June 1935

Discussion of Recent Decisions

Chicago-Kent Law Review

Follow this and additional works at: https://scholarship.kentlaw.iit.edu/cklawreview

Part of the Law Commons

Recommended Citation
Available at: https://scholarship.kentlaw.iit.edu/cklawreview/vol13/iss3/4

This Notes is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact dginsberg@kentlaw.iit.edu.
DISCUSSION OF RECENT DECISIONS

CONSTITUTIONALITY OF STATE STATUTE PROHIBITING ADVERTISING BY DENTISTS.—An interesting illustration of the lengths to which a state may go in its exercise of police power is found in the case of *Semler v. Oregon State Board of Dental Examiners*,¹ just decided by the United States Supreme Court. The case is particularly apt at the present time because there is now pending in the Illinois Supreme Court a similar case, involving the constitutionality of the amendments to the Dental Practice Act, added in 1933, to the prior Dental Practice Act of 1909. The Illinois case is based in part on language in that statute which is the counterpart of language in the Oregon statute, here held valid by the Supreme Court.

The plaintiff in the Oregon case, a practising dentist, brought his bill in the state court to enjoin enforcement of the statute on the ground that it was repugnant to the due process and equal protection clauses of the Fourteenth Amendment, and impaired the obligation of contracts in violation of Section 10, Article I, of the Constitution of the United States. The trial

¹ 79 L. Ed. 595 (1935).
DISCUSSION OF RECENT DECISIONS

court sustained a demurrer thereto, and the state supreme court affirmed, whereupon the case was sent on appeal to the United States Supreme Court.

The particular provision of the statute complained of related to grounds for revocation of a dentist's license, the following grounds being set forth: "advertising professional superiority or the performance of professional services in a superior manner; advertising prices for professional service; advertising by means of large display, glaring light signs, or containing as a part thereof the representation of a tooth, teeth, bridge work or any portion of the human head; employing or making use of advertising solicitors or free publicity press agents; or advertising any free dental work, or free examination; or advertising to guarantee any dental service, or to perform any dental operation painlessly."\(^2\)

The plaintiff claimed that he had continuously advertised his services and used such signs and advertising solicitors, but that his advertisements were truthful and made in good faith. He alleged that he had made contracts for advertising of which he would be unable to take advantage if the legislation in question were sustained, and that in that event his business would be destroyed or materially impaired.

The court held the statute constitutional and said that the plaintiff was not entitled to complain of interference with his contracts if the regulation of his conduct as a dentist was not an unreasonable exercise of the police power of the state, as his contracts were necessarily subject to that authority; that the statute was not discriminatory, but based upon a reasonable classification.

The court said that the state was interested in providing safeguards against deception and practice which would "tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous. What is generally called the 'ethics' of the profession is but the consensus of expert opinion as to the necessity of such standards."\(^3\) The court held that to accomplish its purpose the legislature could pass a general rule, even though in particular instances the results might be detrimental because advertising statements made might be true and not intended to deceive.

The similar section of the Illinois act which is involved in the case of *Winberry v. Hallihan et al.*,\(^4\) now pending on appeal to the Illinois Supreme Court direct from the Superior Court of Cook County, reads in part as follows:

\(^2\) Oregon Laws, 1933, Ch. 166.
\(^3\) 79 L. Ed. 595, 597.
\(^4\) Supreme Court of Illinois, Case No. 22528.
"It shall be unlawful for any person, firm or corporation to publish, directly or indirectly, or circulate any fraudulent, false or misleading statements as to the skill or method of practice of any person or operator; or in any way to advertise to practice dentistry without causing pain; or to advertise in any manner with a view of deceiving the public, or in any way that will tend to deceive or defraud the public; or to claim superiority over neighboring dental practitioners; or to publish reports of cases or certificates of same in any public advertising media; or to advertise as using any anesthetic, drug, formula, material, medicine, method or system which is either falsely advertised or misnamed; or to advertise free dental services or examinations as an inducement to secure dental patronage; or to advertise any amount as a price or fee for the service or services of any person engaged as principal or agent in the practice of dentistry, or for any material or materials whatsoever used or to be used; or to employ 'cappers' or 'steerers' to obtain patronage; or to exhibit or use specimens of dental work, posters or any other media calling attention of the public to any person engaged in the practice of dentistry; or to give a public demonstration of skill or methods of practicing dentistry upon or along the streets or highways, or any other place than his office where he is known to be regularly engaged in the practice of his profession, and any person committing an offense against any of the provisions of this section, shall, upon conviction, be subjected to such penalties as are provided in this Act"; then follow certain exceptions as to size of professional cards permitted, etc., not here material. 5

The italicized portions in the above substantially correspond to provisions in the Oregon act which have been held constitutional in the Semler case. Although the Illinois statute has been attacked on other grounds, the principal emphasis is on the claim that it is illogical, unreasonable, and discriminatory to prohibit such practices as far as dentists are concerned, while permitting them to physicians, optometrists, oculists, and medical institutes. What will be the decision in the Illinois Supreme Court is only matter of speculation at this time, but it is certain to have far reaching effects, in view of the present vogue for advertising among the members of the dental profession. 6

HELEN W. MUNSELT

DIRECTED VERDICT UNDER CIVIL PRACTICE ACT.—In the recent case of Herbst v. Levy, 1 the Illinois Appellate Court held that

6 Since this went to press, the Illinois Supreme Court, on June 14, 1935, upheld the constitutionality of the Illinois Dental Practice Act, in Winberry v. Hallihan et al., Case No. 22528.
1 279 Ill. App. 353 (1935).
the provisions of the Civil Practice Act permitting the trial court to reserve decision upon a motion for a directed verdict, are not applicable to a motion by the defendant at the close of the plaintiff’s evidence, when the plaintiff has failed to prove a prima facie case.

In reserving judgment upon such a motion, the trial court admitted that there was no “competent evidence of negligence that could properly have been submitted to the jury,” but said, “the new practice seems to contemplate this case going to the jury.” The jury found for the plaintiff, and the court entered judgment on the verdict.

In reversing the judgment, the Appellate Court held that the provisions of the Civil Practice Act are applicable only to those cases where the defendant has introduced evidence; that as to those cases where the motion is made at the close of the plaintiff’s evidence, the common law is still applicable.

This construction seems preferable to that given the statute by the court below. The Civil Practice Act refers only to motions “at the close of the testimony.” The construction given the act below might frequently, as here, work an unfair hardship upon the defendant, in that if the plaintiff totally failed to prove a cause of action, the evidence introduced by the defendant might be sufficient to carry the case to the jury.

Moreover, there is no great need for a statutory change in this respect. The common law rule with respect to such motions was sufficiently liberal and allowed the trial court adequate discretionary power in doubtful cases. In *McDermott v. Burke,* the Illinois Supreme Court sustained the action of the trial court in refusing to direct a verdict at the end of the plaintiff’s case, and in reserving decision until defendant’s evidence was in, where there was no showing that the judge based his ruling upon a preponderance of the evidence, rather than merely upon that of the plaintiff. A similar decision was announced five years later by the Illinois Appellate Court in *Arrigoni v. Strassheim.* There the court sustained the reservation of judgment, but held specifically that only the plaintiff’s evidence might be considered in arriving at a decision.

It is interesting to note that the construction contended for by the court below in the principal case would practically abolish directed verdicts, and leave only in their stead judgments *non obstante veredicto.*

W. J. J. WAHLER

---

2 Cahill's Ill. Rev. Stat. (1933), Ch. 110, sec. 196.
3 256 Ill. 401, 100 N. E. 168 (1912).
4 207 Ill. App. 354 (1917).
LIMITATION THAT EXERCISE OF POLICE POWER MUST BE REASONABLE WITH RESPECT TO IMPOSING EXPENSE OF GRADE CROSSING UPON RAILROAD.—The recent United States Supreme Court case of Nashville, Chattanooga and St. Louis Railway v. Herbert S. Walters, Commissioner of Highways\(^1\) presents a somewhat novel application of two familiar principles of constitutional law: First, the state may, under its police power, impose upon a railroad the whole cost of eliminating a grade crossing, or such part thereof as it deems appropriate; second, the police power is subject to the constitutional limitation that it may not be exerted arbitrarily or unreasonably. The railroad commenced this action under the Uniform Declaratory Judgment Act of Tennessee\(^2\) against the Commissioner of Highways and the Attorney General to test the constitutionality of an order entered by the Commission and, as so applied, of a Tennessee statute upon which the order was based.\(^3\) The statute authorized the Commission whenever a state highway crosses a railway to require the separation of grades if in its discretion “the elimination of any such grade crossing is necessary for the protection of persons traveling on any such highway or any such railroad”; and requires the railroad in every instance to pay half the total expense. After hearing some 492 pages of evidence, the trial court held that the order and the statute as applied to the present case were arbitrary and unreasonable and ordered the entire cost of the project to be borne by the State Highway Commission. The evidence in question tended to prove, and according to the finding of the trial court, did substantially prove, that the highway was not essential to the local transportation needs of the rural community where the underpass was located; that such underpass was prescribed as part of a system of Federal aid highways and as such would principally benefit motor busses in direct competition with the railroad; and that the railroad was already paying in the form of taxes more than its proportionate share of the cost of highways for the advantage and convenience of such motor busses.

The Supreme Court of Tennessee reversed the decree of the trial court, and declined to consider the special facts relied upon as showing that the order, and the statute as applied, were arbitrary and unreasonable.

The Supreme Court of the United States (Justices Stone and Cardozo dissenting upon the ground that the facts do not sustain the charge of arbitrariness and unreasonableness; and Justice

\(^1\) 79 L. Ed. 458 (1935).

\(^2\) Tenn. Pub. Acts 1923, Ch. 29.

\(^3\) Tenn. Pub. Acts 1921, Ch. 32, entitled “An act to provide for the elimination of grade crossings on State Highways”; amended 1923, Ch. 35; 1925, Ch. 88.
Reynolds taking no part in the decision) reversed and remanded, holding that a statute valid when enacted may be invalid by change in the conditions to which it is applied, and that here the court had erred in refusing to consider evidence tending to prove that the statute was arbitrary and not a reasonable exercise of the police power.

The general power of a state to require a railroad to bear all or a share of such expense as that here involved is well sustained by the decisions. In New York & New England Railroad Company v. Town of Bristol, the Supreme Court of the United States held that, where it appeared that a state railroad commission, by virtue of a statute which authorized it to require a railroad to alter or abolish dangerous crossings, had ordered a railroad to remove such a crossing at its own expense and to replace it with an overhead bridge, the statute was a valid exercise of the police power.

In North Dakota State Highway Commission v. Great Northern Railway Company, the Supreme Court of North Dakota held that the railroad commission could compel a railroad to eliminate a grade crossing by constructing an underpass and that the exercise of such authority did not constitute a violation of the railroad’s constitutional rights. A similar result was reached by the New York Court of Appeals and the United States Supreme Court in Re Staten Island Rapid Transit Company, and by the Supreme Court of Pennsylvania in Erie Railway Company v. Public Service Commission.

