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Business Organizations - Survey of Illinois Law for the Year 1951-1952

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SURVEY OF ILLINOIS LAW FOR THE YEAR 1951-1952*

I. BUSINESS ORGANIZATIONS

CORPORATIONS

THE INFORMALITY with which small corporations transact their affairs, particularly in the absence of legal advice, has been as productive of litigation as the act of the proverbial testator who drafts his own will and thereby provides a field day for lawyers at the expense of his estate. A startling illustration of this fact appears in the case of *Chapman v. Barton*,¹ one of two significant cases decided during the year which involved an issue of corporation law. It appeared therein that it had been the practice, at the annual meeting of the shareholders, to retain the board of directors for an additional term pretty much by agreement and without the formality of a written ballot. On the occasion in question, the majority shareholders proposed to act according to custom but a member of the minority demanded a ballot. The presiding officer, expressing lack of familiarity with the by-laws, said that he would secure legal advice and declared the meeting adjourned until a lawyer could be consulted. The minority group had, in the meantime, taken a written ballot among themselves and

* The present survey is not intended in any sense to be a complete commentary upon, or annotation of, the cases decided by the Illinois courts during the past year, but is published rather for the purpose of calling attention to cases and developments believed significant and interesting. The period covered is that of the judicial year, embracing from 409 Ill. 407 to 412 Ill. 309; from 344 Ill. App. 126 to 347 Ill. App. 182.

¹ 345 Ill. App. 110, 102 N. E. (2d) 565 (1951).

purported to elect a majority of the board of directors who, thereafter, took charge of the management of the company, discharged the former officers and, in general, seized possession of its affairs. A suit to enjoin the alleged conspiracy of the minority and, incidentally, to test the validity of the election so conducted, resulted in a decree ousting the directors chosen by the minority and that decree was affirmed, on appeal to the Appellate Court for the Fourth District, despite the objection that the election was valid and over the claim that a proceeding in the nature of quo warranto² would be the only proper remedy. That decision was attained on the basis of a distinction made between two earlier cases,³ a distinction turning on the matter of the good faith of the competing groups. In the absence of an appropriate use of the principle of cumulative voting,⁴ it was said to be an act of bad faith on the part of the minority to pursue their objective, especially after they had, to all intents and purposes, agreed to the adjournment of the annual meeting.

In the only other case of significance, that of *People ex rel. Barrett v. Annie Merner Pfeiffer Foundation*,⁵ an attempt was made to produce the dissolution of a corporation organized not for profit, one intended to support Korean educational institutions by endowment and annual gifts and to promote artistic and scientific relations between the United States and Korea, on the ground that the franchise had been obtained by fraud⁶ and because the corporation had, subsequent to organization, engaged in profit-making enterprises. The issue, however, arose on an appeal from

² Ill. Rev. Stat. 1951, Vol. 2, Ch. 112, § 9(a). The court relied on *Hall v. Woods*, 325 Ill. 114, 156 N. E. 253 (1927), to support its view that an equity court would have jurisdiction to enjoin unauthorized persons from interfering with the management of a domestic corporation.

³ Compare, for example, *West Side Hospital v. Steele*, 124 Ill. App. 534 (1906), with *Western Cottage Piano & Organ Co. v. Burrows*, 144 Ill. App. 350 (1908).

⁴ Ill. Rev. Stat. 1951, Vol. 1, Ch. 32, § 157.28, authorizes cumulative voting. The court in the instant case noted that, even if cumulative voting had been used, the minority group would have been unable to secure any greater representation on the board than it had previously enjoyed.

⁵ 345 Ill. App. 55, 102 N. E. (2d) 756 (1951).

