March 1938

Discussion of Recent Decisions

Chicago-Kent Law Review

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DISCUSSION OF RECENT DECISIONS

Bankruptcy—Taxes—Power of Courts to Reduce Taxes.—In the case of In re Lang Body Company the county treasurer of Cuyahoga County, Ohio, filed claims for real estate taxes against Lang Body Company, bankrupt. The trustee in bankruptcy objected to the allowance of these claims on the grounds that the valuations were grossly excessive. The referee made substantial reductions in the valuations. The District Court affirmed the order of the referee. The Circuit Court of Appeals set aside the order of the district judge on the ground that the assessments were shown to be merely excessive and not so grossly excessive as to be illegal. It held, however, that the bankruptcy court did have jurisdiction to reduce valuations of properties in process of bankruptcy by virtue of section 64 (a) of the Bankruptcy Act as amended, 11 U. S. C. A. 104 (a), which provides, "Upon filing the receipts of the proper public officers.

1 92 F. (2d) 338 (1937).
for such payments the trustee shall be credited with amounts thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court."

The case presents again the confusing question of the power of a court of bankruptcy to give relief from improper or illegal tax assessments. With respect to excise taxes, the power to give relief has, in general, been sustained. The courts have readily held that it is not necessary for the trustee to pay the tax first and apply for a refund but that he may appeal directly to the court. It has been held that the bankruptcy court has the power to reduce claims for corporate and franchise taxes; to reduce claims for income taxes; or where the income tax is levied and

3 New Jersey v. Anderson, 203 U. S. 483, 27 S. Ct. 137, 51 L. Ed. 284, 17 A.B.R. 63 (1906). Bankrupt, having failed to make a return, state of New Jersey levied assessment, for the license or franchise tax, in amount of $40,000,000. On the basis that capital stock had been reduced from $40,000,000, referee reduced the tax. Held that finding of state board of assessors as to amount of capital stock outstanding is not conclusive upon the bankruptcy court in determining amount of the tax.

In re Becker Co., 12 A.B.R. (N.S.) 732 (1928). Held, where state law imposes franchise tax on manufacturing corporations unless more than 50 per cent of its capital stock, issued and outstanding, is invested within the state, provided a report is filed with the proper board showing the right to exemption, the bankruptcy court should not allow a claim for franchise taxes against bankrupt which comes within the exemption, even though report was never filed.

In re Simcox, Inc., 243 F. 479, 40 A.B.R. 195 (1917). State of New York presented claim for taxes. District court approved reduction of claim by 50 per cent on basis that half of capital stock was used in manufacturing within the state and therefore exempt.

In re Heffron Co., 216 F. 642, 33 A.B.R. 443 (1914). In fixing taxes, New York state comptroller ignored claim of Heffron Co. that it was a manufacturing company with 60 per cent of capital employed in New York and therefore partly exempt. Master reduced franchise tax which was confirmed by district court.

In re E. C. Fisher Corp., 229 F. 316, 36 A.B.R. 509 (1915). Tax commissioner of Massachusetts acted on a padded and false return made by corporation and valued stock at fifty dollars per share when it was really worthless. Held, tax was not due and claim was expunged.

In re Thermodyne Radio Corp., 26 F. (2d) 716, 12 A.B.R. (N.S.) 192 (1928). Claim against bankrupt by state of N. Y. for franchise taxes was reduced by referee. Affirmed by district court.


U. S. v. Eyges, 286 F. 683 (1923). Company adjudged bankrupt July 15, 1921. At that time tax for year ending June 30, 1917, was due and unpaid.
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no taxable income has been earned to disallow the entire tax;\textsuperscript{5} and to set a time after which the United States cannot file a claim for income taxes;\textsuperscript{6} but it has been denied the power to re-examine or redetermine questions relative to an income tax deficiency after they have been determined and an order has been entered by the Board of Appeals.\textsuperscript{7}

It has also been held that the Federal bankruptcy court may reduce personal property taxes,\textsuperscript{8} and even in a case where, under state law, it is too late to review or offer a defense to the tax, the court may, nevertheless, decide whether or not the property

Government had filed no claim in the bankruptcy proceedings. Held, since trustee had no knowledge of this tax and if he distributed the assets the United States could not come in later and collect same.

In re General Film Corp., 274 F. 903, 48 A. B. R. 149 (1921). Government filed two claims for income taxes, one for year 1914. This claim had never been assessed and time for assessment seems to have expired. Claim for 1915 was for taxes in addition to amount returned by the corporation for that year. Referee disallowed both claims. Affirmed on grounds of Sec. 64a of Bankruptcy Act.

Comacho v. International Express & Foundry Co., 48 A. B. R. 317 (1922). Here bankrupt voluntarily inflated value of his property and returned it for assessment at an amount far in excess of its actual value. A claim for taxes based on such assessment was held to be not preferred as against the claims of bona fide ordinary creditors of the bankrupt.

And see In re Robin, 32 A. B. R. (N. S.) 462 (1937); In re Wyley Co., 292 F. 900 (1923).

\textsuperscript{5} In re Sheinman, 14 F. (2d) 323, 8 A. B. R. (N. S.) 623 (1926).

Collector of Internal Revenue filed proof of debt for income taxes for 1919, 1920, 1921. Bankrupt had filed return for 1919 and had paid small tax. Claimed he did not earn taxable income in 1920 and 1921. Collector assessed taxes after petition in bankruptcy was filed. Referee disallowed claim. Affirmed.

\textsuperscript{6} In re Mutual Parlor Suite Co., 11 A. B. R. (N. S.) 116 (1927). Order of referee directed Collector of Internal Revenue to file claim within 60 days or be barred. Served Feb. 8, 1927. Collector notified trustee he desired to make additional claim for income taxes for year 1922. Claim filed April 27, 1927. Trustee filed objections. Notice of hearing served on collector. Latter failed to appear at hearing and claim was expunged. Held, bankruptcy court is not concluded by findings of the Collector of Internal Revenue as to amount due.

In re Stavin, 12 F. (2d) 471 (1925). On Oct. 5, 1925, referee filed order directing United States to file within sixty days after service any and all claims for taxes or be forever barred. Similar order on state tax department.

\textsuperscript{7} Time for filing proof of claim as permitted by Sec. 57n of bankruptcy act was April 28, 1926. Petition to review orders by trustee. United States made no appearance. Held, under Sec. 64a of bankruptcy act, claims for taxes should be promptly determined without waiting for expiration of year allowed for filing of ordinary claims.