The Illinois Supreme Court in Chicago, Milwaukee, and St. Paul Railroad Company v. Lake County used this language: "A railroad is a public utility, and the state may, in the exercise of its police power—and it is its duty where the public safety demands it—require the separation of grade crossings for the preservation of human life and the protection of property." In Chicago and Northwestern Railway Company v. Illinois Commerce Commission, the Illinois Supreme Court said: "The police power of the state is, however, in matters touching the public safety, a broad one, and, undoubtedly, for the promotion of public safety, railroad property may in a proper case be subjected to uncompensated obedience to police regulation; and the railroad company compelled to relocate its

4 151 U. S. 556, 14 S. Ct. 367, 38 L. Ed. 269 (1894).
5 51 N. D. 680, 200 N. W. 796 (1924).
6 245 N. Y. 643, 157 N. E. 892 (1927); error dismissed in 276 U. S. 603, 72 L. Ed. 726 (1928).
7 271 Pa. 409, 114 A. 357 (1921).
8 287 Ill. 337, 122 N. E. 526 (1919).
9 326 Ill. 625, 158 N. E. 376 (1927).
crossing of a highway and at its expense change from an over-
head crossing to a subway when necessary to promote or pre-
serve the public safety. The orders and decisions of the com-
mision are subject to review as to the reasonableness of its con-
clusions.相似语句用于同一法庭在Commerce Commission ex rel. Bloomington v. Cleveland, Cin-cinnati, Chicago, and St. Louis Railway Company,10 and in Town of Sidney v. Wabash Railway Company.11
The principle that the police power is subject to the con-
stitutional limitation that it may not be exerted arbitrarily or unreasonably is supported by an abundance of case authority. If the statute is arbitrary or unreasonable it is unconstitutional as constituting a deprivation of property without due process of law.
In Nectow v. Cambridge,12 in declaring a zoning act uncon-stitutional, the United States Supreme Court said: "The gov-
ernmental power to interfere by zoning regulations with the general rights of the landowner by restricting the character of his use is not unlimited, and, other questions aside, such restric-
tion cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare."
In the case of Delaware, Lackawanna, and Western Railroad Company v. Town of Morristown,13 the United States Supreme Court held that a municipal corporation cannot, without making compensation therefor, establish a public hack stand upon a driveway maintained by a railroad company upon its own property to afford to the public means of ingress and egress to its station, which has not been dedicated as a public highway.
It is difficult to predict the probable effect of the principal case. The decision is particularly opportune with respect to President Roosevelt's announced intention of spending a sub-
stantial portion of the new Federal recovery appropriation for the elimination of dangerous railroad crossings. The court stressed the element of Federal aid in the construction of the highway, and pointed to the presence of such aid as indicative of a purpose to accommodate high-speed, long-distance motor traffic, likely to compete with the railroads. While it is true that the case merely reiterates well accepted principles of constitu-
tional law, such a decision must be reassuring to the railroads at a time when, in the incessant struggle between rights of property and the police power, the police power is conspicuously in the ascendancy.
G. S. Stansell

10 309 Ill. 165, 140 N. E. 868 (1923).
11 333 Ill. 126, 164 N. E. 201 (1928).
12 277 U. S. 183, 48 S. Ct. 447, 72 L. Ed. 842 (1928).
13 276 U. S. 182, 48 S. Ct. 276, 72 L. Ed. 523 (1928).
DISCUSSION OF RECENT DECISIONS

NOTICE OF APPEAL ESSENTIAL TO CONFER JURISDICTION ON APPELLATE COURT.—In Wishard v. School Directors, the Illinois Appellate Court said with respect to appeals: "This court has no jurisdiction to consider the case in the absence of a notice of appeal. It is a requirement of the statute and is a matter that cannot be waived by agreement of parties nor supplied by estoppel arising out of the conduct of either party. No appeal has been perfected; there is nothing to dismiss. The order will be that the case be stricken from the docket."

Appellant had appealed from a judgment of the Circuit Court of Jasper County entered June 12, 1934. Appellee moved to dismiss and in support attached an affidavit of the clerk of the circuit court showing that no notice of appeal had ever been filed.

The court referred to its decision in Veack v. Hendricks, where it said that "the filing of a notice of appeal is jurisdictional and ... the proceedings of the lower court cannot be reviewed on appeal unless such notice has been filed. The right of appeal is purely statutory and the statute granting such right must be strictly complied with."

Appellants urged against the motion to dismiss the fact that the appellees had actual notice of the appeal and subsequent proceedings; that they entered an appearance; and that they moved for an extension of time which was granted. Appellants contended that such facts operated as a waiver and estoppel. However, the court held, upon authority that when jurisdiction does not exist, it cannot be conferred by consent or acquiescence.

There is but little comment to be made. The court has held that it is the filing of notice of appeal that confers jurisdiction upon the appellate court. Since it is a statutory right no substitute will serve. Such notice is not merely to advise the opponent of an appeal, but is the way to reach the ears of the reviewing court.

J. E. BRUNSWICK

RIGHT OF APPELLATE COURT TO DECREE PARTIAL REVERSAL OF JUDGMENT AGAINST JOINT TORTFEASORS.—In volume 278 of the Illinois Appellate Court Reports there are reported three cases involving the same point, two of which are decided one way, and the third, in exactly the opposite way. Briefly the

1 279 Ill. App. 333 (1935).
2 278 Ill. App. 376 (1935).
cases are as follows: (1) Rhoden v. Peoria Creamery Company,\(^1\) in which the plaintiff recovered a judgment against the Creamery Company and the Peoria Cartage Company for $20,000. Both defendants appealed. The Appellate Court reversed and remanded the judgment against both, although the verdict was only against the weight of the evidence as to the cartage company; the court said: "The judgment being a unit as to both the creamery company and the cartage company, it cannot be affirmed as to one and reversed as to the other." (2) Adkins v. Strathmore Company and Svoboda,\(^2\) in which the plaintiff recovered a judgment against the two defendants for $750. In this case only the company appealed and the court, holding that the evidence did not justify a verdict against the company, reversed as to it, but affirmed the judgment as to Svoboda, saying, "But the reversing of the judgment as to the defendant Strathmore Company, a corporation, does not affect the judgment against the defendant Svoboda." (3) Fogel v. 134 N. Clark St. Building Corporation et al.\(^3\) Here, again, a judgment was recovered against two defendants, this time for $90, and the defendant corporation appealed. The court reversed as to the corporation and affirmed as to the defendant Deitz, saying that section 92 of the Civil Practice Act gave it the right to enter such an order. All three of these cases were heard after January 1, 1934; all involved judgments against joint tortfeasors; and in none of them was a partial new trial ordered.

Prior to January of 1934, the law in Illinois was well settled that a judgment against joint tortfeasors was a unit and could not be reversed as to one alone. The most recent treatment of the point by the Supreme Court, prior to January 1, 1934, is found in Livak v. Chicago and Erie Railroad Company.\(^4\) In that case, the judgment was in tort, and it was argued that the Supreme Court had the power to decree a partial reversal of the judgment. The court held otherwise, and said: "This court has held for about 70 years, beginning with McDonald v. Wilkie, 13 Ill. 22, that a judgment against several defendants, whether rendered in an action for tort or on a contract, is a unit and cannot be reversed as to one or more defendants and affirmed as to

---

\(^1\) 278 Ill. App. 452 (1935).
\(^2\) 278 Ill. App. 183 (1935).
\(^3\) 278 Ill. App. 286 (1935).
\(^4\) 299 Ill. 218, 132 N. E. 524 (1921). The court here cited Seymour v. Richardson Fueling Co., 205 Ill. 77 (1903), which was an action of assumpsit and the verdict was for the plaintiff against four defendants. The court there said, "The money judgment thus rendered was a unit as to all the defendants, and upon appeal the judgment must be reversed as to all the defendants if reversed as to any one of them." and cited cases of many jurisdictions and the works of Chitty, Black, and Waite.
DISCUSSION OF RECENT DECISIONS

the others.'" The McDonald case, to which the court referred, was an action for damages for assault and battery, and the trial resulted in a judgment in favor of the defendants. The court, on appeal, reversed as to all the defendants, and said: "A judgment, jointly entered in favor of several defendants, whether in an action upon contract or for tort cannot be affirmed as to one and reversed as to another. Such a judgment is an entirety, and must stand or fall together." The Appellate Court has been just as definite in the matter as has the Supreme Court. In a 1932 decision, here in the First District, the court, in reversing a judgment entered in favor of the plaintiff, said: "It is unavoidable, though regrettable, that the judgment as to both defendants must be reversed, as a judgment against two defendants is a unit, and if it must be reversed for error against one, it must be reversed as to both.'

Since the law in this regard is so well settled, it is strange that two out of three very recent cases should have held differently. The reason, as the court in the Fogel case pointed out, is the Civil Practice Act, which provides:

"Sec. 92. Powers of reviewing court. (1) In all appeals the reviewing court may, in its discretion, and on such terms as it deems just,—

"(f) give any judgment and make any order which ought to have been given or made, and make such other and further orders and grant such relief, including a remandment, a partial reversal, the order of a partial new trial, the entry of a remittitur, or the issuance of execution, as the case may be." It will be noted that the only difference between this section, and sections 110 and 111 of the Practice Act of 1907, is the provision allowing the Appellate Court to grant a partial reversal, so that the practice under the new provision will be the same, in this regard, as it has been in the past, at least in the opinion

5 McDonald v. Wilkie et al., 13 Ill. 22 (1851).
See also, Christensen v. Johnson and Johnson, 207 Ill. App. 209 (1917), and Freeman v. Dixon, 233 Ill. App. 196 (1924).
7 Cahill's Ill. Rev. Stat. (1931), Ch. 110, sec. 110: "In all cases of appeal and writ of error, the Supreme Court or Appellate Court may give final judgment and issue execution or remand the cause to the inferior court, in order that an execution may be there issued or that other proceedings may be had thereon. Any judgment rendered in the Supreme Court or Appellate Court shall become a lien on real estate after execution shall be issued and levied and a certificate thereof filed in the office of the recorder of deeds of the county where the real estate levied on is situated.

"Sec. 111: The Supreme Court or Appellate Court, in case of a partial reversal, shall give such judgment or decree as the inferior ought to have given, and for this purpose may allow the entering of a remittitur, either in term time or in vacation, or remand the cause to the inferior court for further proceedings, as the case may require."
of two members of the formulating committee, Edward W. Hinton⁸ and O. L. McCaskill.⁹ In other words, both before the Civil Practice Act and since its passage the reviewing court has had the right to decree a partial reversal such as was decreed in the Adkins and Fogel cases. Even under that act, however, the court has held that where such partial reversal is decreed the matters must be separate and distinct. "Under similar statutes on practice as our own above quoted, courts of last resort in this country have generally followed the rule that where a judgment appealed from consists of distinct and independent matters, so that an erroneous portion thereof can be segregated from the parts that are correct, the court will not set aside the entire judgment but only so much as is erroneous, leaving the residue undisturbed. Where a judgment is entire and indivisible, it cannot be reversed in part and affirmed in part, and if there is reversible error therein it must be set aside in toto. . . . This court has followed the rule both in law and in chancery cases."¹⁰ Hence, it is clear that prior to the Civil Practice Act the judgments in the Adkins and Fogel cases could not have been reversed in part, since it is certain and undisputed that a judgment against joint tortfeasors is not separable and distinct in any way. Therefore, since the provisions in the Civil Practice Act and the Practice Act of 1907 are practically the same, and since the Adkins and Fogel cases could not have been partially reversed under the former act, there seems to be some doubt as to the propriety of the court acting as it did. Perhaps the liberality intended by the Civil Practice Act was stretched a little too far!

G. E. HALL

TRESPASS AB INITIO AS APPLIED TO THE LAW OF ARREST.—Trespass ab initio, a fiction of ancient origin, was designed for the purpose of providing a remedy for wrongs done to property where an entry on the land, or the taking of a chattel was justified by virtue of a license. The difficulty involved in allowing an action of trespass in such cases lay in the fact that since the original entry or seizure was privileged, there was no trespass. To circumvent this difficulty, the subsequent abuse of the priv-

---

⁸ Stenographic Report of Lectures given in Law 447 at the University College, October, November, December, 1933, Edward W. Hinton, (Distributed by the University of Chicago Bookstore), 296: "(f) To give judgment, and so forth, which is simply a re-enactment of the old Practice Act, I believe."

⁹ Illinois Civil Practice Act Annotated, (O. L. McCaskill, editor, The Foundation Press, Inc., 1933), 339: "Subsection (1, f) is a combination of sections 110 and 111 of the Practice Act of 1907, and except in one respect, that of a partial new trial, there will be no change in the practice formerly obtaining under those sections."

¹⁰ City of Kewanee v. Pusker, 308 Ill. 167, 139 N. E. 60 (1923).
ilege by the actor was taken as conclusive evidence of his original intent. The doctrine, although always confined to acts privileged by law, was soon after its origin allowed to be extended to serve purposes beyond that for which it was created.

In most instances, although the reason for the doctrine has failed, it still survives and has found application in wrongs to the person as well as to property. Although some courts have sought to limit it, the New York Supreme Court recently held in *Dumas v. Erie Railroad Company*¹ that an arrest, though legal in its inception, was illegal *ab initio* where during the period of detention the defendants brutally treated the person arrested in order to extort a confession from him.

The plaintiff had been suspected of stealing an automobile, and it was not contended that the arrest in the first instance was unlawful. This was an action for false imprisonment brought to recover for the wrongful detention and injuries sustained from the brutal treatment inflicted on him for the purpose of extorting a false confession. The court said: ‘Whether or not the period of detention was so utilized was a question for the jury, and their finding that it was so utilized, made the detention illegal from the inception and deprived the defendants of the protection that otherwise would have been theirs if the arrest were legal in its inception and there had been no such illegal purpose carried out during the period of detention.’

