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Discussion of Recent Decisions

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DISCUSSION OF RECENT DECISIONS.

ACTION—JOINDER, SPLITTING, CONSOLIDATION, AND SEVERANCE—WHETHER CLAIMS FOR PERSONAL INJURY AND PROPERTY DAMAGE BELONGING TO ONE PERSON AND ARISING FROM ONE TORTIOUS ACT MAY BE SEVERED AND LITIGATED SEPARATELY—In the Ohio case of Vasu v. Kohlers, Inc.,1 an action was instituted to recover damages for personal injuries sustained by the plaintiff growing out of a collision between defendant’s truck and plaintiff’s automobile. In bar of such action, defendant relied on a judgment rendered in a prior suit brought by an insurance company against it for damage done to the present plaintiff’s automobile in the same collision. Plaintiff had been reimbursed by the insurance company for such damage and, under the policy, he had assigned his right of action to them. That company had sued the defendant but had failed to succeed. Such judgment was offered as a bar to the present proceeding on the theory that the plaintiff merely had but one cause of action which could not be split into several claims and that, by litigating a part, he had lost the right to enforce the balance. The trial court overruled this contention and gave judgment for plaintiff. The defendant

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145 Ohio St. 321, 61 N. E. (2d) 707 (1945).
appealed and secured a reversal in the intermediate appellate tribunal. The plaintiff then took the cause before the Ohio Supreme Court, which held that the plaintiff had two causes of action as he had suffered injuries to two distinct rights, consequently the judgment in the action for property damage did not serve to bar an action for personal injuries. Although the fundamental question is not new, the case represents the first time the Ohio Supreme Court has had occasion to pass directly upon this point and, by its decision, it has placed that state among a small but growing minority which apply the same rule.

It is universally accepted that where a person has but one cause of action he may not split it into several claims and base several actions thereon for it is the policy of the law that a defendant should not be harrassed by an unscrupulous plaintiff who might otherwise take advantage of the situation and bring several suits where one would suffice. When, therefore, a judgment has been rendered, either in favor of or against the plaintiff, his entire cause of action merges in the judgment and is extinguished. That judgment would then act as a bar to any subsequent action on the claim.

Difficulties arise, however, in deciding whether there is one or more causes of action where the plaintiff suffers both personal injury and property damage from the same wrongful act. If he is entitled to only one cause of action, he must be certain to include all elements of damage, whether to his person or to his property, for a judgment based on only one of these elements would bar a second action. On the other hand, if the wrongful act gives rise to two causes of action, recovery for one of the injuries should not prevent another suit even between the same parties as the issues in the first case are different from those in the second. There is a pronounced division of authority, though, as to this question and

2 No opinion for publication. The decision of the intermediate tribunal is noted at 145 Ohio St. 321, 61 N. E. (2d) 707 at 710.

3 The question was considered in Le Blond Schacht Truck Co. v. Farm Bureau Mut. Automobile Ins. Co., 34 Ohio App. 478, 171 N. E. 414 (1929), where the intermediate appellate tribunal achieved the same result. In Mayfield v. Kovac, 41 Ohio App. 310, 181 N. E. 28 (1932), the court indicated it would follow the one cause of action rule but decided the case on grounds of waiver. The case of Redman v. North River Ins. Co., 128 Ohio St. 615, 193 N. E. 347 (1934), presented the same issue, but when it reached the Supreme Court of Ohio it was decided on other grounds.

4 1 C. J. S., Actions, § 102(b). See, for example, Camp v. Morgan, 21 Ill. 255 (1859).

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the majority of the states follow the rule that only a single cause of action exists. Typical of this view is the Minnesota case of King v. Chicago, Milwaukee & St. Paul Railway Company in which the plaintiff sustained both personal injuries and damage to his horse and wagon when struck by defendant's train. His first suit, for personal injuries, resulted in a judgment in his favor. He then instituted another action to recover for damage done to his property, but the court ruled that the judgment in the prior proceeding barred the second action for the reason that the plaintiff had but one cause of action and could not split it. In order to determine the number of causes of action a plaintiff has, courts applying the majority view look to the number of wrongful acts committed. Where there is but a single wrongful act there can be only one cause of action and the injuries suffered, whether to property or to person, are merely items of damage to be collected in one suit. It is urged, in support of this rule, that in most cases the plaintiff knows exactly how much damage he has suffered by way of injury to himself and his property, can assert these claims at one time, can hold litigation down to a minimum, and can thereby promote speedy and economical justice. Nothing can be gained, it is argued, by permitting two suits where one would serve the same purpose.

A respectable minority, on the other hand, follow the view that two or more causes of action may arise in favor of one person from a single wrongful act. This view is best illustrated by the Texas case of Watson v. Texas & Pacific Railway Company. The plaintiff there accompanied a shipment of his horses being transported over the defendant railroad.


8 80 Minn. 83, 82 N. W. 1113, 50 L. R. A. 161, 81 Am. St. Rep. 238 (1900).


Both plaintiff and the horses were injured when the train was wrecked. A judgment was rendered for the plaintiff in his first suit for damage to his property. He thereafter instituted a second proceeding to recover for his personal injuries. The prior judgment was offered as a bar to the second suit, but the court overruled the plea and followed an English precedent on this subject which had permitted two recoveries in a comparable situation. Under this view, the number of causes of action is determined not by the wrongs done but by the number of rights invaded. In support thereof, it has been argued that the number of rights concerned is the more important, because without them there could be no right of action even though the defendant might be guilty of fault. As the plaintiff in these cases suffers a violation of distinct rights of personal security and of property, he would, therefore, possess two distinct causes of action. There are fundamental differences between the right to recover for personal injuries and the right to recover for property damage which this view recognizes. First, the proof will be different for in the suit for personal injuries plaintiff need prove only the injury to his person, while in the case of property damage he must allege and prove his ownership of or interest in the property plus the damage there-to. Second, there may be a difference in the statute of limitations as to each. Third, claims for personal injuries cannot be assigned while those for loss or damage of property may be. Fourth, different rules of damage may govern the measure of recovery. The logic behind this view would therefore seem to outweigh the expediency of the other one.