\textsuperscript{8} In re Carlisle Packing Co., 12 F. Supp. 11 (1935).

In re United Five & Ten Cent Store, Inc., 242 F. 1005, 40 A. B. R. 146 (1917). While district court disaffirmed referee's report and allowed tax
supposed to be taxed actually existed; and previous failure of
the bankrupt to follow the prescribed statutory provisions for
obtaining review is not fatal to re-examination in bankruptcy.

However, the bankruptcy court will not go so far as to permit the
trustee to urge as an offset to a tax a claim for refund that is
barred by the statute of limitations.

The right of a bankruptcy court to reduce the assessed valua-
tions placed on real property by local bodies was sustained for
the first time in 1930 when the Circuit Court of Appeals, in
Henderson County v. Wilkins, reduced the valuation of a piece
of hotel property from $250,000 to $110,000 and held that a
referee in bankruptcy had the power to reduce the valuations
of real estate below that set by the assessor. This holding has
subsequently been sustained by several other cases. The right
assessed by city of Trenton, N. J., it did say that "there is no doubt that
federal courts have the power to revise state taxes."

In re Florence Commercial Co., 19 F. (2d) 468, 10 A. B. R. (N. S.) 284
(1927). County seized stock of merchandise of bankrupt for purpose of en-
forcing its tax claims. Trustee prayed for show-cause order, to end that,
upon a hearing, the validity and amount of taxes might be determined.
Held, court had power to require county to file statement of taxes and to
restrain sale of property in the meantime.

In re Bradley, 16 F. (2d) 301, 9 A. B. R. (N. S.) 269 (1926). Petition to
review order of referee denying trustee's motion to expunge five claims filed
on behalf of city of New York for personal property taxes. Trustee main-
tained bankrupt owned no property in city. District court held that referee
did have power to determine the amount of taxes claimed against bankrupt's
estate by the Federal government, by a state or municipality.

It has also been held that bankruptcy courts' power under Bankruptcy Act
to re-examine claims for state taxes made against bankrupt estates and to
allow them only for amount which appears to be justly due does not extend
to reorganization of corporation under Bankruptcy Act until liquidation order
has been made. In re A. V. Manning's Sons, 16 F. Supp. 932 (1936).

Tax was assessed and levied against bankrupt and was neglected until a time
when under a state law no review or defense to the tax could be had. Held,
the court could, nevertheless, decide whether the property supposed to be
taxed actually existed. Finding it did not exist, it could expunge the tax.

Contra, In re Perlmutter, 256 F. 860 (1919). Under New Jersey statute
taxpayers were entitled to have deducted, for purposes of taxation, from the
value of personal property, money, etc., as well as bona fide debts due to
creditors residing within the state. Bankrupt had never filed with state any
claim for such exemptions or reductions. Held, bankruptcy court could
not now reduce assessments by amounts of such debts.

In re Perlmutter, supra, n. 10.

Dickinson v. Riley, 86 F. (2d) 385 (1936). Referee reduced tax claim
of county for real estate taxes by almost 50 per cent. District court modified
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thus assumed by the bankruptcy court had been specifically denied in an earlier case\(^4\) and again in the later case of *In re Gould Manufacturing Company.*\(^5\)

In the latter case, the court, on the theory that tax claims do not belong in bankruptcy proceedings, held that the referee had no power to change such valuations; that sovereignties on whose order of referee and held entire tax less penalty due. Affirmed by Circuit Court of Appeals, but latter court did not deny right of bankruptcy court to fix amount of tax.

\(^4\) *Cross v. Georgia Iron & Coal Co.*, 250 F. 438 (1918). Execution in favor of tax collector for taxes levied on real property of bankrupt. On petition that assessment was excessive lower court enjoined sheriff from enforcing the execution and ordered the questions as to the assessment be submitted to arbitration. Arbitrators assessed property at nearly figure set by county. Trustee's tenant claimed latter valuation excessive, and court reduced same from $250,000 to $175,000. Upon appeal, court held that assessment of property for taxation can be validly made only by an officer of body designed by law to make it.

\(^{15}\) 11 F. Supp. 644 (1935). Taxes amounting to $11,904.95 on property of delinquent for years 1930, 1931, 1932, and 1933 had been returned as delinquent. Upon petition of trustee property was authorized to be sold free of incumbrances, including tax levies. However, the order for sale included a provision that proceeds of sale were to be used to redeem land from the taxes then a lien thereon. Sale was made but trustee filed objection to taxes on the grounds they were excessive. Upon a hearing the County objected to the jurisdiction of the bankruptcy court to entertain the application as one for the reduction of taxes. Referee overruled objection to the jurisdiction. Referee then reduced the valuation so as to reduce tax to $6,347, which he directed trustee to pay. Reversed.

Held, "Taxes are sovereign imposition, not filed as claims for 'debts,' but to which functionaries who administer bankrupts' estates are bound to give heed as preferentially assertable against property in their hands, or against bankrupts. . . . Now . . . taxes—except when challenged for illegality . . . are incontestable." The court then compares the first part of the bankruptcy act which contains a duty of the trustee to pay preferentially and in full the taxes "legally due and owing by the bankrupt" and the last part of the act which provides "in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court" and holds that the first section is so clear that it would be inconsistent to hold that "the bankruptcy court was endowed with a power to acknowledge validity and legality of imposition as against the bankrupt, as tested by the law of the taxing sovereignty, and at the same time revise the impositions upon general notions of greater fairness, merely because of the advent of bankruptcy. . . . Obviously every attack on 'legality' must involve, in whole or in part, an attack on 'amount'; but conversely, the 'amount' of a tax may not be 'legally' questioned merely because deemed too high, or because an assessor's judgment on values may be shown to have been optimistic." The Federal Court can not "free itself from every test which the law of the taxing sovereignty provides for assessment and levy, or the settled law respecting 'questioning' either of them."

Referring again to the first section of the act, the words "legally due and owing by the bankrupt" refer to what power of imposition? "Can it be said that no tax is to be regarded as legally due and owing until the bankruptcy court puts upon it a stamp of 'legality' which may not, or need not, respect such tests as must be put upon it by the law of the particular taxing sovereignty?"
behalf tax claims are assertable are not "parties" to the bankruptcy proceedings in the ordinary sense; and that when an assessing functionary, upon ample evidence, makes a determination within the power granted by law, his or its judgment and discretion, honestly exercised, is not subject to substitution or mere revision by any judicial tribunal. In an exhaustive opinion the court said, "As between federal and state governments the courts of each recognize the plenary power of the other to establish and enforce taxing systems, and, with exceptions which go to legality, the range of disputation respecting matters of fact excludes possibility of mere 'revision' or 'reduction' and section 64 (a) contains no such power." This case has recently been followed by In re Schack, wherein the court discusses both the Wilkins case and the Gould case, and declares the latter to be the sounder law.