Although the decision would probably have been different on the same set of facts in England, or in several of the jurisdictions in this country, there is abundant authority to support it,² and it is in line with the prior decisions in New York.³ The theory on which they proceed is that if one is to protect himself by virtue of legal process in obedience to which he has imprisoned, or restrained the plaintiff, the officer must prove that he acted in compliance with the law. If he fails to do so, the defense afforded him by his process wholly fails and he is said to be a trespasser *ab initio*. In Vermont, retroactive liability was imposed in *Gibson v. Holmes*⁴ by virtue of a statute. There appear to be three lines of decisions in this country with reference to the retroactive liability of an officer who makes an

¹ 278 N. Y. S. 197 (1935).
² Pettitt v. Colmery, 20 Del. 266, 55 A. 244 (1903); Stewart v. Feeney, 118 Iowa 524, 92 N. W. 670 (1902); Leger v. Warren, 62 Ohio St. 500, 57 N. E. 506 (1900).
³ “Neither does it justify an unreasonable detention and deprivation of one's liberty. There is in other jurisdictions an abundance of authority to the effect that unlawful detention, following a lawful arrest by the sheriff, makes him a trespasser *ab initio*.” Oxford v. Berry, 204 Mich. 197, 170 N. E. 83 (1897).
⁴ 78 Vt. 110, 62 A. 567 (1905).
arrest under lawful process and subsequently abuses his privilege.

In the first class we may put the cases that hold the actor is liable where the wrongful intent is acquired at any time, either before or after the arrest. *Dumas v. Erie Railroad Company* falls within this group as well as do the prior decisions of the New York courts.

The second class includes cases that hold that the officer is not liable *ab initio* if the wrongful intent is acquired subsequent to the arrest, but that he is if the arrest was made for a wrongful purpose. In *Freisenhan v. Maines* the Supreme Court of Michigan said: "'Unlawful detention following an arrest does not make him a trespasser *ab initio* unless the original arrest was made with the intent of being used for the subsequent wrong.'" Although the writer was unable to find a case directly in point, it appears that Illinois would also come within this group. In *Slomer v. People* the plaintiff was arrested under lawful process for the purpose of extorting money from him. The court said: "'When the prisoner had proved an imprisonment, it was for the defense to make out a justification; and we think in this case, in view of the facts appearing in the evidence it failed. The law will not permit the use of criminal process for the accomplishment of a private purpose, and when it is used for the purpose of extortion, it will not be allowed to screen the prosecutor or those conspiring with him from punishment for false imprisonment.'"

In the third group are the cases which hold that there is no retroactive liability whether the wrongful intent was acquired before or after the arrest. The Massachusetts court said in *Wood v. Bailey*, "'An action for false imprisonment cannot be maintained, but an action would lie for malicious abuse of criminal process.'"

The *Restatement of the Law of Torts* does not seem to recognize the doctrine of trespass *ab initio* with respect to the law of arrest. The following excerpt is taken from that work: "'If the actor abuses the custody which he has taken under a privileged arrest by any form of misconduct . . . he is liable for the harm done thereby. His misconduct does not make him liable for any 'assault' or 'battery' committed in making the arrest or maintaining his custody prior to his misconduct; nor does it make him liable for the confinement imposed by the privileged arrest and custody. *A fortiori*, the actor's subsequent miscon-

---

5 137 Mich. 10, 100 N. W. 172 (1904).
6 25 Ill. 58 (1860).
8 Par. 278.
duct does not affect the other's liability for any force which he
used in resisting the privileged arrest or in escaping or attempt-
ing to escape, nor does it affect the immunity to a third person,
who prior to the misconduct, has assisted the actor in making the
arrest, or maintaining his custody."

Messrs. Bohlen and Schulman, in their article, *Effect of Sub-
sequent Misconduct upon Lawful Arrest,* deprecate the ap-
plication of trespass *ab initio* to the law of arrest and contend
that it is an unwarranted extension of the doctrine. It does
appear, however, that the jurisdictions that recognize the doc-
trine are in the majority, and that their reasoning, although not
strictly in accordance with the early concepts, as laid down in
the *Six Carpenters' Case,* is not without merit.

W. R. MACMILLAN

**EQUITABLE JURISDICTION TO AVOID MULTIPlicity OF SUITS.**—
In the recent case of *Weininger v. Metropolitan Fire Insurance
Company,* the Illinois Supreme Court held that in order to
avoid a multiplicity of suits equity may entertain jurisdiction
of a bill brought to recover upon fire insurance policies issued
by sixteen different companies, and to have the loss apportioned
among them. The policies were "standard" ones and each con-
tained a provision for prorating the aggregate loss on the prop-
erty in the proportion that the insurance written under each
policy might bear to the total insurance carried.

The court admitted that the question of jurisdiction was one
of first impression in Illinois, recognized the fact that there was
a conflict of authority, quoted Pomeroy, observed that "it is one
of the favorite objects of a court of equity to do full and com-
plete justice between the parties by avoiding the delays and
hardships incident to a multiplicity of suits," and then dwelt
upon the practical difficulties of disposing of the matter through
separate suits at law. The court pointed out that separate juries
might very easily arrive at conflicting verdicts; also that in the
present case the apportionment of the loss to the several in-
surers involved a complicated accounting problem, which mer-
ited equitable relief. It is, perhaps, to be regretted that the
court did not base its decision solely upon the last ground men-
tioned, an equitable accounting.

---

9 28 Col. L. Rev. 841 (1928).
1 359 Ill. 584 (1935).
2 In support of this statement the court cited McGovern v. McGovern, 268
Ill. 135, a case of a bill to set aside deeds, and one in which no question
arose of equitable jurisdiction on the ground of avoiding a multiplicity of
suits.
There are two distinctly conflicting views upon this question: one, that equity may assume jurisdiction whenever the rights of the numerous persons depend for solution on the same questions of law and fact, though purely legal rights may be involved, and purely legal relief may be conferred; the other, that "there must be some recognized ground of equitable interference, or some community of interest in the subject matter of the controversy, or a common right or title involved, to warrant the joinder of all in one suit; or there must be some common purpose in pursuit of a common adversary, where each may resort to equity, in order to be joined in one suit; and it is not enough that there is a community of interest, merely, in the questions of law or fact involved." The quotation is from Tribette v. Illinois Central Railroad Company. There the Supreme Court of Mississippi denied the power of equity to enjoin the prosecution of actions at law and compel adjudication in a single suit, where a number of claimants had begun actions against the railroad for destruction of their property by fire. In Tomkins v. Craig the Federal Circuit Court for the Eastern District of Pennsylvania refused equitable jurisdiction of a bill filed to collect amounts previously assessed against stockholders upon statutory "double liability," saying: "Each contest is a separate obligation, and should be separately enforced. It is plain, also, that each defendant may desire to set up a different defense."

Another Federal case, Scruggs and Echols v. American Central Insurance Company, is of especial interest here, because of the factual similarity to the present case. There the court held that one of several insurance companies which had issued policies on the same property, with provisions for apportioning loss, might not maintain a bill in equity to compel an adjustment of the liability on the several policies in one suit. The court branded the bill as an obvious attempt on the part of the insurance company to escape a jury trial.

The principal case arose, of course, before the new Civil Practice Act went into effect. In view of the fact that there could be no question of the right of the court to permit the joinder

---

8 Pomeroy, Equity Jurisprudence (4th ed.), sec. 250 and 269; Eaton, Equity (2d ed.), p. 33; Preteca v. Maxwell Land Grant Co., 50 F. 674 (1892); Osborne v. Wisconsin Cent. R. Co., 43 F. 826 (1890); Black v. Shreeve, 7 N. J. Eq. 440 (1848).

4 70 Miss. 182, 12 So. 32, 39 L. R. A. 660, 35 Am. St. Rep. 642 (1892).


7 176 F. 224, 26 L. R. A. (N. S.) 92 (1910).
DISCUSSION OF RECENT DECISIONS

of these defendants in a single action under the new practice,\(^8\) it may seem at first glance that the decision will have no applica-
tion now. However, upon analysis it will be seen that the case
is decisive of the right to a jury trial in such proceedings. Since
the decision denotes the action as equitable rather than legal
at common law, parties will not be entitled as a matter of right to
a jury in similar cases under the new practice. Even in an
equitable action, of course, the court may in its discretion grant
a jury trial, both under the former practice\(^9\) and under the
new Civil Practice Act.\(^{10}\)

G. S. STANSELL

POWER OF SUPERIOR COURT TO ISSUE WRIT OF PROHIBITION TO
MUNICIPAL COURT OF CHICAGO AS INFERIOR COURT.—The writ of
prohibition is one of the extraordinary writs and seldom used
today, although its use dates back to early times, and was well
known to Blackstone. It is sometimes mistakenly considered to
be in the nature of a writ of review. In its essence it has always
been defined as a writ issuing from a "superior" court to an
"inferior" one, directed to prevent usurpation of a jurisdiction
which does not properly belong to such inferior court. The sub-
ject matter is by the writ thereby removed to the higher court,
but the higher court does not review the proceedings of the
other court. The test as to the power of a court to issue such
a writ of prohibition to another court is whether or not the
latter is inferior to the former, not in the sense that an appeal
will lie from the one to the other, but in the sense that one does
not have as broad jurisdiction as the other.

A recent instance of the writ of prohibition occurred in the
case of The People ex rel. Sokoll v. Municipal Court,\(^1\) wherein
the petitioner sought to have the Superior Court of Cook County
issue such a writ against the Municipal Court of Chicago, for the
purpose of prohibiting that court and a judge thereof from
exercising further jurisdiction over a contempt proceeding. The
defendant argued that because of the wide jurisdiction of the
Municipal Court, it was not inferior, although it did not have
jurisdiction of all cases cognizable in the Circuit and Superior
Courts. The Illinois Supreme Court held that it was proper for
such a writ to issue.

That case originated in the Municipal Court of Chicago as
a trial of a minor traffic violation. Certain irrelevant facts were

\(^{8}\) Cahill's Ill. Rev. Stat. (1933), Ch. 110, sec. 151, 152.
\(^{9}\) Cahill's Ill. Rev. Stat. (1931), Ch. 22, sec. 40, now repealed by new
practice act.
\(^{10}\) Cahill's Ill. Rev. Stat. (1933), Ch. 110, sec. 191.
\(^{1}\) 359 Ill. 102, 194 N. E. 242 (1935).
disclosed during the course of the trial and of accompanying
contempt proceedings, which led Judge Green to declare pub-
licly his intention to conduct a thorough investigation of the
alleged monopolies in the taxicab business in Chicago. He an-
nounced that he would have subpoenas duces tecum issued for
the books of certain taxicab companies and that he would inspect
such books to ascertain if the condition charged, in fact existed.
He further stated that he would strike any answers filed by the
defendants. Thereupon, two of those defendants, Sokoll and
Egan, brought the petition for a writ of prohibition in the
Superior Court of Cook County, directed against Judge Green
and the Municipal Court.

The principal question in the case was whether or not the
Municipal Court is inferior to the Superior Court, especially
since the recent amendments to the Municipal Court Act which
broadened its jurisdiction. This question had never been passed
on before, but there are several cases which help to determine
the issue.

In Reid v. Morton,2 the question arose as to whether the Alton
City Court was inferior to the circuit court, with which it had
concurrent jurisdiction within the city of Alton, in all civil
cases. The case did not involve a writ of prohibition, but it was
urged that only inferior local courts could be established in
cities under the Constitution of 1848, and that therefore the
Alton City Court never had any legal existence. In its decision
the court said it was not plain just what was meant by the
term "inferior," but that since the city court did not have
equal jurisdiction with the circuit court in criminal cases, and
its territorial limits of jurisdiction were less, it was, both in
dignity and jurisdiction, inferior to the circuit court, even
though it was a court of record.

The next important case bearing on the issue was Wolf v.
Hope,3 wherein the question was as to the meaning of "inferior
court of record" as used in the act fixing the salaries of judges
of such courts; and there again it was held that the city court
of Alton was an inferior court of record, not in the sense that
an appeal would lie from it to the Circuit or Superior Court,
but in that it did not have as complete an original jurisdiction,
inasmuch as it was denied jurisdiction in cases of murder or
treason by the act which created it. With reference to the city
court, the Supreme Court said: "It was not a court of unlimited,
general jurisdiction, as are the circuit court and the superior
court, nor is the extent of the territory throughout which it may
exercise its jurisdiction as great as that throughout which may

2 119 Ill. 118, 6 N. E. 414 (1886).
3 210 Ill. 50, 70 N. E. 1082 (1904).
be exercised the jurisdiction of the circuit or superior court. In these respects it is an inferior court . . . ."4 The test there recognized by the court was whether or not jurisdiction was equal—if not, then the court with less jurisdiction was inferior.

