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ADOPTION—NOTICE—WHETHER GODMOTHER, IN CASE OF LACK OF PARENTS, GUARDIAN, OR NEXT OF KIN, IS ENTITLED TO NOTICE OF PROCEEDINGS TO ADOPT A MINOR CHILD—Few cases have yet arisen to elaborate upon the provisions of the revised Adoption Act enacted in Illinois in 1945,[1] but the holding in *People ex rel. Smilga* v. *Hoyer*[2] throws light on the parties who are entitled to notice, pursuant to the statute, of the pendency of proceedings to adopt. The case was one in which it appeared that a war-time waif, born in Latvia and placed in a state foundling home at an early age, eventually was brought to this country, after many hazardous evacuations, and finally was adopted under a decree of an Illinois court entered in 1951. Shortly thereafter, the petitioner, who had served as a nurse's aide at the foundling home, had accompanied the child in its war-time journeyings, had saved its life on at least two occasions, and had caused the child to be baptized while acting as godmother at that ceremony, instituted habeas corpus proceedings to secure custody of the child and also sought to vacate the adoption decree. Her proceedings were based on the claim that the adoption decree was void for failure to furnish her with statutory notice.[3] Relief was denied in the trial court when it was made to appear, by motion to strike the petition, that petitioner had, at no time, been financially responsible for the care of the adopted child,[4] although she had physically cared for it, hence was not entitled to notice. The Appellate Court for the First District, on appeal by petitioner, while recognizing the deep religious significance of the relationship of godmother and godchild existing between petitioner and the child, affirmed the decision.

Under the Illinois statute, the adoption petition must, among other things, contain (1) the name of the person or organization having legal custody; (2) the names of the parents, or that of the surviving parent, if any; or (3) in default thereof, the name of the guardian if one has

[1] Laws 1945, p. 10; Ill. Rev. Stat. 1951, Vol. 1, Ch. 4, § 1—1, et seq. See, however, Dickholtz v. Litfin, 341 Ill. App. 400, 94 N. E. (2d) 89 (1950), noted in 29 CHICAGO-KENT LAW REVIEW 183, and Petition of Thompson, 337 Ill. App. 354, 86 N. E. (2d) 155 (1949), noted in 27 CHICAGO-KENT LAW REVIEW 308, on the question of the right to withdraw an executed consent to adoption.

[2] Sub nom. Klabis v. Hoyer, 345 Ill. App. 365, 103 N. E. (2d) 378 (1952).

[3] Ill. Rev. Stat. 1951, Vol. 1, Ch. 4, § 2—1, specifies the parties to the adoption proceedings and requires service of summons on all who are residents and who have not given written consent in the form designated by Section 3—6.

[4] It was alleged therein that, from the time the child left the foundling home until placed with respondents, the financial obligation for its care had been met by military or charitable organizations. See 345 Ill. App. 365 at 371, 103 N. E. (2d) 378 at 381.

been appointed or, if not, that of a near relative.[5] It is clear that the statute does not expressly refer to godparents, just as it is clear that the petitioner did not fall into any of the categories mentioned. Reliance was placed by petitioner on a claim that she had acted *in loco parentis* and, for that reason, was entitled to be treated as a party to the proceeding. Being unable to find that the petitioner had assumed the financial burden of the parental relationship,[6] the court refused to countenance that claim. There has, however, been a tendency, at least in connection with war risk insurance matters, to break away from the technical elements of the *in loco parentis* relationship,[7] so the court, had it seen fit to do so, could have achieved a different result with some justification for the holding.

DEATH—DAMAGES, FORFEITURE OR FINE—WHETHER OR NOT A WIDOW MAY SECURE REIMBURSEMENT FOR MEDICAL AND FUNERAL EXPENSES OF HER HUSBAND FROM THE TORT-FEASOR WHO CAUSED THE INJURY AND SUBSEQENT DEATH OF THE SPOUSE—A novel fact situation was presented in the case of *Thompson* v. *City of Bushnell*,[1] one wherein the plaintiff, in her capacity as widow and not as administratrix of her deceased husband's estate, sued a municipal corporation to recover for medical, hospital, nursing and funeral expenses furnished her husband as a result of injuries caused by the negligence of the defendant. On motion of the defendant, the trial court ordered the complaint dismissed on the apparent belief it failed to state a cause of action.[2] On appeal to the Appellate Court for the Third District, that court reversed and remanded the cause for further proceedings noting, as it did so, that the precise question had never before been presented to an Illinois reviewing tribunal.