A possible limitation upon the power conceded courts of bankruptcy by some of these decisions should be noted. In all of the cases above cited the taxing bodies filed their claims in the bankruptcy courts and thereby, in a sense, submitted themselves and their rights to the jurisdiction. Could a bankruptcy court, in selling the property free of the lien to taxes and transferring the lien to the proceeds, revise the amount of the taxes, where no claim had been filed? No case so holding has been discovered; only dicta in cases where claims have been filed and inferences drawn from the sustaining of the power to sell free of the lien of taxes suggest such a proposition.

What precisely is the nature of this function exercised by the courts of bankruptcy? Is it that of reviewing tax assessments after the manner of an administrative board, or is it merely the function commonly exercised by courts of equity of invalidating

16 17 F. Supp. 437 (1936). County collector of Cook County, Illinois, filed petition for payment of taxes due county. Trustee claimed taxes were excessive. Held, it was not function of the bankruptcy court to act as a board of review to supervise the legally constituted assessing bodies.
17 In re Davenport Dry Goods Co., 9 F. (2d) 477 (1925). Company adjudged bankrupt Jan. 19, 1924. Trustee, during February, 1924, sold stock free of all liens per order of court and paid dividend to creditors. On Jan. 16, 1924, assessor of city of Davenport assessed stock of merchandise and on Jan. 1, 1924, the county assessor did likewise. Tax claims filed and priority claimed. Held, tax not "due and owing"; it existed only in the existence of the power which had not yet been exercised.
Van Huffel v. Harkelrode, 284 U. S. 225, 52 S. Ct. 115, 76 L. Ed. 256, 18 A. B. R. (N. S.) 730 (1931). Van Huffel bought property at sale made pursuant to an order of bankruptcy court which directed all liens be marshalled; that property be sold free of incumbrances. Treasurer contended that judgment of the bankruptcy court authorizing and confirming the sale free from the tax lien was a nullity because court was without power
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taxes, in whole or in part, by reason of special circumstances? It seems that it is clearly the latter. In the principal case the Circuit Court of Appeals, while affirming the general power to reduce taxes, reversed its exercise in the particular instance because no such special circumstances were shown to be present.

Courts of equity, both state and Federal, proper jurisdictional facts existing, will give general relief where the tax is void, whether because unauthorized by law\(^{18}\) or because the property is exempt;\(^ {19}\) in case of mistake, as where the taxpayer does not own the property in question;\(^ {20}\) in cases of fraud, actual or constructive, that is, where the valuation is grossly excessive;\(^ {21}\) where there has been intentional or systematic discrimination;\(^ {22}\) and where there is no other hearing, judicial or administrative, available with respect to the amount of the tax.\(^ {23}\) Clearly, however, courts of equity will not usurp the functions of boards of tax appeals and take jurisdiction merely for the purpose of substituting their judgment for that of an administrative body or official.

If, as seems to be the case, the courts of bankruptcy will give relief only in those situations where a court of equity might, then the giving of such relief is simply a question of propriety and of statutory construction; if on the other hand the bankruptcy court should go further, then with respect to state taxes a serious problem of Federal invasion of state sovereignty might be presented—even a possible question under the Eleventh Amendment.

The only plausible reason for allowing the bankruptcy court to give relief beyond that available in courts of equity would be to sell property of bankrupt free from existing lien for taxes; and also because it did not acquire jurisdiction over the state in that proceeding. Brandeis, J. held that power to sell property of bankrupt free of incumbrances is granted by implication. Like power has long been exercised by federal courts sitting in equity when ordering sales by receivers on foreclosure.

\(^ {19}\) People's Gas Light & Coke Co. v. Stuckart, supra, n. 18.
\(^ {20}\) Kelly v. Jones, 290 Ill. 375, 125 N. E. 334 (1919).
\(^ {21}\) People's Gas Light & Coke Co. v. Stuckart, supra, n. 18.
\(^ {23}\) Londoner v. City and County of Denver, 210 U. S. 373, 28 S. Ct. 708, 52 L. Ed. 1103 (1908); Great Lakes Steel Corp. v. Lafferty, 12 F. Supp. 55 (1938).
that a taxpayer, approaching or having reached insolvency, loses interest in the property and does not attempt to prevent unfair assessments by appealing to a board of review and thus, in effect, inflicts a penalty on creditors who later find themselves, through laches on the part of the bankrupt, without a remedy at law for correction. Certainly the granting of such relief would present the anomalous situation (in a case where no fraud, either actual or constructive, existed) of a trustee in bankruptcy receiving more property and greater rights than the bankrupt himself had at the time of adjudication.

G. Kloek

Constitutional Law—Due Process—Whether Wage Assignments to Employment Agencies Are Subject to Police Powers.—The sole question involved in People v. Redfield,1 is to what extent an employment agency is affected with a public interest so that it becomes subject to the regulation of the police power.

The defendant, a licensed employment agent, was convicted and fined by a judge of the Municipal Court of Chicago for requiring an applicant to sign a judgment note and an assignment of a portion of her wages as security for her fee, in violation of that portion of Section 5 of the Illinois statute on private employment agencies, which reads as follows: "No such licensed person shall require any person who has applied for and obtained a position through such licensed person to sign any note authorizing a confession of judgment for the payment of any fees or require any applicant for a position to sell, transfer or assign any salary or wages due the applicant or to become due from his employer."2 In reversing the judgment of the Municipal Court and holding unconstitutional that section of the act under which Redfield was prosecuted and convicted, the court among other things said that "It is established that the business of conducting an employment agency is both lawful and beneficial"3 and "not inherently immoral or dangerous to the public welfare,"4 and

1 366 Ill. 562, 10 N. E. (2d) 341 (1937).
2 Ill. Rev. Stat. 1937, Ch. 48, § 197e.
4 Adams v. Tanner, supra.
there is nothing in the nature of the business which in any way threatens the public health, safety, or morals.\(^5\)

In this connection, however, there is no question that employment agencies may be required to obtain a license before transacting business, and are subject to a degree of regulation.\(^6\) It is equally well decided that such a business is not so affected with a public interest that a state may fix the charges made for the services rendered.\(^7\) Any regulation attempted, however, must be

\(^5\) Ex parte Dickey, 144 Cal. 234, 77 P. 924, 66 L. R. A. 928, 103 Am. St. Rep. 82, 1 Ann. Cas. 428 (1904).
\(^6\) Brazee v. Michigan, 241 U. S. 340, 36 S. Ct. 561, 60 L. Ed. 1034 (1916), in which the Act before the court provided for licensing, bonding, keeping of records, giving receipts for fees paid, a limitation upon such fees, prohibition of sending an applicant to an employer who had not applied to the agency for help, and the refunding of fees in certain cases. The Supreme Court held that the state had power to require licenses for employment agencies, and to prescribe reasonable regulations, but declined to pass upon the section relating to the limitation of fees as not necessary to the decision, but held that it was severable from the rest of the Act.