Thus far, this discussion has dealt with cases where the same plaintiff attempts to bring both actions. Situations do arise, as in the present case, where the suits are instituted by two different parties, particularly where an insurance company has become subrogated to the rights of the insured because it has reimbursed him for damage done to his property. Should this fact have any effect upon either the minority or the majority rule? The minority rule, logically, would not be changed since the de-

11 Brunsden v. Humphrey, 14 Q. B. D. 141 (1884).
12 Ill. Rev. Stat. 1945, Ch. 83, § 15, requires that an action for injury to the person shall be commenced within two years. Section 16 fixes the limitation in actions to recover for damage to personal property at five years.
14 Lasher v. Carey, 182 Ill. App. 147 (1913).
15 In Boyd v. Atlantic Coast Line R. Co., 218 F. 653 at 659 (1914), the court noted that the "mental processes for the ascertainment of righteous compensation for the separate injuries are widely different. In the one case, it was a duty to estimate the injury to the intricate machinery made by the art and skill of man; in the other, the injury or mutilation alleged to the far more complex and mysterious machinery made by Nature, or by Nature's God."
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Decision in one case would not have any bearing on the other. Application of the majority rule to this new factual situation, however, has produced a difference of opinion. Most of the courts operating thereunder state that if a party cannot split a cause of action directly, he cannot do it indirectly by assigning his right of action for property damage or by permitting another to become subrogated thereto. They would leave it up to the other party to protect himself by joining in the one suit. To this extent, their holdings are consistent. Two cases from such jurisdictions, however, have refused to apply the doctrine where the claims are advanced by different parties. In *Underwriters At Lloyd's Insurance Company v. Vicksburg Traction Company*, for example, the plaintiff insurance company had insured the damaged vehicle, had reimbursed the owner for the damage done to it by the defendant, and had become subrogated to his rights. The owner had recovered in a suit for personal injury when the insurance company instituted its action to recover for the damage to the car. Although the court expressly favored the majority rule, it pointed out that an injustice might be done for the insurance company could not control the insured insofar as bringing a suit for his personal injury was concerned. Recovery on both claims was, therefore, permitted. *Underwood v. Dooley* presented the direct opposite of the problem for there the insurance company had sued first. Again the court, while recognizing the majority rule, would not apply it because they felt to do so would work an obvious injustice. That court pointed out that the plaintiff had taken out insurance on his car to protect himself, whereas the application of the majority rule would deprive him of the opportunity of recovering a greater sum for his personal injuries than he would be apt to receive under the policy. Further breach has been made in the majority rule by recognition of the fact that it operates only for the benefit of a defendant who asserts it. Being a defense to be pleaded by that defendant, it can be waived and is waived by inaction.

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16 Le Blond Schacht Truck Co. v. Farm Bureau Mut. Automobile Ins. Co., 84 Ohio App. 478, 171 N. E. 414 (1929). The doctrine of estoppel by verdict, which might apply if the same plaintiff litigates both claims: Little v. Blue Goose Motor Coach Co., 346 Ill. 266, 178 N. E. 496 (1931), would have no bearing where the two suits are conducted by different parties, especially if the assignment occurs before the estoppel has arisen: Schafer v. Robillard, 370 Ill. 92, 17 N. E. (2d) 963 (1938).


18 106 Miss. 244, 63 So. 455, 51 L. R. A. (N. S.) 319 (1913).

19 197 N. C. 100, 477 S. E. 686, 64 A. L. R. 656 (1929).

The strongest argument to support the majority view is that the single cause of action rule will prevent the crowding of courts with unnecessary litigation. The minority view follows a less practical but a more logical path. Each jurisdiction concerned has chosen a measuring stick regarded by it as the most important. When it is recalled that the plaintiff usually institutes suit in order to obtain reimbursement for damage done to his rights rather than to punish the defendant for a wrong committed, the question of the number of rights invaded would seem to be the more important one. Such, at least, seems to be the Ohio view and it may now be welcomed as a member of a growing minority of states who feel the same way.

W. A. Heindl

Banks and Banking — Insolvency and Dissolution — Whether Statute Giving State Auditor Exclusive Right to Liquidate Insolvent Bank Prevents Stockholder from Maintaining Representative Suit on Behalf of Bank — Problems concerning the right of a shareholder in a closed bank to maintain a representative suit were involved in the recent case of Rinn v. Broadway Trust & Savings Bank of Chicago {1} wherein, several years after the bank had undertaken voluntary liquidation proceedings and had paid off all depositors and creditors pursuant to statute, {2} the State Auditor had caused a receiver to be appointed on the ground that the capital was impaired. Prior to the appointment of such receiver, a stockholder in the bank had begun proceedings against the liquidating trustee and the other directors on a claim of malfeasance and misfeasance but that action had been delayed because of pending motions to dismiss. These motions were not passed upon until after appointment of the State Auditor’s receiver and were then denied, although the cause was consolidated with the receivership proceeding. Subsequently, the defendants in the stockholder’s suit moved to vacate the order of consolidation and to renew the motion to dismiss. Other stockholders intervened and asked permission to file an amended complaint charging that the Auditor’s suit was begun merely to obstruct the stockholder’s action. The trial court vacated the order of consolidation, sustained the motion to dismiss, refused permission to file the amended pleading, and dismissed the case for want of equity. The net result was to deny the accounting sought for. On appeal, the Appellate Court for the First District reversed on the ground that to deny such suit would be to leave the plaintiffs without a remedy, and that since every obligation of the bank, except to its shareholders, had

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1 326 Ill. App. 376, 62 N. E. (2d) 8 (1945).
been discharged the statute purporting to give the State Auditor exclusive jurisdiction over its affairs had no application.

Only one case was cited to support the action taken, that of *Harris’ Estate v. West Grove Savings Bank.* That case depended upon an Iowa statute similar to the Illinois provision, but involved a proceeding by the State Superintendent of Banking to be appointed liquidating receiver for the bank there concerned. Upon finding that all depositors and creditors had been paid in full, the court denied the relief sought on the ground that the liquidation of the bank was purely an auxiliary remedy to settle private differences between the shareholders in which there was no public interest so state action was unnecessary and without object. Whether the same view existed in this state prior to the instant decision is a matter of doubt and the case in question is the first one to hold that, after public interests in a bank have been satisfied, the State Auditor is no longer concerned in its liquidation.

Before the present statute was enacted purporting to place exclusive authority in the State Auditor, there was no question but what equitable remedy would lie on behalf of a stockholder for the appointment of a receiver where there had been a fraudulent use of the bank’s funds even though power in the state to liquidate and dissolve such corporations was recognized. That view prevailed in other jurisdictions also, even where power to appoint a receiver was given to some public official placed in a position to supervise banking activities, since such statutes were not treated as possessing exclusive effect. For these reasons, general creditor’s bills have been sustained as well as suits based on fraud or abuse of power.

Courts of equity, however, have no general power to dissolve corporations and can exercise such power, including the right to appoint liquidat-

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3 Ibid., § 11.
4 207 Iowa 41, 217 N. W. 477 (1928).
5 Iowa Code 1939, Ch. 412, § 9154.03.
6 Chandler Mortgage Co. v. Loring, 113 Ill. App. 423 (1904).
8 Dickerson v. Cass County Bank, 95 Iowa 329, 64 N. W. 395 (1895).
ing receivers, only if the same is conferred on them by statute.\textsuperscript{11} It is,
therefore, within the power of the legislature to withhold such authority or
to grant it on any terms it may see fit. This fact is well illustrated by the
decision in \textit{People ex rel. Barrett v. Skurlieff},\textsuperscript{12} where it was decided that,
in the absence of fraud and in the absence of statutory authority, a court
was lacking the power to remove a receiver appointed by the State Auditor
and mandamus would lie to expunge such an order.