The argument in the case was confined to the question of whether or not the plaintiff, in her capacity as widow, had the right to bring the instant action for the particular type of damages claimed. Referring to an earlier Illinois case which had upheld the right of a husband to recover from a tort-feasor who had fatally injured the wife for losses incurred by reason of being put to expense for medical treatment and the

5 Ill. Rev. Stat. 1951, Vol. 1, Ch. 4, § 1—2.

6 In 46 C. J., Parent and Child, § 174, p. 1334, the phrase *in loco parentis* is defined to indicate one "who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relationship, without going through the formalities necessary to a legal adoption."

7 See, for example, Zazove v. United States, 156 F. (2d) 24 (1946), noted in 25 CHICAGO-KENT LAW REVIEW 150, to the effect that the relationship may arise between adult persons.

1 346 Ill. App. 352, 105 N. E. (2d) 311 (1952).

2 Ill. Rev. Stat. 1951, Vol. 2, Ch. 110, § 169, authorizes dismissal if the complaint fails to state a cause of action.

eventual funeral of his spouse,[3] and adopting the reasoning of the Supreme Court of Oregon in *Hansen* v. *Hayes*,[4] the Appellate Court decided that, where a "family expense" statute, as in Illinois, imposes the burden of family expenses on the husband and the wife, or either of them,[5] the liability imposed upon the wife for medical care and funeral expense of her husband is not a consequential but a direct result of the tort-feasor's act, entitling the widow to a parallel recovery with that which would be granted to the husband under the converse of the situation presented.

In matters of this nature, the action is more typically brought by the surviving spouse in his or her capacity as legal representative of the decedent's estate and the suit is generally predicated upon the "wrongful death" statute.[6] In that form of action, the plaintiff is limited to damages arising from the pecuniary loss sustained by reason of the death and is precluded from collecting any of the nursing and medical expenses which have been incurred in the treatment of the deceased.[7] The present decision indicates a possible basis for recovering these losses also in a proper suit but it does not indicate the effect a verdict or judgment therein would have upon an action for wrongful death if, and when, brought by the legal representative.

Where a subsequent action is brought between the same parties as those involved in a prior action, based upon the same transaction but asserting a different cause of action, claim, or demand, it is well-settled law that the judgment in the first suit operates as an estoppel as to any point or question actually litigated and determined in that suit.[8] This principle, sometimes called estoppel by verdict, is equally available to either party as the circumstances may warrant. It is apparent, then, that a court could well listen to an argument in favor of an estoppel on such matters as relate to the question of negligence or other material facts in a later wrongful death action if a valid and subsisting judgment has previously been obtained in a suit to recover medical and funeral expenses. The converse should also be true for, of necessity, the earlier decision would have involved a determination of the fundamental question relating to the existence of negligence and other material facts.

Whether or not such an argument would be favorably received is still a matter of some conjecture, but the reasoning in its support is persuasive. As a matter of tactics, therefore, a plaintiff's bargaining power in the

[3] Nixon v. Ludlam, 50 Ill. App. 273 (1893).
[4] 175 Ore. 358, 154 P. (2d) 202 (1944).
[5] Ill. Rev. Stat. 1951, Vol. 1, Ch. 68, § 15.
[6] Ibid., Ch. 70, §§ 1-2.
[7] Holton v. Daly, 106 Ill. 131 (1882).
[8] Harding v. Harding, 352 Ill. 417, 186 N. E. 152 (1933).

settlement of a wrongful death claim might be endangered by a judgment against him in a suit to recover the medical and funeral expenses, or could be enhanced by an earlier judgment in his favor in such a suit. The defendant should likewise be conscious of this fact, and not treat the suit of a spouse to recover medical and funeral expenses with light regard as being relatively unimportant, because of the effect such a suit might have on the more substantial claim apt to arise from the alleged wrongful death.

