September 1937

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/vol15/iss4/3

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

ADJOINING LANDOWNERS—RIGHT TO OBSTRUCT LIGHT, AIR, OR VIEW—MALICIOUS MOTIVE AS BASIS OF INJUNCTION TO RESTRAIN ERECTION OF SPITE FENCE AS NUISANCE.—The only decision¹ since 1928 on the precise question of "spite fences"² in a jurisdiction where the subject is not regulated by statute was recently rendered by the Supreme Court of South Dakota. In Racich v. Mastrovich,³ a case of first impression, that court adopted the Michigan rule as stated in Burke v. Smith,⁴ that a fence erected maliciously and with no other purpose than to shut out the light

¹ The obstructions complained of in Ash v. Tate, 73 F. (2d) 518 (1935), and DeMers v. Graupner, 186 Ark. 214, 53 S. W. (2d) 8 (1932), were held not to be spite fences.

² A "spite fence" is defined as a fence erected for no benefit or pleasure to the person erecting it, but solely with the malicious motive of injuring the adjoining owner by shutting out his light, air and view.


and air from an adjoining owner’s building is a nuisance which equity will enjoin.

Prior to the Michigan decision, and for some time thereafter, it was the general common law rule that a landowner might erect on his own land a structure for the express purpose of shutting out the light, air, and view from an adjoining landowner and that the motive and intent of such person in erecting the structure was immaterial. This was based on the theory that the rights of a landowner with respect to the use of his own land are absolute. The Michigan decision, which was based on the ground that every person in the use of his own property should avoid injury to his neighbor as much as possible, and which treated the rights of a landowner with regard to his neighbor as relative rather than absolute, was unsupported by any other court until 1909, when it was followed by the Supreme Court of North Carolina in the case of Barger v. Barringer. Since that decision the trend of authority has been to hold a spite fence actionable, and the Michigan rule has been acknowledged by current writers to be the modern rule.

All of the decisions upholding the so-called modern rule are founded on the doctrine, comparatively new in the law, that the rights of landowners are relative and each owner must so use his

5 "... a balance of reasonable users as between owners of neighboring properties must be struck, and any use of land by one of the parties which is in violation of this balance, unreasonably interfering with the rights of enjoyment of the others, is a nuisance, a wrong punished by the courts since the beginning of the common law." W. F. Walsh, "Equitable Relief Against Nuisance," 7 N. Y. U. L. Q. Rev. 352 (1930).


9 "This decision [Burke v. Smith] thereafter became the rule in Michigan without dissent, and has been quoted with approval and followed by the courts of so many of the other states, that it may be considered as establishing the modern rule." I Cooley on Torts (4th ed., 1932) 157, sec. 56.

"In view of the fact that for more than twenty years a right of action has been held to lie in every case of spite fences arising under the common law, it is submitted that the weight of modern authority favors the Michigan view which appears clearly the sounder on principle and natural justice." Note, 11 Va. L. Rev. 122 (1924), at p. 127. See also 11 R. C. L. 877.
property as to avoid injury to the adjoining owner; hence the question of malice becomes material, contrary to the generalization long accepted in the law that "a malicious motive cannot render actionable an act otherwise not actionable." It is on this theory that some courts hold that a fence on one's own land, while lawful in itself, is a nuisance when erected for malicious reasons only. This has been recognized in courts of law in actions for damages as well as in courts of equity in suits for injunction.

The argument that the problem is one for the legislatures of the states rather than the courts, and that in the absence of statutory authority there is no right to relief against a spite fence, is answered by the Michigan court in *Burke v. Smith* as follows: "It is said that the adoption of statutes in several of the states making this kind of injury actionable shows that the courts have no right to furnish the redress without statutory authority. It has always been the pride of the common law that it permitted no wrong with damage, without a remedy. In all cases where this class of injuries have occurred, proceeding alone from the malice of the defendant, it is held to be a wrong accompanied by damage. That courts have failed to apply the remedy has ever been felt a reproach to the administration of the law; and the fact that the people have regarded this neglect of duty on the part of the courts so gross as to make that duty imperative by statutory law furnishes no evidence of the creation of a new right or the giving of a new remedy but is a severe criticism upon the courts for an omission of duty already existing, and now imposed by statute upon them, which is only confirmatory of the common law." Likewise, the courts of several states where "spite fence" statutes

---

10 J. O'Meara & H. W. Santen, "Legal Status of the Spite Fence in Ohio," 2 U. of Cin. L. Rev. 164 (1928), quoting Burdick on Torts, states: "There is, however, increasing recognition of the principle that intentional damage is prima facie tortious and requires a justification. . . . Intentional damage having been inflicted, the justification is benefit intended. Such intended benefit will justify the intended harm. But where there is no intended benefit, the harm will be actionable."

11 This idea is aptly expressed in the following language of the Supreme Court of Alabama in *Norton v. Randolph*, 176 Ala. 381, 58 So. 283 (1912): "The authority of precedents, however, must often yield to the force of reason, and to the paramount demands of justice, as well as the decencies of civilized society, and the law ought to speak with a voice responsive to these demands. We have examined the decisions and the reasoning of the various courts upon this question, and, unfettered by any precedents of our own, we are led to the deliberation that the majority view, as above stated, is founded upon a vicious fallacy, and is violative of sound legal principle as well as of common justice. But little else remains to be said in support of the rule of reason and good morals. The rule of malice was, we think, conceived in error, and has indeed become a Caliban of the law,—the ugly and misshapen offspring of a decent and honorable parentage,—and we are unwilling to sanction in this jurisdiction its evil and odious sway."
have been enacted indicate that a right of action existed in favor of a plaintiff even without the statute.\textsuperscript{12}

While the majority of the decisions invoking the modern rule have been in suits in equity for injunctive relief, two of the leading opinions\textsuperscript{18} were in case actions for damages, and no distinction seems to have been made as to the applicability of the two remedies in the spite fence situation. The primary question in either form of action is whether the particular obstruction is a spite fence such as constitutes a nuisance. In this respect, it should also be noted that the equity decisions cite the law decisions, and vice versa, with no distinction as to the form of action. Of the states following the modern rule, Michigan,\textsuperscript{14} Nebraska,\textsuperscript{15} and Alabama\textsuperscript{16} are the only ones in which cases on spite fences have been presented more than once, and those cases all involved injunction suits. In Oklahoma only has the problem been presented in actions both at law\textsuperscript{17} and in equity.\textsuperscript{18} The equity action was the earlier one to be decided, and, while the evidence there did not justify an injunction, inasmuch as the fence complained of was not erected purely out of spite, there is no indication by the court that the modern rule would not be adopted if the facts established the existence of a spite fence; and in the law action damages were awarded. Thus, there is nothing to indicate that the courts in accepting the modern rule are relying on the theory of an "equitable tort."

In Illinois, three cases have touched on the problem of spite fences; none were equity actions, and the opinion of the court in the third, in so far as spite fences are concerned, was dictum. The Supreme Court in Guest v. Reynolds,\textsuperscript{19} an action on the case, held that, in the absence of an adverse right by prescription, grant, or otherwise, the owner of real property has a right to erect

\textsuperscript{12} Bar Due v. Cox, 47 Cal. App. 713, 190 P. 1056 (1920); Rideout v. Knox, 148 Mass. 368, 19 N. E. 390 (1889); Horan v. Byrnes, 72 N. H. 93, 54 A. 945 (1903).
\textsuperscript{13} Barger v. Barringer, 151 N. C. 433, 66 S. E. 439 (1909); Hibbard v. Halliday, 58 Okla. 244, 158 P. 1158 (1916).
\textsuperscript{15} Dunbar v. O'Brien, 117 Neb. 45, 220 N. W. 278 (1928); Bush v. Mockett, 95 Neb. 552, 145 N. W. 1001 (1914).
\textsuperscript{16} Daniel v. Birmingham Dental Mfg. Co., 207 Ala. 659, 93 So. 652 (1922); Norton v. Randolph, 176 Ala. 381, 58 So. 283 (1912).
\textsuperscript{17} Hibbard v. Halliday, 58 Okla. 244, 158 P. 1158 (1916).
\textsuperscript{18} Bixby v. Cravens, 57 Okla. 119, 156 P. 1184 (1916).
\textsuperscript{19} 68 Ill. 478 (1873).
on his own land a fence which will have the effect of depriving an adjoining owner of light and air, and such a fence, unless it is made of offensive material, will not be a nuisance for which an action will lie. While the plaintiff alleged malice and insisted his action was for a nuisance, arising out of a violation of a relative right, the theory on which the modern rule is based, the court refused to recognize it as such, but treated it as an action for damages for obstruction of light, air, and view. *Honsel v. Conant,* another case action, followed the Guest decision. In the third case, *City of Dixon v. Messer,* decided after the Michigan rule had been pronounced, the city sought to prosecute the defendant for violating an ordinance forbidding partition fences more than four feet high. The court, citing the Guest case, held the ordinance invalid on the ground that ownership of property carries with it the general right in the owner to use and enjoy his property in such a manner as he sees fit. While the fence here was not a spite fence, since it was erected to prevent trouble between the adjoining families, the court by way of dictum said: "But if this had been a ‘spite fence’ and the ordinance had been aimed at spite fences, yet the very great weight of authority is that, in states where there is no prescriptive right to an unobstructed view and light and air over adjoining premises of another owner, even a spite fence may be built by a landowner, or rather, his motive is immaterial, and he may build such a structure as he pleases on his own land." The cases supporting this rule were cited by the court, as were also the Michigan decisions tending to establish a modern doctrine. Inferentially, however, the Illinois court approves the former.

Since there has been no "spite fence" decision in Illinois in the past thirty years, the attitude which the court in this jurisdiction might take today is left to conjecture.