In Hanley v. Moody, 39 F. (2d) 198 (1930), the District Court, N. D. Texas, upheld that part of a statute which required employment agencies to procure a license, pay a tax, keep books, and allow inspection of the same, but held a section requiring one furnishing transportation of eleven or more inhabitants to be employed in another state to post a bond to furnish return transportation to be an unconstitutional interference with the liberty to contract.

In Karr v. Baldwin, 57 F. (2d) 252 (1932), the court upheld the regulation of employment agencies as outlined in Hanley v. Moody, and in addition a section prohibiting false and misleading advertising, but declared unconstitutional that part of the statute fixing the fees which might be charged.

In National Employment Exchange v. Geraghty, 60 F. (2d) 918 (1932), the Circuit Court of Appeals upheld a section of a New York employment agency law making the retention of fees charged contingent upon success in obtaining employment as a reasonable regulation. The same statute contained a section fixing the gross fees to be charged. However, this section was not considered, the court merely stating that if this section was invalid, it was severable from the rest of the statute.

See also Adams v. Tanner, supra; Price v. People, supra; Rosetti v. Chicago, Rock Island and Pacific Ry. Co., 203 Ill. App. 200 (1917); Williams v. Fears, 179 U. S. 270, 21 S. Ct. 128, 45 L. Ed. 186 (1900).

\(^7\) In Ribnik v. McBride, 277 U. S. 350, 48 S. Ct. 545, 72 L. Ed. 913, 56 A. L. R. 1327 (1927), the New Jersey statute before the court required licenses for the conduct of employment agencies and fixed a schedule of fees which might be charged only with the approval of the Commissioner of Labor. The majority opinion by Mr. Justice Sutherland declared the statute unconstitutional as being a deprivation of property without due process of law. The reasoning of the majority was based upon Tyson & Bro. v. Banton, 273 U. S. 418, 47 S. Ct. 426, 71 L. Ed. 718 (1927), where a New York statute restricting the resale price of theatre tickets to fifty cents in advance of the price printed on the face of the ticket was held unconstitutional. It was the Court's view that there was no essential difference between a theatre ticket broker and an employment agent, and since a theatre ticket broker was not subject to price fixing regulation, an employment agent was likewise exempt. Mr. Justice Sanford concurred because he considered Tyson & Bro. v. Banton, a decision in which he dissented, to be controlling. The reasoning expressed by the dissenting opinion is stronger,
reasonable, and reasonable grounds must exist for making a distinc-
tion between those who fall within the scope of the regulation
and those who do not. This statute, therefore, must be
upheld unless the regulation is unreasonable and discriminates
between persons in substantially similar situations.8

A law is not general or constitutional if it confers special
privileges or imposes peculiar disabilities or burdensome condi-
tions in the exercise of a common right upon a class of persons
arbitrarily selected from the general body.9 Classification must

broader and more in keeping with the mind of the legislature in an attempt
to correct existing abuses. Mr. Justice Stone contended that "whenever any
combination of circumstances seriously curtails the regulative force of com-

petition, so that buyers and sellers are placed at such a disadvantage in the
bargaining struggle that a legislature might reasonably anticipate serious
consequences to the community as a whole," price regulation is within the
State's power. 273 U. S. at 451. The case has been amply reviewed and the
majority opinion disapproved in 38 Yale L. J. 225 (1928), 17 Cal. L. Rev.
55 (1928), 28 Col. L. Rev. 970 (1928), 14 Cornell L. Q. 75 (1928), 3 U. of
Cin. L. Rev. 69 (1929). See also City of Spokane v. Macho, 51 Wash. 322,

8 Thomas M. Cooley, A Treatise on the Constitutional Limitations
also arise whether a regulation made for any one class of citizens entirely
arbitrary in its character, and restricting their rights, privileges, or legal
capacities in a manner before unknown to the law, could be sustained, not-
withstanding its generality. Distinctions in these respects must rest upon
some reason upon which they can be defended—like the want of capacity in
infants and insane persons; and if the legislature should undertake to provide
that persons following some specified lawful trade or employment should not
have capacity to make contracts, or to receive conveyances, or to build such
houses as others were allowed to erect, or in any other way to make such
use of their property as was permissible to others, it can scarcely be doubted
that the act would transcend the due bounds of the legislative power, even
though no express constitutional provision could be pointed out with which
it would come in conflict."

9 City of Pasadena v. Stimson, 91 Cal. 238, 27 P. 604 (1891). In Eden
v. People, 161 Ill. 296, 43 N. E. 1108, 32 L. R. A. 659, 52 Am. St. Rep. 365
(1896), the court held that to single out a certain class of men (i. e., barbers)
and deny them the right to pursue their ordinary vocation on Sunday was
deprivation without due process of law. In Bailey v. People, 190 Ill. 28, 60
N. E. 98 (1901), a statute restricting the number of persons a lodging-house
keeper may allow to sleep in one room, but making no provision for inn-
keepers, was declared void for arbitrary discrimination.

In Connally v. Union Sewer Pipe Co., 184 U. S. 540, 22 S. Ct. 431, 46
L. Ed. 679 (1901), the question of equality of protection and privilege was
before the court and the court said, "The difficulty is not met by saying that,
generally speaking, the state when enacting laws may, in its discretion, make
a classification of persons, firms, corporations, and associations, in order to
subserve public objects. For this court has held that classification 'must
always rest upon some difference which bears a reasonable and just relation
to the act in respect to which the classification is proposed, and can never
be made arbitrarily and without any such basis . . . But arbitrary selection
can never be justified by calling it classification. The equal protection
demanded by the fourteenth amendment forbids this . . . No duty rests more
imperatively on the courts than the enforcement of those constitutional
be based upon some real and substantial distinction bearing a reasonable and just relation to the things in respect to which such classification is imposed.\(^{10}\)

Wage assignments are valid in this state if made for a valuable consideration and untainted by fraud,\(^{11}\) and the validity of judgment notes is recognized by the Civil Practice Act.\(^{12}\) Judgment notes and wage assignments are not peculiar to employment agencies, but are in common use in all kinds of business transactions. Such security may be required of those seeking credit from banks, pawnbrokers, wage loan corporations, small loan companies, so-called "loan sharks" and others. There is not such a distinction between employment agencies and all these other forms of business enterprise as will warrant the classification attempted by this statute, nor is this device more apt to be abused flagrantly by them.