⁶ See *People v. White Circle League of America*, 408 Ill. 564, 97 N. E. (2d) 811 (1951), noted in 30 CHICAGO-KENT LAW REVIEW 2-3, for a decision authorizing ouster where the not-for-profit corporation continues to violate the Criminal Code.

an interlocutory order appointing a liquidating receiver⁷ which the Appellate Court for the First District held erroneous on the ground that it had not been made to appear that dissolution of the corporation should eventually result as a penalty for the acts complained about.⁸ In arriving at that result, the court found no fraud had been charged merely because the corporation might, under its by-laws, make distribution of its assets among its members, for the by-laws in question were no broader in scope than the provisions of the statute under which the organization had been formed⁹ or which currently prevail.¹⁰ It was also of the opinion that any charge of commercialized activity on the part of the organization had been adequately refuted, at least on the basis of the pleadings on file, or if not, had been abandoned so as not to constitute a "continued" excess or abuse of the authority conferred by law.¹¹

PRINCIPAL AND AGENT

While the most noteworthy recent decision relating to the law of principal and agent can best be discussed elsewhere,¹² other agency cases furnish the basis for comment. One problem which has repeatedly plagued courts, both here and elsewhere, formed the subject of difficulty in the case of *Parotto v. Standard Paving Company*.¹³ The principal question concerned was one as to when and where an employee, who had departed from the path of his duties, could be said to have returned to the orbit of his em-

⁷ The order was based on Ill. Rev. Stat. 1951, Vol. 1, Ch. 32, § 163a54. The appeal from the interlocutory order rested on Ill. Rev. Stat. 1951, Vol. 2, Ch. 110, § 202.

⁸ Ill. Rev. Stat. 1951, Vol. 1, Ch. 32, § 163a53, authorizes an equity proceeding by the Attorney General only if it is "made to appear that liquidation . . . should precede the entry of a decree of dissolution" for the not-for-profit corporation.

⁹ Ill. Rev. Stat. 1937, Ch. 32, § 158 et seq.

¹⁰ Ill. Rev. Stat. 1951, Vol. 1, Ch. 32, § 163a25, authorizes distribution in case of dissolution, and *ibid.*, § 163a44, directs the order of distribution.

¹¹ See Ill. Rev. Stat. 1951, Vol. 1, Ch. 32, § 163a49, for the grounds for involuntary dissolution.

¹² See discussion of the case of *Tallios v. Tallios*, 345 Ill. App. 387, 103 N. E. (2d) 507 (1952), noted in 30 CHICAGO-KENT LAW REVIEW 343, dealing with the liability of the principal for a tort inflicted by the husband-agent on the wife of the latter, set out hereafter, Section V, Family Law, notes 20-2.

¹³ 345 Ill. App. 486, 104 N. E. (2d) 102 (1952), noted in 30 CHICAGO-KENT LAW REVIEW 370. Leave to appeal has been denied.

ployment so as to make the employer liable for an accident caused by the employee's negligent driving. The startling answer of the Appellate Court for the First District was that, even though the accident happened some four miles from the employer's garage and about seven hours later than the time when the employee should have returned the car for the night, the question of substantial deviation was not one to be decided as a matter of law but remained a question for the jury. The court made much of the fact that the employee, who had made the round of numerous taverns, had turned in the direction of the employer's garage when the accident occurred. It also advanced some new thoughts on the problem by stating that the deviation which would bar an employee from recovery under the Workmen's Compensation Act¹⁴ need not be as substantial as one which would be needed to bar a third party from a recovery against the employer. To permit the employee to recover from his employer for an injury received while returning from a "frolic" of his own, undertaken in violation of the terms of his employment, would allow him to take advantage of his own wrong. No such consideration would be present when a non-negligent third party suffered the injury.

The age-old problem of the "loaned servant" cropped up again in the case of *Henry v. Industrial Commission*.¹⁵ The corporation there concerned needed carpenters to remodel its elevator. It made an arrangement with a contractor, who was also a carpenter, to furnish the necessary men as and when needed. It designated the number of men who were to work each day and also instructed them as to the work to be done but they were paid their wages by the contractor who received reimbursement, plus a small differential, from the company. The extra payment was retained by the contractor for his services in picking up tools. When one of the workmen was injured on the job and sought compensation, the Supreme Court decided that he was an employee of the corporation, rather than of the contractor, hence could recover compensation from it.

¹⁴ Ill. Rev. Stat. 1951, Vol. 1, Ch. 48, § 138.1 et seq.

