RECENT CASES

Bills and Notes—Joint and Several Obligation—[Illinois].—A promissory note was, by its terms, joint and several. The second paragraph of the note provided ". . . . the makers and all endorsers hereof severally waive presentment for payment . . . . and . . . . authority is hereby irrevocably given to any attorney of any court of record . . . . [to] confess judgment against the undersigned . . . ." The note was signed by two persons and judgment was confessed against one of the two signers. *Held*, the warrant of attorney, like the note itself, was several as well as joint, and judgment was properly confessed against one of the two signers. *Farmer's Exchange Bank of Elvaston v. Sollars*, 353 Ill. 224, 187 N.E. 289 (1933).

The power to confess a judgment must be clearly given and strictly pursued, and if power is given to confess judgment against the promisors jointly, a confession of judgment against one severally will render the confession and judgment on it void. *Keen v. Bump*, 286 Ill. 11, 121 N.E. 251 (1918), *Wells v. Durst Chevrolet Co.*, 341 Ill. 108, 173 N.E. 92 (1930). Apparently the Illinois statute requiring that "all joint obligations and covenants shall be taken and held to be joint and several obligations and covenants" does not apply to confessions of judgment. Ill. Cahill's Rev. Stat. (1933), c. 76, § 3; see *Keen v. Bump*, 286 Ill. 11, 121 N.E. 251 (1918). That a note is in terms joint and several will not authorize a several judgment against one of the makers on a joint confession of judgment clause. *Mayer v. Pick*, 192 Ill. 561, 61 N.E. 416 (1901).

In *Mayer v. Pick*, 192 Ill. 561, 61 N.E. 416 (1901) the confession of judgment was held joint where the language of the confession was "we authorize," even though the note was joint and several. The court distinguished the present case from the *Mayer* case because of the use of the words "the undersigned" (which might refer to each signer) in the confession clause, and of the word "severally" in the preceding waiver of presentment clause.

TELFORD F. HOLLMAN

Certiorari—Scope of Review—Revocation of Medical License—[Illinois].—Proceedings were instituted under the Medical Practice Act, Ill. Smith-Hurd Rev. Stat. (1933), c. 91, § 16a(3), to revoke the defendant's license to practice medicine, charging him with gross malpractice, resulting in the permanent injury of a patient. *Certiorari* to review an order of the Medical Committee revoking defendant's license was quashed, and defendant appealed. *Held*, reversed and remanded, on the ground that the committee in making its order had adopted an erroneous rule of law. *Schireson v. Walsh*, 354 Ill. 40, 187 N.E. 921 (1933).

Briefs filed in the case reveal that the record brought up contained findings by a committee of physicians that the patient was diagnosed for bow legs by means of a photograph, despite the fact that the only proper method of diagnosis was by X-ray or fluoroscope; that even the photograph did not reveal a case of bow legs; yet the defendant performed an unnecessary operation, which eventually necessitated the amputation of both legs. In finding the defendant guilty as charged, the committee applied

the rule that when a physician proclaims himself as a skillful plastic surgeon, a much higher degree of skill and ability is demanded of him than of the average physician.

The Supreme Court, in reversing the judgment and order of the committee on *certiorari*, held that an erroneous standard of skill had been applied and that where an order of an administrative body is based upon an incorrect rule of law, such order must be set aside, regardless of the evidence introduced.

The problem of the scope of the review on *certiorari* is fairly presented by this decision, since an appeal from a judgment on *certiorari* can be no more extensive in its review than *certiorari* itself. *Minaker v. Adams*, 55 Cal. App. 374, 203 Pac. 806 (1921). The scope of the writ of *certiorari* has been restricted or enlarged either by judicial definition or statute. See 24 Mich. L. Rev. 844 (1926); 36 Yale L. Jour. 1017 (1927); Freund, Administrative Powers over Persons and Property (1927), 240–242. Some courts adhere to the conservative notion that on *certiorari* inquiry will be made only into defects and errors which concern the jurisdiction of the inferior tribunal. *Tinn v. United States District Court*, 148 Cal. 773, 84 Pac. 152 (1906); *Minaker v. Adams*, 55 Cal. App. 374, 203 Pac. 806 (1921); *Mays v. District Court*, 40 Ida. 798, 237 Pac. 700 (1925). But the meaning of the concept "jurisdiction" is elusive; it has been held that where the finding has no support in the testimony, there was no jurisdiction to make it. *International Harvester Co. v. Industrial Commission*, 157 Wis. 167, 147 N.W. 53 (1914).

Many jurisdictions hold that the office of *certiorari* is also to review questions of irregularity in the proceedings, i.e., whether the tribunal proceeded according to the legal forms prescribed by statute or common law. *Ex parte Big Four Coal Mining Co.*, 213 Ala. 305, 104 So. 764 (1925); *First Nat'l Bank v. Gibbs*, 78 Fla. 118, 82 So. 618 (1919); *People v. Lindblom*, 182 Ill. 241, 55 N.E. 358 (1899); *Barry v. District Court*, 167 Iowa 306, 149 N.W. 449 (1914); *State ex rel. Matranga v. Judge of Crim. District Ct.*, 42 La. 1089, 8 So. 277 (1890); *Garnsey v. County Court*, 33 Ore. 201, 54 Pac. 539 (1898). See also *Doran v. State Board of Medical Examiners*, 78 Colo. 153, 240 Pac. 335 (1925), where, under the writ, the court may inquire into "abuse of discretion."