The present provision of the Illinois statute places control of liquidat-
ing proceedings over state banking corporations, entirely and exclusively
in the State Auditor\textsuperscript{13} and vests in him all rights of action belonging to
the bank. Certainly, in the public interest and prior to the satisfaction of
the claims of creditors, no one should be permitted to interfere with that
official’s attempts to realize on the assets of the bank. That point was ex-
pressly passed upon in \textit{McIlvaine v. City National Bank & Trust Company
of Chicago}\textsuperscript{14} where a stockholder was denied the right to maintain a repre-
sentative suit based on a claim that, prior to appointment of a liquidating
receiver, the bank had transferred some of its assets for an insufficient
consideration for it was there held that such cause of action, if any existed,
was solely under the control of the State Auditor and he alone could sue
thereon.\textsuperscript{15} In a still later decision, that of \textit{Lorimer v. Rosehill Cemetery
Company},\textsuperscript{16} the right of creditors and stockholders of a closed bank to re-
cover the assets thereof which had allegedly been fraudulently sold by its
directors was denied, even though the State Auditor had not appointed a
receiver until twenty years after the bank’s collapse, on the ground that
such official, when appointed, had exclusive control over such claims.

While it appears that the public and the creditors still had an interest
in the closed banks in these cases, it does not seem that the rules there
enunciated should cease to apply merely because the public interest, as
represented by unpaid creditors, has been subserved. So long as the bank-
ing corporation exists, i. e. until decree of dissolution is actually entered
upon final liquidation, the public generally still has an interest in the

\textsuperscript{11} Wheeler v. Pullman Iron & Steel Co., 143 Ill. 197, 32 N. E. 420 (1892) ; People
v. Welgley, 155 Ill. 491, 40 N. E. 300 (1895) ; Coquard v. National Linseed Oil Co.,
171 Ill. 480, 49 N. E. 563 (1898). See also Miner, \textit{A Treatise on the Law of Bank
Receiverships and Stockholders’ Liability in Illinois} (1894), p. 9. Of similar effect
is the holding in \textit{Feess v. Mechanics State Bank}, 84 Kan. 828, 115 P. 563, L. R. A.
1915A 606 (1911).

\textsuperscript{12} 353 Ill. 248, 187 N. E. 271 (1933).

\textsuperscript{13} Ill. Rev. Stat. 1945, Ch. 16%, § 11.

\textsuperscript{14} 314 Ill. App. 496, 42 N. E. (2d) 93 (1942), noted in 22 \textit{CHICAGO-KENT LAW
REVIEW} 3, cause transferred 371 Ill. 565, 21 N. E. (2d) 737 (1939).

\textsuperscript{15} The McIlvaine decision was not referred to in the instant case, nor was any
attempt made to distinguish the same from the facts there concerned.

\textsuperscript{16} 325 Ill. App. 258, 59 N. E. (2d) 893 (1943), abst. opin.
corporation for it was brought into existence only through public fiat as expressed in the Banking Act. Until the bank has actually ceased to exist, even though it has but a "mere shell of a charter," the designated public official should continue to exercise the power and perform the duties exclusively vested in him and no private person, no matter how personally interested, should be allowed to assume these functions. If such person believes the public official is derelict in the performance of his duties, his remedy would seemingly lie in mandamus rather than to substitute himself as proper plaintiff in the conduct of the litigation.

If the litigation in the instant case eventually results in a judgment on the merits and is again appealed, it is likely that the question of the right of the plaintiff to maintain the suit will be re-examined and may there be decided in an entirely opposite fashion. If not, the case becomes a questionable precedent for future litigation of this character for the decision seems to be without adequate foundation and contrary to earlier cases which it does not claim to overrule.

E. Justus.

Execution—Execution Against the Person—Whether Judgment Debtor is Entitled to Notice and Hearing Before Issuance of Body Execution or Whether Writ Should Issue Solely on Sufficient Affidavit By Creditor—In the recent case of Morris v. Schwartz, the Appellate Court for the First District was asked, for the first time, to pass upon the question of the necessity for granting notice and hearing prior to the


18 The analogy between banking and insurance company liquidations is close. Control over the latter is exclusively vested in the Director of Insurance by Ill. Rev. Stat. 1945, Ch. 73, § 813. No private person may assume the powers of the Director according to People ex rel. Palmer v. Niehaus, 356 Ill. 104, 190 N. E. 349 (1934), and People ex rel. Lowe v. Marquette Nat. Fire Ins. Co., 351 Ill. 516, 184 N. E. 800 (1933), but mandamus will lie to compel him to perform his duty: People ex rel. Gosling v. Potts, 264 Ill. 522, 106 N. E. 524 (1914). See also American Surety Co. v. Jones, 384 Ill. 222, 51 N. E. (2d) 122 (1943).

19 The cause was remanded with directions to permit the filing of amended pleadings.

issuance of a body execution. In that case, Morris had judgment against Schwartz on a claim arising under a contract. He caused execution to issue thereon. Prior to the issuance of execution but after the debt had been contracted, Schwartz gave a chattel mortgage to one Fuchs on certain goods to secure a purported loan made by Fuchs. That mortgage was duly recorded. The execution was subsequently returned unsatisfied. Morris then notified Schwartz that he would file an affidavit for body attachment and ask for execution thereon. Schwartz filed written objections thereto supported by affidavit. Plaintiff moved to strike defendant's affidavit and was met by written objections to his motion. Upon a hearing ordered by the trial court, plaintiff was required to produce evidence to sustain the allegations of fraud made in his affidavit. He refused on the ground that he was not required to do so. His application for body execution was denied and a further order was entered denying his motion to strike defendant's affidavit from the files. Upon appeal, the Appellate Court at first reversed both orders and remanded the cause with directions. On rehearing, it denied plaintiff's application for a body execution on the ground that the affidavit supporting the request was defective. It did, however, sustain his other motion on the theory that the statute does not contemplate any notice and hearing prior to the issuance of a body execution.

At common law, imprisonment for debt, particularly under a capias ad satisfaciendum, was well recognized although distinctions have since been made between judgments obtained in contract actions and those based on torts where malice was the gist of the action. It should be remembered, therefore, that the instant case is one based on a contract. The present Illinois statute provides for execution against the person upon (a) the return of an execution unsatisfied in whole or in part; (b) the filing of an affidavit that a demand had been made upon the debtor; (c) a statement therein that the judgment creditor verily believes such debtor has estate not exempt from execution which he unjustly refused to surrender; (d) that since the debt was contracted or the cause of action accrued the debtor has fraudulently conveyed, concealed, or otherwise disposed of some part of his estate with a design to secure the same to his own use or to defraud his creditors. which facts are to be demonstrated by affidavit based upon knowledge, information and belief tending to show that the belief is well-founded; and then not until (e) the plaintiff procures an order from a


3 In the affidavit, Morris recited the execution of the debtor's chattel mortgage to Fuchs to substantiate his own allegation of fraudulent concealment of property.