S. ZIBLAT

**Aliens—Disabilities—Right of Alien Widow of Citizen to Dower.**—In the case of *Schoellkopf v. DeVry,* the Supreme Court of Illinois was confronted with the question of whether or not an alien widow of a citizen of the United States and this state is entitled to dower in the real estate of which her husband died seised; and the majority of the court held in favor of her application. In arriving at this conclusion, the court, beginning with an act in 1819, reviewed the course of legislation with regard to the

20 12 Ill. App. 259 (1882).
21 136 Ill. App. 488 (1907).
1 366 Ill. 39, 7 N. E. (2d) 757 (1937).
rights of aliens to hold property in this state and pointed out that with one exception liberality toward aliens was the keynote; that the purpose of the dower act was to give the right to all surviving husbands and widows; that while section 1 of the dower act of 1897, which is now in force, could not apply to alien widows of citizens, it was passed at a time when an act of Congress provided that an alien woman who married a citizen would immediately become a citizen, and that section 2 of the dower act provided that the widow of an alien (whether she be an alien or a citizen) should have the right of dower as if the alien were a citizen; that since the legislature was not trying to discriminate against the alien widow of a citizen, the implication is that she also should receive dower.

In a dissenting opinion by Mr. Justice Herrick, the strongest point made is that section 1 and section 2 of the present dower act were first enacted in 1845—before Congress provided that an alien woman who married a citizen would become a citizen—and that re-enactment of these sections worked merely a continuation of them. However, admitting this, the writer is inclined to believe that as the act stood in 1845 the same result should have been reached then as was reached in this case. Other courts have given the alien husband of a citizen an estate by courtesy and the alien widow of a citizen dower when nothing more was present to indicate a change in the common law than a statute providing substantially that an alien should have the right to take and hold land acquired by deed, devise, or descent. A similar statute was in effect in 1845 and is in force in Illinois today, although there are certain qualifications set forth in the present act limiting the time for which an alien can hold title before the state will have the right to divest the alien thereof. The majority of the court does not avail itself of this provision, not wishing to say that dower is acquired by descent, although the dissenting opinion

---

2 Ill. State Bar Stats. (1935), Ch. 41, ¶ 1.
3 10 Stat. at L. 604 (1855), R. S. § 1994; this continued in force until 1922, when it was provided that if a woman marries a citizen she shall not become a citizen by reason of such marriage. U. S. C. A., Tit. 8, Sec. 368.
4 Cooke v. Doron, 215 Pa. 393, 64 A. 595 (1906); Breuer v. Berry, 194 Iowa 243, 189 N. W. 717 (1922).
5 Sutliff v. Forgey, 1 Cow. (N. Y.) 89 (1823). This case caused much confusion in subsequent cases in New York, because of an erroneous note in the report.
7 Ill. State Bar Stats. (1935), Ch. 6, ¶ 2 contains the limitations as to time for holding.
DISCUSSION OF RECENT DECISIONS

erroneously indicates that the majority does so hold. But the Illinois dower act provides a much more substantial footing in itself by the provisions of the second section, and it is on this that the majority very largely rests its opinion.

Further, the cases cited by the minority, as sustaining the statement that some courts have held an alien widow of a citizen could not take dower although had her husband been an alien she could have, are not good authorities, as the statutes involved are dissimilar to any we have ever had. In *Mick v. Mick*\(^8\) it was stated that no provision had ever been made by statute in New York for the alien widow of a natural born citizen, but this was clearly erroneous and was shown so to be in the subsequent case of *Priest v. Cummings*.\(^9\) Chief Justice Savage in *Mick v. Mick* relied on an incorrect marginal note in *Sutliff v. Forgey*,\(^10\) as did Chancellor Kent in his *Commentaries*.\(^11\) Connolly *v. Smith*\(^12\) and *Currin v. Finn*\(^13\) refer to *Mick v. Mick* for the same blanket statement, although all of these cases are correctly decided in view of the peculiar statutory provisions which control them as well as the case of *Priest v. Cummings*.\(^14\) Without entering into an extended discussion of the provisions on which these decisions hinged, it is sufficient to say that all of these cases must be carefully read and their relation to each other considered to reach the doctrine really set forth.

The dower act is not a masterpiece, and the court was indeed given a difficult problem; but proceeding with the usual principles of statutory construction as a guide and ascertaining the legislative intent by looking at similar legislation which preceded the act in question, the thing to be remedied, and the object to be attained, the court reached a logical conclusion.

G. W. McGurn

APPEARANCE—GENERAL OR SPECIAL—WHETHER PROCEEDING TO TRIAL CONSTITUTES GENERAL APPEARANCE SO AS TO WAIVE ERROR IN OVERRULING MOTION ATTACKING JURISDICTION UNDER ILLINOIS PRACTICE.—In the recent case of *In re Rackliffe’s Estate*,\(^1\) the

\(^8\) 10 Wend. (N. Y.) 379 (1833).
\(^9\) 16 Wend. (N. Y.) 617 (1837).
\(^10\) 1 Cow. (N. Y.) 89 (1823).
\(^11\) 4 Kent’s Comm. 36-7. See also *Priest v. Cummings*, 16 Wend. (N. Y.) 622 (1837).
\(^12\) 21 Wend. (N. Y.) 59 (1839).
\(^13\) 3 Den. 229 (N. Y.) (1846).
\(^14\) 20 Wend. (N. Y.) 338 (1838).
\(^1\) *In re Rackliffe’s Estate*, 366 Ill. 22, 7 N. E. (2nd) 754 (1937), reversing on other grounds 284 Ill. App. 649, 3 N. E. (2nd) 164 (1936). The pertinent facts are as follows: The defendant was subpoenaed as a witness in
Supreme Court of Illinois held that a defendant has a right to file a motion attacking the jurisdiction of the court, together with such other motions as are desired to be made, and that by entering on the trial, such defendant does not waive the error in the refusal of the motion attacking the jurisdiction.

This decision apparently removes all doubt as to the meaning of the sections of the Civil Practice Act that were here involved, for, in this case, among other things, the plaintiff contended that by entering upon the trial of the cause in the Circuit Court, offering proof, and examining witnesses, the defendant thereby entered her general appearance and cannot raise the question of jurisdiction on this appeal. Such was undoubtedly the well settled rule before January 1, 1934, the effective date of the Civil Practice Act. However, as the court pointed out, this rule has been changed by the Civil Practice Act and Supreme Court Rule 21, and the defendant does not waive his plea to the jurisdiction when it is overruled, by answering over.

H. N. Lingle

a hearing in the Probate Court to declare one Julia B. Rackliffe incompetent. The suggestion was made, during the course of the hearing, that the defendant had in her possession $18,000.00 in bonds belonging to Julia B. Rackliffe. The defendant was not questioned on that matter and no citation was ever issued to require her to turn over the bonds. Nevertheless, the Probate Court entered an order requiring the defendant to turn over the bonds to the conservator. The conservator then moved the court for a rule to show cause why defendant should not be in contempt of court. Defendant filed a special appearance contesting the jurisdiction of the Probate Court to enter the order. This contention was overruled and the defendant appealed to the Circuit Court which affirmed the order of the Probate Court and required the defendant to give testimony as to the ownership of the bonds.


3 Section 48, Civil Practice Act; Smith-Hurd’s Ill. Rev. Stats. (1935), Ch. 110, § 172, as follows: “Defendant may, within the time for pleading, file a motion to dismiss the action or suit, where any of the following defects appear on the face of the complaint, and he may within the same time, file a similar motion supported by affidavits where any of the said following defects exist but do not appear upon the face of the complaint: (a) That the court has not jurisdiction of the person of the defendant. (b) That the court has not jurisdiction of the subject matter of the action or suit, provided the defect cannot be removed by a transfer of the case to a court having jurisdiction.” This largely adopts rules 106-110 under the New York Rules of Civil Practice. Section 43, Civil Practice Act; Smith-Hurd’s Ill. Rev. Stats. (1935), Ch. 110, § 167 (3), as follows: (3) “All defenses, whether to the jurisdiction or in abatement or in bar, may be pleaded together, but the court may order defenses to the jurisdiction or in abatement to be tried first. An answer containing only defenses to the jurisdiction or in abatement shall not constitute an admission of the facts alleged in the plaintiff’s complaint.”

4 Supreme Court Rule 21; Smith-Hurd’s Ill. Rev. Stats. (1935), Ch. 110, § 259.21, as follows: “Where, after denial by court of a motion under section
DISCUSSION OF RECENT DECISIONS

BANKS AND BANKING—STOCKHOLDERS—LIABILITY OF STOCKHOLDERS OF LIQUIDATING BANK TO ASSIGNEE BANK WHICH ASSUMED LIABILITIES.—The Supreme Court of Illinois in Continental Illinois National Bank & Trust Company v. Peoples Trust & Savings Bank, decided that stockholders of a bank are not liable for the debts incurred by the bank by a contract of liquidation not made in compliance with section 152 of the Banks and Banking Act. The Peoples Trust & Savings Bank having become financially involved entered into a contract with the Continental Illinois Bank & Trust Company by the terms of which the latter bank was to loan an amount of money equal to the liabilities of the Peoples Bank, taking as security all of the assets except leases. The Continental was to retain the proceeds of the loan and pay it out to the creditors as they sought payment of their demands. After all of the assets were liquidated in compliance with this agreement and applied against the loan, there remained an unpaid balance of over five and one-half millions of dollars, for which amount suit was brought against the stockholders of the Peoples Bank to enforce their constitutional liability. The Supreme Court reversed a judgment in favor of the plaintiff, obtained in the Circuit Court of Cook County, holding that the Continental was not a creditor of the Peoples Bank within the meaning of Section 6 of Article XI, as the contract, having been made without the approval of the Auditor of Public Accounts as required by statute, was void.

48 of the Civil Practice Act, the defendant pleads over, this shall not be deemed a waiver of any error in the decision denying such motion, and the defendant shall have the right to assign such error on appeal from the final judgment. This rule shall extend to the case where the motion is one attacking the jurisdiction of the court over the person made under a special appearance, and the pleading over by the defendant has involved the entry on his part of a general appearance."

1 366 Ill. 366, 9 N. E. (2d) 53 (1937).
3 Ill. Const. (1870), "Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors, over and above the amount of stock by him or her held, to an amount equal to his or her respective shares so held, for all its liabilities accruing while he or she remains such stockholder."
4 Smith-Hurd's Ill. Rev. Stats. (1935), Ch. 16½, § 15, "Any association organized under this Act or any corporation with banking powers organized in pursuance of any general or special law of this state, or any consolidated corporation with banking powers as provided for by this Act, on depositing with the Auditor an amount of money equal to the whole amount of debts and demands against it, including the expenses of this proceeding, or upon making a contract in writing, approved by the Auditor, by which another bank or banking association incorporated under the laws of this State or of the United States assumes the whole amount of debts and demands against
The decision is based upon the theory that the contract was ultra vires of both banks, for by the rule that charters of corporations affected with a public interest are to be strictly construed, a power that is not one of the enumerated ones can not be implied. The statute gave to the banks the power to enter into such a liquidation agreement, but the present contract, not having been made in compliance with its terms, was beyond the corporate powers of both banks.