DISMISSAL AND NONSUIT—INVOLUNTARY DISMISSAL—WHETHER STATUTE PRESCRIBING TERMS UNDER WHICH COURT MAY DISMISS PROCEEDING FOR WANT OF PROSECUTION IS CONSTITUTIONAL—There is occasion to believe, from the holding in the recent case of *Agran* v. *Checker Taxi Company*,[1] that the Illinois Supreme Court is reviving interest in its rule-making powers, at least to the extent of preventing the legislature from exercising those powers for it. The case was one for personal injury allegedly suffered at the hands of the defendant. The trial court, without observing the provisions of the recently enacted statute purporting to prevent dismissal for want of prosecution without warning,[2] ordered the suit dismissed when plaintiff failed to respond at the trial call. Plaintiff seasonably moved to reinstate the case, urging a misprison of the clerk in failing to give the notice required by statute, but was met by defendant's claim that the statute was unconstitutional. The trial court, agreeing with defendant, declared the statute invalid and refused to reinstate the case. On direct appeal to the Supreme Court because of the constitutional issue,[3] that court affirmed the holding on the ground the statute represented a direct legislative usurpation of the judicial power.[4]

Inasmuch as the legislative addition to the Civil Practice Act under consideration did regulate, in intimate detail, the procedure to be followed in the execution of judicial business, the provision in question[5] did represent an attempt by the legislature to control the work done by the judicial department. It could be said, in that regard, that every legislative en-

1 412 Ill. 145, 105 N. E. (2d) 713 (1952).

2 Laws 1951, p. 1707; Ill. Rev. Stat. 1951, Vol. 2, Ch. 110, § 172, § 174(6), and § 174a.

3 Ill. Rev. Stat. 1951, Vol. 2, Ch. 110, § 199.

4 Separation of the powers of government among the three departments is directed by Ill. Const. 1870, Art. III, with the added injunction that "no . . . one of these departments, shall exercise any power properly belonging" to either of the others.

5 The case specifically concerned Section 50a of the Civil Practice Act, Ill. Rev. Stat. 1951, Vol. 2, Ch. 110, § 174a, but the court noted that the amendments made to Sections 48 and 50 by the same statute were subject to the same criticism: 412 Ill. 145 at 150-1, 105 N. E. (2d) 713 at 716.

actment prescribing procedural methods would be open to the same objection except for the fact that the court purported to see a difference in those situations where the laws enacted do "not unduly infringe" upon the inherent judicial power.[6] As the court said nothing on the point of the inherent justice or injustice in the purpose underlying the statute so stricken down, and there should be a measure of relief against the unexpected and unanticipated default judgment for failure to respond after the case has reached the trial calendar, there is reason to believe that the court ought, under its acknowledged rule-making power,[7] revive the idea by embodying it in an appropriate rule.

RELEASE—CONSTRUCTION AND OPERATION—WHETHER A RELEASE TO ONE JOINT TORT-FEASOR IN A PENDING STATUTORY ACTION OPERATES AS SATISFACTION OF A COMMON-LAW JUDGMENT AGAINST ANOTHER JOINT TORT-FEASOR—Recently, in the case of *Zboinsky* v. *Wjocik*,[1] plaintiffs alleged that the lessor of a certain dram shop and his son, having become intoxicated as patrons, did, as a result of such intoxication, commit an assault upon the plaintiff husband, thereby causing permanent disability to the husband and a loss of support to the wife. The complaint, in three counts, asserted two statutory causes of action under the Dram Shop Act against the dram shop operator, the lessor, and his son as joint tort-feasors,[2] and a third based on a common-law cause of action for assault against the lessor and his son. Severance of the common-law action was granted and a trial thereon resulted in a verdict for the plaintiffs against the son but an acquittal of the lessor. Subsequent to judgment on that verdict, but prior to trial of the statutory actions, plaintiffs executed and delivered to the lessor and operator a general release of all claims growing out of the assault. In his petition in the nature of a writ *audita querela* to quash a *capias ad satisfaciendum* which issued against him, the judgment debtor contended that the release given to one joint tort-feasor operated as a release of all joint tort-feasors. He therefore prayed that the judgment entered against him be ordered satisfied of record. The trial court granted this petition and the judgment creditor appealed. The Appellate Court for the First District reversed on the ground that,

[6] Apparently, any statute designed to relieve the court of hampering influences growing out of earlier practice and procedure would receive approval if not unconstitutional for other reasons. See, for example, the provisions regulating voluntary nonsuit: Ill. Rev. Stat. 1951, Vol. 2, Ch. 110, § 176, which have received approval and application in many instances, of which Gilbert v. Langbein, 343 Ill. App. 132, 98 N. E. (2d) 140 (1951), is but one illustration.