4 Huntington v. Metzger, 158 Ill. 272, 41 N. E. 881 (1895), reversing 51 Ill. App. 222 (1893).

judge or master in chancery in the same county certifying that probable cause is shown in such affidavit.\(^6\)

A careful study of Illinois decisions shows no prior cases in which the question of necessity for notice and hearing has arisen since the enactment of the present statute. A search for decisions in other jurisdictions also reveals a dearth of cases on the point. Massachusetts requires express notice to the debtor,\(^7\) as does also South Dakota.\(^8\) In Indiana, a rule to show cause why body execution should not issue is necessary,\(^9\) and in Kansas it has been held that a requirement for notice and hearing was implied.\(^10\) In the case of *In re Keene,\(^{11}\) however, a Rhode Island debtor had been confined to jail by commitment under an execution on a judgment recovered in an action of assumpsit. Writ for body execution had been issued by order of court upon application of the judgment creditor supported by affidavit which charged the debtor with fraud in the retention of his property. The debtor sought release by habeas corpus, contending that the writ for body attachment was void because it had been granted on an *ex parte* hearing. Relief was denied when the court held that the local statute did not prescribe notice and that to give one would, in many cases, defeat the purpose of the statute. It might be mentioned that the Illinois statute resembles closely the provision found in Rhode Island,\(^{12}\) hence the holding in the instant case is not without some support.

As the Illinois statute does not expressly require notice and hearing, defendant sought to raise an inference that the same were required by

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\(^6\) The Act of Feb. 17, 1823, Laws 1823, p. 158, required the affidavit of plaintiff to be proved before a jury of not less than six nor more than twelve householders. That provision was abolished in 1845, R. S. 1845, Ch. 52, § 1, and in lieu thereof the writ was to issue when plaintiff filed his affidavit before a justice of the peace and recited the fact that the debtor refused to surrender his or her estate for the satisfaction of an execution. That statute seems to be the forerunner for the present Insolvent Debtor's Act, Ill. Rev. Stat. 1945, Ch. 72, § 1 et seq., in that Section 2 of the 1845 statute provided that courts of probate, now county courts, should have the sole power, in the first instance, to hear and determine all applications for discharge from imprisonment for debt. The law remained in that condition until 1872, when the present law was enacted. Although Ill. Const. 1870, Art. II, § 12, provides that no person shall be imprisoned for debt unless upon refusal to deliver up his estate for the benefit of creditors, statutes of this character have been held constitutional: Huntington v. Metzger, 158 Ill. 272, 41 N. E. 881 (1895).

\(^7\) Lane v. Holman, 145 Mass. 221, 13 N. E. 602 (1887).

\(^8\) J. I. Case Co. v. Alick, 68 S. D. 423, 3 N. W. (2d) 482 (1942).

\(^9\) Krohn v. Templin, 2 Ind. 146 (1850).

\(^10\) Tatlow v. Bacon, 101 Kan. 26, 165 P. 835 (1917). Although Kan. Gen. Stat. 1935, Ch. 60, § 60-3472, provides that the judge may issue the writ upon being satisfied by the affidavit of the judgment creditor or his attorney, it does not exclude the theory that notice and hearing are necessary.

\(^11\) 15 R. I. 294, 3 A. 418 (1886).

\(^12\) Gen. Laws R. I., 1938, Ch. 552, § 11.
reference to another provision of the same statute. That provision directs that no body execution shall issue where the judgment was obtained in a tort action unless the trial court or jury shall make a special finding that malice is the gist of the action, and except where defendant shall refuse to deliver up his estate for the benefit of creditors. He argued that since a special finding of malice can only be had upon a hearing, a similar hearing must also be had when the debt arises out of a contractual relationship. There is an intrinsic difference between the two, for a debtor may be imprisoned for failure to pay a judgment where there is a special finding of malice regardless of whether he has or has not any estate with which to satisfy the judgment, while Section 62 allows incarceration in tort or contract cases only when the debtor actually has estate which he refuses to surrender or in cases where there is a strong presumption of attempt to defraud creditors.

The decisions in *Pappas v. Reabus* and *Marshall Field & Company v. Freed* help point out the fallacy in defendant's argument. In the first of these cases, defendant was found guilty of a tort and there was a special finding of malice. A writ for body attachment was issued. Defendant argued that the writ was void because it was issued without any affidavit that defendant had refused to deliver up her estate, claiming that both the special finding of malice and a finding that she had refused to surrender her property were necessary. The court distinguished between the two bases for imprisonment and held the finding of malice was enough to support the writ. In the Freed case, by contrast, it was declared that the purpose of Section 62 was to authorize execution against the body upon any judgment, whether in tort or contract, provided the plaintiff would file an affidavit complying with the requirements of that section.

There is further evidence that notice and hearing is not contemplated by Section 62 for certain provisions of the Insolvent Debtor's Act would be unnecessary if notice and hearing were required. Section 5 thereof, for example, provides that where any debtor is arrested or imprisoned for debt upon charge of fraud, or upon execution on the charge of refusal to surrender his estate for the payment of any judgment, he shall be entitled "to have the question, whether he is guilty of such fraud, or has refused to surrender his estate, tried by a jury who may be summoned for that purpose." Such trial, of course, comes after imprisonment occurs. As the legislature has seen fit to allow these sections to remain in the statute, it

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15 269 Ill. 558, 109 N. E. 1018 (1915).
16 Ill. Rev. Stat. 1945, Ch. 72, §§ 2 and 5.
can only be inferred that it was the legislative intention to have Section 62 operate without these requirements.

It should also be noticed that under Section 62 the judgment creditor is to make his application to the judge of the court or to a master in chancery in the same county. While the former could entertain a true hearing, it is hardly conceivable that the legislature intended that the defendant would have a right to appear and demand a trial before the latter since he is only a quasi-judicial official. He might hear evidence and make recommendations, but if the statute purported to enlarge the scope of his office by vesting him with discretion there would be serious doubts as to its constitutionality. All such doubt is removed by holding that issuance of the writ is a ministerial function involving no exercise of discretion.

A second interesting point in the case related to the sufficiency of the affidavit filed by plaintiff. Earlier cases from this and other jurisdictions did not require that any great detail be set out therein. A statement of the amount of principal and interest due upon a judgment, expressed in one lump sum, was held sufficient in *Kenan v. Carr*. A recital that the defendant had money which could not be reached by *ieri facias* was enough, according to *Dozier v. Dozier*. In *Fergus v. Hoard* it was held that an affidavit sufficiently complied with the statute when it recited that the defendant had refused, and still refuses, to surrender his estate for the satisfaction of an execution, the fact being implied that defendant had property which he refused to surrender. Six years later, in *Tuttle v. Wilson*, the doctrine of the Fergus case was modified to the extent of requiring an allegation that the defendant had estate, lands and tenements, goods or chattels, liable to be seized and sold upon execution, specifying them as near as may be. The affidavit filed in *Doty v. Colton* was held sufficient because it stated facts to show that the defendant had property which he refused to surrender, and had fraudulently concealed and withheld said property after demand.

