11 State v. Vick, 213 N. C. 235, 195 S. E. 779 (1938).

12 People v. Donovan, 216 Mich. 231, 184 N. W. 863 (1921).

intent element. It found, however, that the defendant in the instant case met none of these tests hence it could not be said, as a matter of law, that he had intended to use the tools in a burglary. The prior conviction for burglary was ruled out on the ground that there had been no showing of any continuation of felonious habits or association with criminals following defendant's release from the penitentiary.[13] As defendant had not resisted arrest, had carried the tools in normal fashion, and had an appropriate explanation for his presence on the scene, it was held the evidence was insufficient to meet the burden of proof in relation to intent, hence the conviction had to be reversed.

The opinion, by placing stress on the fact that it would usually be necessary to place reliance on circumstantial evidence to support a conviction for violation of the statute in question, appears to have adopted something of the rationale used by the Supreme Court of Michigan in the case of *People* v. *Howard.*[14] That court wrote that the intent, "being something entirely within the mind" of a defendant, would typically have to be established without his admission or confession and entirely from circumstances, hence there "should . . . be accorded the people [prosecution] more than usual latitude in the proof looking towards intent."[15] While this view may be said to be the majority one among those states which have had occasion to construe similar statutes, it would appear to be too liberal in character. Admitted that circumstantial evidence must usually be used in such cases, it is believed that the evidence should point more directly toward a plan to commit a present crime of burglary than could be inferred from such things as the fact that a given defendant had associated with burglars or had previously been convicted of burglary. While the instant case eliminates the right to use the latter form of evidence, particularly when the earlier conviction is remote in point of time, it loses some of its validity by appearing to endorse the first of these forms of proof.

DIVORCE—ALIMONY, ALLOWANCES, AND DISPOSITION OF PROPERTY—WHETHER COURT HAS AUTHORITY UNDER STATUTE TO DIRECT A CONVEYANCE OF REALTY IN SATISFACTION OF ALIMONY IN GROSS—The Supreme Court of Illinois, in *McGaughy* v. *McGaughy,*[1] recently had occasion to rule on the 1949 amendment to Section 18 of the Divorce Act,[2] one whereby

13 Any inference to be drawn from the possession of a "peep flashlight" was said to be rebutted by defendant's testimony that it was needed by one, such as himself, when doing close work while afflicted with poor eyesight.

14 73 Mich. 10, 40 N. W. 789 (1888).

15 73 Mich. 10 at 12, 40 N. W. 789 at 791.

1 410 Ill. 596, 102 N. E. (2d) 806 (1952).

2 Laws 1949, p. 729; Ill. Rev. Stat. 1951, Vol. 1, Ch. 40, § 18.

the legislature provided that real or personal property may be awarded by the court as alimony to wife or husband. The trial court there had entered a decree granting plaintiff a divorce and awarding her one-half of the defendant's real property, consisting of a substantial farm, as alimony in gross. Of the total acreage, a major portion had been conveyed to the defendant by his mother but the remainder had been purchased by the defendant with money derived from farming operations. A mortgage on the property had been substantially reduced during the period of ownership but a balance still remained due thereon. The plaintiff's allegations tended to show that this reduction had been accomplished by the joint efforts of both plaintiff and defendant in farming the realty. The scope of the plaintiff's assistance in working on the farm, in addition to the usual household duties, included such things as the cultivation of the fields. This fact appears to have influenced the trial court to award the plaintiff one-half of the realty as alimony in gross. On direct appeal to the Supreme Court as a freehold was involved, the defendant relied heavily on the fact that the property had come almost entirely from his mother and upon expert testimony offered at the trial to the effect that the property could not profitably be farmed if divided. The Supreme Court, despite the 1949 amendment, reversed the alimony ruling and remanded the cause with directions to enter a decree awarding the plaintiff such periodic alimony for her support as the chancellor should deem fair and equitable, but it denied the court authority to order a division of the real property.