A more liberal treatment of the writ has made *certiorari* concurrent with appeal or writ of error, to bring up all errors of law, i.e., where the evidence is such that it will not justify the findings as a legitimate inference from the facts proved; where the action of the tribunal is based upon an erroneous application of the law to the findings; and where evidence is improperly admitted or excluded. *Harwell v. Marshall*, 125 Ga. 451, 54 S.E. 93 (1906); *Jackson v. People*, 9 Mich. 111 (1860); *Mayor of Medford v. Judge of Court*, 249 Mass. 465, 144 N.E. 397 (1924); *People ex rel. Cook v. Board of Police*, 39 N.Y. 506 (1868); *Dryden v. Swinburne*, 20 W.Va. 89 (1882).

The broadest application of the writ was effected under the New York Civil Practice Act (6th ed. 1931), § 304, permitting a review of the weight or preponderance of the evidence in all *certiorari* proceedings; and under the Illinois Workmen's Compensation Act, Ill. Smith-Hurd Rev. Stat. (1933), c. 48, § 15b, f, providing for inquiry into all questions of law and fact presented by the record in such proceedings. *Otis Elevator Co. v. Industrial Commission*, 302 Ill. 90, 134 N.E. 19 (1922). The principal case holds that *certiorari* may properly review an erroneous application of the law to the findings. Inasmuch as the proceedings here were prescribed by the Medical Practice Act which directs *certiorari* as the proper remedy but does not purport to define its scope, the common law writ apparently was intended. Yet a long line of Illinois decisions have established that the ruling of the lower court upon the law and the application of the law to the facts in the rendition of a judgment cannot be reviewed on common law *certiorari*,

whose restricted province is an inquiry into the jurisdiction of the court, and the legal form of the court's proceedings. *Hamilton v. Harwood*, 113 Ill. 154 (1885); *People v. Lindblom*, 182 Ill. 241, 55 N.E. 358 (1899); *White v. Wagar*, 185 Ill. 195, 57 N.E. 26 (1900); *Joyce v. Chicago*, 216 Ill. 466, 75 N.E. 184 (1905); *Carroll v. Houston*, 341 Ill. 531, 173 N.E. 657 (1930); *Crocker v. Abel*, 348 Ill. 269, 180 N.E. 852 (1932); *Ellfeldt v. Chicago*, 189 Ill. App. 610 (1914); *People ex rel. Aeberly v. Chicago*, 240 Ill. App. 208 (1926).

Even conceding that the court felt the need for a more efficacious writ, the order of the Medical Committee might well have been affirmed. The record contained specific findings of facts made by a group of medical practitioners. If these facts were sufficient to justify the finding of gross malpractice by applying the lowest conceivable standard to the medical profession, then the conclusion should have been upheld and the application of the erroneous standard considered as harmless error. Though an improper finding of law may be made, if the findings of fact are in accordance with the proper construction of the law, then the specific finding of law which is erroneous is mere surplusage.

WALTER W. BAKER

Conflict of Laws—Extraterritorial Effect of Custody Decree—[Minnesota].—The plaintiff and defendant were divorced in Iowa, the court awarding custody of an infant child alternately to each parent for six months of the year, and providing, for a readjudication of the question of custody in three years. The plaintiff later became domiciled in Minnesota. At the end of one of the six-month periods, plaintiff surrendered custody of the child to the defendant; but before defendant could return to Iowa, the plaintiff sued out a writ of *habeas corpus* challenging his right to the child's custody. The lower court awarded custody of the child to the plaintiff until further order, and the defendant appealed, principally on the ground that the Minnesota court lacked jurisdiction to make a decree affecting the child's custody. *Held*, the child was domiciled in Minnesota and the Minnesota court had jurisdiction to determine the child's custody, not being bound by the full faith and credit clause of the Federal Constitution to give effect to the Iowa decree. *State ex rel. Larson v. Larson*, 252 N.W. 329 (Minn. 1934).

Since a decree of custody of a child is an adjudication of a domestic status and alters substantially the relationship of parent and child, only the state of the child's domicile should have jurisdiction to award such a decree. *People ex rel. Wagner v. Torrence*. 27 P. (2d) 1038 (Colo. 1933); *Brandon v. Brandon*, 154 Ga. 661, 115 S.E. 115 (1922); *Weber v. Redding*, 200 Ind. 448, 163 N.E. 269 (1928); *In re Volk*, 254 Mich. 25, 235 N.W. 854 (1931); *Sanders v. Sanders*, 224 Mo. App. 1107, 14 S.W. (2d) 458 (1931); *In re Erving*, 109 N.J. Eq. 294, 157 Atl. 161 (1931); *Griffin v. Griffin*, 95 Ore. 78, 187 Pac. 598 (1920); Goodrich, Conflict of Laws (1st ed. 1927), § 131; Beale, The Status of The Child and the Conflict of Laws, 1 Univ. Chi. L. Rev. 13, 21 (1933); Beale, The Progress of the Law, 34 Harv. L. Rev. 50, 57 (1920); Goodrich, Custody of Children in Divorce Suits, 7 Corn. L. Quar. 1 (1921). Cf. *Minick v. Minick*, 149 So. 483 (Fla. 1933).

If a court decreeing custody of a child to one parent has adequate jurisdiction, the preponderance of authority holds that the decree is *res judicata* as to all matters prior to the time of its rendition, and the right of the parent to custody of the child will be recognized in another state. *Wakefield v. Ives*, 35 Ia. 238 (1872); *State ex rel. Nipp v.*