¹⁵ 412 Ill. 279, 106 N. E. (2d) 185 (1952).

Scope of the agency relationship was involved in the case of *Freeport Journal-Standard Publishing Company v. Ziv Company*,¹⁶ wherein a commercial manager of a radio broadcasting station was held to have apparent authority to enter into a radio transcription lease on behalf of the corporation which owned the radio station. Noting that the duties of the commercial manager included the selling of radio programs for the radio station, the court opined that, in order to sell such programs, the manager would necessarily have to have something in the way of material to sell, hence had ostensible authority to acquire the material in the first instance. The holding was strengthened by the fact that the general manager of the station, after learning of the transcription lease, did nothing about it for approximately six months and even then did not positively repudiate the transaction but merely questioned its wisdom. Such conduct clearly amounted to a ratification.

A principle all too often forgotten by some practitioners was reiterated by the Appellate Court for the First District in *Capitol Hardware Manufacturing Company v. Naponiello*.¹⁷ It was necessary there to repeat the proposition that, when an agent enters into a transaction on behalf of an undisclosed principal, the third party, having discovered the identity of the principal, may file a suit against both the agent and the principal but he must, before judgment, elect against which he will proceed for there can be no joint liability on the part of the agent and the principal under such circumstances.

From among the many brokerage cases usually found in the yearly grist of judicial labor, two should be mentioned. The first, that of *Hummel v. Thomas*,¹⁸ declares that where a real-estate broker has been engaged to secure a purchaser and has done so, he is entitled to his commission even though the offer of the prospective buyer fails to include a provision as to when possession is to be transferred, provided the omitted provision is added later

¹⁶ 345 Ill. App. 337, 103 N. E. (2d) 153 (1952).

¹⁷ 345 Ill. App. 272, 102 N. E. (2d) 685 (1951).

¹⁸ 345 Ill. App. 275, 102 N. E. (2d) 683 (1951). Leave to appeal has been denied.

by negotiation of the parties and, as so revised, conforms to the principal's notion of what the agency contract called for. The fact that the revised offer may be subsequently rejected does not mean that the broker's services are unsuccessful.

In the second case, that of *Nicholson v. Alderson*,¹⁹ an exclusive listing agreement provided that, in consideration of the broker's promise to use his efforts to advertise and to sell the real estate, the broker should have the exclusive right to sell for a period of ninety days. It was also stipulated that if a sale was made during that period, or within ninety days after the termination of the agreement, to anyone with whom the broker had had negotiations with the owner's knowledge, the broker should receive the usual commission. The owner in fact revoked the broker's authority before the expiration of the ninety-day period and then sold the property to a purchaser who had not been introduced by the broker. In a suit by the broker for a commission based on the sales price, the broker insisted that he had an executory contract which became irrevocable when he began to perform so as to make the owner liable in damages for the amount the broker would have earned had not the owner wrongfully revoked the authority. The Appellate Court disagreed with the broker's contention on the ground the agency ceased to exist when the broker was notified of the revocation of his authority and the same, not being one coupled with an interest, was revocable at the will of the principal. It did indicate, however, that as the broker's authority was to continue for a stated period the principal could not rightfully revoke the authority, unless for misconduct, without exposing himself to liability for such damages as were directly incurred, to-wit: the value of the services rendered to date of discharge together with such disbursements as the broker may have made in the principal's behalf.

The degree of laxity which Illinois courts have shown in recent years, when dealing with an agent's fiduciary duty toward his principal, has again been unfortunately demonstrated in the

¹⁹ 347 Ill. App. 496, 107 N. E. (2d) 39 (1952).