In the absence of statute, and in Illinois before the present statute was in effect, contracts of this nature have usually been held to be valid, some states limiting the assumption of liabilities to the amount of assets received. Whether such a contract will give the transferee bank a right to hold the stockholders of the transferor for the loss it sustains in carrying out the contract depends upon the nature of the transaction. If the transaction is an outright sale of the assets there exists no debt of the bank and hence no liability of its stockholders. If, however, the transaction is something short of a sale such as a liquidating agreement, a loan with the assets pledged as security, or a transfer of assets plus a note of the transferor, the courts have uniformly held that a debt was created which could be enforced against the stockholders. This liability may not be avoided by the stockholders by showing that they did not consent to or voted against the agreement.

DISCUSSION OF RECENT DECISIONS

The contract in the instant case, which was ratified by the stockholders, expressly provided that the obligation of the Peoples Bank to repay the loan constituted an existing debt, and that the liability of the stockholders under the constitution should remain in full force and effect until the loan was repaid, which, if it were not void, would bring this case within those holding the stockholders liable, as the transaction was not a sale. It would seem that the statutory provision requiring prior approval of this type of contract was designed to protect the stockholders and depositors of the bank assuming the debts, rather than to permit the stockholders of a failing bank to escape an otherwise almost certain liability. If this be so, then the Continental should be subrogated to the rights of the creditors whose claims it has paid in full under the void agreement. The case was not tried on this theory nor does it appear that recovery was urged on this ground.

In *American National Bank of Mt. Carmel v. Holsen*, which arose before the present statute was enacted, recovery on the theory of subrogation was denied, because the transaction between the banks was held to be an outright sale of the assets. However, in a recent case in West Virginia, recovery on the theory of subrogation was permitted, but it was held that the agreement was not a sale but a liquidation agreement.

F. G. ANGER

CONSTITUTIONAL LAW — POLICE POWER — REGULATION OF ACCOUNTING AS A PROFESSION IN RELATION TO C. P. A. AND P. A. REQUIREMENTS.—The constitutionality of the Illinois statutes regulating the profession of public accountants was reviewed for the second time by the Supreme Court of Illinois in the case of *Elliott v. University of Illinois*.

The first act in relation to this profession was passed in 1903 and amended in 1907. This statute was entitled “An act to regulate the profession of public accountants.” It provided that the Trustees of the University of Illinois should receive applications, ascertain qualifications, give examinations, and grant certificates to persons entitling them to practice as Certified Public Accountants. Those individuals who had been employed as public accountants or had practiced on their own for a period of five years prior to the act were exempted from the above requirements.

1 365 Ill. 338, 6 N. E. (2d) 647 (1937).
The statute further provided that "nothing herein contained shall operate to prevent one who is the lawful holder of a C. P. A. certificate issued in compliance with the laws of another state from practicing as such within this State and styling himself a C. P. A." Any use of the title C. P. A. unauthorized by the Act was declared to be unlawful.

In 1925, another statute was passed which provided for the regulation of the use both of the title of P. A. (Public Accountant) and C. P. A. (Certified Public Accountant). It was stated to be unlawful to practice under either of these titles without a certificate of registration issued by the Department of Registration and Education. "Public Accountancy" was defined as "accounting or auditing services as distinguished from bookkeeping, on a fee basis, per diem, or otherwise, for more than one employer." Although a distinction is maintained throughout the act between the titles P. A. and C. P. A., provision is made only for the licensing of Public Accountants. No provision was made for the licensing of any citizen of Illinois as a C. P. A. who was not one at the time the act went into effect, but the statute did allow previously licensed C. P. A.'s and those licensed in other states to be licensed as such in Illinois. In addition, the act allowed those persons practicing as public accountants prior to July 1, 1925, to register as such, but required those employed as such, but not practicing on their own, to have five years experience in order to be exempt. Penalties were laid on Public Accountants, but not on Certified Public Accountants, for practicing without obtaining a license within ten days after date when the license fee was due.

The first case involving the constitutionality of this legislation to reach the Supreme Court of Illinois was that of Fraser v. Shelton, which concerned the 1925 statute. The court declared that statute to be unconstitutional for four reasons: First, the failure to provide for the future granting of the title C. P. A. and the licensing as Certified Public Accountants of those previously holding the title C. P. A. amounted to the granting of a special "privilege, immunity, or franchise" in violation of the state con-

4 L. 1925, p. 505.
5 320 Ill. 253, 150 N. E. 696, 43 A. L. R. 1086 (1926).
6 After the 1925 statute was declared unconstitutional, the legislature adopted an act "regulating the practice of public accounting by registration." L. 1927, p. 689, amended 1935, L. 1935, p. 1075; Smith-Hurd's Ill. Rev. Stats. (1935), Ch. 110½, §§ 7-24. § 7 reads, "That for the purposes of this act a public accountant is one who serves or offers to serve the public generally in (1) Performing audits or preparing financial statements for municipal cor-
DISCUSSION OF RECENT DECISIONS

Institution; second, the granting of the right to register as a P. A. to those practicing public accountancy on their own prior to July 1, 1925, and the requiring of five years experience of those employed as public accountants, but not practicing on their own, constituted an unreasonable and unconstitutional discrimination in favor of the former and against the latter group; third, the providing of penalties for the failure of P. A.'s to pay their license fee within ten days after the date due without laying similar penalties upon C. P. A.'s for a like failure amounted to a discrimination which was arbitrary and unreasonable; fourth, the state police power does not extend to the regulation of the practice of public accountancy as defined in the 1925 act. The Supreme Court specifically pointed out in *Frazer v. Shelton* that they were not deciding that the regulation of the use of the title C. P. A. was not constitutional nor within the police power.

The principal case of *Elliott v. Trustees of the University of Illinois* concerned the validity of the statute of 1903 as amended in 1907. A bare majority of the Supreme Court (four justices out of seven) held the act to be constitutional on three main grounds: first, the title, "to regulate the profession of public accountants," is germane to the contents of the body of the act, and although it may be broader than the contents themselves, that fact will not necessarily render the act unconstitutional; porations, public utilities, banks, building and loan associations, trust estates (except when employed by the cestui que trust), insurance companies and charitable organizations which receive and dispense funds donated by the public. (2) Preparing or vouching for the accuracy of financial statements of any business, knowing that such statements are to be used, (a) For the information of stockholders or inactive or silent partners in such business, (b) As an inducement to any person to invest in or extend credit to such business, or (c) For filing in the office of the Secretary of State under the provisions of "The Illinois Securities Law." No case has yet arisen in regard to this statute which has reached either the Illinois Appellate or Supreme Court.

7 Ill. Const. (1870), Art. IV, § 22. 8 People v. Logan, 284 Ill. 83, 119 N. E. 913 (1918); People v. Evans, 247 Ill. 547, 93 N. E. 388 (1910); Williams v. People, 121 Ill. 84, 11 N. E. 881 (1887). 9 Josma v. Western Steel Car Co., 249 Ill. 508, 94 N. E. 945 (1911); Off & Co. v. Morehead, 235 Ill. 40, 85 N. E. 264 (1908); Braceville Coal Co. v. People, 147 Ill. 66, 35 N. E. 62 (1893); Frorer v. People, 141 Ill. 171, 31 N. E. 395 (1892); Millett v. People, 117 Ill. 294, 7 N. E. 631 (1886). 10 In the case of State of Oklahoma v. Riedell, 109 Okla. 35, 233 P. 684, 42 A. L. R. 765 (1924), a statute requiring all public accountants to obtain certificates was declared unconstitutional. Also see Bell v. Tackett, 134 Okla. 164, 272 P. 461 (1928). 11 320 Ill. 253, at p. 269. 12 People v. Roth, 249 Ill. 532, 94 N. E. 953 (1911); People v. Sayer, 246 Ill. 382, 92 N. E. 900 (1910).
second, since the use of the title C. P. A. suggests that the person using it has been examined and certified as an accountant, the state may in the reasonable exercise of the police power regulate the use of such title; third, the exemptions granted under the statute are valid in that they are reasonable and apply equally to all similarly situated.

One of the facts which make this case of particular interest is that a vigorous dissent was filed by three of the justices, Chief Justice Herrick, Justice Farthing, who, after having written the majority opinion, changed his mind and joined in the dissent, and Justice Jones, who wrote the minority opinion. The chief reasons for the dissent were: first, that the body of the act is not germane to the title in that the act creates a trade name (Certified Public Accountant) and seeks to give a monopoly to those who possess such certificates, and does not regulate the profession of public accountants as it purports to do; second, the statute constitutes an unreasonable exercise of the police power in that it does not protect or relate to public health, comfort, safety, morals, or general welfare, but seeks to regulate an occupation which is private except where carried on in businesses affected with a public interest; third, the statute discriminates unjustly against public accountants in Illinois because it permits those licensed in compliance with the laws of other states to practice in Illinois as Certified Public Accountants without filling the requirements demanded of Illinois practitioners.

In studying the decision one can note with profit that the decisions of other states are uniform in upholding the validity of


14 Frazer v. Shelton, 320 Ill. 253, 150 N. E. 696, 43 A. L. R. 1086 (1926); People v. Logan, 284 Ill. 83, 119 N. E. 913 (1918); People v. Evans, 247 Ill. 547, 93 N. E. 388 (1910); Williams v. People, 121 Ill. 84, 11 N. E. 881 (1887).

15 People v. Roth, 249 Ill. 532, 94 N. E. 953 (1911); People v. Stokes, 281 Ill. 159, 118 N. E. 87 (1917); People v. Ankrum, 286 Ill. 319, 121 N. E. 579 (1919).


