all provisions of the contract and the words "general administration" have been substituted.[55] Also, in an attempt to clearly establish the architect's lack of responsibility to supervise the construction methods, the contract provides: "The Architect will not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work. . . ."[56] The only time the word "supervise" is used in the AIA form is in describing the *contractor's* duties: "The Contractor shall supervise and direct the work, using his best skill and attention. He shall be *solely responsible* for all construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract."[57] (Emphasis added.) In addition to these provisions, there is one entire article of the AIA form which is devoted to the contractor's duty to take various safety precautions for the protection of persons and property.[58]

After these new revisions it is difficult to see how a court could again base the architect's duty to supervise the methods and techniques of construction solely on the contract. However, in light of *Fabricius v. Montgomery Elevator Co.*,[59] these terms of the contract do not disclaim the architect's common-law duties. In *Fabricius*, a workmen's compensation carrier was held liable for negligently inspecting the work places, machinery and equipment covered by its policy. The court held that, even though the carrier was not obligated to inspect under the terms of its policy, it did in fact undertake to inspect, thereby giving rise to a common-law duty to use reasonable care in making the inspection. This case illustrates the principle that while a party may disclaim contractual duties in the terms of his contract, he cannot so disclaim his common-law duties. In light of the *Fabricius* case, the new provisions in the standard AIA contract form in effect disclaim the architect's contractual duty to act with reasonable care to prevent injury to persons who might be forseeably injured by improper construction techniques. It is of importance to note that the contract retains the provision giving the architect authority to stop the work if he feels it is not in compliance with the contract.[60] Therefore, the result should be a return to the rule which existed prior to the *Dewitt* case in Illinois. That is, the architect has no duty to interfere with the contractor's method of construction unless (1) he has expressly agreed in the contract to supervise these activities, or (2) he has knowledge of the use of some method of construction which is sufficiently dangerous to give rise to a duty to exercise his power to stop construction or to warn of the danger.

How the courts will treat these new provisions in the standard AIA contract form is still to be determined. However, it is likely that the courts, in view of their recent liberal attitude towards allowing personal injury claims

55 AIA Document A 201, *supra* note 23 ¶ 2.2.1.
56 AIA Document A 201, *supra* note 23 ¶ 2.2.4.
57 AIA Document A 201, *supra* note 23 ¶ 4.3.1.
58 AIA Document A 201, *supra* note 23 art. 10.
59 254 Iowa 1319, 121 N.W.2d 361 (1963).
60 AIA Document A 201, *supra* note 23 ¶ 2.2.12.

against the architect, will look closely at the circumstances of each case in an effort to find either a contractual or a common-law duty to supervise methods and techniques of construction.

## Conclusion

The body of law concerning the architect's tort liability to third persons for personal injury has undergone a tremendous evolution in recent years. The major turning point occurred in 1953 with the *Inman*[61] decision which did away with the requirement that the plaintiff be in privity of contract with the architect in order to recover, and which substituted instead the rule that an architect would be liable for his negligent design to anyone whose injury was within the range of forseeability. However, his liability for design defects extends only to those which present a patent as opposed to a latent danger.[62]

The architect is generally not considered to warrant that his design is fit for a particular purpose. Instead, as in the case of other professional men, he warrants that he will exercise that skill and knowledge common to the members of his profession. The elements of this warranty therefore are the same as those of negligence.[63] One case,[64] however, indicates that there is a possibility that the architect will in the future be held to a warranty of his design for a particular purpose or at least to some type of strict liability.

In addition to using reasonable care in designing a building, the architect may also be held to a duty to supervise the construction of the structure he designed. This duty may be derived from two sources. It may be a contractual duty defined in the contract between the architect and owner, or it may be a common-law duty arising from the architect actually undertaking supervisory duties or from his knowledge of a dangerous condition created by the contractor's improper supervision.[65] The standard contract used by architects today attempts to disclaim a great portion of the architect's duty to supervise. However, if he undertakes to do any supervision at all, whether it be for the purpose of seeing that the structure conforms to the drawings or to supervise the method of construction, he will be under at least some duty to act to prevent injury to third persons. The standard to be applied to the architect in all such cases is whether or not he exercised the learning, skill and care ordinarily possessed and practiced contemporaneously by others in the same profession and in the same locality.[66]

Michael G. Voorhees

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61 Inman v. Binghamton Housing Authority, 3 N.Y. 2d 137, 143 N.E.2d 895, 165 N.Y.S.2d 699 (1957).