case of *Glasser v. Essaness Theatres Corporation*.²⁰ In that case, a managing agent of a motion picture theater, leased to a partnership, was expressly charged with the duty of procuring a renewal of the lease. When the landlord refused to renew or extend the lease and declared it to be his intention to sell the building, the agent informed the principal of this development, suggesting that it would be advantageous for the partnership to buy the building. Negotiations to that end were undertaken between the principal and the landlord. In the meantime, the agent negotiated in his own behalf for the purchase of the building, without informing his principal, and eventually acquired the property. The principal then filed suit against the agent, basing the claim upon an alleged destruction of the partnership expectancy of securing a renewal of the theater lease by reason of the agent's purchase of the property. A majority of the Appellate Court for the First District, one judge dissenting, refused to consider the agent's conduct as a breach of his fiduciary duty. It declared that while it was true that an agent, entrusted with procuring an extension of a lease, could not negotiate for a lease for his own benefit so long as his principal had the right to expect a renewal of the lease, yet, as soon as that expectancy had been extinguished without deception on the part of the agent, all reason for the rule ceased so the agent could then properly obtain a lease for himself or even purchase the building.

LABOR LAW.

Primary problems in the field of labor law pertained to issues arising under the Illinois Unemployment Compensation Act.²¹ An attack on the constitutionality of the provisions thereof dealing with the contribution rate to be paid by an employer was parried by the Supreme Court in the case of *Conlon Bros. Manufacturing Company v. Annunzio*.²² For this purpose, employers are divided into two groups, to-wit: those who qualify for a variable contribu-

²⁰ 346 Ill. App. 72, 104 N. E. (2d) 510 (1952). Friend, J., wrote a dissenting opinion. Leave to appeal has been granted.

²¹ Ill. Rev. Stat. 1951, Vol. 1, Ch. 48, § 300 et seq.

²² 409 Ill. 277, 99 N. E. (2d) 119 (1951).

tion rate because they have incurred liability based upon five or more years of experience with the risk of unemployment, and those who, because of lack of such experience, are compelled to pay the full rate.²³ The employer in question challenged that classification as being arbitrary and unreasonable,²⁴ contending that the basic rate bore no actual relationship to the risk of unemployment or to the requirements of the state as a whole. The Supreme Court declined to agree with that contention, pointing to the fact that the statute was uniform in operation as applied to all employers who had less than five years of experience, particularly since a classification of the objects of legislation did not have to be scientific, logical or consistent so long as the classification was adapted to secure the avowed purpose of the statute.

Questions concerning the coverage of the Unemployment Compensation Act also arise from time to time. In one case, that of *Wallace v. Annunzio*,²⁵ certain attorneys who officed and associated with a law firm but who worked on their own cases as well as on those referred to them by the firm and who did not receive a salary but did divide the fees received according to an arrangement made for the mutual advantage of both the attorneys and the firm, were classified by the Director of Labor as covered employees. The Supreme Court disagreed on the basis that while the controlling statutory concept of employment is broader than the common-law definition of the master-servant relationship it does not make every act of service performed by one for another sufficient to form the basis for a covered relationship. The statute expressly excludes independent contractors from its purview²⁶ and the attorneys in question were said to be such. In fact, the relationship between the parties was more nearly one of landlord and tenant for each associate had his own office and paid rent therefor out of the percentage of fees credited to his account.

In another case, that of *Mowry v. Board of Review*,²⁷ the

²³ Ill. Rev. Stat. 1951, Vol. 1, Ch. 48, § 570.

²⁴ The challenge was based on the Fourteenth Amendment to the United States Constitution and on Ill. Const. 1870, Art. II, § 2.

²⁵ 411 Ill. 172, 103 N. E. (2d) 467 (1952).

²⁶ Ill. Rev. Stat. 1951, Vol. 1, Ch. 48, § 322.

²⁷ 411 Ill. 508, 104 N. E. (2d) 280 (1952).

question was one as to whether the leader of a band or the person hiring the services of the band should be considered to be the employer. The contract of hiring was conventional in form. Under it, the hotel corporation was designated as "employer" and the musicians as "employees," the latter agreeing to render their services collectively to the "employer" under the leadership of the band leader. The "employer" was to pay a lump sum weekly to the band leader and he, in turn, was to distribute, on behalf of the "employer," the amount so received to the several members of the band, including himself, in accordance with a schedule to be supplied by the hotel. The hotel was to have, at all times, complete control over the services rendered by the musicians, but it was up to the band leader, on behalf of the hotel, to replace any of the band members. When the hotel was charged with an obligation to make an employer's contribution for unemployment compensation, it objected on the theory that the band leader was the real employer. The Illinois Supreme Court upheld the position of the hotel. It noted that the Illinois statute contains a provision to the effect that, irrespective of any contrary provision, a person is to be considered an employer who is regarded as such for purpose of the federal unemployment tax.²⁸ As the United States Supreme Court, in *Bartels v. Birmingham*,²⁹ had concluded that it was the band leader, and not the operator of the dance hall where the band played, who was the employer for federal unemployment tax purposes, the court concluded the hotel was entitled to an implied exemption. It refused to be bound by the language of the agreement, being guided instead by the actualities of the case.