Before the enactment of the 1949 amendment, courts only ordered a conveyance of realty in divorce actions, from one spouse to the other, where special equities were pleaded and proven by the party seeking such conveyance. The award of realty, in these instances, was made not on the basis of the statutory divorce jurisdiction of the court but rather upon the basis of the court's inherent equity powers. Language, typical of the decisions prior to the amendment, is to be found in *Anderson* v. *Anderson*[3] wherein the court, although refusing to order a conveyance, said: "Where, however, the wife has from equitable considerations, other and additional interests in her husband's property than such as attach to her status as wife . . . for example . . . if the real estate represents joint earning, work, or savings of the parties, the court may properly, when dissolving the marriage relation, decree that the wife shall be vested with title in fee to such real estate."[4] The case of *Shekerjian* v. *Shekerjian*,[5] one in which the court awarded a

[3] 380 Ill. 435, 44 N. E. (2d) 54 (1942).

[4] 380 Ill. 435 at 440, 44 N. E. (2d) 54 at 57.

[5] 346 Ill. 101, 178 N. E. 365 (1931). The wife there had aided the husband's business constantly and had helped in the accumulation of the estate for a period of over twenty years.

conveyance of realty, applies the theories expressed in the Anderson case and furnishes an excellent illustration of the prior practice on the subject.

It is to be noted that, in no decision before the 1949 amendment, did the courts successfully award realty as alimony in gross, except by agreement of the parties, without finding facts similar to those outlined in the quotation from the Anderson case.[6] In fact, where awards were granted and sustained, they were based upon a showing of an equitable interest in the land not dissimilar to the interest which would be required to move equity to act to order a conveyance in situations other than those involving a dissolution of a marriage. It would seem, therefore, that the legislature, when enacting the 1949 amendment to the Divorce Act, had in mind the thought that the said amendment should give courts the power, in divorce actions, to make an award of realty as alimony, subject to the court's discretion, without the necessity of finding the existence of special equitable interests. The Supreme Court, however, in the instant decision, based its reversal of the trial court award of realty as alimony in gross upon the fact that insufficient equities had been shown to exist on behalf of the plaintiff.[7]

As the language of the court is so completely in accord with the law stated in the Anderson case, one can only be led to the conclusion that the amendment will have no effect whatever, despite the action of the legislature, on the nature of the pleading and proof required to move the court to award a conveyance of realty in a divorce action. The emphasis on what would constitute a proper exercise of judicial discretion in such matters would seem to outweigh the legislative policy in providing for a complete settlement of all matters between the divorced spouses.

HABEAS CORPUS—JURISDICTION, PROCEEDINGS, AND RELIEF—WHETHER THE ILLINOIS SUPREME COURT WILL EXERCISE ORIGINAL JURISDICTION OVER HABEAS CORPUS PROCEEDINGS WHEN THE ORIGINAL PETITION PRESENTS AN ISSUE OF FACT—In the recent case of *People ex rel. Jones* v. *Robinson*,[1] the Illinois Supreme Court was confronted with an original petition for

[6] See, for example, Byerly v. Byerly, 363 Ill. 517, 2 N. E. (2d) 898 (1936); Lipe v. Lipe, 327 Ill. 39, 158 N. E. 411 (1927); Walz v. Walz, 325 Ill. 553, 156 N. E. 828 (1927); Meighen v. Meighen, 307 Ill. 306, 138 N. E. 613 (1923).

[7] The court in the instant case said: "The record fails to disclose any special circumstances, equities or reasons for splitting up the defendant's farm . . . *The ordinary and better method* of awarding alimony is by periodic allowances, payable at such intervals as may best suit the convenience of the husband and meet the demands of his wife." 410 Ill. 596 at 610, 102 N. E. (2d) 806 at 812. Italics added.

[8] By way of contrast, see the decision in Glassman v. Glassman, — Ohio App. —, 103 N. E. (2d) 781 (1951), which affirmed a division of real property by way of alimony made pursuant to a statute comparable to the provision referred to in note 2, ante.