62 *Id.*

63 Audlane Lumber & Builders Supply, Inc. v. D. E. Britt Associates, Inc., 168 So. 2d 333 (Fla. 1964).

64 Shipper v Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965).

65 *See* Division II *supra.*

66 *See* notes 14 and 15 and accompanying text *supra.*

# CERTIORARI: ADVANTAGE TO STATE IN CRIMINAL CASES

In recent times the writ of certiorari has been extended far beyond its common-law implications, affording the state what may be tantamount to an "appeal" in a criminal case. Certiorari has been utilized by the state to challenge the suppression of evidence as well as to challenge the denial of a change of venue. If the state's right to certiorari is further liberalized, the question arising is whether or not a defendant will be afforded an equal opportunity to utilize the ancient writ. Accordingly, this note is addressed to an analysis of these aspects of certiorari.

The extraordinary writ of certiorari has been available to the state in criminal cases since the early days of the common law.[1] Judicial power emanated from the king, under whose aegis the King's Bench was established to supervise and control inferior courts.[2] A majority of the early cases involved the right of the Crown[3] to apply for certiorari prior to trial in order to transfer the indictment from a lower to a higher court.[4] Although venue was involved, the issue at base was one of power. Under the feudal system and the common law, power was derived from jurisdiction; out of proper jurisdiction flowed power to hear and power to adjudicate.[5] Gradually certiorari was held to include any abuse of power by the court. In this form the writ became an integrated part of the statutory law of English speaking peoples.[6]

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1 *See* T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 173 (5th ed. 1956). *See also* Maitland, *The History of the Register of Original Writs*, 3 HARV. L. REV. 97, 106 (1889); 14 AM. JUR. 2d *Certiorari* § 14 (1964); Annot., 91 A.L.R.2d 1097 (1963).

2 Note, *Certiorari in Arkansas*, 17 ARK. L. REV. 163 (1963).

3 On trial before King's Bench a defendant was usually entitled to a jury from the county out of which the indictment was brought, but a writ of certiorari, when applied for on behalf of the king, issued as a matter of course to change venue. State *ex rel.* Fletcher v. District Ct., 213 Iowa 822, 828, 238 N.W. 290, 293 (1931); 4 BLACKSTONE COMMENTARIES *265, *303.

Lord Mansfield stated the rule: "In the case of an application on the part of the prosecutor, for a certiorari; it goes of course: in cases of application by the defendant, there must be a special ground laid." Rex v. Clace, 4 Burr 2456, 98 Eng. Rep. 288 (1769).

4 14 AM. JUR. 2d *Certiorari* § 14 (1964).

5 *See* Weintraub, *English Origins of Judicial Review by Prerogative Writ: Certiorari and Mandamus*, 9 N.Y.L.F. 478, 503 (1963). The article states:

> Of course, in the fourteenth and fifteenth centuries the writ of certiorari in nowise resembled, in its practice or its function, the writ which was to later become the vehicle for reviewing actions of officials and official bodies in regard to exercise of jurisdiction. The earlier writ of certiorari was technical nomenclature denoting that certain records or documents were certified and transmitted at the request of the Crown. By the year 1414, the use of certiorari for sundry purposes had become so widespread that abuse had already crept into the usages attending it.