Consequently, the section of the statute which prohibits employment agencies from accepting wage assignments or judgment notes while permitting that right to be enjoyed by all others is a classification not based upon a reasonable ground and is a violation of the constitutional guaranty of equal protection of the laws.\(^{13}\)

provisions intended to secure that equality of rights which is the foundation of free government. . . . It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and that in all cases it must appear, not only that the classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection." This case was followed in People v. Butler St. Foundry and Iron Co., 201 Ill. 236, 66 N. E. 349 (1903).

10 Southern R. Co. v. Greene, 216 U. S. 400, 30 S. Ct. 287, 54 L. Ed. 536, 17 Ann. Cas. 1247 (1909). In Mutual Loan Co. v. Martell, 200 Mass. 482, 86 N. E. 916, 43 L. R. A. (N. S.) 746 (1909), size was held to be an appropriate index to classification in the case of a statute which prohibited wage assignments to secure small loans, unless certain conditions were performed, but which permitted such assignments without restriction to secure large loans. The reason for the permitted classification was the fact that the practice of exacting excessive rates of interest was largely, if not entirely, confined to small loans. In Millett v. People, 117 Ill. 294, 7 N. E. 631 (1886), the Supreme Court held that the legislature had no right to single out owners of coal mines as a distinct class and provide that they should bear burdens not imposed on other owners of property. See also Frorer v. People, 141 Ill. 171, 31 N. E. 395, 16 L. R. A. 492 (1892).


12 Civil Practice Act, Section 50, subd. (5) ; Ill. Rev. Stat. 1937, Ch. 110, § 174 (5).

13 Lasher v. People, 183 Ill. 226, 55 N. E. 663 (1899) ; Starne v. People, 222 Ill. 189, 78 N. E. 61 (1906).
The decision of the court is predicated upon the protection afforded the freedom of contract by the Constitution. The right to contract and to enforce contracts is a property right within the meaning of the constitutional provision that no person shall be deprived of life, liberty or property without due process of law. Thus, wage assignments and judgment notes, which are evidences of a contractual obligation, given to employment agencies, may not be put upon a different footing from other contracts simply because the recipients thereof are employment agencies, since to make an act done by one person penal and impose no penalty for the same act under like circumstances upon another is unjust and unreasonable.

In short, this case may be cited as additional authority for the well established proposition that the legislature cannot, under the guise of the police power, unreasonably interfere with a lawful and useful occupation or business, which is neither injurious in and of itself nor because of the manner in which it is carried on.

J. R. Scott

Constitutional Law—Equal Protection of Laws—Imposition of Penalty or Forfeiture in “Heart Balm” Legislation.—The Indiana Supreme Court lately had occasion to consider the constitutionality of its “Heart Balm” Act in Pennington v. Stewart, which was a civil action by a husband based upon the alienation of his wife’s affections. Defendant demurred to the complaint, and Pennington assigned as error the action of the trial court in sustaining the demurrer, on the ground that the statute referred to had abolished the cause of action set forth in the complaint. He contended that this statute violated Article 1, Section 12, of the Indiana Constitution, which provides in part

14 City of Carrollton v. Bazzette, 159 Ill. 284, 42 N. E. 837 (1896); Booth v. People, 186 Ill. 43, 57 N. E. 798 (1900); Ritchie v. People, 155 Ill. 98, 40 N. E. 454 (1895).
15 Tugman v. City of Chicago, 78 Ill. 405 (1875); Chicago v. Rumpff, 45 Ill. 90, 92 Am. Dec. 196 (1867).

1 Acts of 1935 of the General Assembly of the State of Indiana, Ch. 208; this statute abolishes all civil causes of action for breach of promise of marriage, alienation of affections, criminal conversation, and seduction of females over the age of 21, and declares it a felony to file, cause, or threaten to file, any paper or pleading seeking recovery on such a cause of action, punishable by a fine of $100 to $1,000 and/or imprisonment from one to five years.
2 10 N. E. (2d) 619 (Ind. 1937).
that "every man for injury done to him in his person, property, or reputation, shall have remedy by due course of law."

The Supreme Court of Indiana sustained the demurrer and held valid that part of the act which abolished the right of action for alienation of affections, upon the ground that a husband has no property right in his wife's affections, and that the legislature has power to pass such laws, regulating the institution of marriage, as public policy should dictate.\(^3\) The court, however, without being requested so to do, branded as unconstitutional the penal provisions of the act because it considered that they denied equal protection of the laws. In declaring the penal provisions void, the court relied upon dictum in *Cotting v. Godard*,\(^4\) and upon *Ex parte Young*.\(^5\)

It would seem that the case most strongly relied upon by the Indiana Court, that of *Ex parte Young*, has no application to the present case. The statute there under consideration imposed an arbitrary scale of railroad freight rates fixed by the legislature and provided punishment for any one who violated the same. The United States Supreme Court held the law invalid because the penalties imposed thereby so burdened a resort to the courts as to deny equal protection of the laws. It is important to note that the Supreme Court expressly limited its remarks concerning the penal provisions of the act there under consideration to cases involving the fixing of rates and to other questions requiring an extensive investigation of facts. The court specifically exempted from the operation of the decision "the ordinary case of a statute upon a subject requiring no such investigation and over which the jurisdiction of the legislature is complete in any event." *Ex parte Young* is a protection largely against the danger of legislation which imposes complicated rate schedules upon public utilities and provides penalties for violation thereof without first permitting a judicial consideration of the reasonableness of the rates before they take effect.

In *Terrace v. Thompson*,\(^6\) the United States Supreme Court held valid a Washington statute forbidding aliens from owning any interest in lands and providing for forfeiture and criminal prosecution against any grantor violating the same. The penalties provided for the violation of the act in that case were

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\(^4\) 183 U. S. 79, 22 S. Ct. 30, 46 L. Ed. 92 (1901).