In Miller v. The People,5 an indictment charging an offense committed in Cook County was brought up in the Municipal Court, and the defendant argued that the jurisdiction of that court was limited to the actual confines of Chicago. The court held that such contention was correct, and said of municipal courts in general: "They are limited, territorially, to the municipality in and for which they are created, and their jurisdiction is usually limited in amount or to petty offenses."6 Because of such territorial limits, these municipal courts cannot be considered as being on the same level of jurisdiction with the circuit courts or the Superior Court of Cook County.

Again, in Lott v. Davis,7 in discussing the distinctions between the Municipal Court and the circuit courts, the court said that the former lacked some of the more important classes of jurisdiction of circuit courts—the entire chancery division, tort actions for more than a stated sum, ejectment, mandamus, quo warranto, and habeas corpus. Because of these limitations, the Municipal Court cannot be regarded as of the same grade as the circuit courts.

It was true, as the defendants in this petition said, that these cases were all decided before the amendments to the Municipal Court Act, but the Court itself is still subject to certain limitations. It has no jurisdiction beyond the city limits, whereas the Superior Court of Cook County has jurisdiction throughout the county. It has no general chancery jurisdiction, nor any over felony cases, nor over certain torts, whereas the Superior Court does have such jurisdiction, and may also issue the other extraordinary writs of mandamus and the like. Basing, then, the distinction on scope of jurisdiction, it must be held that the Municipal Court, in relative rank, is inferior to the Superior Court of Cook County and to the circuit courts.

After the court had found that such inferiority exists, the next question was, did the Superior Court have power to issue the writ of prohibition. The Supreme Court went rather deeply into a discussion of that writ in The People v. Circuit Court,8 and pointed out that, as a prerogative writ, it was to be used with caution and only to secure regularity of proceedings where

4 210 Ill. 50, 65, 70 N. E. 1082 (1904).
5 230 Ill. 65, 82 N. E. 521 (1907).
6 230 Ill. 65, 74, 82 N. E. 521 (1907).
7 264 Ill. 272, 106 N. E. 179 (1914).
8 347 Ill. 34, 179 N. E. 441 (1932).
there was no other adequate remedy. It was in itself a common
law remedy, and exists in this country unless abolished by
statute, which has not been done in Illinois. The court cited
The People v. Cook Circuit Court,⁹ which distinctly held that
the writ was never used to correct mere irregularities or to
perform the functions of an appeal or writ of error, and that
since the constitution did not provide original jurisdiction in
the state Supreme Court to issue a writ of prohibition, it could
only issue such a writ in aid of its appellate jurisdiction. After
such citation, the court went on to voice the general rule that
the writ may issue from the superior to the inferior court, but
considered the case mainly from the point of view that the
issuance was in aid of the appellate jurisdiction of the superior
court.

In the case under discussion, as to the power of the Superior
Court of Cook County to issue the prohibition, there is no ques-
tion of its being in aid of any appellate jurisdiction. According
to some of the wording in The People v. Circuit Court,¹⁰ the
only true purpose of the writ is to prevent an attempt on the
part of the inferior court to set aside a judgment of the superior
court once entered. No such situation exists in the principal
case, and the court distinctly holds that the writ may—indeed
must—issue to prevent the inferior court from exceeding the
limits set for it by law, and operates, not like an injunction,
on the parties, but on the court, and the judge and officers who
disregard it may be punished. From the holding comes the
latest principle enunciated by the Illinois Supreme Court as
to a writ of prohibition, that the circuit and superior courts
are the only ones having original jurisdiction to issue writs of
prohibition; and that such power does not depend upon the
power to review judgments of the other court for the writ
does not have to be, as before believed, in aid of appellate
jurisdiction. The court said that the Superior Court erred in
refusing to issue the writ as petitioned, since Judge Green was
powerless to investigate the taxicab monopoly situation. Such
investigation could in no way have any bearing upon the ques-
tion of petitioners' obstruction of justice in the Municipal
Court. In fact, there was no basis for any charge of obstruc-
tion of justice.

HELEN W. MUNSELT

ENLARGEMENT OF LIFE ESTATE TO FEE BY POWER OF DISPOSAL.
—The recent West Virginia case of Hustead v. Murray¹ presents

⁹ 169 Ill. 201, 48 N. E. 717 (1897).
¹⁰ 347 Ill. 34, 179 N. E. 441 (1932).
¹¹ 177 S. E. (W. Va.) 898 (1935).
DISCUSSION OF RECENT DECISIONS

anew the perplexing problem of the enlargement of a life estate to a fee by means of powers of disposal given the life tenant. In that case, the language of the will was as follows: "I give, devise and bequeath to my wife, Rosalie Hustead, all of my property, both personal property and real estate, of which I may die seized and possessed, she to have the right and privilege to use, sell or dispose of the same as she may see fit during her lifetime, but any personal property or real estate remaining at her death shall by this will become the property of my daughter, Ada M. Hustead." The court held that Rosalie took the property in fee simple, and that the devisee under her will took title to the exclusion of the daughter, the present complainant. The court admits that the decision is clearly against the weight of authority but feels bound by its own precedents.  

The almost universal rule is that a life estate expressly created by will is not converted into a fee merely because a power of disposal is given the life tenant. Perhaps the most persuasive decision, although one dealing solely with personalty, is the United States Supreme Court case of Smith v. Bell, in which the opinion is written by Mr. Chief Justice Marshall. The will in that case contained the following language: "I give to my wife, Elizabeth Goodwin, all my personal estate whatsoever and wheresoever, and of what nature, kind and quality soever, after payment of my debts, legacies, and funeral expenses; which personal estate I give and bequeath unto my said wife, Elizabeth Goodwin, to and for her own use and benefit and disposal absolutely; the remainder of said estate after her decease, to be for the use of the said Jesse Goodwin." The court pointed out the impracticability of Procrustean rules of construction, declared that the cardinal rule should be to give effect to the intent of the testator, and asserted that here the intention of the testator was clear, and, might be given effect without contravening any positive rule of law. The court held that the later words might limit the apparent scope of the gift, and that the son took a vested remainder in the property.

2 The court points out that Virginia and West Virginia, both of whom have adhered to the minority rule, have recently passed statutes bringing them into conformity with the majority doctrine, and comments further: "It is to be hoped that it may be the means of freeing the courts of the state from adherence to an ancient rule, the effect of which is to defeat in part the apparent purpose of the testator."


4 31 U. S. 68, 8 L. Ed. 322 (1832).
The cases upon the subject are so endless in number and the wills construed so infinitely varied in phraseology that it is impossible here to consider them all. It may be of interest, however, to review a few typical Illinois cases.

In *Ducker v. Burnham* the language of the will was: "I give, bequeath and devise to my wife . . . the use of all the rest of my real and personal estate for and during her natural life, and I hereby give her full power and authority to sell, dispose of, and convey any and all of said real and personal estate, and to invest the proceeds thereof in any other form she deems advisable, and I give her full right and authority to use and exhaust such part of the principal of my estate, real and personal, as she may at any time think necessary for her support and maintenance." After the death of the wife the property then remaining was to be equally divided among the testator's children. It was held that a life estate was created, which was not increased to a fee by the power of disposal.

In *Wardner v. Seventh Day Baptist Memorial Board* it was decided that the words "use, dispose of and control according to her own judgment during her natural life" did not give the devisee the power to sell and dispose of the fee in the property, there being a limitation over after the death of the devisee. The court said: "It is a general rule in all cases where by the terms of the will there has been an express limitation of an estate to the first taker for life and a limitation over, with general expressions apparently giving the tenant for life an unlimited power over the estate, but which do not in express terms do so, that the power of disposal is only coextensive with the estate which the devisee takes under the will, and means such a disposal as the tenant for life could make, unless there are other words clearly showing that a larger estate was intended."

In *Smith v. Windsor,* a devise of all of testator's real and personal property to his wife "for and during her natural life with full and complete power to sell and convey all or any part thereof, or to loan the same, or to use and employ the same, or any part thereof, in any other way she shall desire for her comfort or advantage," with remainder to his heirs at law, was held to give the widow only a life estate in the property of the deceased, with a limited power to dispose of the fee in the property.

In the very recent case of *The Rock Island Bank and Trust Company v. Rhoads,* where the testator had no children, his

---

5 146 Ill. 9, 34 N. E. 558, 37 Am. St. Rep. 135 (1893).
7 239 Ill. 567, 88 N. E. 482 (1909).
8 353 Ill. 131, 187 N. E. 139 (1933).
DISCUSSION OF RECENT DECISIONS

will read in part: "All the rest, residue and remainder of my estate, both real, personal and mixed and wheresoever situate, I give, devise and bequeath unto my well-beloved wife, Mary E. Robinson to have and to hold the same unto her for and during her natural life, with full authority to use and dispose of so much of the same as may in her judgment be necessary for her comfort and satisfaction in life." The will also gave to the wife "full and exclusive management . . . with power to invest," power from time to time to "sell and dispose absolutely of any, every, and all of the real estate," etc.

Under this will, the court sustained gifts over to various charitable institutions, and held that she could not dispose of the property by will. The court did, however, sanction large gifts and donations which she had made from the corpus of the estate to various religious and charitable institutions. "The only limitation on that power of disposal was that such disposal be, in her judgment, necessary for her comfort and satisfaction in life. Within the power of disposal, she, alone, was to determine what was necessary for her comfort and satisfaction in life." 9

Mr. Justice Stone renunciates the general rule applicable to this class of cases: "It is a rule long followed and frequently announced in this State, that a life estate may be created with power to dispose of the fee; that by the same instrument there may be created a limitation of the remainder after the termination of the life estate, and that such power of absolute disposition annexed to a life estate does not enlarge that estate into an estate in fee." 10

G. S. Stansell

Presumption of Malice under a General Verdict.—In an action for alienation of affections and criminal conversation, Mrs. Nottingham recovered a judgment against Mrs. Blacklidge, and, the defendant refusing to pay, a capias ad satisfaciendum issued upon the judgment and Mrs. Blacklidge was imprisoned in the county jail. She sought to be released under the provisions of the Insolvent Debtors Act. 1 Her release was denied on the ground that the judgment was recovered in an action of which malice was the gist and that the petitioner had failed to show that malice was, in fact, not the gist. The declaration in the

9 The Massachusetts court uses similar language in Dana v. Dana, 185 Mass. 156, 70 N. E. 49 (1904): "If through reasons of religion or of benevolence and for her mental satisfaction she chose to devote any part of the estate left to her in aid of either charitable or philanthropic objects, there is nothing in the terms of his will that restricts her from making such use of the principle. If the testator did not care to confine her discretionary powers there is no duty incumbent on us to seek for reasons to limit their exercise."

1 In re Petition of Blacklidge, 359 Ill. 482 (1935).
original action was made up of two counts, alienation of affections and criminal conversation, both charging malice; but malice was the gist of only one of them, the count for alienation of affections. In this regard, the court said that the "gist of the action" constitutes the essential ground or object of a suit, without which there is not a cause of action. The verdict returned was a general verdict. Interestingly enough, the court held citing *Buck v. Alex*\(^2\) and *Jernberg v. Mix*,\(^3\) that a presumption was raised that the verdict was based on the cause of action of which malice was the gist. Such a presumption is not conclusive, however, for the petitioner under section 2 of the Insolvent Debtors Act\(^4\) has the privilege of showing that the verdict was in fact based upon a count of which malice was not the gist. In the present case Mrs. Blacklidge failed to produce any evidence at all for the purpose of making such a showing, and therefore the court very rightly held that she had not brought herself within the provisions of the Insolvent Debtors Act and that she should not be released.