The operation of several businesses by the same person often-times gives rise to the problem as to whether such business enterprises can be lumped together and treated as an entity for unemployment tax purposes. The statute not only defines an "employer" but also defines an "employing unit" as one which,

²⁸ Ill. Rev. Stat. 1951, Vol. 1, Ch. 48, § 370. The federal tax is based on 26 U. S. C. A. § 1600 et seq.

²⁹ 332 U. S. 126, 87 S. Ct. 1547, 91 L. Ed. 1947, 172 A. L. R. 317 (1947).

“together with one or more other employing units, is owned or controlled, directly or indirectly, by legally enforceable means or otherwise, by the same interests.”³⁰ It then requires that the dominant interest must be treated as an employer provided there are six or more persons employed in all of the employing units when put together. In *Todd v. Annunzio*,³¹ one Todd owned 75% of one movie theater, 50% of another, and was the sole proprietor of a third. Each theater had three employees and each was, to some extent, operated as a separate business, having its own office, maintaining a separate bank account in a different bank, purchasing supplies and services independently, keeping separate books, and filing separate social security and income tax returns. Booking of films for all three theaters and their control and supervision, however, was centered in Todd’s managing agent. Todd fought an assessment for contributions to the unemployment compensation fund, contending that he did not own and control the three theaters, but the Supreme Court, one judge dissenting, rejected his arguments and affirmed a judgment declaring the enterprises to be a single employing unit. The majority distinguished the instant case from the contrary holding on a similar factual situation in *Moriarty, Inc. v. Murphy*,³² upon the ground that the Director of Labor had there made no finding as to control, thereby leaving out a vital prerequisite for the establishment of coverage under the Unemployment Compensation Act.³³

The shutting down of a plant for vacation periods may generate claims for unemployment compensation benefits. The facts in *Grobe v. Board of Review*³⁴ showed that the employees were covered by a union contract which provided for a vacation with pay fixed at a percentage of the employee’s gross earnings for the preceding year. The contract contemplated that when a depart-

³⁰ See Ill. Rev. Stat. 1951, Vol. 1, Ch. 48, § 315(B) and § 315(F).

³¹ 410 Ill. 343, 102 N. E. (2d) 297 (1951). Crampton, J., wrote a dissenting opinion.

³² 387 Ill. 119, 55 N. E. (2d) 281 (1944).

³³ The court also ruled out an estoppel based upon a delay of almost five years in assessing contributions and a delay of up to eighteen months in holding a hearing, with a consequent accrual of interest, on the theory an estoppel would be inapplicable to the state when functioning in a governmental capacity.

³⁴ 409 Ill. 576, 101 N. E. (2d) 95 (1951).

ment was closed down the employees thereof should then take their vacation and receive their vacation pay but an employee was permitted to request a vacation at some other time subject to company approval. The company closed the plant for two weeks, designating the time as a vacation period, and distributed the stipulated vacation pay. An employee then immediately applied for unemployment compensation benefits, contending that he was unemployed during the two weeks in question and that the vacation pay did not constitute wages within the meaning of the statute³⁵ as he could, under the union contract, request a different vacation period. The Supreme Court, affirming a trial court decision denying benefits, disagreed with his contentions, pointing out that it was the legislative intent to grant unemployment compensation only to those who were involuntarily unemployed.³⁶

Not only must the claimant for benefits be involuntarily unemployed but he must also be "available for work."³⁷ In *Fleiszig v. Board of Review*,³⁸ the Supreme Court took the view that certain coal miners, over the age of sixty-five, who had left their work in a coal mine and had thereafter elected to receive social security benefits and a pension from their labor union, under a plan which provided that they had actually to retire in order to be eligible for such benefits, were not "available for work" within the meaning of the statute. The court there made the rather doubtful statement that an application for, and receipt of, retirement benefits and old-age assistance clearly evidences an intention to retire from gainful labor.