17 Gore v. National Association of Public Accountants, 231 Ill. App. 38 (1923). In this case it was held that one of the state examiners could not restrain the giving of examinations in Illinois by a corporation organized under the laws of the District of Columbia and engaged in examining and certifying persons as Certified Public Accountants.
DISCUSSION OF RECENT DECISIONS

statutes which regulate the use of the title C. P. A. But it is plain that public accountants in Illinois are at a disadvantage in that persons may take examinations (even within the state of Illinois) and receive the title C. P. A. from corporations or persons authorized to grant said title by the laws of other states, and then may proceed to practice in Illinois in competition with local accountants. And the use of a title so received is not prohibited but expressly allowed by the Illinois statute. The solution to this dilemma would seem to lie in the setting of certain requirements or qualifications for those licensed under the laws of other states and in forbidding the giving of examinations in Illinois for the purpose of granting the title C. P. A. by others than those authorized to do so under Illinois law. Illinois may well look to the example of New York in this respect.

H. WILL

COUNTIES—Taxation—Limitations on Power of Clerk to Increase Levy.—In People ex rel. Ghent, County Collector v. Cleveland, Cincinnati, Chicago & St. Louis Railway Company the Illinois Supreme Court has set out some of the limitations on the power of the county clerk to add to the sum levied by the taxing body.

The court stated, "The county clerk in extending taxes may add a reasonable amount for loss and cost where it has not been added by the taxing body," and "courts will not interfere with the exercise of sound business judgment on the part of public authorities but will intervene to prevent an abuse of discretion."

In the instant case the clerk testified that in extending the taxes and determining the rate for the various political sub-


21 People v. Marlowe, 203 N. Y. S. 474 (1923); People v. National Association of Certified Public Accountants, 197 N. Y. S. 775 (1923).

1 365 Ill. 443, 6 N. E. (2d) 851 (1937).


divisions he took cognizance of the amount of revenues realized from taxes in previous years, the amount of loss sustained in previous years, and of the cost of extending and collecting these various taxes. He had treated as losses all delinquent personal property taxes not collected, all real estate forfeited to the state, objections sustained, objections pending, objections in litigation and discounts allowed. It was to these items of loss that the defendant objected, and the court upheld its contention. As to uncollected personal property taxes, the court, citing *People v. North Western Mutual Life Insurance Company*, said they may be included as losses only where it is shown that a bona fide attempt has been made to collect them (which was not done in this case), so that it is possible to determine what proportion are uncollectible. The other items are obviously not tax losses and it has in prior cases been so held.

L. WHIDDEN

**COURTS—JURISDICTION—WHETHER PROCEEDING FOR JUDGMENT BY CONFESSION IS "CONTRACT ACTION" WITHIN JURISDICTION OF MUNICIPAL COURT.**—It has been held in *Schillinger v. O'Connell*, that the municipal court of Chicago had jurisdiction to enter a judgment by confession for more than one thousand dollars, because such judgment was based on an "action" within the meaning of the Municipal Court Act.

The question arose in a complaint in chancery, filed in the Superior Court of Cook County, to set aside and vacate a judgment by confession entered against the plaintiff in the municipal court for $2,104.11. It was the plaintiff's contention that the municipal court had no jurisdiction to enter such judgment because more than one thousand dollars was involved, and because a judgment by confession on a warrant of attorney was not an "action" on an express or implied contract within the meaning of the act, requiring the jurisdiction of that court to be based on an "action." The Appellate Court of Illinois held that such

* Smith-Hurd's Ill. Rev. Stats., Ch. 37, § 390, provides that the municipal court shall have jurisdiction of cases designated as of the first class "which shall include (a) all actions on contracts express or implied, . . . when the amount claimed by the plaintiff exclusive of costs exceeds one thousand dollars ($1,000)."
* Ibid.
a proceeding was an action on an express contract and that, therefore, the judgment was not void so as to be subject to collateral attack on the ground that it was entered without jurisdiction.

Necessarily the holding of the court was based upon a construction of the act in question, and the controversy was merely one of whether the proceeding was an action within the application of the statute. There are many broad and comprehensive definitions of the term "action." It has been designated as any legal proceeding in a court for the enforcement of a right. In Trustees of Schools v. Farnsworth, in speaking of the word "action," it was stated: "In legal practice this word means the formal demand of one's rights from another person or party made and insisted on in a court of justice." In that same case it was also pointed out that the term "action" had been employed as synonymous with "proceeding at law."

Yet despite this continued practice, this is the first case in which want of jurisdiction has been urged on this ground in an appellate court. The court points out that one reason for holding a confession of judgment to fall within the definition of the term "action" is that it has been so construed for more than twenty-five years in the municipal court by the consistent entering of judgments by confession for more than one thousand dollars.

E. J. Medlin

DAMAGES—DIRECT OR REMOTE CONSEQUENCES—LIABILITY FOR NERVOUS SHOCK WITHOUT PHYSICAL IMPACT. — In Purdy v. Woznesensky, the Court of Appeals of the province of Saskatchewan, Canada, sustained a recovery of five hundred dollars damages for injuries following nervous shock without physical impact as the proximate result of a battery committed upon a third person. The facts show that Mr. Purdy was dancing the quadrille at a local country schoolhouse when the defendant, without provocation, deliberately struck him on the head. Mrs. Purdy, the plaintiff, saw her husband fall, screamed hysterically, and fainted. As a result, her nervous system was permanently impaired, and she was still under the care of a physician at the time of this action. Although this inquiry is primarily directed toward the recovery of damages, it is necessary to note that the

4 Ibid.
5 1 C. J. 926, 928.
6 Brand v. Brand, 252 Ill. 134, 96 N. E. 918 (1911).
7 278 Ill. App. 474 (1934).
court ruled that a good cause of action did exist. It asserted that
the wrongful act created an apparent and imminent danger to
the plaintiff's right of personal security which was foreseeable,
for "the defendant must be presumed as a reasonable man to
know of the vital concern which a wife instinctively feels for the
safety of her husband."  

However, the defendant's contention was that even if a cause
of action did exist, the damages are too remote in the absence
of physical impact. He relied upon *Victorian Railways Commis-
sioners v. Coultas*, where the defendant's gateman negligently
allowed a Mr. and Mrs. Coultas to enter upon a crossing with a
horse and buggy as a train was approaching. Although they
managed to escape, Mrs. Coultas became ill as a result of fright.
The court refused a recovery on the ground that sudden terror
without any physical injury at the same instant was not the
natural and probable consequence of the gateman's negligent act.
This holding obtained a "strong footing" in the United States
as the basis of the "physical impact" theory of liability in torts
and developed into a hard and fast rule—if the defendant is
negligent and if at the same time there is physical impact of
some sort, then damages for nervous shock are proximate; if the
defendant were negligent and if there were no physical impact,
then the damages were remote and there could be no recovery.

In Ireland, the Coultas case was repudiated in 1890 by the
celebrated case of *Bell v. Great Northern Railway* which held
that the distinction was one of time only and not of proximity.
In other words, the rationale of the impact theory is to start
from the time of the effect and work backward instead of con-
sidering the cause and effect in the natural chain of events.
The court stated: "As well might it be said that a death caused
by poison is not to be attributed to the person who administered
it because the mortal effect is not produced contemporaneously
with its administration."  

England questioned the doctrine and
attempted to avoid it by subtle differentiation. Then it repudi-
ated the impact theory where the defendant's conduct was wilful
or wanton. However, wilful or wanton conduct is more the basis
for punitive damages as punishment rather than the basis for

---

2 Ibid., at p. 119.
4 26 L. R. Ir. 428 (1890).
5 Ibid., at p. 438.
DISCUSSION OF RECENT DECISIONS

compensatory damages. Finally, in Dulieu v. White and Sons,\(^8\) England definitely rejected the Coultas decision. Scotland followed suit in Gilligan v. Robb.\(^9\) The court in the instant case said that previously\(^{10}\) it had been prone to abandon the precedent of the Coultas case and could now do so, because the Privy Council had stated: "But in England, in Scotland, and in Ireland alike, the authority of Victorian Railway Commissioners v. Coultas has been questioned, and, to speak frankly, has been denied. I am humbly of the opinion that the case can no longer be treated as a decision of guiding authority."\(^{11}\) Hence, it is definitely settled\(^{12}\) in these jurisdictions that proof of actual impact is not necessary to recover damages and that the relation of cause and effect may be direct or proximate without it.

In the United States, the majority of the courts started with the Coultas case as authority, and since then various doctrines have been developed.\(^{13}\) In Mitchell v. Rochester Railway Company,\(^{14}\) the plaintiff, waiting to board a horsecar, was frightened by another horsecar belonging to the defendant. Assuming the defendant to have been negligent, the court denied recovery of damages for a subsequent miscarriage and illness on the ground that there can be no recovery for mere fright. It did not appreciate the difference between mental anguish and physical injury resulting from a nervous shock, which is physiological. It is injudicious to assume as a matter of law that a nervous shock merely affects the mental functions when medical science has proven, especially since the World War, that a shock without impact can destroy human tissues.\(^{15}\) It must be admitted that the nervous system is as much a part of the human body as the bones and that the mind and the body act reciprocally upon each other.\(^{16}\) The doctrine that there can be no recovery for fright has been perverted where the facts show a tortious act and a

\(^{8}\) [1901] 2 K. B. 669, 70 L. J. K. B. 837.
\(^{12}\) See also Ontario, Negro v. Pietra's Bread Co., Ltd., [1933] O. R. 112.
\(^{13}\) The weight of authority in the United States denies recovery of substantial damages, 26 R. C. L. 762; 17 C. J. 831, 838. For citations pro and con, see Cooley on Torts (4th ed., 1932), I, 103-104, sec. 48; A. H. Throckmorton, "Damages for Fright," 34 Harv. L. Rev. 260 (1921).
\(^{14}\) 151 N. Y. 107, 45 N. E. 354, 34 L. R. A. 781 (1896).
resultant bodily injury. The court also asserted that if such claims were allowed, a flood of litigation of feigned claims for speculative damages would result, and a strong public policy forbids this. It is argued that injury resulting from a state of mind is too elusive and indefinite to be calculated according to the objective test of liability. The effect of such a conclusion is to deny a remedy for an actual wrong and to brand a reality as a mental fancy. There can be no objection to increased litigation if legal rights are actually infringed. Also, the measure of damage is no more difficult to prove under the modern doctrine than it is in the cases of real estate valuation or in the cases of physical impact where the jury is allowed to consider mental pain and suffering, inconvenience, and the like. Expert medical testimony is available and it is for the jury to make the final determination.