6 IOWA R. CIV. P. 306 provides: "A writ of certiorari shall only be granted when specifically authorized by statute; or where an inferior tribunal, board or officer, exercising judicial functions, is alleged to have exceeded its, or his proper jurisdiction or otherwise acted illegally." An Australian view of the writ follows:

> Briefly, the cases in which a decision can be questioned on certiorari fall into the following classes: Firstly, where the lower tribunal had no jurisdiction to make it. Secondly, where in giving it, the tribunal acted in excess of jurisdiction. Thirdly,

Hence, it was not surprising that an early Iowa court, construing a codification of the common law, looked beyond the question of jurisdiction. In *Tiedt v. Carstensen*,[7] where a circuit court reviewed the action of a board of supervisors, the Iowa Supreme Court declared there was no question of jurisdiction. The issue was whether or not the circuit court had acted illegally in contemplation of statute. The court distinguished illegality and discretion by reasoning that, if a statute prescribed proceedings to be had by an officer or tribunal and such proceedings were omitted, the court or officer omitting them would have acted illegally. However, if discretionary power had been conferred upon the inferior tribunal, exercise of such discretion would not be illegal. The tribunal had been clothed with express authority to decide the facts before it. While a decision might be inexpedient, if the subject matter and the parties were properly within the court's jurisdiction, the law specifically entrusted the decision to the court's discretion, therefore, the court would not be acting illegally. Clearly, this early Iowa Supreme Court did not contemplate that decisions of inferior tribunals upon questions of fact were to be reviewed by the writ of certiorari.[8]

Later the question of illegal action became a study of the abuse of an inferior court's discretionary power. Under Iowa law of a few decades ago the state could not request a change of venue in a criminal case.[9] After legislative enactment providing for such a transfer, *State ex rel. Fletcher v. District Court*[10] became a leading case supporting the right of the state to obtain certiorari in a criminal proceeding. In that case twenty-six defendants were charged with conspiracy and false pretenses in the sale of imported range cattle, which they represented to be more valuable native grown stock. Notoriety from previous cattle cases had created an atmosphere in the trial community which the state contended could not result in a fair trial. The state requested a change of venue, reinforcing their request with 360 supporting affidavits from citizens of the county. The defense countered with 765 affidavits to the contrary. Following the trial court's denial of a change in venue, the state brought certiorari to the Iowa Supreme Court, which was sustained in a five to three decision. Two issues were raised. Had the district court erred or

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where the decision was obtained by fraud or by perjury of one of the parties. Finally, where the decision involves an error of law apparent upon the face of the record. Note, *Certiorari: Errors of Law on the Face of the Record*, 4 MELBOURNE L. REV. 552, 552 (1964).

[7] 61 Iowa 334, 16 N.W. 214 (1883).

[8] In *Tiedt*, after explaining what was meant when an inferior court "acted illegally" the court succinctly concluded: "The distinction between erroneous proceedings which are termed 'illegalities,' and erroneous decisions of fact, are obvious." *Id.* at 336, 16 N.W. at 214.

[9] Explaining the legislation the Iowa Supreme Court stated:

> Up to the time of the passage of Chapter 221, 40th G. A., the state had no right to apply for a change of place of trial. . . . By Chapter 221 the legislature undertook to correct this evil by enacting: "In all criminal cases which may be pending in any of the district courts, any defendant therein, or the state, in cases where defendant is charged with felony, may petition the court for a change of place of trial to another county."

State *ex rel.* Fletcher v. District Ct., 213 Iowa 822, 829, 238 N.W. 290, 293 (1931).

[10] 213 Iowa 822, 238 N.W. 290 (1931).

abused its exercise of discretion, and if so, did such abuse have a remedy in the statutory writ of certiorari?

To answer the question the court reasoned hypothetically that if conditions were reversed and defendant was a nonresident offering a host of substantiating affidavits, requesting a change in venue which was denied, defendant would have been entitled to a new trial due to an abuse of the court's discretion. The court added: "The defendant has an efficient remedy after conviction by appeal. The state, however, after defendant has been put in jeopardy has none."[11]

In reviewing the record, the majority determined there were undisputed facts to show the court below had exceeded its discretion. "The question here is to be determined prospectively whether the state can 'receive a fair and impartial trial' not, after the event, whether it has received a fair and impartial trial. The trial begins with the calling of the jury."[12] Even had the state won, the majority reasoned, it would have won in the face of unfair obstacles in an unfair trial.