Outside of unemployment compensation matters, the only other issues involving elements of labor law were quite varied. In *Schaffer v. Park Bowl, Inc.*,³⁹ for example, the court declared

³⁵ Ill. Rev. Stat. 1951, Vol. 1, Ch. 48, § 344.

³⁶ Answering the employee's contention that the vacation pay did not constitute "wages," the court pointed to the fact that the vacation pay was based upon a percentage of prior earnings, hence was a part of compensation received for services performed.

³⁷ Ill. Rev. Stat. 1951, Vol. 1, Ch. 48, § 420(C).

³⁸ 412 Ill. 49, 104 N. E. (2d) 818 (1952), noted in 30 CHICAGO-KENT LAW REVIEW 386.

³⁹ 345 Ill. App. 279, 102 N. E. (2d) 665 (1951), noted in 30 CHICAGO-KENT LAW REVIEW 286.

that where an employment contract is in force for a fixed period and the employer, with knowledge of violations of duty on the part of the employee, retains the employee he does not thereby condone the employee's offenses but can use them as ground for discharge thereafter if the violations should be continued but may not discharge him solely on the basis of the prior violation of duty. Another case, that of *Keel v. Illinois Terminal Railroad Company*,⁴⁰ tested the jurisdiction of a state court to entertain a complaint for reinstatement offered on behalf of an allegedly wrongfully discharged railroad employee. The employee's complaint consisted of two counts; the first for damages, the second for reinstatement. The union contract which covered the working conditions of the railroad employee in question provided for a grievance procedure with the final determination over the legality of a discharge being vested in the National Railway Labor Board. Based upon these facts, the Appellate Court for the Fourth District held that a suit seeking both damages and reinstatement was inconsistent. If the employee maintained that his employment relation was continuing and insisted upon reinstatement, then the state court would lack jurisdiction because of the exclusive character of the grievance procedure. If, on the other hand, the employee accepted his discharge as final and demanded damages therefor, the state court would possess jurisdiction. Under the circumstances, it was deemed necessary to reverse and remand the case to give the plaintiff an opportunity to amend the complaint, if he wished, to show the suit was clearly one for damages only.

WORKMEN'S COMPENSATION

Activities pursued by an employee during the course of his employment, but intended to further his own health or comfort, may generate a problem as to whether or not an injury sustained by him arising from such activities is compensable under workmen's compensation statutes. In *Hill-Luthy Company v. Indus-*

⁴⁰ 346 Ill. App. 169, 104 N. E. (2d) 659 (1952).

trial Commission,⁴¹ the employee, whose job it was to deliver and install soft water tanks, proceeded to light a cigarette as he returned to his delivery truck following an installation which he had made at a customer's place. The head of the match flew off and hit him directly in the eye, thereby causing a loss of eyesight. The Illinois Supreme Court, affirming a judgment denying recovery, declared that the injury was not compensable because it did not arise out of the employment although it had occurred in the course thereof. Smoking and the use of matches were said to be in no way incidental to the employment, any risks connected therewith were entirely divorced from the employment, and were no more than ones to which the general public was equally exposed while performing similar acts.

Once the employee has left the employer's premises at the close of the working day he is no longer in the course of his employment but, under certain exceptional circumstances, this rule may be modified to the extent that an employee might still be deemed to be in the course of his employment if he uses, with his employer's express or implied consent, premises adjacent to the employer's business place as a means of ingress and egress. Some coal miners, in *Christian v. Chicago & Illinois Midland Railway Company*,⁴² having completed their day's work, drove off the premises of the employer, riding in the car of a fellow-employee on their way home, when they were struck by one of defendant's railroad trains and were killed. At that time, they were on the defendant's right of way located across a roadway which was not generally used by the public but did serve as one of the means of ingress and egress to the premises of the employer. The roadway was, however, open to all members of the public and was under the jurisdiction of the township highway commissioner. The Supreme Court, reversing a judgment for the defendant notwithstanding a verdict, concluded that the employees in question were, at the time of the accident, not subjected to any greater risk than would be true for other persons travelling on

⁴¹ 411 Ill. 201, 103 N. E. (2d) 605 (1952), noted in 1952 Ill. L. Forum 318.