In conclusion, the "impact theory" is giving way to common sense where the injuries from a nervous shock can be traced from the tortious act with some degree of assurance in the natural course of events. Once the wrongful act is established, the defendant should be held liable for all damages that flow proximately therefrom, and it is not necessary that he foresee the particular consequences. The maxim "wherever there is an injury, there is a remedy," has been referred to with pride by jurists as denoting the flexibility of the common law to meet new situations. The marked advancement of medical science, therefore, demands that the courts carefully reconsider the old doctrine, as newly realized factors naturally change the premises from which deductions are to be made. The Restatement of the Law of Torts favors the growing doctrine, but so far Illinois has upheld the principles of the Coultas case.

R. F. OLSON

EVIDENCE—JUDICIAL NOTICE—LANDSTEINER BLOOD TEST, USED TO NEGATIVE POSSIBILITY OF PATERNITY, AS ESTABLISHING SCIENTIFIC FACT.—In Arais v. Kalensnikoff the District Court of California, on an appeal from a decision establishing the defendant as the father of the plaintiff's child, held that, where such a decision is contrary to physical possibility as shown by

---

18 Vol. II (1934) 1177, sec. 436. See also p. 840, sec. 310.
1 67 P. (2d) 1059 (Cal., 1937).
DISCUSSION OF RECENT DECISIONS

the Landsteiner blood grouping test, the court will take judicial notice of such test and the result derived from it as establishing a scientific fact and will reverse the finding of the trial court which is based solely on testimony of a witness which is contrary to scientific fact.

In the instant case, the plaintiff testified that the defendant was the father of her child and that she had had sexual relations with no man other than the defendant since her separation from her second husband. The defendant, a man seventy years of age, testified that he had never had sexual relations with the plaintiff and both he and his wife testified that he had been impotent for many years.

The trial court, with the consent of the plaintiff, appointed a physician to make a blood grouping test on the plaintiff, the defendant, and the child. The testimony of the doctor making the test was that from the results it was shown that the defendant could not be the father of the child; that the child fell into blood group B while both the plaintiff and the defendant were of blood group O. The conclusion from these established facts is that one of the parents had to be in a group containing the gene designated as B in order for issue of that union to fall into blood group B. Despite this scientific conclusion, the trial court held for the plaintiff.

In giving their opinion reversing the trial court, the District Court stated: "... a finding of fact based solely upon the testimony of a witness, contrary to a scientific fact, will be set aside by this court on appeal as not supported by substantial evidence." Thus, they recognized the results of the Landsteiner test as a scientific fact of which the court will take judicial notice.

The only court of last resort in this country that has passed on the admissibility of such tests is the Supreme Court of South Dakota. In the case of State v. Damm,\(^2\) they held that it was not such an abuse of discretion for a trial judge to refuse to direct that the plaintiff mother and her child submit to the blood test as to constitute prejudicial error requiring reversal. This holding was based specifically upon the proposition that it did not "sufficiently appear from the record in this case that modern medical science is agreed upon the transmissibility of blood characteristics to such an extent that it can be accepted as an unquestioned scientific fact that if the blood groupings of parents are known, the blood group of the offspring can be determined, or that, if the blood groupings of the mother and child are known it can be accepted as a positively established scientific fact that the blood group of the father could not have been a certain specific char-

\(^2\) 62 S. D. 123, 252 N. W. 7 (1933).
acteristic group." From this it might be inferred that it was more a lack of sufficient evidence as to the reliability of blood tests than a refusal to accept them in evidence.

Scientific opinion is now in accord regarding the fact that the blood of the child can contain only such elements as were present in the blood of the parents and no elements not contained in the blood of the parents. It may be seen from this that the only value such tests may have at present is in determining that the accused is not the parent of the child. Where the blood of the child falls into a grouping such as might be a result of a mating of the alleged parents, the test is valueless since all human blood is roughly grouped into four main classes which do not sufficiently limit the number of possible parents.

Two states, New York and Wisconsin, now have statutes empowering the trial court, in an action to establish paternity, to direct that the plaintiff, her child, and the defendant submit to one or more blood tests, the result of which is to be receivable in evidence where definite exclusion is established. At the present there have been no cases involving this question before the appellate courts of Illinois, hence we do not have, as yet, any judicial determination of the admissibility in this state.

R. L. Tindall

Fraud—Reliance and Inducement—Whether Relation Between Bank and Customer Gives Right to Rely on Representation as to Future Conduct. — The case of Stewart v. Phoenix National Bank, decided by the Supreme Court of Arizona, presents an interesting problem concerning fiduciary relations. In an action for fraud and deceit, the plaintiff alleged that for twenty-three years he had been a customer of the defendant bank and that during this time the bank had been his financial adviser, by reason of which a confidential relationship existed between the parties; that the plaintiff was induced by an agent of the defendant to give a note and mortgage as security for a previously incurred and unsecured indebtedness by representations that they were wanted only to make the records of the bank satisfactory to the banking authorities and that the mortgage

3 Ibid., p. 12.
7 Wisconsin Laws of 1935, Ch. 351.
1 64 P. (2d) 101 (Ariz., 1937).
DISCUSSION OF RECENT DECISIONS

would not be foreclosed, and that these representations were false. The defendant demurred, and the lower court ruled in its favor as to this part of the complaint and also as to other matters set forth. The plaintiff appealed from this ruling.

The Supreme Court stated that all the elements of a cause of action were shown clearly except that of a right to rely upon a representation as to future conduct, but held that such reliance was justified in this case, as the relationship between a bank and a customer whom it advises on financial matters must now be placed in the category of other relations legally presumed to be fiduciary.

The opinion contains no citations to support this holding. After making clear that it still regards the relation of a bank and depositor as only that of a debtor and creditor, the court discusses the changes in the banking system which have resulted in the present complicated credit structure under which one must almost necessarily go to a bank to secure loans to carry on any sizeable enterprise, saying that it cannot ignore the fact that before a loan is given an investor will usually consult a bank believing that he can rely on what the officers tell him, and that banks hold themselves out as paragons of integrity and seek such positions of confidence as trustee, executor, or administrator. It ends this portion of its opinion by stating that the decision will not preclude the bank's making a legitimate profit from clients, but means that it is under a duty to make a full disclosure to the customer. The court squarely holds that at the time of the action of foreclosure brought by the defendant, the plaintiff in the principal case had a cause of action, but judgment for the defendant was affirmed on other grounds.

In considering this case, the distinction between the two types

2 Brandenburg v. First Nat. Bk. of Casselton, 48 N. D. 176, 183 N. W. 643 (1921); when a president of a national bank, pretending to act as such, made false representations to a customer, the bank was held liable, although the acts were ultra vires; when fraud and deceit have been practiced, ultra vires is not available. See also the many cases cited therein.

3 After alleging that defendant foreclosed, the plaintiff stated that agents constantly assured him the bank would reconvey when plaintiff could pay off the amount which was due on the note at the time of foreclosure, but that when arrangements for payment were made, the defendant refused to fulfill its representations.

The Supreme Court upheld the demurrer of defendant as to this part of the complaint and gave judgment for it. It also held that the lower court properly took judicial notice of the record of the foreclosure action (a procedure unusual for a state court), in which the defense of fraud was not raised, that the judgment was res judicata on this point, and that the assurances as to reconveyance were not shown by the complaint to have prevented plaintiff from making use of his possible defense.
of confidential relations must be kept clearly in mind; they are: first, the cases in which, from the very relationship of the parties, a fiduciary relation is presumed, such as in the case of attorney and client,\(^4\) physician and patient,\(^5\) trustee and beneficiary,\(^6\) priest and parishioner,\(^7\) guardian and ward,\(^8\) and the like; and second, those cases where there is a finding of fact that in the particular situation involved there was a confidential relation.\(^9\) As the court stated in *Higgins v. Chicago Title and Trust Company*,\(^10\) a confidential relation is not limited to certain recognized legal relations, "but it exists in all cases in which influence has been acquired and abused, in which confidence has been reposed and betrayed. The origin of the confidence is immaterial. It may be moral, social, domestic, or merely personal."

The first group is based upon artificial relations created by law or the course of business.\(^11\) Generally, so long as the relationships included in this category exist, confidence is reposed on one side, while the power to exert influence is possessed on the other,\(^12\) hence these are presumed to be confidential. The Arizona case, in effect, states that a new artificial relation has been created by the course of business, because the superior position of the banks have reached the point where the relation consistently gives the banks influence, and causes the client to repose confidence in them. Thus, the decision is placed solidly on the reasons assigned as the basis of the doctrine.

\(^5\) Morrison v. Smith, 130 Ill. 304, 23 N. E. 241 (1889).
\(^6\) Robbins v. Bulte, 24 Ill. 387 (1860).
\(^8\) Huff v. Wolfe, 48 Ill. App. 589 (1892).

Facts were held insufficient to show relationship of confidence in *Higgins v. Chicago Title and Trust Co.*, 312 Ill. 11, 143 N. E. 482 (1924); *VanGundy v. Steele*, 261 Ill. 206, 103 N. E. 754 (1913); *Gager v. Matthewson*, 93 Conn. 539, 107 A. 1 (1919). See also 26 C. J. 1158 et seq., for discussion of entire doctrine; and on fiduciaries in equity where the doctrine originated as the outgrowth of the protection of incapacitated persons. See Kerr on Law of Fraud and Mistake, p. 150 et. seq. Also Pomeroy's *Equity* (A. L. Bancroft and Co., 1882), II, sec. 951.

\(^10\) 312 Ill. 11, 143 N. E. 482 (1924). This is a reiteration of what numerous other Illinois decisions set forth; Illinois courts have been particularly careful to keep this doctrine well defined and to avoid any limitation on situations in which a confidential relation can be found as a matter of fact.
\(^11\) 12 R. C. L. 235, sec. 5.
\(^12\) Smith v. Patterson, 33 Ohio St. 75 (1877).
DISCUSSION OF RECENT DECISIONS

There is a decision,\(^1\) of an appellate court of Illinois which is indirectly in conflict with the principal case. A representation as alleged in the third count of the declaration would have been actionable if a fiduciary relation had been held to exist. However, there was a short, though pertinent dissenting opinion, and the case has been hereinbefore criticized.\(^2\) A holding that there was a confidential relationship on the facts presented would have made the case more consistent with the Illinois decisions.