A spirited minority admitted that certiorari would lie when a tribunal exceeded its proper jurisdiction or acted illegally, but that a mistake in weighing the sufficiency of the evidence was an error in judgment which did not come within the meaning of the term "acting illegally." The minority insisted certiorari was never to be used to correct a mere error in judgment, but only to test the jurisdiction of the tribunal and the legality of its action. The dissenters insisted: "The court acted in the exercise of the very judicial discretion conferred by the statute. Its action may have been erroneous, but it was not *illegal*. We cannot in certiorari review the facts and declare a different result."[13] Undoubtedly the minority could not envision the countless hours courts were to spend debating the fact-law question in the forthcoming era of the proliferating administrative agency, whose decisions of fact were to be frequently reviewed as matters of law.[14]

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11 *Id.* at 831, 238 N.W. at 294.

12 *Id.* at 835, 238 N.W. at 295.

13 *Id.* at 843, 238 N.W. at 299.

14 Recently the Iowa Supreme Court stated: "Certiorari is not, and was never intended, to be a trial de novo, as on appeal. Such is not the office of the writ. We have repeatedly held the writ presents only a question of law and does not entitle a petitioner to have the facts reviewed." Klein v. Civil Service Comm'n, 152 N.W.2d 195, 196 (Iowa 1967). "There is not the slightest proof plaintiff's conduct impaired the administration of the public service of which they were a part." *Id.* at 200. The dissent stated: "The rules were violated twice in June 1964 . . . . They made no attempt to get his approval of the August 5 news release . . . . The holding here encourages disobedience and insubordination." *Id.* at 201.

Reviewing an administrative agency case, Justice Rawlings, dissenting, declared: "Under the record this is nothing more nor less than a finding of fact by the trial court and a substitution of its own judgment for that of the lower tribunal." Butler v. Pension Bd., 147 N.W.2d 27, 32 (Iowa 1966). On the same date as *Butler* the court said: "The cause is not triable de novo here but the judgment does not have the full force and affect of a jury verdict. While we give weight to the trial court's findings we are not bound by them." American Sec. Benev. Ass'n v. District Ct., 147 N.W.2d 55, 59 (Iowa 1966). Quaere: Does searching the record for substantial evidence on which to justify a decision amount to trial de novo at least to that extent? *See also* Koelling v. Board of Trustees, 146 N.W.2d 284 (Iowa 1966). An excellent discussion of the fact-law problems in administrative cases is to be found in K. DAVIS, ADMINISTRATIVE LAW TEXT 543 (1959).

By 1959, in *Hohl v. Board of Education*,[15] wherein certain individuals questioned the legality of reorganization procedures of a Board of Education under the authority of the State Department of Public Instruction, a unanimous court agreed:

> It is also true that there is a tendency to broaden the scope of the writ especially where no appeal is permitted and, unless such relief is granted, substantial justice will not be done. . . .
>
> Rules 306 and 308, R.C.P., do more than simply codify the common law. They slightly enlarge the scope of the writ and establish a fixed procedure in our law for review by certiorari. However, they retain the ordinary conception of this remedy and we think make it available to any person affected by the action of bodies performing quasi-judicial functions such as these . . . .[16]

While administrative cases may turn on whether the act of the administrative agency was legislative or judicial,[17] of no import in a criminal case, yet the liberalization of certiorari reflected by *Hohl* has naturally carried over and enlarged the implications of certiorari whenever applied in a criminal proceeding.

In *State v. Rees*,[18] the state utilized certiorari to challenge the trial court's granting of a motion to suppress evidence claimed to have been secured by an unreasonable search and seizure. The seizure consisted of gathering evidence by a group of officials and agents acting in both public and private capacities repeatedly investigating the scene of a fire. None had ever requested or secured a search warrant. After testimony by some of the group before a grand jury an indictment was returned charging the accused with arson. Prior to trial the accused filed a motion to suppress the evidence gained by these persons. The trial court held that evidence gathered after the blaze had been extinguished was inadmissible as having been the fruits of an unlawful search and seizure and therefore granted the motion to suppress. On certiorari, the Iowa Supreme Court in a 5 to 4 decision held that there was no unlawful search and seizure because the investigations had been conducted pursuant to statute in a routine manner—acts well within the police power of the state.