[7] Ill. Rev. Stat. 1951, Vol. 2, Ch. 110, § 126.

[1] 347 Ill. App. 226, 106 N. E. (2d) 764 (1952).

[2] Ill. Rev. Stat. 1951, Vol. 1, Ch. 43, § 94 et seq.

at the time of the release, the judgment debtor was no longer a joint tort-feasor, hence the rule in question did not apply.

Where there is no question as to the nature of the joint liability, it is generally well settled in Illinois that a release of one joint tort-feasor does operate as a release of all[3] and, for this purpose, it is immaterial that the joint liability is based in part on statutory law and in part on common law.[4] In the instant case, one involving multiple causes of action for a single indivisible injury, the court seems not to have rejected the general doctrine but to have arrived at a conclusion of its non-applicability on the ground that at the time the release was executed and delivered the respondent was no longer a joint tort-feasor, at least as to the cause of action upon which judgment was rendered, but was rather a judgment debtor of record,[5] any prior cause of action having become merged in the judgment from the date thereof. The case of *Leslie* v. *Bonte*,[6] on which the court relied, did hold that the note there concerned, which was the basis on which a judgment had been rendered, had become merged in the judgment so that a subsequent suit on the same note would be improper as, in essence, the note no longer existed. The court therein cited *Wayman* v. *Cochrane*[7] which had declared that it was the general rule, in law or equity, that a contract or instrument upon which the proceeding was based became entirely merged in the judgment. In the instant case, however, the court, in the light of the authorities relied upon, failed to distinguish sharply between the cause of action and that which is the basis of the cause of action.[8]

Dicta in *Boynton* v. *Ball*[9] intimates that every cause of action will, if recovered upon, merge into the judgment or decree but it was there held that a debt which existed prior to proceedings in bankruptcy, but which proceeded to judgment subsequent to bankruptcy, was not removed by the bankruptcy decree since, having become merged in the judgment, it represented a new debt created subsequent to bankruptcy. The Supreme Court of the United States reversed that holding on the ground that, notwithstanding the change in form by merger, the claim still remained the same debt for which action had been brought in the state court. That holding has not been altered. There is no Illinois case in

3 Welty v. Laurent, 285 Ill. App. 13, 1 N. E. (2d) 577 (1936).

4 McClure v. Lence, 345 Ill. App. 158, 102 N. E. (2d) 546 (1951), noted in 30 CHICAGO-KENT LAW REVIEW 273; Manthei v. Heimerdinger, 332 Ill. App. 335, 75 N. E. (2d) 132 (1947), noted in 26 CHICAGO-KENT LAW REVIEW 358.

5 49 C. J. S., Judgments, § 6, p. 30.

6 130 Ill. 498, 22 N. E. 594, 6 L. R. A. 62 (1887).

7 35 Ill. 152 (1864).

8 Doerr v. Schmidt, 375 Ill. 470, 31 N. E. (2d) 971 (1941).

9 105 Ill. 627 (1883), reversed in 121 U. S. 457, 7 S. Ct. 981, 30 L. Ed. 985 (1887).

point involving the view to be taken as to an antecedent tort liability but, as the court in the instant case relies entirely on assumpsit cases to support its view, it is reasonable to conclude that the decision stands on tenuous grounds.

SOCIAL SECURITY AND PUBLIC WELFARE—UNEMPLOYMENT COMPENSATION—WHETHER OR NOT THE TERM "AVAILABLE FOR WORK", AS USED IN THE ILLINOIS UNEMPLOYMENT COMPENSATION ACT, INCLUDES CERTAIN "RETIRED" EMPLOYEES—In the recent case of *Fleiszig* v. *Board of Review of Division of Unemployment Compensation of Department of Labor*,[1] the Illinois Supreme Court was faced with the problem of determining whether or not a "retired" employee could be deemed entitled to benefits under the Illinois Unemployment Compensation Act.[2] The plaintiff therein and three other former employees of a mining company had there filed claims for unemployment benefits. The evidence showed that the claimants were sixty-five years of age or older; had ceased working when the mine had been closed for lack of work; had been receiving a pension under a plan set up by their union;[3] and had collected social security payments under the federal Social Security Act. Upon the basis of these facts, the claims were denied by the claims deputy and, after claimants had exhausted administrative remedies, the matter reached the circuit court which affirmed the denial. On direct appeal to the Illinois Supreme Court,[4] that court also affirmed the denial of benefits on the ground the claimants had made an inadequate canvass of the labor market[5] and, in addition, were not "available for work" within the terms of the statute.[6]