G. W. McGurn

JUDGMENT—OPENING OR VACATING—TIME WHEN JUDGMENT BECOMES FINAL UNDER CIVIL PRACTICE ACT.—Attention is called to the recent case of *Davis v. East St. Louis and Suburban Railway Company,*\(^3\) in which the Appellate Court of Illinois held that in accordance with the provision of the Civil Practice Act and the Judgment Act, a judgment in the trial court becomes final, so far as that court is concerned, thirty days after its rendition. The original suit was filed February 10, 1933, the original declaration on March 31, 1933, and the defendant's plea of the general issue on April 4, 1933. The case was reversed by the Appellate Court and, on the retrial, judgment was entered on the verdict on May 25, 1936. On June 26, the defendant filed a motion to vacate the judgment, the basis of which was newly discovered evidence, but the motion was denied.

Inasmuch as the case was started before the Civil Practice Act became effective the question was raised as to whether the defendant's motion to vacate the judgment was controlled by the provision of the Act and should have been filed within thirty days after entry of the judgment, or whether it was subject to the provision of the Statute as it existed prior to the adoption of the Act, which permitted the filing of a motion to vacate a judgment at any time before the close of the term.

According to the provisions\(^2\) of the Civil Practice Act the Court might, in certain cases, within thirty days after entry of a judgment or decree, set it aside. In order to adapt the Act to those cases filed previous to its effective date, the Supreme Court designated what cases were to be controlled by it by adopting rule one, the latter part of which reads, "Except as provided

---


\(^{2}\) Smith-Hurd's Ill. Rev. Stats. (1935), Ch. 110, § 174 (7); Ill. State Bar Stats. (1935), Ch. 110, ¶ 129 (1).
by this rule, or by written stipulation of parties, or by order of the court, upon notice and motion, proceedings instituted prior to January 1, 1934, shall not be governed by the Civil Practice Act. The case would, therefore, come clearly under this provision, but the Court, holding that the judgment was final, stated that the judgment was controlled by the Judgment Act which provides that, "Hereafter every judgment, decree or order, final in its nature, of any court of record in any civil or criminal proceeding shall have the same force and effect as a conclusive adjudication upon the expiration of thirty days from the date of its rendition as, under the law heretofore in force, it has had upon the expiration of the term of court at which it was rendered."

C. E. HACKLANDER

Mortgages—Disposition of Proceeds—Proportionate Share in Security of Creditor Bondholders in Relation to Total Bonds Pledged With Trustee.—In The First National Bank of Ottawa v. Kay Bee Company, the Illinois Supreme Court held that in the foreclosure of a trust deed the creditors are entitled to share in the security in the proportion that their mortgage bonds bore to the total bonds pledged with the trustee rather than in proportion to the amount of the debts secured by the bonds.

In October of 1932, the Kay Bee Company was indebted to the First National Bank of Ottawa and also to the Smith Trust & Savings Bank of Morrison, Illinois, and each of the creditors held notes for the indebtedness. On the 29th, the company delivered a trust deed to the Ottawa bank as trustee, thereby conveying certain real estate to secure payment of fifty thousand dollars evidenced by two bearer bonds, each for twenty-five thousand dollars. There was no priority between these two bonds. To secure the debts then owing, as well as any loans that might be made in the future, the company pledged note number one to the Ottawa bank and note number two to the Morrison bank. The company defaulted in the payment of interest due, and the Ottawa bank as trustee began foreclosure. At that time the Ottawa bank held notes of the company aggregating twenty-four thousand dollars. The Morrison bank held notes amounting to about sixteen thousand dollars. The foreclosure was allowed and the court issued an order of sale to satisfy the indebtedness. The

3 Smith-Hurd's Ill. Rev. Stats. (1935), Ch. 110, § 259.1; Ill. State Bar Stats. (1935), Ch. 110, § 223, Rule 1.
4 Smith-Hurd's Ill. Rev. Stats. (1935), Ch. 77, § 82; Ill. State Bar Stats. (1935), Ch. 110, § 268 (1).
1 366 Ill. 202, 7 N. E. (2d) 860 (1937).
DISCUSSION OF RECENT DECISIONS

decree further ordered that if the sum realized from the sale should be insufficient to pay the amount of the notes plus interest, then the master should distribute the fund to the two creditors in the proportion that the amount due each bank bore to the total due both banks.

Under this arrangement the Morrison bank would get approximately two-fifths of the proceeds of the foreclosure sale. It contended that it should get one-half—that is to say, the proportion of the fund which the bond it held bore to the total amount of the bonds outstanding. The Appellate Court\(^2\) affirmed the order of the lower court. The Supreme Court, however, reversed the decree and ordered distribution according to the method urged by the Morrison bank.

The contrary views of the two courts are explained by their interpretations of *Georgetown Water Company v. Fidelity Trust & Safety Vault Company*.\(^3\) The facts there were very similar to the instant case, and upon foreclosure by the trustee, the situation stood thus: the sureties, who had succeeded to the rights of the water company, held fifty-four bonds of a par value of twenty-seven thousand dollars to secure a debt of ten thousand dollars. The machinery company held ten bonds at a par value of five thousand dollars in payment of its debt of five thousand dollars. The Kentucky court held that distribution should be made to the bondholders in the proportion that their bonds bore to the total of the bonds pledged, the rule adopted by the Illinois Supreme Court in the instant case.

The Appellate Court had distinguished the instant case from the Georgetown Water Company case on the ground that the machinery company was a purchaser for value while in this case both banks held the bonds merely as collateral security for loans already made, and were not, as to these amounts, purchasers for value. Refusing this viewpoint, the Supreme Court stated: "One who holds bonds pledged as collateral to secure the repayment of a loan is, as to the extent of the primary debt, a bona fide purchaser of the bonds, and in the enforcement of his rights is entitled to like protection as a purchaser in due course."

The Appellate Court probably had in mind *Bay v. Coddington*\(^5\)


\(^{3}\) 117 Ky. 325, 78 S. W. 113 (1904).

\(^{4}\) At p. 205.

\(^{5}\) 5 Johns. Ch. 54, 9 Am. Dec. 268 (1821). Chancellor Kent held that one who took a note as collateral security for a pre-existing debt was not a holder in due course. The true owner of the paper, whose agent had wrongfully pledged it, was allowed to recover.
and the Supreme Court based its conclusion on *Swift v. Tyson.*

It is difficult to see the relation of those cases to this one, where both holders took with full knowledge of all the facts. The dispute is not between the maker and the holder of a bond. No defense is sought to be raised by the maker, and his liability is admitted. Nor is this the case where A, the debtor, pledges as security a note for an amount greater than the debt, and B, the pledgee, negotiates it for its face value to C, a bona fide purchaser. The dispute is between the holders of two bonds; what distribution should be made of the security pledged for their protection.

However, the rule adopted by the Supreme Court gives effect to what the parties probably intended. If an undivided one-half interest in the land had been mortgaged directly to each creditor, neither one could have claimed more than the proceeds from the sale of his half interest. The intervention of the trustee in the instant case could not change the result. Each creditor took a bond representing half the security. The excess of the bond over the debt must have been thought of as additional protection to be looked to if the security depreciated in value. That is why one who lends money usually insists upon collateral in excess of the amount of the loan. If the ruling of the Appellate Court were followed, this added protection, insisted upon by the Morrison bank, would mean nothing. A preference would be given to the Ottawa bank simply because its claim was the larger. The effect would be that the worth of the collateral pledged to a creditor to secure a series of notes would vary constantly with the amount of notes pledged to other creditors, even though one creditor, more conservative than the others, had, with their knowledge, insisted upon a greater margin of safety.

R. Roe

**R. ROE**

**Mortgages—Pleadings and Process—Trial by Jury as Right of Guarantor Who Has Been Joined as Party Defendant in Foreclosure Action.** — The New York Court of Appeals in *Jamaica Savings Bank v. M. S. Investing Company, Incorporated,* decided that in a proceeding to foreclose a mortgage and for a deficiency decree the guarantors of the payment of the mortgage debt have no constitutional right to try to a jury defenses which...

---

6 16 Pet. 1, 41 U. S. 1, 10 L. Ed. 865 (1842). This case held that the transfer of negotiable paper by endorsement to a creditor, as a security for a pre-existing debt, was a transfer for value.

1 274 N. Y. 215, 8 N. E. (2d) 493 (1937).
would release them if proved. The New York Constitution provided that "The trial by jury in all cases in which it has been heretofore used shall remain inviolate forever." The guarantors contended, and the minority opinion so argued, that because prior to the act which permitted chancery courts to render deficiency decrees in foreclosure proceedings the mortgagee could have proceeded against them only at law, in which event the guarantors would be entitled to a trial by jury, their constitutional right to such trial as to the issues raised should remain unimpaired.

The majority decided the case upon the ground that equity, having obtained jurisdiction to foreclose the mortgage, will award complete relief, although it may incidentally allow a remedy available originally in a court of law, and that in a proceeding in equity there is no absolute right to trial by jury, even where, as incidental to the main relief prayed for, the complaint seeks money damages.

The Jamaica Savings Bank case and the decisions of the courts of other states permitting joinder of guarantors and certain other third persons in foreclosure proceedings are based upon statutes which are sufficiently broad to include all persons subject to liability in connection with the mortgage debt. However, in the absence of a statute giving that authority, a guarantor of the mortgage debt cannot be joined in a proceeding to foreclose a mortgage. In such a case he is not a proper party, and it follows that no deficiency decree may be entered against him.

The Illinois Mortgages Act is the source and prescribes the extent of the authority of the chancery courts of Illinois to enter deficiency decrees in foreclosure proceedings. Before the adoption of section 16 of that act, our chancery courts had no such power, because foreclosure proceedings were simply actions in rem against the mortgaged property.