⁴² 412 Ill. 171, 105 N. E. (2d) 741 (1952).

the roadway, hence the miners were not killed within the course of their employment and their representatives were not limited to compensation relief.⁴³

Limitation provisions of the Workmen's Compensation Act state that a claim thereunder is barred unless application is filed with the Commission within one year after the date of injury or within one year after the date of the last payment of compensation.⁴⁴ These provisions received an unduly harsh and illiberal interpretation by a majority of the Supreme Court, three judges dissenting, in the case of *International Harvester Company v. Industrial Commission*.⁴⁵ The employee there concerned had been injured while working on his job. He notified the company physician and, in the ensuing nine-month period, during which he was partly hospitalized and partly treated by the company physician, he received weekly benefit payments from the funds of an "Employees' Benefit Association." Following his return to work, payments from the Association ceased. He thereupon filed an application for workmen's compensation benefits, more than one year after the injury had occurred but within one year from the time when he had last received a payment from the benefit association. The Supreme Court reversed a holding in the employee's favor made by the Industrial Commission and the lower court, upholding the employer's contention that the application for compensation came too late. It was said, by the majority, that payments made by the "Employees' Benefit Association" could not qualify as compensation since they were not made by the employer, were unrelated to the provisions of the Act, and were inconsistent with any acknowledgment of its application. The minority, in turn, emphasized the illogic of the assumption indulged in by the majority, to-wit: that payments unrelated to the provisions of the Workmen's Compensation Act could not suffice to stay the running

⁴³ Ill. Rev. Stat. 1951, Vol. 1, Ch. 48, § 138.5(b), purports to limit the statutory right to recover damages for wrongful death to those cases where the employee was not in the line of duty.

⁴⁴ *Ibid.*, Ch. 48, § 138.6(c).

⁴⁵ 410 Ill. 543, 103 N. E. (2d) 109 (1951). Schaefer, J., wrote a dissenting opinion, concurred in by Bristow and Hershey, JJ. See also note in 30 CHICAGO-KENT LAW REVIEW 287.

of the limitation period. The statute was said not to contain such a requirement but, even if it did, the payments made by the benefit association were, for all practical purposes, the same as payments made by the company for it had actual control of the fund and its employees handled both types of payment interchangeably.

A decision which vitally affects the whole structure of the Workmen's Compensation Act was rendered by the Illinois Supreme Court in the case of *Grasse v. Dealer's Transport Company*⁴⁶ when it declared former Section 29 of the Act⁴⁷ to be unconstitutional, thereby permitting a covered employee, injured in the course of his employment by the negligence of a third party tort-feasor who was bound by the Act, to maintain a common-law action against such tort-feasor. The provision was deemed to be unconstitutional by reason of a violation of the due process and equal protection clauses of the federal and state constitutions⁴⁸ as well as for violating a state provision forbidding the granting of special privileges and immunities.⁴⁹ The unique character of the statutory provision in question, without counterpart in most workmen's compensation laws, purported to forbid an Illinois employee, injured by a third party tort-feasor who was bound by the Act, from following his right to a recovery of common-law damages and limited him to a recovery of compensation from his employer. It imposed no such limitation on an employee injured by an uncovered third party tort-feasor. The court found such differentiation to be completely arbitrary and unreasonable, particularly since there was no rational basis for treating employees differently solely because the tort-feasor who injured them was or was not covered by the Act. Employer's subrogation rights have also thereby been materially affected.⁵⁰

In that connection, mention should be made of the problem

⁴⁶ 412 Ill. 179, 106 N. E. (2d) 124 (1952), noted in 30 CHICAGO-KENT LAW REVIEW 375.