The dissenting opinion of Justices Shaw and Herrick is built chiefly around two Illinois cases, *Buck v. Alex*\(^5\) and *People v. LaMothe*.\(^6\) In the *Buck* case this statement was made: "The presumption is that the verdict and judgment are based upon a cause of action of which malice is the gist and that the defendant cannot be released from imprisonment under a *capias ad satisfaciendum* under the Insolvent Debtors Act." In the *LaMothe* case, in connection with the question of imprisonment for debt under the constitution, section 12 of article 2,\(^7\) the court stated that in the enforcement of this provision every doubt should be resolved in favor of the liberty of the citizen. Clearly, as stated by Justice Shaw, these two views are not in harmony, and it was therefore necessary to determine which view should be upheld. The dissenting opinion then went on to review the decisions of other states in regard to presumptions of this nature and concluded with this statement: "I feel that the more

\(^2\) 350 Ill. 167, 182 N. E. 794 (1933).
\(^3\) 199 Ill. 254, 65 N. E. 242 (1902).
\(^4\) Cahill's Ill. Rev. Stat. (1933), Ch. 72, par. 5: "When any person is arrested or imprisoned upon any process issued for the purpose of holding such person to bail upon any indebtedness, or in any civil action when malice is not the gist of the action, or when any debtor is surrendered or committed to custody by his bail in any such action, or is arrested or imprisoned upon execution in any such action, such person may be released from such arrest or imprisonment upon complying with the provisions of this act."
\(^5\) 350 Ill. 167, 182 N. E. 794 (1933).
\(^6\) 331 Ill. 351, 163 N. E. 6 (1928).
\(^7\) "No person shall be imprisoned for debt, unless upon refusal to deliver up his estate for the benefit of his creditors, in such manner as shall be prescribed by law, or in cases where there is strong presumption of fraud."
humane rule, as well as the weight of authority, is in accordance with our expression in People v. LaMothe, supra, that all presumptions should be indulged in favor of the liberty of a citizen, and that when the record is left in doubt we should not presume that the verdict was based upon a count of which malice was the gist.' This dissenting opinion seems to have ignored the fact that the presumption raised by the majority of the court was only a prima facie one.

In the instant case, therefore, the decision is absolutely sound according to the Illinois statutes. Since the presumption of malice is only prima facie, the petitioner had the right under the Insolvent Debtors Act to rebut it by competent evidence. Failing to do so and thus failing to bring herself within the relief afforded by the statute, her petition for a release was rightly denied.

G. E. HALL

Is Privity Between Claimants Still Requisite to a Bill of Interpleader?—In the recent case of Camden Safe Deposit and Trust Company v. Barber,\(^1\) the New Jersey Court of Errors and Appeals decided that privity is no longer necessary. In this case, the plaintiff bank was the depositary of certain dividend checks, endorsed to them by one of the claimants, the wife of deceased, who was acting under a power of attorney. The other claimants were the judgment creditors of the deceased, who had levied on the deposit, and the administrator. The court admitted that the claims were each paramount and adverse, but stated that this fact did not preclude a bill of interpleader in New Jersey.

This decision is directly in line with previous interpleader cases in New Jersey,\(^2\) and is certainly nothing new in the law. However, it does suggest the question, What has happened to the doctrine of privity in Illinois?

In discussing this, it is first necessary to define interpleader and determine what its requisites originally were. Pomeroy, in his treatise on Equity Jurisprudence,\(^3\) states: ‘Where two or more persons whose titles are connected by reason of one being derived from the other, or of both being derived from a common source, claim the same thing, debt, or duty, by different or separate interests, from a third person, and he, not knowing to which of the claimants he ought of right to render the debt or duty, or to deliver the thing, fears he may be hurt by some of

---

1 176 A. 313 (1935).
2 Trust Co. of New Jersey v. Biddle, 112 N. J. Eq. 397, 164 A. 583 (1933); Blair v. Porter, 13 N. J. Eq. 267 (1861).
3 Pomeroy's Equity Jurisprudence 343.
them, he may maintain a suit and obtain against them the remedy of interpleader. To sustain the suit, four requisites are necessary: First, the same thing, debt or duty . . . Second, privity between the opposing claimants . . . Third, plaintiff a mere stakeholder and . . . Fourth, no independent liability to one of the claimants." In discussing the second requisite, privity, Pomeroy says: "Where there is no privity between the claimants, where their titles are independent, not derived from a common source, but each asserted as wholly paramount to the other, the stakeholder is obliged . . . to defend himself as well as he can against each . . . ." This principle was integrated into the early English law as a result of the cases in which a tenant attempted to interplead his landlord and another claiming adverse and paramount title, and in which a bailee interpled his principal and an adverse paramount claimant. But it was subsequently decided that if the property actually belonged to another, the bailee might safely deny his bailor's title.

This subsequent decision seemed to remove the very foundation upon which the doctrine rested, but the technical requisites had been laid down and the courts continued to restate them, not, however, without frequent criticism from both judges and writers on the subject. Thus, in England, by the Common Law Procedure Act of 1860, privity is no longer required. By statute, in this country, many states have abolished it. In those states where no statute has been enacted, the question continues to arise. New Jersey has solved it by judicial legislation. The Illinois cases seem to have solved it as effectively without expressly abrogating the rule.

Walsh, one of the critics of this doctrine, on page 565 of his Treatise on Equity, states: "Another technicality which, however, has not even the excuse of mere logic . . . arises from the supposed rule that there must be 'privity' between the claimants, their title being derived from a common source, so that where the title of each is wholly distinct and independent of the other, interpleader can not be had." The author then points out that in each case equitable relief is just as necessary, that in each, the plaintiff is ready to pay the successful claimant exactly what he is entitled to, that the real controversy is between the

6 Story, Commentaries on Equity Jurisprudence, II, 28; Walsh, A Treatise on Equity, p. 565.
8 33 C. J. 421, footnote 37.
DISCUSSION OF RECENT DECISIONS

claimants, and it is thus unfair that the plaintiff should be
subjected to liability, litigation and annoyance. He then states
that many courts have refused to recognize privity, and as one
of the cases supporting this statement, he cites an Illinois case,
The Platte Valley State Bank v. The National Live Stock Bank.9
A study of this case, and its relation to the cases following,
will show the Illinois doctrine. In this case, one Halsey deposited
with the plaintiff bank the sum of $5,983.18 to be credited to
the Platte bank and to be remitted to that bank upon presenta-
tion of a draft to be drawn upon it. The plaintiff sent notice to
the Platte bank of this deposit, but before the latter had drawn
upon the plaintiff bank, the Union Stock Yards Bank of South
Omaha made known to the plaintiff that it claimed the said
fund, under a chattel mortgage given by Halsey upon cattle
sold in Chicago. In making its decision, the court quoted Pom-
eroy and laid down as necessary to a bill of interpleader in
Illinois the four requisites he enumerates. But in determining
the question of privity, they did not demand that the claimants
have a dependent title in the sense of one being derived from
the other. It was held sufficient that both claimed under Halsey,
and that thus both claims were derived from a common source.

Since this case was decided in 1895, practically all cases in
interpleader in Illinois have cited it as authority, not, however,
for the apparent extension of the rule of privity, but as
authority for demanding that the four requisites be maintained.10
In actual practice, though, the courts have maintained the liberal
attitude established in that case. Thus in Fidelity Fire Insur-
ance Company v. Illinois Trust and Savings Bank,11 the
plaintiff bank held a fund arising from the business of an insur-
ance company as conducted by its agents, and in which the
bank claimed no interest. The insurance company demanded
payment on the account, while the agents threatened to hold
the bank liable to them if such payment were made. After
determining that there was no independent liability to the in-
surance company, the court allowed interpleader, holding that
it was not controlling that the claim of the agents was for
damages for an alleged breach of contract.

Another case in which the doctrine was even more liberally

9 155 Ill. 250, 40 N. E. 621 (1895).
10 Fidelity Fire Ins. Co. v. Illinois Trust & Savings Bank, 110 Ill. App. 92
(1903); Snow v. Ulrich, 126 Ill. App. 493 (1906); Peterson v. Hartford Fire
Insurance Co., 111 Ill. App. 466 (1903); Noble v. Carruthers, 235 Ill. App. 1
(1924); Supreme Council of the W. C. U. v. Morris, 154 Ill. App. 465 (1910);
Prudential Ins. Co. v. Ostrom, 274 Ill. App. 241 (1934); Rauch v. Ft. Dearborn
National Bank, 223 Ill. 507, 79 N. E. 273 (1906); Chicago Title & Trust Co.
11 110 Ill. App. 92 (1903).
applied was that of Noble v. Carruthers.\textsuperscript{12} There the plaintiff had made contracts with each of two defendants, agreeing to pay a specified sum if either secured a tenant for the plaintiff’s building. A tenant was procured and both defendants claimed the fund. The court determined from the facts that there was no independent liability, thus distinguishing the case from that of Sachsel v. Farrer.\textsuperscript{13} With respect to the question of privity, the court found that the tenant, credit for finding whom was claimed by both, was a “common source” sufficient to fulfill such requisite. In concluding the opinion, Justice Taylor said: “... and it is true that in early history of the law as it pertains strictly to bills of interpleader such a situation as exists would not give a court of equity jurisdiction. But the tendency of the law seems to be more and more towards allowing bills in the nature of bills of interpleader wherever there are conflicting claims, made by several against one, which grew out of a single transaction and which may be determined with better justice in one suit in equity than in several suits at law.” Justice Thompson, in a concurring opinion, in answer to the question of privity raised by the defendants, said: “There need not be [privity] in order to make out a proper case for interpleader.” He then stated that the privity referred to as essential in Platte Valley National Bank v. The Live Stock National Bank, does not require a derivative title between adverse claimants but merely that both claimants can find a “common source.”

In Illinois, then, it seems that privity in name is still demanded as an essential element of interpleader,\textsuperscript{14} but in actual practice, through the application of the words “common source,” the courts have circumvented the strict technical meaning as required in the early law and thus solved the problem in this state.

R. L. HUFF

\textbf{WHAT CONSTITUTES NOTICE OF AN INFIRMITY IN THE TITLE OF A VENDOR OF NEGOTIABLE PAPER?}—The Circuit Court of Appeals for the Seventh Circuit recently handed down a decision in White-Phillips Company, Inc. v. Graham,\textsuperscript{1} as to what constitutes an infirmity in the title of a vendee of negotiable paper under the Negotiable Instruments Law as it exists in Illinois. The conclusion of the court is not startling, since there is adequate authority to support it. It is particularly interesting, however, to those who follow Illinois law, since it is but the

\textsuperscript{12} 235 Ill. App. 1 (1924).
\textsuperscript{13} 35 Ill. App. 277 (1889).
\textsuperscript{14} Prudential Insurance Co. v. Ostrom, 274 Ill. App. 241 (1934).
\textsuperscript{1} 74 F. (2d) 417 (1935).
DISCUSSION OF RECENT DECISIONS

Second reported decision interpreting this section of the statute.2 The first Northwestern National Bank v. Madison & Kedzie State Bank,3 was a decision of the Illinois Appellate Court. There the court arrived at a conclusion opposite to that of the Circuit Court of Appeals.

Better to understand the decision of the Circuit Court of Appeals, it is well to consider first, the Appellate Court case. The Northwestern National Bank had a number of bonds stolen from it. The customary notice of theft was circulated among other companies dealing in bonds, and such notice was mailed to the Madison-Kedzie Bank and received by an agent authorized to receive and open the mail. Subsequently the stolen bonds were purchased by an agent of the Madison-Kedzie Bank acting in good faith and without actual knowledge of the theft and at full value. The Northwestern National Bank brought an action for the conversion of the bonds. In that case the court said:

"In our opinion notice depends upon the authority of the agent to acquire it through the opening and inspecting of the bank's mail and not upon the duty to report it to the agents of the bank. If there was neglect in that respect on his part, it did not change the fact that notice was received by an agent of the bank authorized to receive the knowledge and to deal with it. If to constitute actual knowledge of the bank, it would be necessary to bring such notice to the actual attention of each of its several agents likely to deal with such securities, then it would open the door to easy evasion of liability and put a premium on the negotiation of stolen securities. The notice having been received by the proper agent of the bank to receive, open, and acknowledge its mail in the line of his duties, we think the bank is estopped from claiming it did not have actual knowledge of the defect in the title of the bonds subsequently received."

In White-Phillips Company, Inc. v. Graham, the court was faced with a similar set of facts. On or about September 2, 1930, certain Illinois State Highway bonds were stolen from a safe in the home of one Graham. He immediately gave notice of the theft to the Foreman State Corporation and others. Pursuant to its custom, the Foreman Company mailed a report of this theft to a list of municipal bond dealers about September 5. White-Phillips Company, the appellant in this case, was a dealer in municipal bonds and received the said notice. Sub-

2 Cahill's Ill. Rev. Stat. (1933), Ch. 98, sec. 76: "To constitute notice of an infirmity in the instrument or defect in title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect or knowledge of such facts that his action in taking the instrument amounted to bad faith."