\(^6\) 263 U. S. 197, 44 S. Ct. 15, 68 L. Ed. 255 (1923).
sufficient to bring it within the purview of Ex parte Young, but the Supreme Court merely decided that the penalties justified a court of equity in taking jurisdiction to determine the validity of the statute. It has been suggested elsewhere that this case may indicate that the penalties attached to "Heart Balm" legislation provide only a basis for a determination by a court of equity of the validity of such laws.⁷

It does seem that the Indiana Statute acts more directly upon the right to resort to the courts than apparently any statute involved in a reported case. The question still remains, however, whether the right to use the courts extends to allow their use for an unlawful purpose. The purpose of the Indiana Act was to promote public morals by abolishing certain civil causes of action which the legislature deemed to be conducive to blackmail and extortion. It would seem that such an enactment, if it bears a reasonable relation to its announced purpose, would undoubtedly be within the police power, which allows the state to define, within constitutional limits, what conduct shall be criminal and to punish such conduct.⁸

Furthermore, it would seem that the validity of a criminal statute may be properly tested only in a proceeding to punish the commission of a crime, unless there is such irreparable harm threatened to property rights as will justify the intervention of a court of equity.⁹ One who violates such a law would seem to have sufficient opportunity to test its constitutionality in a prosecution for the commission of the offense charged.¹⁰ If the statute is valid, it would seem that he must suffer the consequences of a violation of the plainly declared public policy of the state.

Illinois has an act similar to that of Indiana here under consideration, except that the Illinois law does not abolish the right of action for seduction.¹¹ For that reason the present case is of great importance and interest in this state. If the penal provisions of the act should be declared void, its fundamental purpose, that is, the prevention of blackmail and extortion under threat of publicity resulting from the filing of suit on one of

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⁷ Note, 30 Ill. L. Rev. 764, 777.
¹⁰ Sherod v. Aitchison, 71 Or. 446, 142 P. 351 (1914).
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the causes therein abolished, also fails. The effect of the Indiana decision is to allow litigants, despite the complete absence of a cause of action, to extort money under threat of the unfavorable publicity which would result from filing suit.

B. P. Morissette

Constitutional Law—Vested Rights—Whether a Pension Is a Gratuity Subject to Change at the Will of the Legislature.—The Illinois Legislature in 1927 provided for the compulsory and voluntary retirement of school teachers and at the same time fixed annuities to be paid to both classes.1 By amendment2 in 1935, the Legislature reduced the amount of the pension and did away with the provision for voluntary retirement. The pensions or annuities provided for by the above acts were separate and distinct from, and have no effect upon, those provided for by the Teachers Pension Act of 1909, as amended.3

In Dodge v. Board of Education of Chicago,4 the appellants, teachers who had retired under the 1927 law or were desiring to retire under the law in effect before the amendment, sought to enjoin the reduction of the pension, contending that their rights were fixed and determined by the law as it existed at the time of the application for the annuity and could not be abolished or reduced by subsequent legislation; that such legislation as applied to them was an attempt to take away a vested right without due process and to impair the obligation of a contract.

The Supreme Court of Illinois held that pensions are not based on contract, but are merely expectancies based on the anticipated continuance of existing law, and future installments are not vested property rights, but may be changed at will by the legislature. This decision was affirmed by the Supreme Court of the United States,5 and is in accord with the great weight of authority that a pensioner has no vested right in his pension, which is a bounty of the government, and that the legislature has the power to give, withhold, distribute, or recall at its discretion.6

The courts apparently hold as they do because although teachers are not, properly speaking, public officers, their employment is in a public capacity, and they are treated in some cases as

3 Ill. Rev. Stat. 1937, Ch. 122, § 175 et seq.
4 364 Ill. 547, 5 N. E. (2d) 84 (1936).
5 Dodge v. Board of Education, 58 S. Ct. 98, 82 L. Ed. 77 (1937).
There is uniformity of opinion that the right of a public officer to future compensation does not rest on contract express or implied and consequently this right is not within the constitutional provision against impairment.

The same result is reached even though a portion of the fund is gathered by withholding part of the compensation of the employee or officer. Though called part of his compensation, the employee does not receive, control, nor have power of disposition over it, nor can he prevent its application to the fund. All he has is a mere expectancy based on the continuation of the present general law, which may vest upon the happening of an event. Upon the happening of the event, however, the pensioner's vested right is only in such payments as have accrued and are unpaid before a change in the law is made.

7 22 R. C. L. 397; 54 L. R. A. 572.
10 In Pennie v. Reis, 132 U. S. 464, 10 S. Ct. 149, 33 L. Ed. 426 (1889), the application of a fund accumulated by withholding part of the officer's compensation for a benefit to be paid upon death was changed by statute. The court held that there was no contract on the part of the state that the funds' disposition should always continue as originally provided; until death occurred there was no vested right, but the interest was a mere expectancy created by law and liable to be revoked or destroyed by the same authority; Eddy v. Morgan, 216 Ill. 437, 75 N. E. 174 (1905); Pecoy v. Chicago, 265 Ill. 78, 106 N. E. 435 (1914), a statute in force at the time of appointment, granting a policeman a pension, does not form part of his contract, nor create vested property rights, even though he suffered a deduction from his compensation; People v. Retirement Board, 326 Ill. 579, 108 N. E. 220, 54 A. L. R. 1940 (1927); McCann v. Retirement Board, 331 Ill. 193, 162 N. E. 859 (1928), the right to a pension created by statute may be limited or restricted by a retroactive statute.
11 Pennie v. Reis, supra.
12 Thomas M. Cooley, A Treatise on the Constitutional Limitations (Boston: Little, Brown and Company, 1921), II, 749; Hughes v. Treager, 264 Ill. 612, 106 N. E. 431 (1914). In People v. Hanson, 330 Ill. 79, 161 N. E. 145 (1928), an amendment requiring a policeman to be fifty years of age in addition to serving twenty years as originally required, was held valid because the right to the pension was not a vested right, but a mere expectancy.
13 Gibbs v. Minneapolis Fire Dept. Relief Assn., 125 Minn. 174, 145 N. W. 1075 (1914), as between the state and members of the Fire Department, a pension is a mere gratuity and may be taken away, except so far as it has accrued, without affecting a vested right; Ryan v. Foreman, 262 Ill. 175, 104 N. E. 189, Ann. Cas. 1915B 780 (1914); Arnold & Murdoco Co. v. Industrial Commission, 314 Ill. 251, 145 N. E. 342, 40 A. L. R. 1470 (1924). In Beutel v. Foreman, 288 Ill. 106, 123 N. E. 270 (1919), a policeman, having served twenty years, applied for a pension. After the application an amendment made fifty years of age an additional requirement. The court held the amendment valid and retroactive, for no payments were due and no rights had vested. In Kavanaugh v. Police Pension Fund Assn., 134 Cal.
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The application of this doctrine, while hard enough upon those compelled to retire because of age, seems extremely harsh on those who voluntarily retired relying upon the statute in force at that time. One would believe that the surrender of a right to continue in employment would be sufficient consideration to support a statutory contract, and that the right to the pension would vest by reason of the recipient having performed all he was required to do. Though there is one decision, a Florida case, which supports this view, the result is still unsatisfactory to the pensioner, due to the limitations placed upon it. In this case a pension was reduced by the legislature from three hundred dollars to one hundred dollars per month. The court held that, while the right to the pension had vested in the sense that the legislature could not entirely deprive the pensioner of his pension, the retirement provision would not be construed as a contractual limitation binding upon the legislative prerogative to fix the amount, which might be reduced so long as the amount fixed was not unreasonably low. The Illinois courts, however, reject even this theory and flatly hold that no such right vests.