⁴⁷ The text thereof was the same as Ill. Rev. Stat. 1951, Vol. 1, Ch. 48, § 138.5(b).
⁴⁸ U. S. Const., Amend. XIV; Ill. Const. 1870, Art. II, § 2.

⁴⁹ Ill. Const. 1870, Art. IV, § 22.

⁵⁰ The provisions of Ill. Rev. Stat. 1951, Vol. 1, Ch. 48, § 138.5(b), are now in need of substantial revision.

raised by *Melohn v. Ganley*.⁵¹ The question there was one as to whether or not an employer who had paid compensation to his employee, injured by a third party not bound by the Act, would be barred from instituting a subrogation proceeding against the third party by reason of the fact that the third party had paid damages to both the employer and the injured employee, pursuant to a judgment entered on their respective counterclaims, in an earlier common-law proceeding. The Appellate Court for the Second District answered that question in the affirmative. The facts showed that the employee, while driving the truck of his employer, had been injured by a non-covered third party. The latter commenced a negligence action against the injured employee and his employer, both of whom filed counterclaims alleging that it was the third party who drove negligently. The jury were instructed, when assessing damages on the counterclaims, to consider any possible future bodily suffering and loss of health the employee might sustain. Their verdict awarded damages to both the employee and the employer. The employee thereafter filed a claim for workmen's compensation against his employer and the employer was required to pay a substantial sum, far in excess of any recovery under his counterclaim. When the employer sought subrogation against the third party, the trial court sustained a motion to dismiss the complaint on the ground the earlier proceeding was *res judicata*, and that decision was affirmed on appeal. The mere fact that the damages awarded by the jury in the first case were not substantial enough was deemed to be no reason for supporting another action to secure reimbursement, for the employer had obviously split his cause of action.

Equally novel was the question decided by the Supreme Court in *Lambert v. Industrial Commission*.⁵² In that case, an employee who had deficient vision, corrected by the use of eyeglasses, suffered an injury to his eye. The question then arose whether the vision corrected by the use of glasses, or the uncorrected naked vision, without artificial appliance of any kind, should be the

⁵¹ 344 Ill. App. 316, 100 N. E. (2d) 780 (1951), noted in 40 Ill. B. J. 238.

⁵² 411 Ill. 593, 104 N. E. (2d) 783 (1952).

basis for determining the degree of loss of sight or loss of use of the eyes for compensation purposes. The employer argued for the latter yardstick, contending that, since the uncorrected vision of the injured employee was no worse after than it was before the accident, the injury should not be compensable. The Supreme Court did not agree. It pointed out that, the statute being silent on the particular question, a practical and common-sense approach was desirable. As the theory underlying workmen's compensation was that industry, rather than society as a whole, should bear the responsibility for its injured manpower, it was said to follow therefrom that the injured workman should be compensated for the financial loss suffered by him through a reduction in his industrial value. In the case at hand, the employer had hired an employee with corrected vision, and he had performed his work satisfactorily. The injury produced the same industrial loss to the injured workman and to industry as would have attended the loss of vision on the part of another employee having full vision. For these reasons, it was held that vision as corrected should form the basis for compensation.

One more case deserves a word of attention. In *Fulton v. Knight*,⁵³ the Industrial Commission had approved a lump sum settlement between an employer and an injured employee who had previously been adjudged insane but who was not represented by a guardian *ad litem* or conservator. A conservatrix, appointed over a year later, then sought to obviate the effect of the lump sum settlement but was denied relief. The Appellate Court for the First District approved such decision, declaring the order of the Commission valid on the basis that established rules of practice and procedure which prevail in courts of law are to be followed in compensation cases. As an insane person, prior to appointment of a guardian or conservator, has the same capacity to sue or to be sued as a person *sui juris*, neither a judgment at law nor an award of the Industrial Commission would be void or voidable merely because one of the parties happens to be insane.

⁵³ 346 Ill. App. 122, 104 N. E. (2d) 554 (1952). Leave to appeal has been denied.