There was no question whether certiorari would lie in the case. The issue was resolved with a few terse lines declaring that it did. However, in order to determine whether or not the lower court acted illegally it was necessary to show that the search had been legal or that there was no evidence in the record to the contrary. After asserting that the investigations were made pursuant to the police powers of the state the court concluded: "In the case at bar except for the fact that the evidence was obtained pursuant to a statutory

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15 250 Iowa 502, 94 N.W.2d 787 (1959).

16 *Id.* at 509, 94 N.W.2d at 791.

17 Porter v. Iowa State Bd. of Pub. Instruction, 144 N.W.2d 920 (Iowa 1966); Lehan v. Greigg, 257 Iowa 823, 135 N.W.2d 80 (1965); Massey v. City Council, 239 Iowa 527, 535, 31 N.W.2d 875, 879 (1948).

18 258 Iowa 813, 139 N.W.2d 406 (1966).

mandate instead of a search warrant there is not a word in the record to support the order of suppression."[19]

A four member minority reviewing the same record dissented with the "factual analysis, reasoning and conclusions"[20] of the majority declaring that the state had never denied their evidence was obtained by an unconstitutional search and had offered no evidence to the contrary. The minority argued that the decision of when the right of privacy must reasonably yield to the right of search should be made by a judicial officer, as a rule, not by a policeman or Government enforcement agent. The majority opinion, the dissenters claimed, held that when peace officers, administrative agents or others were in a place where they had a lawful right to be for conducting a civil investigation, they were by the same token in a place where they had a lawful right to be for a search and seizure. This, the dissenters argued, could not be.

The basic thrust of the majority opinion, the dissent asserted, was that the defendant failed to sustain his burden of proof, that the meagerness of the record was the defendant's fault, that the defendant failed to produce all evidence necessary to support his claim or to make his case and that this was fatal to his motion to suppress. As a result the defendant found himself on the horns of a dilemma, with the majority contending he did not prove enough. Conversely, the dissenters were satisfied defendant had made his case, that the burden was then upon the state and the state had failed to meet its burden.

Facts relevant to the search and seizure were never controverted. The legality or illegality of the search was to be decided as a matter of law. The court has often reiterated that it will not search outside the record or review de novo a case brought on certiorari,[21] but, arguendo, the majority did precisely that. In defense of the court it may be offered that a scanty record leads to reasoning only evidence aliunde may be able to sustain. Neither opinion complained of an insufficiency in the record. Nor did the case turn on the degree of discretion exercised by the inferior court. In order to achieve an almost even division of the court any abuse of discretion would, a fortiori, have been either minimal or based on an issue so finely drawn that reasonable men reviewing the record might arrive at opposite conclusions. In *Rees*, however, the views expressed are so widely divergent it is difficult to reconcile the

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19 *Id.* at 821, 139 N.W.2d at 410.

20 *Id.* at 827, 139 N.W.2d at 414.

21 Klein v. Civil Service Comm'n, 152 N.W.2d 195 (Iowa 1967); Butler v. Pension Bd., 147 N.W.2d 27 (Iowa 1966); American Sec. Benev. Ass'n v. District Ct., 147 N.W.2d 55 (Iowa 1966); Koelling v. Board of Trustees, 146 N.W.2d 284 (Iowa 1966); Porter v. Iowa State Bd. of Pub. Instruction, 144 N.W.2d 920 (Iowa 1966); Powers v. McCullough, 258 Iowa 738, 140 N.W.2d 378 (1966); Mangan v. Department of Pub. Safety, 258 Iowa 359, 138 N.W.2d 922 (1965); Iowa-Ill. Gas and Elec. Co. v. Gaffney, 256 Iowa 1029, 129 N.W.2d 832 (1964); Wood v. Iowa State Commerce Comm'n, 253 Iowa 797, 113 N.W.2d 710 (1962); Hohl v. Board of Educ., 250 Iowa 502, 94 N.W.2d 787 (1959); Grant v. Norris, 249 Iowa 236, 85 N.W.2d 261 (1957); Luke v. Civil Service Comm'n, 225 Iowa 189, 279 N.W. 443 (1938); Tiedt v. Carstensen, 61 Iowa 334, 16 N.W. 214 (1883).