J. R. SCOTT

CRIMINAL LAW—SECOND OFFENSES AND HABITUAL CRIMINALS
—PROSECUTIONS FOR SUBSEQUENT OFFENSES WHEN PRIOR OFFENSES WERE PARDONED.—In the recent case of People v. Biggs, decided by the Supreme Court of California, it was held that a pardon of a crime within the purview of an habitual criminal statute did not operate to relieve the defendant from the additional penalty prescribed by such a statute for a second offense. The defendant had on two previous occasions been convicted of crimes in a foreign state and each time had obtained a pardon. He contended that these pardons operated to erase the former

50, 66 P. 36 (1901), the pension statute was repealed after the death of a policeman. The court held that his widow had a vested right in the amount due and unpaid.


15 Eddy v. Morgan, 216 Ill. 437, 75 N. E. 174 (1905); Hughes v. Treager, 264 Ill. 612, 106 N. E. 431 (1914); Beutel v. Foreman, 288 Ill. 106, 123 N. E. 270 (1919); Wall v. C. & O. Ry. Co., 290 Ill. 227, 125 N. E. 20 (1921); Pecoy v. Chicago, 265 Ill. 78, 106 N. E. 435 (1914); People v. Hanson, 330 Ill. 79, 161 N. E. 145 (1928); People v. Retirement Board, 326 Ill. 579, 108 N. E. 220, 54 A. L. R. 1940 (1927); McCann v. Retirement Board, 331 Ill. 193, 162 N. E. 859 (1928).

1 71 P. (2d) 214 (Cal., 1937).

convictions and consequently should not be considered as prior convictions to bring him under the statute.

In *People v. Dutton*, before the court at the same time on substantially identical facts, the following additional contentions were urged: First, by increasing defendant’s punishment on the basis of the prior conviction the court was denying full faith and credit to the foreign governor’s act in pardoning defendant; second, the defendant should have been allowed to show that the pardon was granted on the alleged ground that defendant was in fact innocent of the crime for which he was convicted.

The contention that a pardon not only relieves the convicted person of the penalty and, in crimes of this nature, restores his civil rights, but also removes the fact of the conviction, was disposed of by a quotation from a leading Kentucky Supreme Court decision, which is as follows: “The pardon relieved the convict of the entire penalty incurred by the offense pardoned and nothing else or more. . . . the augmented punishment is for the last, and not at all for the first offense; and of course a pardon of the first could, in no way or degree, operate as a pardon of the last offense or remission of any portion of the punishment denounced for the perpetration of it.” The same reasoning constitutes an answer to the contention regarding full faith and credit since if the question of augmented punishment is considered solely in connection with the last crime, there can be no problem as to the effect of the previous pardon or pardons. Prior convictions are matters of record, and the mere existence of such a record brings the defendant within the class of persons on whom the legislature has seen fit to impose a heavier penalty. The legislature undoubtedly has the right to impose such a burden.

The other contention of the defendant that since in his application to the Governor for pardon he alleged his innocence, the fact that the pardon was granted should be sufficient evidence that his prior conviction was erroneous and hence should not be used to bring him under the Act in question is adequately answered by the same reasoning that the increased punishment

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8 71 P. (2d) 218 (Cal., 1937).
4 Mount v. Commonwealth, 2 Duv. (63 Ky.) 93 (1865) and this view is adhered to in *Ex parte Garland*, 4 Wall. 333, 18 L. Ed. 366 (1867), concerning the competency of one to practice before the United States Supreme Court after having held office in the Confederate Government during the Civil War, for which act he had been pardoned by the President of the United States.
5 See note, 58 A. L. R. 22.
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is solely for the last crime and the record of the former conviction is not vitiated by the pardon.

There is a divergence in decisions as to whether or not a pardon so far removes the effect of a conviction that it cannot be used as the basis for the heavier penalty prescribed by an habitual criminal statute. The weight of authority would seem to be in accord with the holding of the court in the instant cases, but there is a substantial minority view to the effect that the pardon "reaches both the punishment prescribed for the offense and the guilt of the offender. . . . It obliterates in legal contemplation the offense itself, and hence its effect is to make the offender a new man."

The majority view with its emphasis on the fact that the prior judicial record should not be disturbed except by judicial proceedings would appear to be supported by the better reasoning. It is difficult to see how a pardon by the Governor of a state can operate to remove a conviction obtained through judicial proceedings, which conviction still remains a matter of record, and it is equally difficult to see how the chief executive can make a "new man" of the convicted person when most habitual criminal statutes make it mandatory that when the defendant has previously been convicted, the heavier punishment is to be applied.

Illinois has an habitual criminal act similar to the California statute, but it has not as yet been interpreted on this point. Probably the majority view will be followed, since it is supported by better legal reasoning, rather than the more humanitarian view of the minority.