3 242 Ill. App. 22 (1926).
sequent to the receipt of the notice, J. A. Gonley of Saint Paul wrote to the appellant on September 13, 1930, and asked for bids for eight Illinois Highway bonds of certain maturity dates. On the 16th the appellant wired a bid which was promptly accepted. The bonds were shipped accompanied by a sight draft, which was paid by the appellant. After receipt of the bonds, one of the employees observed that the serial numbers on the bonds corresponded with the numbers on the theft notice.

It was not questioned that the bonds were purchased before maturity, that the full market value had been paid, or that the negotiating agent had no knowledge of the theft at the time of the purchase.

The treasurer of the State of Illinois, not knowing who was entitled to be paid for the bonds, filed a bill of interpleader, wherein the bond company and the larceny victim were made parties defendant. In the district court the latter based his case on Northwestern National Bank v. Madison & Kedzie State Bank, before cited. The decree was in favor of the larceny victim and the bond company appealed to the Circuit Court.

The court said that a holding of the Illinois Supreme Court, if any existed, would govern in this decision. It did not feel, however, that a denial of a writ of certiorari by the Supreme Court amounted to a decision by it. It, therefore, felt free to apply the law as it interpreted it to be in the light of general state and Federal decisions.

The court intimated that the Northwestern National Bank v. Madison & Kedzie State Bank was an isolated case which stood alone without authority to support it, and then cited cases to substantiate their opinion that, upon the above set of facts, the appellant bond company had good title to the bonds.

Raphael v. Bank of England4 was a suit on a note stolen from Shipley and Company in Liverpool. Notices of the theft were widely circulated and it was found in a special verdict that St. Paul and Company in Paris, who purchased the note, had received notice of the robbery, but at the time of the sale, the purchasing agent had no knowledge of the fact, although he had means at his disposal of ascertaining that it had been stolen. The court held that St. Paul and Company was a bona fide purchaser and acquired good title to the paper.

In Vermilye and Company v. Adams Express Company,5 the United States Supreme Court said: "By the well established law of the case they [bankers] may purchase such paper before due withoutumbering their minds or their offices with the memorandum of such notices."

In *Merchants National Bank v. Detroit Trust Company*, a notice that the bonds had been stolen was received by the bank's mailing clerk, but the officers of the company who had charge of the purchases denied they had received or had been made acquainted with the contents of the notice. The Supreme Court of Michigan said, in referring to the decision in the case of *Northwestern National Bank v. Madison & Kedzie State Bank*: "So far as we can determine, this case stands alone. It estops the purchaser from showing good faith at the time the bonds were acquired. It makes notice of the theft exclusive evidence of *mala fides*. It overlooks the established rule, that one who receives actual notice, if by the forgetfulness or negligence he does not have it in mind when he acquires the bonds, he may still be a good faith purchaser."

The decision of the Illinois Appellate Court, however, is not without authority. *German-American National Bank v. Kelly*, decided by the Supreme Court of Iowa, was a suit on a note made by the defendant. The defense was that the bank acquired the paper with knowledge that the note was procured by fraud. The bank proved that the cashier who purchased the note took it in good faith. The jury found for the defendant, and the bank appealed on the ground that the court should have been instructed to find for the plaintiff. In affirming the judgment the court said: "... such knowledge might have reached the bank through the president, or the assistant cashier, both of whom were dealing actively with the public in behalf of the bank, and no evidence negativing the possession of such knowledge by these officers was adduced."

In *Harter v. Peoples Bank*, decided by the Supreme Court of New York, it was held that if the bank's manager had notice or knowledge that the transaction was unlawful, and did not act in good faith, his bad faith was imputable to the bank. The cases supporting the contention that a bank can acquire good title to negotiable paper where notice of its theft has been received by it, are the majority. They seem to lose sight, however, of the fact that a corporation must deal solely through its agents, and of the principle of agency that notice to the agent is notice to his principal. As pointed out in the *Restatement of the Law—Agency*, "Notification given to an agent is notice to the principal if given to an agent authorized to receive it." It is laid down in *Story on Agency* that "notice of facts to an

---

7 183 Iowa 269, 166 N. W. 1053 (1918).
9 Sec. 168.
10 Sec. 140.
agent is constructive notice thereof to the principal himself, where it arises from, or at the time connected with, the subject matter of the agency; for, upon general principles of public policy, it is presumed that the agent has communicated the facts to his principal; and that if he has not, still the principal having entrusted the agent with the particular business, the other party has the right to deem the acts and knowledge obligatory on his principal."

The decision of Northwestern National Bank v. Madison & Kedzie State Bank, from a standpoint of reason and principle, seems the more logical conclusion.

W. R. MacMillan

Effect of Married Woman’s Acts on Estates by the Entirety.—With the advent of married woman’s acts in the United States and England, courts have been forced to consider what effect such legislation has had upon the common law estate by the entirety. Some jurisdictions have held that this type of estate has been abolished; others, that it is still possible of creation; while still others have created it by express statute.

Pennsylvania, in the case of Benski v. American Alliance Insurance Company of New York, decided indirectly that the estate was still possible of creation. However, the court treated the case more from the standpoint of insurance than of property. The parties admitted by their pleadings that the estate held by husband and wife was one by the entirety. The express language of the deed of conveyance to the husband and wife was not before the court, and it is difficult, therefore, to determine what words Pennsylvania would recognize as creating such an estate.

Other cases indicate, however, that the law in Pennsylvania is not settled as to what language is actually necessary to create the estate. In the case of Hoover v. Potter, the question to be decided was whether a devise or grant to “John N. Beecher and Annie, his wife, as tenants in common” created an estate by entirety or an estate as tenants in common. The court held that the purpose of the Married Woman’s Act was to protect the wife’s property by removing it from the husband’s dominion; that it was not the intent to destroy the unity of husband and wife, but, to secure to the wife property which she owned at the time of the marriage or which accrued to her thereafter.

1 176 A. 205 (1935).
2 42 Penn. Sup. Ct. 21.
3 Pa. Stat., par. 14569: "Hereafter a married woman shall have the same right and power as an unmarried person to acquire, own, possess, control, use, lease, sell, or otherwise dispose of any property of any kind real, personal, or mixed, and either in possession or expectancy, and may exercise the said right and power in the same manner and to the same extent as an unmarried person, but she may not mortgage or convey her real property unless her husband join in such mortgage or conveyance."
DISCUSSION OF RECENT DECISIONS

It was not the intent of the act to affect the estates known to the common law, but only to secure to the wife added rights. As to the language necessary to create the estate, the court relied upon In re Young's Estate\(^4\) and held that a conveyance to husband and wife as such, whether they were described in the deed as tenants in common or joint tenants, vested in them an estate by the entirety. These cases, however, have been criticized. Most authorities would regard the language used in the Pennsylvania cases as creating a mere tenancy in common, although a deed to husband and wife, without further qualification, would create an estate by the entirety.

In the case of Godman v. Greer,\(^5\) a Delaware case, the court held that the purpose of the Married Woman's Act was remedial only and that the act did not attempt to destroy the oneness of husband and wife, but simply protected the wife's separate property by removing it from the control of the husband. The language of the conveyance in the Delaware case was the same as that in the Pennsylvania cases, but the Delaware court held that a tenancy in common was created.

North Carolina, in the case of First National Bank of Durham v. Hall,\(^6\) held that a deed to a husband and wife, unless it required them to hold by another character of tenancy, conveyed to them the common law estate by entirety; and that the constitutional provisions relating to married women and the statutes enacted in pursuance thereto made no change in this common law estate.\(^7\)

In Goodrich v. Village of Otega,\(^8\) New York held that estates by the entirety were still recognized in that jurisdiction. The question raised in that case was whether a wife had to join with her husband to convey the estate by the entirety. At common law, both parties had to execute the deed in order to pass the estate. The court ruled that the harsh principles of common law, which destroyed for most purposes the legal identity of the wife and subjected her person to the control of her husband, were not incidents to the tenancy by the entirety and have long been detached from that estate by reason of the Married Woman's Act.\(^9\)

\(^4\) 166 Pa. St. 645, 31 A. 373 (1895).
\(^5\) 12 Del. Ch. 397, 105 A. 380 (1918).
\(^6\) 201 N. C. 787, 161 S. E. 484 (1931).
\(^7\) Const. Art. 10, par. 6 of the North Carolina Code: "The real and personal property of any kind of any female in this state acquired before marriage and all property to which she may after marriage become possessed shall be and remain the sole property of such female, and shall not be liable for the debts, obligations, or engagements of her husband and may be devised and bequeathed with the written assent of her husband."
\(^8\) 216 N. Y. 114, 110 N. E. 162 (1915).
\(^9\) Ch. 14, par. 50 and 51. The married woman has the general rights of distribution and sale, right to profit, etc. She may contract with her husband also.
The husband was held to be a tenant in common with the right of survivorship; likewise the wife; an award to the husband was held not to bind the wife; however, either party was held entitled to alienate his life interest. Therefore, it will be noticed, the only incident still extant in the estate by the entirety in New York is survivorship.

In Oklahoma, a deed to husband and wife creates an estate by the entirety. It was decided in the case of Clay v. Robertson\textsuperscript{10} that the Married Woman's Act applied only to the separate property of the wife and did not affect the joint interests of husband and wife in an estate by the entirety. The act merely intended to preserve the estate of the wife from liability for the debts of the husband.

In the case of Appeal of Robinson,\textsuperscript{11} the Maine courts held that a devise to "my son-in-law, J. Robinson, and my daughter, O., his wife" created an estate in common, since tenancy by the entirety was destroyed by the Married Woman's Act.\textsuperscript{12} The court held that the unity of husband and wife was destroyed by the statute, since such a conception was repugnant to the American idea of the enjoyment and devolution of property; that since the fictitious basis of the unity of husband and wife had been removed, and the basis for the rule in an estate by the entirety had been destroyed, the rule itself failed.

In the Tennessee decision of Gill v. McKinney,\textsuperscript{13} a deed to Gill and his wife was made in 1914. The Married Woman's Act was passed in 1913.\textsuperscript{14} The court, in construing the act, held that

\textsuperscript{10} Okla. 758, 120 P. 1102 (1912).
\textsuperscript{11} 88 Me. 17, 33 A. 652 (1895).
\textsuperscript{12} Rev. Stat. of Me., Ch. 74, sec. 1, (Act of 1844). "A married woman of any age may own in her own right real or personal estate acquired by descent, gift, or purchase, and may sell, convey and devise the same by will without the joinder or assent of her husband, but such conveyance without the joinder or assent of the husband shall not bar his right and interest in descent of the estate so conveyed. Real estate directly conveyed to her by her husband, cannot be conveyed by her without the joinder of her husband, except real estate conveyed to her as security or in payment of a bona fide debt actually due to her from her husband. Where payment was made for property conveyed to her from the property of her husband, or it was conveyed by him to her without a valuable consideration, it may be taken as the property of her husband to pay his debts contracted before such purchase."

\textsuperscript{13} 140 Tenn. 549, 205 S. W. 416 (1918).
\textsuperscript{14} Act of 1913, 8460, Tenn. Code: "That women be, and are, hereby duly emancipated from all disabilities on account of coverture and the common law as to disabilities of married women and its effect on the rights of the wife is totally abrogated and marriage shall not impose any disabilities or incapacities on a woman as to the ownership, acquisition, or disposition of property of any sort, or as to her capacity to make contracts and do all acts in reference to her property which she could lawfully do if she were not married, but every woman now married, or hereafter to be married shall have the same capacity to acquire, hold, manage, control, use, enjoy, and dispose of all property real or personal in possession, and to make any contract in reference to it, and to sue and be sued."
it was the intent of the legislature to abolish estates by the entirety; that the estate was created at common law because of the disability of a married woman to hold and dispose of property; that since, however, the statute had given her full powers of disposition, the reason for the rule had failed and the estate could not be created. Such was the condition of the law in Tennessee until 1919, when the legislature by express statute revived the estate by the entirety.

In the Wisconsin case of Wallace v. St. John it was stated that estates by the entirety were abolished. The court held that, although after the Married Woman's Act of 1850 an estate by the entirety could still be created in Wisconsin, the amendment of 1878 so far removed the disabilities of married women that the estate by the entirety was abolished.