fact that only one record was under review. Certiorari in *Rees* has taken on the characteristics of an equitable appeal; the majority there engaging in an extra-record foray to justify supplanting the lower court decision. The writ has apparently been broadened both horizontally and vertically, otherwise the court would have confined itself to the record to determine whether or not the lower court exceeded its authority. By allowing an unbridled review the state has, arguendo, acquired easy access to the high court, which in all probability would have been denied the accused had the tables been turned. The court in *State ex rel. Fletcher v. District Court*[22] twice raised the issue of fairness by utilizing a hypothetical transposition of parties. The thrust of the argument there involved the securing of a remedy for the state which was enjoyed by the accused. While there is no doubt that the state should have a remedy to secure a fair trial, it is seriously open to doubt that the state should have access to certiorari in its broadened form *if* the accused is denied an identical remedy at the same stage of trial.

Absent a label, the "new certiorari" resembles in large measure an interlocutory appeal, a remedy which the accused is specifically deprived by the Code.[23] While the *Rees* holding is not without precedent in the law,[24] it must be recognized that an adverse ruling on a motion to suppress may be tantamount to an adjudication on the merits. At this juncture the accused should have access to certiorari instead of being required to run the gamut of a trial before receiving remedial relief on appeal.[25] To reply that section 793.2 of the Code does not deprive the accused of certiorari[26] at an early stage of trial, but merely precludes interlocutory appeal, is to retreat from the problem.

If the accused is convicted on evidence wrongfully admitted, no matter how reasonable or justified the verdict may seem, he has nevertheless been denied a fair trial. A reviewing court may find it more expedient to allow the verdict to stand than to disturb the result. The problem is not unique to Iowa.

Other jurisdictions, while reluctant, have granted certiorari to the defendant in criminal cases in a somewhat more liberal manner than the Iowa court. In *State ex rel. Ronan v. Burke*,[27] where members of the Arizona Tax Commission were charged with conspiracy to accept bribes, the superior court in advance of trial granted a defense motion to supply those accused with transcripts of testimony given before the grand jury. The county attorney petitioned the supreme court for a writ of prohibition but the Arizona court

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22 213 Iowa 822, 238 N.W. 290 (1931).

23 IOWA CODE § 793.2 (1966) states: "An appeal can only be taken from the final judgment, and within sixty days thereafter."

24 Narcotics Act, 18 U.S.C. § 1404 (1966) states in part: "[T]he United States shall have the right to appeal from an order granting a motion for the return of seized property and to suppress evidence made before the trial of a person charged with a violation . . . ." (Applies to certain sections of Int. Rev. Code and Narcotic Drug Import and Export Act.)

25 Viewing the situation pragmatically, defense counsel may be induced to forego the motion to suppress, reserving his objection until evidence is offered.

26 Chicago & N.W. Ry. v. Fachman, 255 Iowa 989, 125 N.W.2d 210 (1963).

27 95 Ariz. 319, 390 P.2d 109 (1964).

was of the opinion that certiorari was the proper remedy and treated the petition as if certiorari had been requested. Reviewing the record the high court could not find a "particularized need" which, in the furtherance of justice, would authorize the trial judge to make available a transcript of testimony before the grand jury. The trial court's granting of the motion, the supreme court opined, had not been made in the furtherance of justice because public interest in the preservation of secrecy outweighed defendant's interest in discovery.[28]