After the adoption of Section 62, however, it was declared in the case

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17 Bottom v. City of Edwardsville, 308 Ill. 68, 139 N. E. 5 (1923).
18 Civ. Prac. Rules, Municipal Court of Chicago, Rule 77, where the instant case arose, carries out this idea for it is there provided that, upon arrest, the party shall be brought before the court and, if he fails to pay the judgment, he shall be imprisoned until he shall "be discharged according to law." No exercise of discretion is called for thereby.
19 10 Ala. 867 (1846).
20 30 Ga. 523 (1860).
21 15 Ill. 357 (1854).
22 24 Ill. 553 (1860).
23 90 Ill. 453 (1878).
of Peiffer v. French,\(^2\) that statutes of this character are penal in nature, hence are subject to the rule of strict construction. The Tuttle, Doty, and Peiffer cases support the view that the provisions of the statute must be strictly met so it is the duty of the judge or master in chancery to demand that the affidavit be in strict compliance therewith. In the light thereof, there was no error in holding that the affidavit in the instant case was defective. That statute calls not only for a statement that the judgment creditor verily believes that the debtor has estate not exempt from execution which he unjustly refuses to surrender, but also requires that he set forth, upon his knowledge, information, and belief the facts tending to show that said belief is well-founded. As a well-founded belief can only rest on basic facts, these facts ought to be expressly disclosed for a mere belief alone will not suffice.\(^2\) Language of the California Supreme Court in Fkumoto v. Marsh\(^2\) bears out this view for the court there indicated that if an affidavit resting in any essential part on information and belief is required, and such affidavit does not state facts on which such belief is founded, it does not confer jurisdiction to issue the order.

The growing tendency to look with disfavor upon imprisonment for debt leads to the conclusion that every requirement of the statute permitting such imprisonment must be closely followed. The affiant must be meticulous, for failure to comply with statutory requirements will render his affidavit defective. By demanding strict compliance, especially where there is no requirement for hearing prior to the arrest, courts will be able to protect honest but unfortunate debtors from oppression.

J. J. LIMPERIS.

GARNISHMENT—PERSONS AND PROPERTY SUBJECT TO GARNISHMENT—
WHETHER OR NOT CONTENTS OF SAFETY DEPOSIT BOXES MAY BE REACHED
BY GARNISHMENT PROCEEDINGS—A comment appeared in a recent issue of the CHICAGO-KENT LAW REVIEW on the Appellate Court decision in Morris v. Beatty.\(^1\) Subsequent thereto, leave to appeal was granted by the Illinois Supreme Court, and the latter reversed the Appellate Court and

\(^2\) 376 Ill. 376, 33 N. E. (2d) 591 (1941), affirming 306 Ill. App. 326, 28 N. E. (2d) 983 (1940).

\(^2\) The only facts recited in the affidavit in the instant case related to the execution and delivery of the chattel mortgage. The allegations as to lack of consideration therefor are all made upon "belief" rather than charged as positive fact.

\(^2\) 130 Cal. 66, 62 P. 303 (1900).

\(^1\) 323 Ill. App. 390, 55 N. E. (2d) 830 (1944), noted in 23 CHICAGO-KENT LAW REVIEW 182.
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affirmed the judgment of the Municipal Court of Chicago which had discharged the garnishee. The final outcome of the case rested upon the failure of the judgment creditor to traverse the allegation contained in the garnishee’s answer that it had no control over the safety deposit box in question as well as his failure to sustain the burden of proof. On the primary issue argued by the parties, to-wit: whether a safety deposit box may be the subject of garnishment, the court declined to express any opinion upon the ground that it was not required to pass thereon. There is reason to believe, therefore, that in a proper case the Illinois Supreme Court might yet decide that the contents of safety deposit boxes can be reached by garnishment proceedings.

The Supreme Court decision does, however, pose some practical difficulties in the way of the judgment creditor who might wish to reach such property particularly with reference to discharging the burden of proof. If, to be successful, he must first independently show that the safety deposit box contained property subject to garnishment and then establish that the garnishee, by permitting the debtor to have access thereto after service of the writ, has allowed the property therein to escape from seizure, he is placed in a desperate position. No such impossible requirement is imposed in case the property garnisheed be a bank account, for example, as the garnishee’s records may be subpoenaed to establish the necessary facts. It is only by indirection and inference that he could establish a semblance of a case as to the contents of a safety deposit box.

The nature of the business and the methods of operating safety deposit vaults are too well known to permit the proprietors thereof to say they have no control over the renter’s deposit box even though it be but a negative type of control. It is also equally well known that such boxes are usually rented as storage spaces for the protection of valuable articles. It is not reasonable to suppose that the judgment debtor seeks entrance to the box, after service of garnishment process, for the purpose of adding to the valuables therein contained. Hence the inference necessarily follows that

\[2\] 390 Ill. 568, 62 N. E. (2d) 478 (1945).

\[3\] Traverse to the garnishee’s answer, so as to raise an issue of fact, is required by Ill. Rev. Stat. 1943, Ch. 62, § 7. In the absence thereof, the answer must be accepted as true: Ranklin v. Simonds, 27 Ill. 352 (1862).

\[4\] The burden is generally on the judgment creditor: Rippen v. Schoen, 92 Ill. 229 (1879); Wilhelmi v. Haffner, 52 Ill. 222 (1869). It may shift to the garnishee: McCoy v. Williams, 6 Ill. (1 Gill.) 584 (1844). The Appellate Court had concluded that the conduct of the garnishee in permitting the judgment debtor to have access to the box had placed on it the burden of proving either that the box contained no property subject to garnishment or else that none of the contents had been removed: 323 Ill. App. 390 at 402, 55 N. E. (2d) 830 at 835.

\[5\] Ill. Rev. Stat. 1943, Ch. 62, § 7, states that the trial on the answer of the garnishee and the traverse thereto “shall be conducted as in other civil cases.”
his purpose must be to remove his property to prevent its seizure by the creditor. The proprietor, as a reasonable person, could well expect such result to follow from allowing the debtor to have uncontrolled access to the box and its contents, and might be said to be willing to co-operate in that plan.

As the judgment creditor could prove no more than that a safety deposit box had been rented to the debtor and that the latter had been granted access thereto after service of the writ, such proof should be sufficient to make out a prima facie case against the garnishee. The proprietor of the vault should then be held to assume the burden of proving otherwise or else be responsible to see to it that enough valuables remain on hand to permit satisfaction of the creditor's claim. If a prima facie case of that character cannot be accepted as the basis for judicial action against the garnishee, then it is time that the legislature provided some statutory substitute and preferably one comparable to that used when access is required to the safety deposit box of a deceased person.