[1] 409 Ill. 553, 101 N. E. (2d) 100 (1951).

habeas corpus wherein the facts in support thereof were placed in issue. The relator, a prisoner in the state penitentiary, after having been released to Tennessee authorities, was subsequently arrested and returned to the Illinois penitentiary at which time he presented an original petition to the Supreme Court[2] seeking liberty on the ground that his prior release, on a warrant of extradition issued upon the demand of the Governor of Tennessee, had operated as a waiver of any further jurisdiction by the Illinois authorities over his person.[3] The allegation relating to the petitioner's release to the Tennessee authorities was expressly denied in respondent's amended return, and the basis for the writ was thus factually put in issue. The Supreme Court, on the record then before it, thereupon dismissed the petition and remanded the relator to the custody of the warden, holding that it would not exercise original jurisdiction where the original petition for habeas corpus and the return created an issue of fact which would have to be decided before the relator's right to release could be determined.

While, on its face, the result might appear to be a reasonable one, considerable difficulty is experienced to find the basis for it as no Illinois precedent can be found, except by way of dictum,[4] and the constitutional provision would tend to indicate that an opposite result should have been reached. In view of the mandatory character of the language of the present constitution, and especially considering the fact that it superseded the permissive language which appeared in the 1848 Constitution,[5] it would seem that the Supreme Court has been denied any discretion in the matter of acceptance or refusal of jurisdiction in any of those cases which the present constitution places within the sphere of the original jurisdiction of that tribunal. Notwithstanding this, the Illinois Supreme Court has consistently maintained that the mandatory "shall have jurisdiction" does not deprive it of a discretion in such matters and that original cases must still conform to certain requirements before it will take jurisdiction in such matters.[6] Along that line, the court has always considered the presence of

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

3 Ill. Rev. Stat. 1951, Vol. 1, Ch. 65, § 22. See also People ex rel. Barrett v. Bartley, 383 Ill. 437, 50 N. E. (2d) 517 (1943).

4 People v. Loftus, 400 Ill. 432, 81 N. E. (2d) 495 (1948).

5 Ill. Const. 1848, Art. V, § 5.

6 Original jurisdiction in revenue cases is refused unless the controversy involves a public interest, is between a taxing authority and a taxpayer, and involves the collectability of the tax: North Chicago Hebrew Congregation v. Board of Appeals, 358 Ill. 549, 193 N. E. 519 (1934). Original jurisdiction in mandamus is taken only if the public interest in involved, People ex rel. Kocourek v. City of Chicago, 193 Ill. 507, 62 N. E. 179 (1901), and not even then if a fact issue is presented: People ex rel. Damron v. McCormick, 106 Ill. 184 (1883).

a disputed fact question in an original proceeding to be one of those characteristics which will operate to deprive it of its power to determine the case.[7]

Because the court has failed to elaborate on the point, it can only be supposed that the rule is an arbitrary one designed for the court's convenience alone, especially since the hearing on a petition for a writ of habeas corpus is essentially a summary one, to be conducted by the court without a jury, and there is no likelihood that the court would experience difficulties of the type which probably would be encountered if trial by jury were necessary.[8] The court said it was "foreclosed from determining the issue of fact" raised by the case before it.[9] That statement is without logical support, other than in the court's own self-imposed limitations, for the court does take testimony and receive other evidence, through the medium of a commissioner, when it hears original proceedings for disbarment or for contempt of court.[10] True, there is no express statutory provision for the appointment of a commissioner to take testimony in reference to original petitions for habeas corpus, but the court has the power to appoint commissioners, if needed, under its authority to make and adopt appropriate rules,[11] and it has used the services of commissioners in the past.[12]

There is no doubt that the circuit courts of the state are vested with an equivalent jurisdiction in habeas corpus matters,[13] for the original jurisdiction of the Illinois Supreme Court is not exclusive, but any argument based on that fact would fail to sustain the position taken by the court. Under the constitution, it is the relator who is given the right to select the tribunal in which he will institute his proceeding. Considering the nature and the importance of the writ of habeas corpus, it would seem to be the right of the relator to have his case heard, not dismissed, and the arguments offered by the court to sustain its position are weak indeed. If the

7 See cases cited in notes 4 and 6, ante.

8 39 C. J. S., Habeas Corpus, § 101, pp. 682-3. The summary character of the proceeding is emphasized in Ill. Rev. Stat. 1951, Vol. 1, Ch. 65, § 19.