In In re Ray's Will there was a conveyance to "Charles Ray and Jennie Ray, his wife, as tenants by the entireties." The court, citing as its authority the case of Wallace v. St. John, stated that the husband and wife took an estate as tenants in common. In this case, it will be noted that express language was used. Despite this fact, the court held that estates by the entirety arose not because of the form of the conveyance but because of the status of the grantees. Regarding this point, it was stated in Morris v. McCarty that a conveyance to two grantees expressly limited to hold as tenants by the entirety was ineffective to create the estate by the entirety, because the grantees were not in fact married; that the provisions of the Married Woman's Act have served to destroy the common law basis for the estate; that under the statute, the feme covert had the power to convey her interest; and that that power, accompanied by other rights of emancipation, reduces what would be an estate by the entirety to a mere joint tenancy.

In Illinois, it still remains a moot question whether or not the estate can be created since the passage of the Married Woman's Acts of 1861, 1869 and 1874. In the case of Park

15 119 Wis. 585, 97 N. W. 197 (1903).
16 Act of 1850, Ch. 44, Wis. Code, providing that a wife could receive or inherit by gift, grant, devise, or bequest from any person other than her husband and hold the same to her sole and separate use and convey and devise in the same manner as if she were unmarried.
17 Act of 1878, of Property Rights of Married Women, Wis. Code, par. 246.01: "The real estate of every description, including all held in joint tenancy with her husband, and the rents, issues, and profits thereof, of any female now married shall not be subject to the disposition of her husband, but shall be her sole and separate property as if she were unmarried."
18 188 Wis. 180, 205 N. W. 917 (1925).
19 158 Mass. 11, 32 N. E. 938 (1893).
20 Same as Act of 1878.
Commissioners v. Coleman, a conveyance was made in 1855 to Henry Johnson and Nancy Johnson, his wife, and Mary Ann Johnson, his daughter, under which the family took possession. The court held that the husband and wife became seized of an estate by the entirety in half, and the daughter was seized in fee of the other half as tenant in common with her parents.

Mittel v. Karl, another Illinois case, involved a conveyance to "Maria Jobst and Michael Jobst, her husband, and the survivor of them in her or his own right." The appellees claimed as tenants in common, while appellants claimed the entire estate as tenants by the entirety. The court stated that the estate by the entirety no longer existed in this state; that, although before the legislature passed the Married Woman's Acts a conveyance to husband and wife was a tenancy by the entirety, the act of 1861 conferred upon married women the right to acquire property and hold and enjoy it free from the husband's control; and that the estate created here was a tenancy in common.

The Illinois case usually cited as authoritative is Cooper v. Cooper, where it is stated that the common law estate by the entirety was abolished with the adoption of the Married Woman's Act. The court said: "We are aware that this construction is not in harmony with that given by the courts of some of the states of the Union in construing their statutes . . . . But it may be our statute is materially different from theirs. But if it is not, still the tenor of our legislation has been broader and more liberal on the subject than the legislation in those states, and hence we, to effectuate the intention of our General Assembly, should be more liberal; otherwise the courts would rather hinder than carry out the intention of the law. The intention of a law may be, to some extent, ascertained by subsequent legislation on the subject. If, then, we look at all of our legislation on the subject, we can entertain no doubt that the General Assembly intended to remove all the fetters.''

Illinois has never decided, however, whether an estate by the

108 Ill. 591 (1884).

133 Ill. 65, 24 N. E. 553 (1890).

76 Ill. 57 (1875). In this case the granting clause was, "This indenture, between Noah M. King and Jane King, his wife, . . . of the first part, and Wm. Cooper and Sarah Ann Cooper, and the heirs of her natural body, . . . . of the second part: Witnesseth, that the said party of the first part, . . . have granted, bargained, and sold, and by these presents do grant, bargain and sell unto the said party of the second part, their heirs and assigns, all the following." The court held that the husband and wife took each an undivided half in fee as tenants in common and that upon the husband's death his portion went to his heirs at law; and that the words "heirs of her natural body" must be rejected as surplusage, there being no apt words to limit an estate to the heirs of the wife's body. The appellant's contention that an estate by the entirety was created was overruled; such estate was said to have been abolished in Illinois.
entirety would be created in a case where the language of the granting clause expressly provided for it. Those who state that the estate may possibly be created base their arguments on the fact that since the estate existed at common law, it will still continue despite the emancipation of married women. They contend that the statutes are remedial and, therefore, create new rights without removing any of the common law incidents of marriage. Those who argue that the estate cannot be created in any form, base their contentions on the fact that the existence of the estate depends upon the status of the parties and that the requisite status has been changed by the married woman’s acts. The possibility of creation of an estate by the entirety, then, will depend upon the construction that the various courts place upon the statutes in their respective jurisdictions.

W. J. J. WAHLER

HOW A GRANTEE ASSENTS TO THE CLAUSE IN A DEED BY WHICH HE ASSUMES MORTGAGE.—The Illinois Appellate Court, in two decisions rendered this year, repeated rather ambiguous language from the Supreme Court opinion of *Ludlum v. Pinckard.* One of these, *Sebolt v. Verderevski et al.,* undoubtedly rests on sound law. In a mortgage foreclosure, the mortgagee sought a deficiency decree against the mortgagor’s grantee, predicated liability upon the deed of record by which the grantee assumed and agreed to pay all encumbrances. A decree *pro confesso* against the grantee was reversed in the Appellate Court upon the ground that the complaint did not show that the defendant actually assumed the encumbrance, inasmuch as it failed to aver that he assented to the assumption clause. There was no allegation that he had accepted the deed, or had, himself, had it recorded, or had taken possession of the property.

Plainly, the only necessary conclusion of the court as a matter of law was that the mortgagee must show an actual assumption of the obligation by the grantee; that the deed by which he assumes and agrees to pay is not of itself enough, but must be supplemented by some fact, however slight, indicating his assent.

This proposition is neither new nor doubtful. The Illinois Supreme Court decision of *Thompson v. Dearborn* in 1883 rested upon it. That case was followed in three later Appellate decisions under substantially identical conditions. The Appel-

2 304 Ill. 449, 136 N. E. 725 (1922).
3 279 Ill. App. 30 (1935).
4 107 Ill. 87 (1883).
late Court characterized Thompson v. Dearborn as "somewhat similar" to the principal case. It did not stop with this authority, but proceeded to fortify its position by quoting verbatim this paragraph from Ludlum v. Pinckard: "An agreement on the part of a grantee to pay incumbrances on property conveyed must be based on sufficient consideration and the assumption clause of the deed must be accepted and agreed to by the grantee. The law requires something more than the mere insertion by the grantor of a clause in the deed that the grantee assumes such incumbrance. The assumption of such incumbrance is by way of contract or agreement on the part of the grantee, and the grantee's assent to such contract must in some manner appear. While the general rule is that if the grantee takes and claims title under a deed he takes it by the terms of the deed, yet in order that a grantee be held personally liable for payment of an incumbrance against the property, it must be shown, in addition to having accepted title to the property, that he assented to the condition of the deed relating to the personal assumption of the debt. Unless it be shown that the grantee in a deed has some reason to believe that the deed to him contained a personal contract on his part to pay a mortgage or other lien on the property transferred, and that he assented thereto, he cannot be held, as a matter of law, to have assumed such obligation."

One statement in this passage requires particular attention, namely, that the grantee must have assented to the assumption "in addition to having accepted title to the property." On its face this assertion seems directly opposed to the doctrine prevailing in most of the United States, including Illinois, that a grantee's assumption of incumbrances by deed makes him personally liable for the debt.

As authority for this statement, the court in the Ludlum case cited Thompson v. Dearborn. But we have seen that that case, and the ones following it, held only that the grantee must give some indication of assent to the terms of the deed. Might not "acceptance of title" indicate assent?

Discussing the Thompson case, the court in Bay v. Williams explained the reason for its doctrine: "In the absence of all proof that Thompson assented to the execution of the deed, or had ever ratified it in terms, or tacitly by receiving it, or in some other manner, it was held that the bill failed to show a liability—that to fix the liability of such a grantee it must appear that he participated in its execution, or had knowledge that it

---

6 304 Ill. 552, 136 N. E. 767 (1922).
7 See notes, 21 A. L. R. 439; 47 A. L. R. 339; and cases.
8 Flagg v. Geltmacher, 98 Ill. 293 (1881).
9 112 Ill. 91 (1884).
DISCUSSION OF RECENT DECISIONS

had been made or assented to, or in some manner approved or ratified it; otherwise it would be in the power of the mortgagor, of his own motion, without the knowledge and without the assent of the grantee, to render anyone liable to pay the mortgage debt by simply executing to him a deed containing such a clause, and having it recorded in the proper office." Some fantastic litigation might appear in our courts if this state of affairs obtained.

But the court in Thompson v. Dearborn did not attempt to stretch its decision beyond this reasonable ground. It said that the grantee’s assent must be shown, and then added: "This might be done by showing that he signed and sealed the deed. . . . Or it might be shown that the deed was delivered to and accepted by him." Would the grantee, by performing one of these acts, be doing something "in addition to having accepted title to the property?" Or did the words used in Ludlum v. Pinckard "having accepted title" mean something less than the acts themselves which would evidence acceptance of title?

This passage quoted from the Ludlum case came under consideration again in the late case of Freitag v. Buck. This was another bill to foreclose, seeking also a decree setting aside a release of record of a mortgage on the ground of fraud. The complainant held the mortgage by assignment of the original mortgagee. He had, however, failed to record his assignment. The mortgagor and his grantees paid all of the interest and principal to the complainant’s assignor, who paid over the interest to the complainant, but absconded with the principal. The last deed of conveyance, made to the defendant, contained a clause by which the grantee assumed and agreed to pay the mortgage.

The court stated the ground for its decision succinctly: "It was the duty of appellant, if he wished to protect himself against subsequent purchases and incumbrances without notice, to have recorded his assignment of the mortgage." But it reached this decision in the face of the Supreme Court’s holding that the rule requiring the assignee of a mortgage to give actual or constructive notice, in order to protect himself against payments to the mortgagee, does not extend to subsequent purchasers of the property who assume and agree to pay the incumbrance." This holding, it regarded as "not controlling." It certainly seems that defendant’s payments on the mortgage were evidence of his acceptance of the assumption clause, although he may not have known of its existence.

10 107 Ill. 93 (1883).
12 Ibid., 294.
14 279 Ill. App. 293 (1935).
It will be noticed that the holding in the Ludlum case is consistent with the court's statement that assent as well as acceptance of title must be shown in order to bind the grantee personally. The grantee in *Ludlum v. Pinckard* had clearly accepted title, and her payment of a thousand dollars on the mortgage showed her assent. The payment was an act in addition to acceptance of title.

The defendant in the case of *Gage et al. v. Cameron* never even saw the deed which contained the assumption clause, but his book-keeper accepted for his benefit, and followed the course suggested by him. The court compelled him to discharge the debt, and made this observation: "If he [the grantee] accepts the instrument and places it upon record, such acceptance of the deed with knowledge of its contents binds him as effectually as though the deed has been executed by him." Patently, the acceptance and recording of the deed could be held to be more than mere acceptance of title.

In *Swisher v. Palmer* in which the defendant had taken title under a misconception of liability, merely as a conduit for title, and subsequently, upon discovering his mistake, quit-claimed to the actual grantee, deficiency was decreed against him because, while he would not have been liable without some assent, his execution of the quit-claim deed under the circumstances, when he need have done nothing, amounted to assent, even though at the time he reiterated his denial of liability. By his deed the court held that he had acknowledged title in himself under the deed which contained the assumption clause, and in acknowledging title he assented to the clause.

In *Dean v. Walker* the court ruled that a grantee who accepted a deed from a mortgagor containing an assumption clause, and placed it upon record, was liable as principal upon the bonds secured by the mortgage, and that the mortgagee could recover against him. In each of the last three cases discussed, the grantee had accepted the deed itself. By doing so he had not only accepted title, but had taken it by the terms of the deed.

In view of these decisions, and of the fact that the court had cited *Thompson v. Dearborn*, and was fully aware of the limit of its authority, and in view of its own final holding, the court, in remarking in *Ludlum v. Pinckard* that assent as well as acceptance of title must be shown in order to bind the grantee personally, must not have considered acceptance of title as equivalent to acceptance of the deed. The cases clearly indicate that the grantee binds himself by accepting the deed.