**Insurance—Actions on Policies—Whether Insurer is Liable to Insured for Refusal to Settle Claim Under Policy Leading to Judgment Against Insured in Excess of Policy Limits—**An invitee of a certain country club had been injured while on the club premises and brought suit for the injury sustained. The club carried a public liability policy with an insurance carrier in an amount less than the *ad damnum* named in the complaint, which insurance carrier took over the defense of the suit. The invitee indicated a willingness to settle the case for $3500 before trial and, even after securing a judgment for $20,000, had been willing to settle for $8000 while the personal injury action was pending on appeal. Both of these proposed settlements were for less than the face amount of the insurance carried although the judgment exceeded the policy limits. Although there was some indication that the insurer's trial attorney favored settlement in each instance, the insurance carrier refused to settle. The appellate court sustained the judgment for the invitee and leave to appeal was denied by the Supreme Court. Thereafter, the country club paid that part of the judgment in excess of the amount of the insurance and sued

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6 It has been held that a garnishee who permits the debtor to withdraw the amount of his balance after service of garnishment process cannot complain against a judgment in favor of the creditor for the full amount originally due the latter: Robinson & Co. v. Marr, 206 Ill. App. 12 (1917), abst. opin. Moreover, the right to retain the debtor's property may be lost to the garnishee by its inequitable conduct after service of summons: Obergfell v. Booth, 218 Ill. App. 492 (1920).


the insurance company for reimbursement. The gist of such action was that the refusal to settle was arbitrary and unreasonable and amounted to a breach of the duty owed to the plaintiff to act honestly and in good faith. At the close of the evidence, defendant moved for a directed verdict but such motion was denied. The jury returned a verdict for plaintiff under an instruction which made it mandatory for the jury to find that a refusal to settle, contrary to advice of counsel, amounted to bad faith. The defendant appealed from the resulting judgment. It was held, in *Olympia Fields Country Club v. Bankers Indemnity Insurance Company,* that an insurance company could be liable under circumstances such as these for fraud, negligence, or bad faith, and that plaintiff had successfully discharged the burden of establishing a prima facie case, but the judgment had to be reversed and a new trial granted because the use of the mandatory instruction constituted reversible error.

Although the case is one of first impression in Illinois, the question of the right to recover from the liability insurer for personal injury judgments in excess of policy limits has been amply litigated in other jurisdictions and has been treated in annotations, encyclopedias, texts, and law reviews. As a Michigan court once stated the point, courts seem to be "unanimous in the opinion, as expressed by direct ruling, recognition, or assumption, that the insurer is liable to the insured for an excess of judgment over the face of the policy when the insurer, having exclusive control of settlement, fraudulently or in bad faith refuses to compromise a claim for an amount within the policy limit." But courts have been equally unanimous in refusing to define what constitutes bad faith.

All agree that by virtue of the usual terms of a liability policy, which vests in the insurer the exclusive right to conduct the defense or negotiations for settlement, the insurer is under a corresponding duty to the in-

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4 36 C. J. 1053; 25 Cyc. 224.
sured to act in good faith. Many courts have attempted to raise this duty from a principal-agent relationship between insured and insurer, but it seems that this is an erroneous and confusing use of terms resulting in no practical advantage. Certainly one of the cardinal characteristics of the agency relation, to-wit: control by the principal, is utterly lacking in this situation. Since relationships other than agency wherein one party owes to another the duty to act in good faith are by no means unknown in the law, it seems unnecessary to attempt to stretch the law of agency to include the present problem. Whatever the rationale, there can be no question as to the existence of such a duty on the part of the insurance carrier. The major problem has always been to determine whether that duty has been breached.

An examination of the factual situations presented in the determined cases should be instructive in order to determine what acts on the part of the insurer may later be held to amount to bad faith. Many of the suits have been based on the theory that the insurer was negligent in defending or negotiating for settlement, with no allegation of bad faith.\(^8\) Some courts have attempted to differentiate between negligence and bad faith, but the sounder view would seem to be raised by the query of a New York court when it inquired: "We may ask what would constitute negligence in the failure to settle a case, as distinguished from bad faith?"\(^9\)

As insurance policies usually give the insurer an option to defend or settle, the mere refusal to settle does not constitute bad faith, consequently courts have held that the insurer is not liable just for a mistake in judgment when exercising such option.\(^10\) Even slightly more evidence for the insured has been held insufficient to support a charge of bad faith. In

\(^8\) E. g., Douglas v. United States Fidelity & Guaranty Co., 81 N. H. 371, 127 A. 708 (1924).


Levin v. New England Casualty Company,\(^{11}\) for example, refusal of a settlement offer of $3150, to effect which the insured was asked to contribute $750, was not sufficient to support liability. A failure to notify the insured of an $8500 settlement offer and give him a chance to contribute the necessary $2000 by which the insurer's counter-offer failed to meet the demand has also been regarded as insufficient.\(^{12}\) In another case, where the first action by the injured party had resulted in a mistrial, the insured notified the insurer that all the members of the jury at that trial were for the injured party and that the insured would expect the insurer to pay all of any subsequent judgment should it fail to take advantage of opportunities of settlement below the policy limit, it was said that the failure to settle was not enough to impose liability.\(^{13}\) Again, a failure to notify the insured of an opportunity to settle a judgment in excess of the policy, the insured being insolvent, did not support a recovery.\(^{14}\) In Hoyt v. Factory Mutual Liability Insurance Company of America\(^{15}\) there was some evidence of contributory negligence and of improper medical treatment of the injured infant, so disregard of the consistent advice of the trial attorney of the insurer that the case be settled was held not to amount to bad faith. The same rule has been applied where there is conflicting evidence as to the facts upon which initial liability rests,\(^{16}\) and a similar result has been obtained where there is doubt as to the legal basis for the claim advanced by the injured person.\(^{17}\) In all such situations, the insurer has been excused for its failure to settle on the basis that it had acted in good faith, hence had breached no obligation to the insured.

Some of the confusion as to what constitutes bad faith may be due to a failure to give consideration to the manner through which that issue is presented. A court is forced to consider different problems and to use different methods of approach when ruling on the sufficiency of pleadings,

\(^{11}\) 233 N. Y. 631, 135 N. E. 948 (1922), affirming 166 N. Y. S. 1055, 174 N. Y. S. 910 (1919). In Lawson & Nelson S. & D. Co. v. Associated Indemnity Corp., 204 Minn. 50, 282 N. W. 481 (1938), a refusal to settle unless the insured contributed $1500 was likewise deemed insufficient. See also Davis v. Maryland Casualty Co., 16 La. App. 253, 133 So. 769 (1931).


\(^{14}\) Norwood v. Travelers' Ins. Co., 204 Minn. 505, 284 N. W. 785 (1939).

\(^{15}\) 120 Conn. 156, 179 A. 842 (1935).

\(^{16}\) Ohio Casualty Ins. Co. v. Gordon, 95 F. (2d) 605 (1938).

\(^{17}\) In Silverstein v. Standard Acc. Ins. Co., 162 N. Y. S. 601, 175 App. Div. 639 (1916), settlement had been made with the infant's mother as guardian ad litem and the entire defense of the subsequent suit was based on such release. Bad faith was deemed to be lacking even though the release was invalid because at the time of the making thereof the mother had not been appointed to act for the infant.
passing on motions for directed verdicts, or deciding issues raised after verdict. Many of the widely-quoted cases bearing on this problem have been before the courts simply on rulings on demurrers where the only problem to decide was whether the complaint stated a cause of action. In that regard, a different result could be expected than if the issue had been considered after verdict. One type of illustration will suffice, that dealing with the question of whether a demand by the insurer for a contribution from the insured constitutes bad faith. On demurrer, the courts have uniformly held that a complaint alleging bad faith in the insistence upon a contribution states a cause of action, but when one such case later reached the higher court on appeal from a jury finding of bad faith, the court reversed. Its action has not gone without recognition.