9 409 Ill. 553 at 556, 101 N. E. (2d) 100 at 101.

10 See, for example, In re McCallum, 391 Ill. 400, 64 N. E. (2d) 310 (1946), and People ex rel. Illinois State Bar Association v. People's Stock Yards State Bank, 344 Ill. 462, 176 N. E. (2d) 901 (1931).

11 Ill. Rev. Stat. 1951, Vol 2, Ch. 110, §§ 126 and 259.59.

12 It is true that the authority of the Illinois Supreme Court to utilize the services of commissioners to draft opinions in cases pending before it on review, a practice which existed from 1927 to 1933, was based on Laws 1927, p. 392, and the several renewals thereof. No similar statutory authority exists for the appointment of commissioners in other cases. Denial of the right to trial by jury, and to the utilization of the services of commissioners, in habeas corpus proceedings instituted in federal courts rests on 28 U. S. C. A. § 2243, formerly 28 U. S. C. A. § 461: O'Keith v. Johnston, 129 F. (2d) 889 (1942), cert. den. 317 U. S. 680, 63 S. Ct. 161, 87 L. Ed. 546 (1942).

13 Ill. Const. 1870, Art. VI, § 12; Ill. Rev. Stat. 1951, Vol. 1, Ch. 65, § 2.

court believes that it is truly powerless to act in the matter without the aid of enabling legislation, it should exercise its constitutional function by reporting that fact to the Governor so that he might incorporate the necessary recommendation in his message to the legislature.[14]

LIMITATION OF ACTIONS—LIMITATIONS AS AGAINST STATE, MUNICIPALITY, OR PUBLIC OFFICERS—WHETHER TIME LIMITATION PROVISIONS OF PROBATE ACT RELATING TO FILING OF CLAIMS ARE BINDING ON STATE—In the recent case of *In re Bird's Estate*,[1] the Illinois Supreme Court was faced with the problem of whether a *nunc pro tunc* order would be proper where the records of a probate court were entirely silent as to an allegedly lost claim. The decedent there had received public assistance from the Illinois Public Aid Commission pursuant to the Old Age Pension Act.[2] After the nine-month period for filing claims against decedent's estate had expired,[3] the commission petitioned for leave to file a claim *nunc pro tunc* as a lost record. The probate court allowed the petition and it was upheld by the circuit court. On direct appeal to the Supreme Court, by reason of the fact that the public revenue was involved, that court also held the *nunc pro tunc* order proper.

The power of courts to restore records which have been lost, even though the court docket is silent on the subject, is supported by the case of *Hickey* v. *Hickey*.[4] If the instant case decided nothing more than that it would be lacking in significance. The more important matter therein relates to the discussion of the question as to whether or not a state agency is bound by the time-limitation provision of the Probate Act. The court treated the issue as one involving the question of whether or not the particular statutory section amounts to a general statute of limitation which would be inapplicable to the state unless expressly declared to be applicable.[5] While recognizing an apparent conflict, at least in phraseology, among its former decisions, the court held the case of *Durflinger* v. *Arnold*,[6] based on an earlier statute, to be controlling. That case had reached the conclusion that the provision was not a general statute of limitation as it did not totally bar claims against a decedent's estate but did, for example,

14 Ill. Const. 1870, Art. VI, § 31, and Art. V, § 7.

1 Sub. nom. Illinois Public Aid Commission v. Sanderson, 410 Ill. 390, 102 N. E. (2d) 329 (1951).

2 Ill. Rev. Stat. 1951, Vol. 1, Ch. 23, § 440—1, et seq. Section 440—4 thereof authorizes the filing of a claim to recover the amount expended for old age assistance.

3 Ibid., Vol. 1, Ch. 3, § 204.

4 295 Ill. App. 67, 14 N. E. (2d) 688 (1938).