There appears to be a unanimity of opinion among the various state courts as to the definition of the term "available for work" as used in state unemployment laws. Generally, the definition calls for a genuine attachment to the labor market plus being ready, willing and able to

1 412 Ill. 49, 104 N. E. (2d) 818 (1952).

2 Ill. Rev. Stat. 1951, Vol. 1, Ch. 48, § 300 et seq. Section 420(c) thereof, similar to Ill. Rev. Stat. 1947, Ch. 48, § 222(c), under which the case arose, defines the unemployed individual who is entitled to benefits.

3 The pension plan provided that the proposed pensioner had to "actually retire" to be eligible for the benefits thereof.

4 Ill. Rev. Stat. 1951, Vol. 1, Ch. 48, § 520, provides for direct appeal.

5 Ibid., § 433. The evidence showed meager attempts by claimants to find light janitorial work in one or two instances but not until after each had filed a claim for benefits. On the subject of attachment to the labor market, see Mohler v. Department of Labor, 409 Ill. 79, 97 N. E. (2d) 762 (1951).

6 Ibid., § 420(c). The court stated that an application for "retirement benefits and old-age assistance" is "evidence of an intention to retire from gainful labor. . . . The acceptance and retention of a pension, conditioned on the fact of retirement . . . is sufficient in itself to bar a claimant from recovering unemployment compensation." 412 Ill. 49 at 52-3, 104 N. E. (2d) 818 at 820.

accept suitable work, which the claimant does not have good cause to refuse.[7] The problem, however, is not so much in definition as it is in application of the definition. Concededly, the facts and circumstances must control in each case,[8] but enough instances are developing to give content to the definition. In *Mohler* v. *Department of Labor*,[9] for example, the Illinois Supreme Court decided that a mere willingness to work was not sufficient but that an actual ability to work at a point where an available labor market existed was required. Under the instant decision, it appears that retirement affords another instance of non-availability provided such retirement conclusively shows an intention to actually withdraw from the labor market. The court did refer to a Pennsylvania decision, that of *Keystone Mining Company* v. *Unemployment Compensation Board of Review*,[10] wherein it was held that the receipt of pension payments does not necessarily bar a claim for unemployment compensation benefits, provided other requirements of the law are met. In the Pennsylvania case, however, the pension plan did not, as in the instant case, demand an actual retirement from the labor market in order to entitle the employee to the benefits thereof. These seemingly inconsistent decisions should, therefore, be viewed with care before too much reliance is placed on either holding.

STATUTES—SUBJECTS AND TITLES OF ACTS—WHETHER OR NOT A PENAL PROVISION IN THE ILLINOIS ACT TO MAKE UNIFORM THE LAW RELATING TO TRUST RECEIPTS IS VOID FOR FAILURE TO EXPRESS THE SUBJECT MATTER THEREOF IN THE TITLE—In the recent case of *People* v. *Levin*[1] the defendant was indicted for failure to pay over the amount collected under a trust receipt in violation of a provision of the Illinois statute dealing therewith.[2] The defendant was a used car dealer and the subject of the trust receipt was an automobile which the dealer sold to a third party in exchange for money and personal property but which proceeds the defendant failed to turn over to the entruster. A motion to quash the indictment was filed based on the claim that the statute in question was unconstitutional and was, therefore, inadequate to support a charge of crime. Constitutionality of the statute was questioned on two grounds,

[7] Reger v. Administrator, 132 Conn. 647, 46 A. (2d) 844 (1946); Mohler v. Dept. of Labor, 409 Ill. 79, 97 N. E. (2d) 762 (1951); Leonard v. Unemployment Compensation Board, 148 Ohio St. 419, 75 N. E. (2d) 762 (1947).