Complaints have been held good against demurrer where the bad faith charged involved refusal to compromise below the policy limit unless the insured contributed and the insurer refused to appeal from a judgment exceeding the policy limits; or where assurance was given by the insurance carrier that appeal was being or had been taken when, in fact, no appeal occurred. In Noskey v. American Automobile Insurance Company, a complaint charging delay by the insurer's agent in effecting settlement until it was too late, even though settlement had been urged by the insured and the insurer's trial attorney, was held to state a cause of action. Refusal to consider small settlement offers before trial, with a refusal to settle a judgment in excess of the policy for the policy amount, made during a pending appeal taken without expectation of success, was regarded as enough to state a cause of action in Tiger River Pine Company v. Maryland Casualty Company. In still another case a charge was deemed sufficient which alleged that a bad faith refusal to settle existed in the light of a serious injury, absolute liability on the part of the insured, and the potential danger of a large judgment.

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20 The cases cited in note 11, ante, involved situations where, after trial, the courts named found that a demand for contribution did not, in fact, amount to bad faith.


22 88 F. (2d) 808 (1934).

23 163 S. C. 229, 161 S. E. 491 (1931). At a trial upon such complaint, judgment for the insured was affirmed in 170 S. C. 286, 170 S. E. 346 (1933).

24 Wisconsin Zinc Co. v. Fidelity & Deposit Co., 162 Wis. 39, 155 N. W. 1081, Ann. Cas. 1918C 399 (1918).
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Much the same attitude can be observed when the court is asked to direct a verdict for the defendant. In a Michigan case, for example, it was held that the issue ought to go to the jury where the evidence disclosed that the insurer's trial attorney, after negotiating a compromise subject to the insurer's approval, warned that the case was dangerous and that a counter-offer would be futile, despite which the insured refused to settle and gave no reason for the refusal.26

When the issues have been submitted, verdicts favoring the insured have been sustained in a number of cases where the bad faith or negligence has been said to rest in a failure on the part of the insurer to make a diligent investigation to ascertain the facts, but in such cases the failure has been coupled with a refusal to settle within the policy limits.27 Judgments have been sustained in other cases, but they are sufficiently dissimilar on the facts as to render them inappropriate for purpose of grouping. Thus, a refusal to settle below the policy limit followed by a refusal to appeal a judgment in excess thereof was held sufficient, in Brassil v. Maryland Casualty Company,28 to support a recovery for the costs of a successful appeal conducted by the insured. Again, a refusal to settle where the injured person was badly hurt, the insured had no defense, and the trial attorney for the insurer, convinced that the verdict would be high, had recommended settlement, justified recovery in McCombs v. Fidelity & Casualty Company of New York.29 Other instances of bad faith can be found where the refusal to settle was made in the face of adequate warning of the consequence,30 especially where settlement for less than the policy amount was rejected unless the insured made a contribution.31 Much clearer are cases where the insurer has refused to assert defenses adequate in law to defeat recovery,32 has made no serious attempt

28 210 N. Y. 235, 104 N. E. 622, L. R. A. 1915A 629 (1914).
29 231 Mo. App. 1206, 89 S. W. (2d) 114 (1936).
31 Lanferman v. Maryland Casualty Co., 222 Wis. 406, 267 N. W. 300 (1936).
32 In Anderson v. Southern Surety Co., 107 Kan. 375, 191 P. 583 (1920), the insurer refused to permit the defense that the injured person sustained injuries while engaged in an unlawful act.
at settlement until too late,\textsuperscript{33} or has disregarded all advice and recommendation despite an obviously hostile atmosphere during the trial.\textsuperscript{34}

An unusual case was presented in \textit{Aycock Hosiery Mills v. Maryland Casualty Company}\textsuperscript{35} wherein the insurer commenced to defend a workmen's compensation suit on the ground that the employment was illegal but abandoned such defense upon the protest of the insured. It thereafter refused to settle or to permit the insured to settle. Liability within the limits of the policy was found to exist but, through the neglect of the insurer, judgment was never entered. A fire in the courthouse later destroyed all of the records. The case was subsequently restored to the docket whereupon the injured employee took a nonsuit and sued and won on a common-law claim, thereby imposing a liability not covered by the policy. The insured was allowed to recover the amount of such judgment from the insurer. In another amply litigated case, that of \textit{G. A. Stowers Furniture Company v. American Indemnity Company},\textsuperscript{36} the injured person offered to settle for $4000, which offer the insurer's attorney recommended should be accepted as the case was dangerous. The insurer was willing, however, to pay only $2500. A judgment for the insurer on the pleadings was affirmed in the intermediate appellate tribunal upon the rather questionable theory that the insured's refusal to contribute was an indication that the insured shared in a bona fide belief that the claim could be defeated or at least minimized, although such belief proved to be erroneous. The highest court of the state reversed and remanded the case for trial before a jury. Verdict favoring the insured was subsequently affirmed.

Despite some discrepancies, then, the cases appear to fit into a fairly rational pattern. There is no doubt that mere refusal to settle does not amount to bad faith. It is equally clear that when other circumstances are coupled with the refusal to settle, that refusal may amount to bad faith. Failure to make diligent investigation; refusal to enter into negotiations for settlement; refusal to settle contrary to the advice of the insurer's agents on the scene; or insistence upon a contribution from the insured to effect a settlement within policy limits have been regarded as sufficient additional circumstances, although the latter represents the greatest point of disagreement in the decided cases. Other factors may be the degree of


\textsuperscript{35} 157 Tenn. 559, 11 S. W. (2d) 889 (1928).

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injury suffered, the consequent probability of a verdict over the policy limits, the presence of a hostile atmosphere at trial, or a refusal to consider the interests of the insured. These observations as to bad faith accord with the converse of the problem, to-wit: what constitutes good faith. The only attempt to provide a judicial definition of the latter appears in a Wisconsin case where the court suggested that that obligation required (1) reasonable diligence in ascertaining the facts; (2) an honest and intelligent decision to contest or settle, based on the facts, plus diligence in carrying out that decision; and (3) the allowance of an opportunity to the insured to protect himself if it seems probable that the amount of recovery will exceed the policy limits.\(^3\)

Viewed either way, the decision in the instant case appears to achieve an eminently correct result.

JOHN K. WISE.

JOINT TENANCY—SEVERANCE—WHETHER OR NOT LEVY UNDER EXECUTION BASED ON JUDGMENT AGAINST ONE OF THE JOINT TENANTS OPERATES TO DESTROY THE JOINT TENANCY—While the Illinois courts have had occasion, on the one hand, to decide that the mere rendition of a judgment against a joint tenant will not act as a severance of the joint tenancy,\(^1\) and on the other that a levy and a completed sale thereunder will,\(^2\) the ground in between has been unexplored. The recent case of Van Antwerp v. Horan,\(^3\) however, has provided an opportunity to speak on the subject of the effect of a levy, made under an execution, upon the share or interest of one of the joint tenants. It appeared therein that a judgment had been secured against one joint tenant and execution had been issued and a levy made thereunder during the joint tenant’s lifetime. After his death, the bailiff prepared to offer the deceased person’s interest for sale pursuant to levy to satisfy the judgment. The transferee of the surviving joint tenant brought suit to enjoin such action. A motion to dismiss was made on behalf of the bailiff and the assignee of the judgment creditor based on the proposition that the making of the levy acted as a severance of the joint tenancy. That motion was denied and the defendants elected to stand thereon. A decree was entered granting plaintiff a permanent injunction. Upon appeal, the Illinois Supreme Court affirmed.