Two years later, in *Burke v. Superior Court*,[29] the Arizona court, receiving a request for a writ of prohibition, again received the case as if certiorari had been requested. Certiorari, the court insisted, was the appropriate remedy to review the *completed acts* of a lower tribunal. While no explanation was offered to clarify the meaning of "completed acts," if the court meant that certiorari would be granted only where there was a final adjudication, this would be a retreat from the *State ex rel. Ronan v. Burke*[30] position where certiorari had been granted prior to trial. It is noted, however, that in *Burke v. Superior Court*[31] the trial was over and the question of whether or not certiorari should be granted prior to a final adjudication was never in issue. Thus, the words "completed acts" may have been employed incidentally rather than as words of art. In the context of *Rees*, the Arizona court would probably grant certiorari to the accused in a criminal case whenever a "particularized need" was shown in the furtherance of justice.

The Tennessee court has also considered whether or not certiorari should issue in an interlocutory appeal in a criminal case. In *McGee v. State*,[32] McGee was charged with carrying a pistol into the state penitentiary with intent to aid prisoners to escape. After a plea of not guilty, McGee gave notice he would take depositions of the State's witnesses, but the district attorney moved for an order to prevent this action. The trial court held that the discovery statute applied only to civil, not criminal cases, and entered a restraining order. McGee petitioned the supreme court for a writ of certiorari.

The Tennessee court distinguished statutory certiorari[33] and common law certiorari, stating that the common law writ had never been employed to inquire into the correctness of a judgment where the court had jurisdiction.

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28 The court held that where the defendant points out a "particularized need" for access to grand jury testimony he must then request the trial judge to examine the grand jury transcript. The judge should read it and upon finding any substantial, relevant and competent material, which in the furtherance of justice should be disclosed, should make available to defendant an intelligible segment thereof. Finding none, the grand jury testimony should be resealed. State *ex rel.* Ronan v. Burke, 95 Ariz. 319, 390 P.2d 109 (1964).

29 3 Ariz. App. 576, 416 P.2d 997 (1966).

30 95 Ariz. 319, 390 P.2d 109 (1964).

31 3 Ariz. App. 576, 416 P.2d 997 (1966).

32 207 Tenn. 431, 340 S.W.2d 904 (1960).

33 TENN. CODE ANN. § 27-801 (1955) provides:

> The writ of certiorari may be granted whenever authorized by law, and also in all cases where an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction conferred, or is acting illegally, when, in the judgment of the court, there is no other plain, speedy, or adequate remedy.

Further, the writ did not lie to review an interlocutory order such as the one complained of by the petitioner. The writ, granted by one member of the court, was dismissed. The result was less than surprising because the court had consistently stated that it would not entertain the writ in an interlocutory proceeding[34] except in a rare instance. Thus, while the door may be closed, the exception remains and a petitioner in Tennessee is not completely denied the remedy if his case falls into the restricted and narrowly defined area which the court labeled, "a rare instance."

Probably the most liberal opinion granting certiorari to a defendant in a criminal case has been written by the North Dakota court. In *State v. Katsoulis*,[35] where defendant was charged with second degree murder, the state moved the trial court for an order to commit Katsoulis to a state hospital for psychiatric examination. When the motion was granted, defendant brought certiorari alleging the order committing him to the hospital exceeded the court's jurisdiction. It was the defense position that since the issue of insanity had not yet been raised, the state's motion should be denied because insanity would not be an issue until raised by the defense. The state contended that it did not need to wait until the defense raised the issue because such an examination would require three weeks and disrupt the trial. The state asked the court to take notice that Katsoulis previously had been in several state and federal institutions for psychiatric care.

At the state hospital Katsoulis was uncooperative, replying to the psychiatrist's questions only that he would not incriminate himself. Consequently he was returned from the state hospital before the high court ruled on the writ, resolving the issue from a pragmatic standpoint. Nevertheless, in view of great public interest in an issue which involved the authority of public officials, the court decided the moot question by quashing the writ. The court at no time questioned defendant's application for the writ prior to the final adjudication—a matter of importance.