C. E. Fox

---

15 212 Ill. 146, 72 N. E. 204 (1904).
16 106 Ill. App. 432 (1902).
17 107 Ill. 540 (1883).
DISCUSSION OF RECENT DECISIONS

WHEN A REPORT OF PROCEEDINGS IS IMPROPERLY FILED—ELECTION NOT TO FILE—TIME FOR APPEAL AFTER ELECTION.—In the recent case of West Side Trust and Savings Bank v. Samuel J. Damond et al., the Appellate Court of the First District decided three points in relation to appellate practice under the new Civil Practice Act and rules of court about which there had been some confusion, uncertainty, and ambiguity. The points decided were: first, when a report of proceedings is improperly filed; second, when and how an election not to file a report of proceedings is to be filed if the original praecipe calls for a report of proceedings; third, when the record must be transmitted to the reviewing court after an election not to file a report of proceedings is made.

The case came before the court in the following manner: Upon the resignation of the bank as trustee, after having instituted foreclosure proceedings, one Reynolds was appointed successor trustee. One Dolan and several bondholders filed an intervening petition, in which they stated that Dolan had been appointed successor trustee under the terms of the trust agreement, and asked that he be substituted for Reynolds as complainant in the foreclosure, and that the order appointing Reynolds be vacated.

Upon the written motion of Reynolds and the foreclosure defendants, Dolan’s petition was dismissed. Dolan and the bondholders’ committee appealed from the order of dismissal, and Reynolds and the foreclosure defendants filed motions to dismiss the appeal upon the ground that the record was not filed in the Appellate Court within the time prescribed by the rules.

The order appealed from was entered on June 1, 1934. On August 29, 1934, the petitioners filed their notice of appeal, and on September 7, 1934, filed their praecipe for record which included "19. Report of proceedings." The record was filed in the Appellate Court on November 7, 1934. The record showed that on July 9, 1934, a "report of proceedings in connection with order entered in this cause on the 17th day of April, 1934, appointing HARRY REYNOLDS successor in trust to the WEST SIDE TRUST AND SAVINGS BANK OF CHICAGO," was filed in the lower court. This had been filed in connection with another and different appeal and had no relation to the instant case. No report of proceedings in connection with the order appealed from was filed.

Attached to the record, after the certification of the clerk, was an instrument headed "Election of L. H. HEYMANN, ET AL., appellants, not to file their own report of proceedings or stipula-

1 Appellate Court of Illinois, First District, Second Division, Case No. 37939.
tion of facts.” This unverified, undated instrument was signed by counsel for appellants. Appellants stated that they did not contend that the instrument attached to the record was the election of appellants but was merely attached to the record to advise the court that they elected not to file a report of proceedings on October 22, 1934.

The court on these facts and the state of the record decided that an election not to file a report of proceedings, once it had been set forth in the praecipe, should and must be a written order to the clerk “not to include any proceedings at the trial in the record on review.” Such an order or election, when filed, becomes a part of the record. This proceeding is not set forth in the rules of court, which merely states, “No dismissal shall be made by the trial court where appellant, after filing his praecipe, elects not to include any proceedings at the trial in the record on review, and transmits the record on appeal to the reviewing court in proper time without such proceedings.”

It is this point, in particular, which caused considerable confusion because the filing of a report of proceedings allows an extension of sixty days to an appellant to file his record in a reviewing court. Appellant in this cause argued that having elected to file a report of the proceedings, he would have this time even though he later elected not to file the report of proceedings.

On this rather important point, the court held that if a proper election not to file a report of proceedings is made, then the record must be transmitted to the Appellate Court within the thirty-five days prescribed by the rules of court for filing of appeals from service of the notice of appeal when no report of proceedings is included in the record.

However, unfortunately for the appellants in this case, they filed their record in the Appellate Court without a report of the proceedings, but not within the thirty-five day time limit. The election not to file a report of the proceedings was a nullity, being no election at all. Consequently, as a matter of law, it followed that the record had not been filed in the Appellate Court within the time prescribed by the rules. The court decided this question on the assumption, presumed for the argument, that the appellants were entitled to a report of the proceedings in the reviewing court.

After stating this, the court went on to say that actually

2 Supreme Court Rule 36, sec. 1, par. (e); Appellate Court Rule 1, sec. 1, par. (e).
3 Supreme Court Rule 36, sec. 2, par. (a) and (b), and sec. 1, par. (c); Appellate Court Rule 1, sec. 2, par. (a) and (b), and sec. 1, par. (c).
4 Appellate Court Rule 10, as amended.
5 Appellate Court Rule 10, as amended.
DISCUSSION OF RECENT DECISIONS

in the case the judgment of the lower court was based solely upon the pleadings and that the two petitions were dismissed for want of equity on the motion to dismiss. The court held that this proceeding was the same as though a demurrer had been sustained under the old practice;\(^6\) and, accordingly, a report of proceedings was unnecessary and improper.

The court goes on to say that to hold otherwise would, in actual practice, render the time limit fixed by the rules for the filing of a record on review purely nugatory. Thus, they will follow the old practice in that any cause decided purely on pleadings is one in which a report of proceedings is improper.

The clear and concise logic of the court in determining these issues is so convincing that it seems quite clear that even if the case were taken to the Supreme Court, the Appellate Court would be sustained in its action in dismissing this appeal on the motion of the appellees for the reasons given. The court, of course, cites no authority, there being none on which to base the matters determined, inasmuch as this is a case of first impression under the act.

J. E. BRUNSWICK

EXTENT OF AMENDMENT PERMITTED IN COMPLAINT AFTER STATUTE OF LIMITATIONS HAS RUN ON ORIGINAL CAUSE OF ACTION.—The first decision, by an appellate court, in relation to amendments since the Civil Practice Act, was given by the Appellate Court of the Fourth District in Randall Dairy Company v. Peveley Dairy Company,\(^1\) where the court decided that the lower court had ruled correctly in refusing to dismiss the cause because the right of action had accrued more than the statutory period before the filing of the amended complaint.

The case was originally commenced in September of 1932, and taken to the Appellate Court,\(^2\) where it was reversed. An amended complaint was filed under the Civil Practice Act on May 19, 1934. To this amended complaint, the defendants duly filed a motion to strike, on the grounds that (1) the court exceeded its jurisdiction because the cause was commenced before January 1, 1934, and (2) that the cause of action (slander) accrued more than one year before May 19, 1934. The motion was denied. Again taken to the Appellate Court, the court, in passing on the second point raised in the motion, said "that the complaint was in reality an amended declaration, in lieu of the original, seems obvious, and as it is apparent that it related to the same transaction as the original pleading, and was

\(^6\) Civil Practice Act, sec. 45.
\(^1\) 278 Ill. App. 350 (1935).
\(^2\) 274 Ill. App. 474 (1935).
filed to supplement and supply defects therein, it was sufficient within the terms of said sec. 46, and should be held to relate back to the date of filing the original declaration; therefore, as there has been no question raised that the original pleading was not filed within apt time, we think the complaint was sufficient to comply with said section, and did not show on its face that the action did not accrue within the statutory period for the commencement of the suit. As to this ground we think the ruling of the trial court was right."

The case leads us to a consideration of just how far the courts may go under the new Act in permitting amendments. It is clear that such amendments, supplying any material elements of a cause of action, could not be made at common law after the Statute of Limitations had run. To eliminate this hardship of depriving a man of his cause of action merely because of some technical blunder, Illinois passed an Act in 1929, intended to eliminate this difficulty. It is interesting to note the reaction of the courts to this amendment. In Zister v. Pollock, the court held: "The 1929 amendment was intended to obviate omission of some allegation which in no way affected the existing facts or merits of the cause asserted." In Townsend v. Postal Benefit Association, the court held: "An amendment which merely changed a party was not barred by the Statute of Limitations." In Pfeffer v. The Farmers' State Bank, the court said: "An amendment changing the charge of negligence from two to only one defendant on the theory of respondeat superior did not state a new cause of

3 Cahill's Ill. Rev. Stat. (1933), Ch. 110, sec. 174, which reads in part: "(2) The cause of action, cross-demand or defense set up in any amended pleading shall not be barred by lapse of time under any statute or contract prescribing or limiting the time within which an action may be brought or right asserted, if the time prescribed or limited had not expired when the original pleading was filed, and if it shall appear from the original and amended pleadings that the cause of action asserted, or the defense or cross-demand interposed in the amended pleading grew out of the same transaction or occurrence set up on the original pleading, even though the original pleading was defective in that it failed to allege the performance of some act or the existence of some fact or some other matter which is a necessary condition precedent to the right of recovery or defense asserted when such condition precedent has in fact been performed, and for the purpose of preserving as aforesaid such cause of action, cross-demand or defense set up on such amended pleading, and for such purpose only, any such amendment to any pleading, shall be held to relate back to the date of the filing of the original pleading so amended."

4 For a comparatively recent case stating the common law rule, see Taylor v. Anderson, 14 F. (2d) 353, decided by the Circuit Court of Appeals of the 7th District, in which the court followed the Illinois law.


6 262 Ill. App. 170 (1931).

7 263 Ill. App. 483 (1931).

8 263 Ill. App. 360 (1931).
DISCUSSION OF RECENT DECISIONS

action.” Then came the case of *Holden v. Schley*. This was an action for wrongful death, and the plaintiff failed to allege that he was in the exercise of due care; the Appellate Court said that the addition of this allegation after one year, stated a new cause of action, and despite the amendment statute, could not be made.

The Supreme Court reversed the Appellate Court, but merely on the grounds that this was not a material and necessary allegation and did not disturb the holding of the Appellate Court with respect to its decision on allowing the amendment. Thus the Act of 1929 did not accomplish its purpose.

In other jurisdictions which have codes, there is much diversity as to the allowing of amendments. Many of the code states even today, do not allow an amendment which changes the cause of action. We find in Pomeroy, *Code Remedies*, at page 441, this statement with relation to amendment: “This authority is conferred in very broad terms with the limitation, however, that the cause of action or defense shall not be substantially changed.” He then cites a great many states which follow this rule, and lays it down as a general principle of code pleading. Under this rule, of course, there can be no question of the running of the Statute, for a new cause of action cannot be stated without starting a new suit.

Under earlier rules in code jurisdictions it was clear that a change of cause of action from one theory to another was not permissible. Clark on *Code Pleading*, at page 515, sets out the following as examples of diverse amendments allowed in various jurisdictions:

“Where it added more particular or different allegations regarding defendant’s negligence; where it alleged that the deceased was killed while being carried as an employee instead of as a passenger; where it made a party coplaintiff who was originally made defendant; where it alleged the provisions of a foreign statute upon which the original action was brought; where it charged defendant as an individual rather than in a representative capacity; where it set forth that the action was brought by the widow as administratrix, instead of by herself and children as the real parties in interest. And the following cases: Where the amendment was refused; where it substituted

---

9 271 Ill. App. 169 (1933).
10 355 Ill. 545, 190 N. E. 80 (1934).
11 Jeffersonville M. & I. R. Co. v. Hendricks, 41 Ind. 48 (1872).
another beneficiary in place of the one named in the original declaration, and thereby changed the amount of recovery;\textsuperscript{17} where it set forth a statutory in place of a common law liability of services of a child;\textsuperscript{18} where it stated a death action in place of an action for personal injuries ultimately resulting in death.\textsuperscript{19}

The section of the Civil Practice Act under consideration in the principal case, seems broad enough to cover any amendment necessary to the proper culmination of a case once it is started, and the language of the Appellate Court seems to indicate that that court, at least, has taken such a view. Of course, it did not have a fine point before it and the original pleading did state a cause of action, although defectively. However, it would seem from the language of the statute, and from a consideration of all other sections of the Act, that its intent is to permit a party to set forth the facts which constitute the grounds upon which he wishes to proceed; and if for some reason, he has omitted some essential allegation, to add such matter, if it happened at the time of the occurrence or transaction referred to.

In other words, the intent of the Act seems to be that if a plaintiff is diligent enough to start a law suit within the period fixed by law, he is not to be barred from his action because of a technical blunder even though such blunder may be the omission of a material allegation.

\textbf{J. E. BRUNSWICK}

\footnotesize{
\textsuperscript{17} Atlanta K. & N. Ry. Co. v. Hooper, 92 F. 820, 35 C. C. A. 24 (Tenn., 1899).
\textsuperscript{18} City of Kansas City v. Hart, 60 Kan. 684, 57 P. 938 (1899).
\textsuperscript{19} Bolick v. Southern R. Co., 138 N. C. 370, 50 S. E. 689 (1905).}