5 Clare v. Bell, 378 Ill. 128, 37 N. E. (2d) 812 (1941).

6 329 Ill. 93, 160 N. E. 172 (1928).

allow the assertion of claims, after the expiration of the nine-month period, against heirs and distributees or against after-discovered and non-inventoried assets. Such being the case, the court indicated that the time-limitation provision in question was to be deemed no different than other substantive rules of law, applicable alike to the sovereign state and to private individuals.[7] It may be noted, therefore, that the enactment of the present Probate Act has done nothing to change the law on the point.

MASTER AND SERVANT—THE RELATION—WHETHER OR NOT CONDONATION OF EMPLOYEE'S VIOLATION OF DUTY PREVENTS SUBSEQUENT DISCHARGE FOR SAME MISCONDUCT—The question of an employer's right to discharge an employee for violations of duty, said to have been condoned with the employer waiving his right to discharge for such acts, was before the Appellate Court for the First District in the case of *Schaffer* v. *Park City Bowl, Inc.*[1] Plaintiff there had been hired for one year to manage a skating rink on a written contract calling for a set wage plus a percentage of the profits. Two months after plaintiff entered upon his duties complaints reached the defendant from the patrons of the rink concerning the alleged wrongful acts. The defendant's officers thereupon spoke to the plaintiff concerning these acts and plaintiff promised to conduct himself and the business properly thereafter. Plaintiff was allowed to continue in his employment for one month and was then barred from entering the premises and was discharged. On suit for breach of contract, defendant claimed the discharge was justified because of plaintiff's previous misconduct. On trial without a jury, the lower court found for the defendant but, on appeal from that judgment, the Appellate Court reversed, holding that the retention of the plaintiff for one month after notice of the breach of duty amounted to a condonation and a waiver of the right to discharge for the prior misconduct.

Surprisingly enough, for an industrial and commercial state like Illinois, very few cases of condonation of contractual misconduct in relation to employment matters have arisen.[2] The law is, however, well settled throughout the country that an employer may, by retaining an employee after violations of duty, condone the acts complained of and waive the right to discharge for those acts.[3] But just what acts amount to condona-

7 See also People v. Small, 319 Ill. 437, 150 N. E. 435 (1925).

1 345 Ill. App. 279, 102 N. E. (2d) 665 (1951).

2 One possible reason may be the fact that, at least in large industries, matters of this character are usually covered by collective bargaining agreements and grievance procedures. Disputes arising thereunder, if not amicably adjusted, are typically resolved by arbitration rather than by litigation.

3 See, for example, Butterick Publishing Company v. Whitcomb, 225 Ill. 605, 80 N. E. 247, 8 L. R. A. (N. S.) 1004 (1907).

tion, or what time period must elapse before the employer can be said to have condoned the act, are situations which the court must face as the cases arise. The defendant claimed that an employer is entitled to overlook breaches of duty on the part of the servant, hoping for reformation, and if disappointed may then terminate the contract. That position had been taken by a New York court in the case of *Gray* v. *Shepard,*[4] upon which the defendant relied, but the Appellate Court in the instant case, while agreeing with that doctrine, pointed out that it applies only when the employee continues, or repeats, the acts originally complained of as constituting a breach of duty. As the defendant in the instant case offered no proof of any additional wrongful acts on the part of the plaintiff from the time he was admonished until the time of his discharge, the rule of that case was held to be inapplicable.

While not laying down any set rule as to when retention will become a condonation and a waiver, the Appellate Court did indicate that a retention for one month after knowledge of the breach of duty was a sufficient time period under the prevailing facts. The case should, therefore, serve as a warning to employers that, although they need not discharge an employee immediately upon knowledge of his breach of duty, they had best not delay too long or they will be apt to find themselves being sued for breach of the employment contract.

WORKMEN'S COMPENSATION—PROCEEDINGS TO SECURE COMPENSATION—WHETHER PERIOD OF LIMITATION IS EXTENDED BY PAYMENT OF COMPENSATION FROM A FUND TO WHICH EMPLOYER AND EMPLOYEE HAVE CONTRIBUTED —In the recent case of *International Harvester Company* v. *Industrial Commission,*[1] the Supreme Court of Illinois had to decide the question of whether a claim for workmen's compensation had in fact been presented within the statutory period.[2] The employee there concerned had sustained an injury during the course of his employment. During the period of his disability he applied for, and received, benefits from an employee's benefit association, one primarily established to provide compensation for those employees who might suffer an injury or an illness not covered by the Workmen's Compensation Act and supported by funds contributed by both the employer and its employees. More than a year after the date of

4 147 N. Y. 177, 41 N. E. 500 (1895).