[8] Fleiszig v. Board of Review, 412 Ill. 49, 104 N. E. (2d) 818 (1952); Mohler v. Dept. of Labor, 409 Ill. 79, 97 N. E. (2d) 762 (1951); Leonard v. Unemployment Compensation Board, 148 Ohio St. 419, 75 N. E. (2d) 762 (1947).

[9] 409 Ill. 79, 97 N. E. (2d) 762 (1951).

[10] 167 Pa. Super. 256, 75 A. (2d) 3 (1950).

[1] 412 Ill. 11, 104 N. E. (2d) 814 (1952).

[2] Ill. Rev. Stat. 1951, Vol. 2. Ch. 121½, § 183.

to-wit: (1) it provided for imprisonment for debt,[3] and (2) the title of the act, designed to make uniform the law relating to trust receipts, failed to refer to any criminal penalty, in violation of the Illinois Constitution.[4] The motion to quash was sustained and the defendant was discharged. On writ of error issued on behalf of the state,[5] taken directly to the Illinois Supreme Court both because the constitutionality of a statute and a charge of felony was involved,[6] that court upheld the ruling of the trial judge and declared the section of the statute in question to be unconstitutional on the second of the grounds mentioned.

It is evident that the purpose expressed in the title of the statute under consideration was to make uniform the substantive law relating to trust receipts[7] and there is nothing in the title to fairly inform the reader of an intention to set forth a penalty for a violation of the terms of the act. It is also evident that Illinois is the only state which has fixed upon a policy of including a penal section in its enactment of the uniform statute on the subject.[8] As it is the ostensible purpose of the pertinent section of the 1870 Constitution to prevent just such an inclusion, the reasoning and conclusion attained by the court in the instant case is both clear and easily substantiated, following a comprehensive line of cases on the point.[9]

Since the decision operates to remove a strong deterrent to the conversion of trust receipt funds and weakens the security of the lender, except as that security is sustained by an appropriate civil action, an important question is raised as to whether the entruster has any equivalent protection under some other penal act. The basic relationship of the parties to a trust receipt transaction being that of debtor and creditor, it is from this fundamental concept that any alternative must be viewed. The trust receipt statute itself declares the relationship is not one of bailment,[10] which fact tends to eliminate the possibility of a charge of larceny by bailee. It is doubtful if there is a sufficient fiduciary or other

3 Ill. Const. 1870, Art. II, § 12.

4 Ibid., Art. IV, § 13.

5 The case illustrates one of the few instances under which the prosecution may secure review of a decision favoring the accused. See Ill. Rev. Stat. 1951, Vol. 1, Ch. 38, § 747.

6 Ill. Rev. Stat. 1951, Vol. 1, Ch. 38, § 780½, and Vol. 2, Ch. 110, § 199.

7 Although the title deviates from the one used in the Uniform Trust Receipts Act, set out in 9A U. L. A. 284, the text is generally modelled on the uniform statute.

8 See Heindl, "Trust Receipt Financing Under the Uniform Trust Receipts Act," 26 CHICAGO-KENT LAW REVIEW 197 (1948), at p. 267.

9 See, for example, People v. Clark, 301 Ill. 428, 134 N. E. 95 (1922), where a penal provision in a statute regulating the registration and operation of motor vehicles was held void as not being within the scope of the title.

10 Ill. Rev. Stat. 1951, Vol. 2, Ch. 121½, § 180.

necessary relationship to sustain an indictment for embezzlement[11] and, in the absence of a written false statement there would be little chance to maintain a prosecution for obtaining credit by false pretense.[12] Other possible offenses would also seem to be negatived by their very definition.

There would, then, appear to be occasion for the legislature to consider the passage of an amendment to the title of the act in question or else to consider the enactment of an equivalent penal section as a part of the criminal code itself. Inasmuch as all questions of policy appear to have been resolved in favor of protecting the entruster, the point is one which could be easily remedied.

[11] The holding in Davis v. Aetna Acceptance Co., 293 U. S. 328, 55 S. Ct. 151, 79 L. Ed. 393 (1934), would indicate the necessary fiduciary relationship would be wanting.

[12] See Ill. Rev. Stat. 1951, Vol. 1, Ch. 38, § 254.