On the basis of the rulings in two Appellate Court cases, it would seem that the decisions of the Illinois courts are contrary to those of New York with respect to the propriety of joining the

2 Guarantors' answer alleged that without their consent plaintiff had waived payment of an installment of interest, had extended time for payment of principal, had changed interest dates and rate, and allowed mortgagor to continue in default of payment of principal and interest.

3 N. Y. Const., Art. 1, Sec. 2 (1821).


6 Ill. State Bar Stats. (1935), Ch. 95, § 17.

7 Cotes v. Bennett, 183 Ill. 82, 55 N. E. 661 (1899).
guarantor of the mortgage debt in a proceeding to foreclose a mortgage. In Walsh v. Van Horn, a deficiency decree was entered against Walsh, the mortgagee, who had assigned the mortgage and notes to Van Horn, and it was disputed whether Walsh assumed the liability of an endorser or of a guarantor in the transaction. The court held that section 16 of the Mortgages Act did not authorize joinder of third persons legally liable for the payment of the mortgage debt and that the statute authorizing chancery courts to enter deficiency decrees against "the defendant or defendants personally liable for the mortgage debt" has reference only to such defendants personally liable for the debt as are before the court for the purposes of foreclosure and upon equitable grounds. The court further held that whether the liability of Walsh for the payment of the note was that of endorser or guarantor, it was a purely legal obligation distinct from that embodied in the note as originally given or in the mortgage, and that there was no element that would make it cognizable by a chancery court. The Walsh case was followed in Christenson v. Niedert.

It appears that in Illinois prior to the adoption of the Civil Practice Act, regardless of the constitutional question raised in the Jamaica Savings Bank case, the guarantor could not be joined in foreclosure proceedings and hence could not be made subject to a deficiency decree therein. No case has as yet arisen in Illinois on this point since the adoption of the Civil Practice Act. It would seem, by virtue of section 24(1), that the plaintiff might join both mortgagor and guarantor as defendants in the one suit in order to secure a "complete determination" of his rights against both. But this section does not dispose of the question as to the type of forum each defendant may demand. There is a provision in section 23 of the Civil Practice Act that the "court may order separate trials," but this language appears to relate only to joinder of plaintiffs and apparently does not contemplate giving the different defendants, so joined, separate tribunals. This confusion must, therefore, remain insoluble until the Illinois courts have passed on the problem.

In Turnes v. Brenkle, the statute under consideration created the right to establish a mechanic's lien by a proceeding in

---

8 22 Ill. App. 170 (1887).
9 259 Ill. App. 96 (1930).
10 Ill. State Bar Stats. (1935), Ch. 110.
11 Ill. State Bar Stats. (1935), Ch. 110, ¶ 152.
12 Ill. State Bar Stats. (1935), Ch. 110, ¶ 151.
13 249 Ill. 394, 94 N. E. 495 (1911).
chancery and further attempted to empower the chancellor, in case he should find no right to a lien existed, to "render judgment as at law for the amount which the contractor is entitled to." The court held that the attempt to vest the chancellor with power to "render judgment as at law" was a transfer to chancery of a purely legal case—a contract case. It branded the statute as unconstitutional partly upon the ground that litigants may not, by a mere transfer of purely legal cases to a court of chancery, be deprived of the constitutional right to trial by jury as to matters wherein such right existed at the time of the adoption of the Constitution, and that even should the chancellor exercise his discretion to grant such trial, this would not satisfy the constitutional guaranty because of the fact that in chancery the verdict of the jury is merely advisory and is not binding on the chancellor.

In view of a provision in the Illinois Constitution of 1870, similar to that of New York quoted above, and the earlier decisions of the Illinois courts previously mentioned, it would appear that, in order to give a construction to section 24 of the Civil Practice Act which would render it constitutional, the question might be decided differently in this state.

B. P. Morisette

PARTIES—INTERVENTION—EFFECT OF CIVIL PRACTICE ACT ON RULES OF EQUITY.—The Civil Practice Act has not changed the general rules of equity as to the right to intervene, the Illinois Supreme Court decided in Hairgrove v. City of Jacksonville. That case involved a representative suit brought by a taxpayer to enjoin the City of Jacksonville from constructing and operating a municipal electric light and power plant, as proposed by city ordinance. The city answered the complaint. On the following day the appellant, Illinois Power and Light Corporation, holding a franchise to supply electric service in the city, was allowed to intervene as a party plaintiff and to file an amendment to the original complaint, making additional parties defendants and adding new issues. The defendant thereafter made a motion to vacate the order allowing intervention, which motion was granted. A second motion was then made by appellant for leave to join as a party plaintiff, to add new allegations to the complaint similar to those contained in the prior amendment, and to make new parties defendant. The appellant relied on the ground that the plaintiff did not bring his suit in good faith but in collusion with

14 Art. II, Sec. 5.
1 366 Ill. 163, 8 N. E. (2d) 187 (1937).
the attorneys for the city. This motion was denied. On appeal from such action it was held that the trial court had decided correctly in denying such motion, since the provisions of the Civil Practice Act concerning joinder of parties had not changed the former practice as to the right to intervene.

The appellant argued it was not seeking to intervene, but merely to exercise its right to join as a plaintiff in a representative suit under section 23 of the Illinois Civil Practice Act, and, having a right to become a party plaintiff under section 23, it then had the right to raise new issues and join new parties under sections 26, 33, 44, and 46 of that act.

Generally, when a representative suit is brought, those who are in the class may join on application, but must usually adopt the suit as they find it and cannot control the original plaintiff’s prosecution thereof. It has, however, been held in England under a practice provision somewhat similar to that of Illinois that any person in the class may dispute the original plaintiff’s claim of right to represent him, and in such case the individual so contending should be joined as a defendant. Had the appellant so sought in the instant case, its request would probably have been granted, and it could then have filed an answer by way of counterclaim under section 38 of the Illinois Civil Practice Act.

Under the facts of the case in question, the court held that

2 Smith-Hurd’s Ill. Rev. Stats. (1935), Ch. 110, § 147; Ill. State Bar Stats. (1935), Ch. 110, ¶ 151.

"Subject to rules, all persons may join in one action as plaintiffs, in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally or in the alternative, where if such persons had brought separate actions any common question of law or fact would arise: Provided, that if upon the application of any party it shall appear that such joinder may embarrass or delay the trial of the action, the court may order separate trials or make such order as may be expedient, and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for the relief to which he or they may be entitled.

"If any one who is a necessary plaintiff declines to join, he may be made a defendant, the reason therefor being stated in the complaint.”


7 47 C. J., 52, 53.

8 See Nelson v. Church, 9 Ch. Div. 552, on p. 559 (1878).


DISCUSSION OF RECENT DECISIONS

what was sought by the appellant was intervention in the proceedings to which it was not an original party, rather than a mere joinder in a representative suit. Intervention has been defined as a proceeding by which one not originally made a party to an action or suit is permitted, on his own application, to appear and join one of the original parties in maintaining his cause of action or defense, or to assert some cause of action in favor of the intervenor against some or all of the parties to the proceeding as originally instituted. But under the general rules of equity, the right to intervene was not an absolute right; it was one granted or denied, depending upon the circumstances surrounding each case and the rules applicable thereto. Moreover, the interest which would entitle a person to intervene in a suit between other parties must have been in the matter in litigation, and it must have been of such direct and immediate character that the intervenor would either gain or lose by the direct legal operation and effect of the judgment or decree. The mere fact that the enforcement of the decree when rendered might benefit or prejudice the applicant for intervention would not entitle him to intervene if its effect were indirect. There has been some conflict of authority as to whether or not a private power plant has such a "direct interest" as would entitle it to intervene. The court in the instant case, without discussion, apparently assumed that the appellant had no such direct interest.

There is another rule that since the right to intervene, where not governed by statute, is not an absolute but a discretionary right, it might be denied where intervention would result in injecting into the pending suit issues which would unduly complicate the case. Further the intervenor must take the suit as he


13 It has been held on a somewhat similar situation that a private corporation furnishing power and light in a municipality has such an interest in the subject matter as to entitle it to predicate litigation thereon. See Kansas Gas & Electric Co. v. City of Independence, Kansas, 79 F. (2d) 32 (1935), rehearing denied 79 F. (2d) 638. Contra, Northwestern Light & Power Co. v. Town of Milford, Iowa, 82 F. (2d) 45 (1936), rehearing denied 82 F. (2d) 1023; Greenwood County, S. C. v. Duke Power Co., 81 F. (2d) 986 (1936); Interstate Power Co. v. City of Cushing, 12 F. Supp. 806 (1935).

14 Wightman v. Evanston Yaryan Co., 217 Ill. 371, 75 N. E. 502 (1905); Houston Real Estate Investment Co. v. Hechler, 44 Utah 64, 138 P. 1159 (1914).
finds it, may neither change the issues between the parties nor raise new ones, may not insist upon a change in the form of procedure, and may not delay trial. It should be noted, however, that this rule has been generally construed to mean that he cannot avail himself of, or urge, mere irregularities in the proceeding which the original parties have expressly or impliedly waived, nor avail himself of defenses which are personal to them. The court dismissed any consideration of this point by its assumption that the appellant had no direct interest in the outcome of the suit. If it had considered the question, it well might have found that the appellant's proposed amendments would have "unduly" complicated the case.

Hence, based on the assumption that the appellant did not have an immediate interest in the subject matter of the suit and was seeking to inject burdensome issues into a pending suit, the decision denying leave to intervene was proper under the general rules of equity which existed prior to the Civil Practice Act.

The Civil Practice Act nowhere expressly treats of the right of intervention. Section 25, concerning the joinder of parties after the inception of suit, was interpreted in the recent Illinois case of Bernero v. Bernero, cited by the court in the instant case, and it was there construed as limited to cases where a complete determination of the controversy could not be had without the presence of other parties. The court there stated, "... but it [section 25] says nothing about intervention, and, so far as we can see, adds nothing to the existing law on that subject." And, in the instant case, the court adds, "The same may be said of other sections of the Civil Practice Act cited. We are of the opinion they do not change the rule as to right to intervene."

The decisions in the Bernero case and in the present case are supported by the strikingly analogous New York case of Yonkers Wightman v. Evanston Yaryan Co., 217 Ill. 371, 75 N. E. 502 (1905).