1 410 Ill. 543, 103 N. E. (2d) 109 (1951). Schaefer, J., wrote a dissenting opinion concurred in by Bristow and Hersey, JJ.

2 Ill. Rev. Stat. 1949, Vol. 1, Ch. 48, § 161, provides that an application for compensation must be made within one year from the date of injury or, where compensation has been paid, within one year from the date of the last payment of compensation. The provision is now embodied in Ill. Rev. Stat. 1951, Vol. I, Ch. 48. § 138.6.

his injury, but within one year from the receipt of the last benefit payment, the employee filed a claim for workmen's compensation. The claim was allowed by the commission and was confirmed by a judgment of the circuit court over the protest of the employer. On writ of error, the Supreme Court, divided four to three, reversed the award on the ground that payment of benefits from an allegedly independent fund to which the employee had contributed was not to be regarded as the equivalent of a voluntary payment of compensation within the meaning of the Workmen's Compensation Act so as to extend the statutory period within which to institute proceedings.

Payment of wages by the employer, whether in whole or in part, especially when not coupled with a denial of liability, has long been held in Illinois to be the equivalent of a recognition of a right to compensation so as to prevent the tolling of what would generally be deemed to be a period of limitation.[3] The precise question involved in the instant case, however, has not appeared before an Illinois court prior to this time and there still exists a large and undefined area on the subject notwithstanding the aforementioned principle. It would appear that payments unrelated to the Workmen's Compensation Act, and inconsistent with any acknowledgment regarding its application, should not be treated as payments of compensation of a type sufficient to negate the limitation provision of the statute.[4] It would, then, seem to follow that payments made by a stranger would be equally ineffective for the purpose.

In line therewith, the majority of the court stressed the fact that the employee was not paid by the employer but by an independent association whose purpose it was to compensate those employees whose disabilities were not covered by the act. Superficially, at least, there was a distinction in law between the employing corporation on the one hand and the benefit fund on the other. The dissenting opinion, however, observed the situation in a more practical light. It pointed to the fact that both the benefit fund and the employee compensation claims were administered by the same office and by the same group of employees. It also noted that the claimant had made a specific request for compensation and had been told that benefits paid by the association would be larger, per week, than compensa-

3 United Air Lines, Inc. v. Industrial Commission, 364 Ill. 346, 6 N. E. (2d) 487 (1936); Marshall Field & Co. v. Industrial Commission, 305 Ill. 134, 137 N. E. 121 (1922). As to the right of the employer to claim credit for payments so made against the compensation eventually allowed, see Olney Seed Co. v. Industrial Commission, 403 Ill. 587, 88 N. E. (2d) 24 (1949), noted in 28 CHICAGO-KENT LAW REVIEW 178.

4 In Diamond T Motor Car Company v. Industrial Commission, 378 Ill. 203, 37 N. E. (2d) 782 (1941), for example, the claimant received $11.50, along with an express statement denying liability, several years after an injury in which he lost the sight of one eye. It was held that the payment was not compensation within the meaning of the pertinent section of the Workmen's Compensation Act.

tion payments.[5] In addition, although fully informed, the corporation had never denied its obligation to provide compensation payments and may, to that extent, have lulled the employee into a false belief as to the nature of his rights. There is, then, much in favor of the minority view. If there is merit to the decision pronounced by the majority, it lies in the fact that it neither upsets nor reverses prevailing principles but serves as an effective guide to define the limits thereof.

[5] Evidence showed that the company physician asked the employee if he would "rather draw $18.50 as compensation, or $20 or $22 a week as he was then drawing." See 410 Ill. 543 at 548-9, 103 N. E. (2d) 109 at 112. Actually, the overall total of workmen's compensation payments due exceeded the sum paid out by the benefit fund.