\(^3\) Hilker v. Western Automobile Ins. Co., 204 Wis. 1, 235 N. W. 413 (1931).
\(^1\) People’s Trust & Savings Bank v. Haas, 328 Ill. 468, 160 N. E. 85 (1928).
\(^2\) Johnson v. Muntz, 364 Ill. 482, 4 N. E. (2d) 826 (1936); Voss v. Rezgis, 343 Ill. 451, 175 N. E. 799 (1931).
\(^3\) 390 Ill. 449, 61 N. E. (2d) 358 (1945).
Joint tenancy was the norm and tenancy in common the exception under theories prevailing at early common law for reasons peculiar to a feudal society. With the decline of the feudal system, however, tenancies in common came to be favored even to the point where some states passed statutes practically abolishing joint tenancies. An early Illinois statute, in fact, provided for the partition of joint estates and nullified the doctrine of survivorship which had been an important feature thereof. Six years later, another statute was passed which had the effect of restoring the right to create joint tenancies. From that time onward, though, the presumption existed that a tenancy in common had been created unless the grant or devise made it clear that a joint tenancy was contemplated. The statutory form of joint tenancy thus created is, in all other respects, identical with the common-law estate and requires the presence of the same four unities made essential for the existence of the earlier type of joint interest. Absence of any one of them will prevent the creation of the joint tenancy.

Similarly, a joint tenancy may be terminated, either voluntarily or involuntarily, by any act which destroys one or more of these constituent unities. Voluntary severance can be produced by partition proceedings, or by conveying or mortgaging the interest of one of the joint tenants to

4 Cover v. James, 217 Ill. 309, 75 N. E. 490 (1905); Mustain v. Gardner, 203 Ill. 284, 67 N. E. 779 (1903); Slater v. Gruger, 165 Ill. 329, 46 N. E. 235 (1897).


6 Ill. Laws 1821, p. 14. Section 1 provided that all joint tenants "... may be compelled to make partition between them of such lands ... as they now hold or hereafter shall hold, as joint tenants. ..." Section 2 directed that if partition was not made then "the parts of those who die first shall not accrue to the survivor or survivors but descend or pass by devise and shall be subject to debts, dower, charges, etc., or transmissible to execution or administration and be considered to every intent as a purpose in the same view as if such deceased joint tenants had been tenants in common."

7 Rev. Laws 1827, p. 97. Section 5 thereof declared that no estate in joint tenancy shall be held or claimed "unless the premises therein mentioned shall expressly be thereby declared to pass, not in tenancy in common, but in joint tenancy." The language of Ill. Rev. Stat. 1945, Ch. 76, § 1, is substantially that of the 1827 statute. See also Mette v. Feltgen, 148 Ill. 357, 36 N. E. 81 (1894).

8 Shipley v. Shipley, 324 Ill. 560, 155 N. E. 334 (1927); Svenson v. Hanson, 289 Ill. 242, 124 N. E. 645 (1919).


a stranger. A contract to convey operates, at least in equity, as a severance, and an agreement between the joint tenants to hold as tenants in common will have the same effect. Such agreement, in fact, may be inferred from the manner in which the parties deal with the property. Involuntary severance, on the other hand, usually arises through levy and completed sale of the interest of a joint tenant under an execution against him for a creditor, by proper action, may reach the interest held by his debtor, even in a joint tenancy, provided it is done before the debtor’s death.

In the case at hand, the judgment creditor had taken out an execution and had levied upon the property but had not proceeded to sale before the joint tenant died, thereby posing the instant problem. In the earlier case of People’s Trust & Savings Bank v. Haas, the creditor had recovered a judgment against one joint tenant and execution thereon had been returned unsatisfied. Nothing further took place prior to the death of the debtor except for the filing of a memorial of the judgment in the fashion required by the Torrens Act. It was there held that the grantee of the surviving joint tenant was entitled to have the memorial removed as a cloud on the title because such action alone did not sever the joint estate. The creation of a lien upon the jointly-held real estate by virtue of the rendition of a judgment or by the filing of a memorial thereof was not regarded as sufficient to disrupt the essential unities.

It was said by an eminent common-law writer that the creation by one joint tenant of a charge upon the land would be a nullity as against the right of the surviving joint tenant. It is to be expected, therefore, that the same thing would be said for judgment liens. Seizure of actual possession of the land under execution, even prior to sale, has been treated elsewhere as producing a severance, but it is unlikely that such result

16 328 Ill. 468, 160 N. E. 85 (1928).
18 Ibid., Ch. 77, § 1.
19 Litt. § 286; Co. Litt., Vol. 1, Book II, Ch. 25, p. 862.
would be reached in this state for levy alone does not disturb the debtor's right to possession.\textsuperscript{21} Furthermore, the mere levy of execution only serves to make the interest of the debtor liable to be taken and sold to satisfy the judgment. It does not destroy his title in the property, nor serve to create one in the judgment creditor. Although a joint interest in personal property may be destroyed by levy thereon since it may result in the absolute appropriation of the property to the possession of the sheriff,\textsuperscript{22} such is not the case as to real property.\textsuperscript{23} Such a levy is merely a step in the process toward securing satisfaction of the judgment. It would, therefore, seem that nothing short of a completed sale, including the expiration of the period of redemption, would operate to destroy the debtor's joint interest in this state. Until then, all incidents of the joint tenancy are to be regarded as fully effective and none of the essential unities impaired.

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\textsuperscript{21} Freeman, Executions, Vol. II, § 282, states: "The nature of proceedings by levy and sale (if land) under execution is entirely different from that which formerly resulted in setting off to the creditor of sufficient lands of the debtor to discharge the debt. By a levy of land under execution the creditor acquires no property in the land, absolute or conditional. Such a levy, unless consummated by a sale (and then only to the extent of the proceeds realized), is no satisfaction of the judgment."

\textsuperscript{22} Pearl v. Wellman, 8 Ill. (3 Ill.) 311 (1846); Ambrose v. Weed, 11 Ill. 488 (1850); Curtis v. Root, 28 Ill. 367 (1862); French v. Snyder, 30 Ill. 339 (1863); Trenary v. Cheever, 48 Ill. 28 (1868).

\textsuperscript{23} It has been held that a levy on real estate is not, like a levy upon personal property, a prima facie satisfaction of the judgment. See Gregory v. Stark, 4 Ill. (3 Scam.) 611 (1842); Gold v. Johnson, 59 Ill. 63 (1871); Herrick v. Swartwout, 72 Ill. 340 (1874); Robinson v. Brown, 82 Ill. 279 (1876); Scott v. Aultman Co., 211 Ill. 612, 71 N. E. 1112 (1904).