The certiorari granted the defendant in *Katsoulis* approximated the type of writ afforded the state in *Rees*. However, in *Rees* the Iowa court granted the writ to the state. The *Rees* holding portends to allow the state to bring certiorari whenever a trial court rules adversely on the state's motion to suppress without affording a reciprocal remedy to defendant. The state thus has an advantage in the possibility that the high court's review, which in some instances appears to be de novo,[36] will repudiate the holding of the court below. The safeguard of certiorari at any stage of trial would remove the danger of a reviewing court minimizing the lower tribunal's error by looking to the apparent justification of the verdict rather than at the fairness employed in reaching it. To preserve fundamental fairness and aid the speedy dispatch of justice it is imperative that the accused have equal access to the writ during

34 Jones v. State, 206 Tenn. 245, 332 S.W.2d 662 (1960); Gilbreath v. Ferguson, 195 Tenn. 528, 260 S.W.2d 276 (1952).

35 148 N.W.2d 269 (N.D. 1967).

36 Cases cited note 14 *supra*.

trial and equal opportunity for the same type of review as the prosecution. While it should be remembered that certiorari is a discretionary writ,[37] it is hoped that the Iowa Supreme Court will in the not too far distant future afford the accused in criminal cases the same quality of writ which has been granted the state.

C. O. LAMP

[37] Aplin v. Clinton County, 256 Iowa 1059, 129 N.W.2d 726 (1964).

# Case Notes

**Common-law Marriage—To Establish Common-law Marriage, Marital Intent, Cohabitation, and Public Declaration of Marriage Must Be Shown.**—*In re Estate of Malli* (Iowa 1967).

Decedent from 1949 until his death in 1959 lived with the respondent intermittently in the alleged relationship of common-law marriage. The decedent referred to respondent on occasion as *the Mrs.* and *my wife*. The parties cohabited and treated each other as married in some instances but at other times and for other purposes asserted that they were single. Respondent, for example, continued to do business, transfer property, and testify in her own name. After decedent's death, respondent in her own name and as a creditor, filed an application for appointment of an administrator for the decedent's estate. The application stated that decedent left no spouse and that his parents were next of kin. After respondent's claim was disallowed, she filed a probate inventory referring to herself as a common-law wife. The parents of decedent filed an application to correct the list of heirs. Respondent resisted such correction, asserting her relationship with the decedent constituted a valid common-law marriage. Trial on the issues resulted in determination that no common-law marriage existed. Respondent appealed. The Supreme Court of Iowa, *Held*, affirmed, all justices sitting concurring. To establish the existence of a common-law marriage one must show intent and agreement *in praesenti* as to marriage, continuous cohabitation, and public declaration of the marital relationship. *In re Estate of Malli*, — Iowa —, 149 N.W.2d 155 (1967).

Although the case found no extant common-law marriage, it did identify and clearly delineate the elements which are essential to sustain such a relationship. These elements, like the problem of common-law marriage itself, are recurrent in legal disputes. Thus, where there has been no ceremonial marriage, these elements are determinative in any case depending upon the marital status of the parties. The existence or non-existence of a common-law marriage has, for instance, been the crucial issue in an action to appoint an administrator,[1] a divorce case,[2] a workmen's compensation action,[3] a proceeding to recover dower,[4] an action by children of deceased to prove their right to intestate share as legitimate issue,[5] an adultery case,[6] and a bigamy case.[7]

The elements outlined as essential take on meaning, of course, when the

1 *In re* Estate of Boyington, 157 Iowa 467, 137 N.W. 949 (1912).
2 Hoese v. Hoese, 205 Iowa 313, 217 N.W. 860 (1928).
3 Royal v. Cudahy Packing Co., 195 Iowa 759, 190 N.W. 427 (1922).
4 Smith v. Fuller, 108 N.W. 765 (1906). Also reported at 138 Iowa 91, 115 N.W. 912 (1908).
5 Brisbin v. Huntington, 128 Iowa 166, 103 N.W. 144 (1905).
6 State v. Grimes, 215 Iowa 1287, 247 N.W. 665 (1933).
7 State v. Nadal, 69 Iowa 478, 29 N.W. 451 (1886).