Note to Walker v. Sanders, 103 Minn. 124, 114 N. W. 649 (1908), at p. 292; 20 R. C. L. 692.

"Where a complete determination of the controversy cannot be had without the presence of other parties, the court may direct them to be brought in. Where a person, not a party, has an interest or title which the judgment may affect, the court, on application, shall direct him to be made a party. ..." Smith-Hurd's Ill. Rev. Stats. (1935), Ch. 110, § 149; Ill. State Bar Stats. (1935), Ch. 110, ¶ 153.

363 Ill. 328, 2 N. E. (2d) 317 (1936). In this case the Retirement Board of Firemen's Annuity and Benefit Fund of Chicago was held not entitled to intervene in a proceeding by the divorced wife of a fireman to set aside a divorce decree after the fireman's death on the ground of fraud, since the interest of the Retirement Board was not direct or immediate in the subject matter of the proceeding.
DISCUSSION OF RECENT DECISIONS

Railroad Company v. City of Yonkers,\(^1\) where a bus company, which had submitted bids for a bus route, was denied leave to intervene in a suit by a taxpayer to restrain the city from awarding consents for operation of motorbuses under a city ordinance, on the ground that, while the bus company was interested in the question to be decided, it was neither a necessary nor proper party and was not shown to be in the category of a person entitled to intervene.\(^2\) This decision, supporting the action of the court in the instant case, is entitled to more weight than merely persuasive authority, inasmuch as the provisions of the Illinois act are based substantially on those of New York.\(^2\)

S. ZIBLAT

PLEADING—TIME FOR FILING—POWER OF COURT TO GRANT ADDITIONAL TIME TO FILE REPLY AFTER PERIOD PROVIDED BY CIVIL PRACTICE ACT HAS PASSED.—In Conour v. Zimmerly et al.,\(^1\) the Appellate Court of Illinois held that the Civil Practice Act\(^2\) does not change the rule prevalent before its adoption that it was within the discretion of the court to grant time within which to plead. The plaintiff had failed to file a reply to new matter contained in the answer within twenty days as provided by the act,\(^3\) and thereafter the plaintiff filed a motion, supported by affidavit, asking that his default be vacated and that be given leave to plead, which motion was granted, the court holding that such a matter was within its discretion. It is to be noted that in addition to the above ground, which supports the court’s decision

\(^{19}\) 217 N. Y. S. 685 (1926).
\(^{20}\) The applicant for intervention in the Yonkers R. Co. case, supra, relied on Section 193, Subdivisions 1 and 3, of the New York Civil Practice Act, which are equivalent to Section 25 of the Illinois Civil Practice Act. The text of Section 193 of the New York Civil Practice Act is as follows:

"1. The court may determine the controversy as between the parties before it where it can do so without prejudice to the rights of others or by saving their rights; but where a complete determination of the controversy cannot be had without the presence of other parties the court must direct them to be brought in.

"3. Where a person not a party to the action has an interest in the subject thereof, or in real property the title to which may in any manner be affected by the judgment, or in real property for injury to which the complaint demands relief, and makes application to the court to be made a party, it must direct him to be brought in by the proper amendment."

Cahill’s New York Civil Practice (7th ed.), p. 100.

\(^{1}\) 290 Ill. App. 546, 9 N. E. (2d) 61 (1937).
\(^{2}\) Smith-Hurd’s Ill. Rev. Stats. (1935), Ch. 110, § 259.8 (3).
on principle, there is a provision in the Civil Practice Act to the
effect that a judge, for good cause shown, on special notice to the
opposite party, may extend the time for putting in any pleading
or the doing of any act which is required by the rules to be done,
within a limited time, not only before but even after the expira-
tion of the time.4

E. J. Medlin

SALES—MODIFICATION OF AGREEMENT—SHOULD UNPAID SELL-
ER'S LIEN REVIVE ON BUYER'S RETURN OF GOODS WITH REQUEST
FOR FULL CREDIT DESPITE DETERIORATION?—The Illinois Appellate
Court for the second district has recently held, in Excelsior Stove
and Manufacturing Company v. Venturelli,1 that where the
defendant had returned stoves purchased from the plaintiff, re-
questing by letter that their purchase price be applied against
the defendant's indebtedness, the plaintiff, after paying the
freight, uncrating the stoves, placing them in his stock, and
holding them five months without notifying the defendant that
his offer was not accepted, was then entitled, over objection, to
credit defendant with less than their purchase price.

An offeree is not generally bound to make reply to an unsolic-
ited offer, and his silence or inaction cannot be construed as
assent to such offer, lacking circumstances, such as prior course
of dealing between the parties, which raise a duty on his part to
answer.2 But any act of the buyer which he would have no right
to do if he were not the owner of the goods may be construed to
be acceptance.8

If the offer is accepted it must be accepted exactly as made, for
any deviations between offer and acceptance prevents the forma-
tion of a contract, and lacking a contract no rights can arise there-
under.4 If, therefore, the plaintiff in the instant case did accept
the defendant's offer of the stoves, it must have been on the con-
ditions stated in defendant's offer—that defendant be credited
with their purchase price.

4 Supreme Court Rules, rule 8 (5); Smith-Hurd's Ill. Rev. Stats. (1935),
Ch. 110, § 259.8 (5).
1 290 Ill. App. 502, 8 N. E. (2d) 702 (1937).
2 Williston on Contracts (Rev. Ed., 1936), I, § 91, and cases there cited.
See also 55 C. J. 96, and Wolf Co. v. Monarch Refrigerating Co., 252 Ill.
491, 96 N. E. 1063 (1911).
8 Wolf Co. v. Monarch Refrigerating Co., 252 Ill. 491, 96 N. E. 1063
(1911); Hall v. Bergschneider, 265 Ill. App. 118 (1932).
4 Standard Growers Exchange, Inc. v. Bredehoft, 227 Ill. App. 72 (1922);
Mackay v. Harvey, 90 Ill. 325 (1878); Middaugh v. Stough, 161 Ill. 312, 43
N. E. 1061 (1896); Davis v. Fidelity Fire Ins. Co., 208 Ill. 375, 70 N. E.
359 (1904).
DISCUSSION OF RECENT DECISIONS

If the plaintiff did not accept the defendant's offer, then he had no right in the stoves except as bailee, unless by reason of a seller's lien. The sales statute provides that an unpaid seller loses his lien "when the buyer or his agent lawfully obtains possession of the goods." The decision seems to intimate that in this case the lien, lost when possession of the stoves passed to the defendant, came back to the plaintiff, along with the stoves, when defendant returned them, as in the case of stoppage in transitu. However, before a bona fide stoppage in transitu can be effected, the buyer must have been insolvent which may or may not have been the situation in this case, and the goods must not have been received by the buyer or his agent. Should it be granted that an unpaid seller's lien had revested in the plaintiff with his new possession of the stoves, he might, of course, exercise that lien by rescission, or by sale of the goods, and an action for his damages.

No Illinois case is found, however, except those involving stoppage in transitu, which holds that a seller's lien, once lost, is regained by the seller regaining possession of the goods, and as stated, stoppage in transitu can be exercised only before the goods come into the buyer's possession.

It would seem, therefore, that plaintiff's rights in the goods were dependent upon whether or not he accepted the defendant's offer. If he did accept, either intentionally or by implication, it must have been in accordance with the terms of the offer. If he did not accept the offer there was no contract, and he had no property in the goods and no right to appropriate them to his own use, without the defendant's consent, at any price.

L. WHIDDEN

WITNESSES—ATTENDANCE AND COMPENSATION—WHETHER EXPERT WITNESS IS GUILTY OF CONTEMPT FOR REFUSING TO TESTIFY UNTIL PAID MORE THAN ORDINARY WITNESS FEE.—In Swope v. State et al. a roentgenologist was held guilty of contempt of court for refusing to testify as to the significance of certain x-ray plates until he had been paid at the trial, as agreed, a fee

5 Smith-Hurd's Ill. Rev. Stats. (1935), Ch. 1211/2, § 56(b).
7 The buyer must also have been insolvent before the unpaid seller, in possession of the goods as agent or bailee of the buyer, may exercise an unpaid seller's lien.
8 Smith-Hurd's Ill. Rev. Stats. (1935), Ch. 1211/2, § 58(a).
10 Smith-Hurd's Ill. Rev. Stats. (1935), Ch. 1211/2, § 60.
1 67 P. (2d) 416 (Kan., 1937).
of $25.00 for testifying, which amount was greatly in excess of
the ordinary witness fee prescribed by statute.

Although the decision cites and follows the holding of an
Illinois Supreme Court case decided in 1897,2 so that our law
is apparently the same, it involves an interesting question. The
defendant's argument was that by coming to court to testify he
lost a day of his time and consequent earnings which the ordinary
witness fee would not approach which resulted in his being
deprived of his property without due process of law. The court
pointed out that there was no violation of the due process clause
in that the witness had not been called upon to render any service,
but merely to testify as to what he had done and observed, and
that at the time he refused to testify no questions calling for
expert opinion had been asked him.

There remained the question as to whether it was equitable in
principle that a highly trained man capable of earning $100 a day
in his profession or business should, when called as an expert
witness, receive the same fee that would be paid a laborer who
could earn only $2.00 a day.

If such a condition is unfair it should be remedied by statute.
But although in England a scale of fees for witnesses is in effect
which seems to adjust the fee to the social importance of the wit-
ess and provides for an amount to be paid "gentlemen" for
"refreshment,"3 there seems to be no statutory grading of witness
fees in this country. On the contrary it seems consistent with our
theory of government, as stated in the instant case, to hold that
each citizen owes the duty of aiding in the settlement of contro-
versies, and that when, as here, a witness makes no special prepa-
raration, but is called upon only to testify as to what he knows,
though in the business world his opinion would be more valuable
than that of another citizen, each giving up his day in fulfillment
of that duty, he should be held equal in the eye of the law to
any other.

To follow the order of gradation of witness fees to its logical
conclusion would, as has been suggested4 result in only the rich
having expert witnesses because of the inability of poor litigants
to pay the set fee, which is not in accordance with the ideas of
equality upon which the United States is founded.

L. Whidden

2 Dixon v. People, 168 Ill. 179, 48 N. E. 108 (1897).
3 Annual Practice (1937), pp. 1894-5.