6 See note, 58 A. L. R. 49.
7 Henderson v. State, 55 Fla. 36, 46 So. 151 (1908); Herndon v. Commonwealth, 105 Ky. 197, 48 S. W. 989 (1899); State v. Edelstein, 146 Wash. 221, 262 P. 622 (1927); People v. McIntyre, 163 N. Y. S. 528 (1917); People ex rel. Malstrom v. Kaiser, 236 N. Y. S. 619 (1929).
11 Williams v. People, 196 Ill. 173, 63 N. E. 681 (1902). In this case the defendant had been convicted on three prior occasions and had been pardoned for only one of them. The court held there were sufficient unpardoned prior convictions to bring the defendant within the act without regard to the one conviction for which he had been pardoned; hence, it refused to decide what effect the pardon would have had, had there been but one prior conviction.
However, the majority view gives rise to another problem which should be considered. Where a defendant was convicted for a crime of which he was in fact innocent and there is no legal remedy whereby he can have such conviction expunged from the record as seems to be the case, then, though later pardoned because of his innocence, he would, on being again convicted, suffer a heavier penalty by reason of the wrongful former conviction. Cases of this kind may be few, but the manifest injustice of such a situation warrants attention. The minority solves the problem by making it impossible for the situation to arise.

R. L. Tindall

Criminal Law—Stay of Execution of Sentence—Proper Time for Filing Application for Probation.—In the case of Trant v. United States, the defendant, who had been convicted of violating the counterfeiting laws of the United States, appealed to the Circuit Court of Appeals, which affirmed the conviction of the defendant in a decision rendered on March 23, 1937; by virtue of a commitment the Marshal took Trant into custody on March 29, 1937, and the prisoner filed an application for probation on March 30, 1937. The District Court held that it had no jurisdiction to hear such an application because the petitioner was in the custody of the Attorney General in execution of his sentence. The Circuit Court affirmed this ruling, saying that even though the defendant was being held in a local jail, he had begun to serve his sentence; the court took judicial notice of the practice of the Marshal of making trips to penitentiaries only at stated intervals and held section 709(a) of Title 18, U.S.C.A. applicable. The court then further stated that the

12 Saleen v. People, 41 Colo. 317, 92 P. 731 (1907), in which case the court suggested to a person shown to be innocent, after his full penalty had been paid, that his only recourse was to apply for a pardon. The defendant cannot controvert the record collaterally by proving his innocence because, if the court had jurisdiction, such is precluded by the former finding which is not void and hence the effect appears to be conclusive. The defendant cannot expunge the record by writ of error since that will only search "the record" and defendant's innocence is not apparent thereon, and he cannot use a writ of error coram nobis because his case is not in the class to which the writ is applicable. 16 C. J. 1326.
18 See E. M. Borchard, Convicting the Innocent (New Haven, Conn.: Yale University Press, 1932).
1 90 F. (2d) 718 (1937).
2 "Time when sentence begins to run. The sentence of imprisonment of any person convicted of a crime in a court of the United States shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of such sentence: Provided, That if any such person shall be committed to a jail or other place of deten-
right of one under sentence to make application for probation would be safeguarded by the court from an overzealous Marshal who might seek to cut off the defendant's statutory right through improper motives, but since there was no evidence of such motives in this case, it was proper for the Marshal diligently to act as the defendant was sentenced on April 25, 1936—almost a year before he was taken into custody.

This is the first occurrence of this particular factual situation since the passage of the statute which permits the courts to place defendants on probation after conviction. In other respects also, the decision is noteworthy and interesting. The court by this decision has held that one who is under sentence, but who has not begun to serve his sentence, is eligible to make application for probation even though he has appealed concerning the merits of his conviction—that is, the defendant can admit his guilt to the lower court, but assert his innocence in the appellate court. Further, the only time at which one is safe to make application for probation without great haste is during the pendency of an appeal; if one is not going to take an appeal but intends to ask the clemency of the trial court, or if one has not filed his petition at the time the mandate of an appellate court is handed down after he has appealed, the Marshal may proceed at once to take him into custody on a mittimus, provided the motive of the Marshal is not a desire to take away the right of application for probation.

The court does not discuss the possibility of defendant's waiver of his right of review by asking for probation, but clearly indicates that there would be no waiver. In spite of the seeming conflict of theory between an appeal and a petition for probation the view taken by the court seems correct. Apparently there are no cases stating that filing a petition will result in a waiver of the right of review, although there are three general groups of cases in which courts have inferred a waiver of appeal from the facts: (1) those in which the defendant accepts a parole, (2) those in which the defendant consents to entry of a suspended sentence, (3) those in which the defendant voluntarily pays a

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3 U. S. C. A., Tit. 18, § 724.
4 17 C. J. 48.
6 State v. Tripp, 168 N. C. 150, 83 S. E. 630 (1914); Renado v. Lummus, 205 Mass. 155, 91 N. E. 144 (1910).
fine when such is the sentence.⁷ Seemingly the intent of Congress prevented this case from becoming the nucleus for a fourth group; the statute authorizing probation is in general terms and in no way indicates that its provision should be in an alternative for any other right of the defendant. And in United States v. Nix,⁸ decided soon after the passage of the act,⁹ the court considered the evils to be remedied and the events leading up to the enactment of this act and in a dictum statement said that an application for probation is not a substitute for a motion for a new trial, review on appeal for errors at the trial, parole, or pardon.

G. W. McGurn

Insurance—Finality of Decree of Liquidation Under Act of 1935—Propriety of Order of Court Directing Insurance Director to Issue License to Company in Absence of Affirmative Showing that Company Had Complied with Statutory Provisions.—In People ex rel. Palmer v. Acme Plate Glass Mutual Insurance Company,¹ the Appellate Court of Illinois held that a decree of liquidation entered by a court under Section 4 of “An Act in relation to delinquent insurance companies, associations and societies”² was final and that after the lapse of thirty days from the entering of the decree the court was without jurisdiction to vacate, alter, or modify its original decree, although additional orders to effect the liquidation were proper.

The order of liquidation was entered on December 4, 1934, a receiver was appointed, and liquidation progressed until May 13, 1936. On that date the defendant company filed a petition asking that the order of liquidation be vacated on the ground that the company was solvent and no further cause existed to liquidate the company. The trial court found that by reason of new releases of claims and the procuring of additional cash the company was solvent, and an order was entered consistent with this view. The receiver was ordered dismissed, the liquidation proceedings terminated, and the defendant company was ordered to be reinstated and relicensed to re-engage in business. It was

⁷ Brown v. City of Atlanta, 123 Ga. 497, 51 S. E. 507 (1905); Town of Batesburg v. Mitchell, 58 S. C. 564, 37 S. E. 36 (1900); State v. Wells, 127 Minn. 252, 149 N. W. 286 (1914).
⁸ 8 F. (2d) 759 (1925).
¹ 292 Ill. App. 275, 10 N. E. (2d) 988 (1937).
² Smith-Hurd's Ill. Rev. Stats. (1935), Ch. 73, § 495 et. seq.
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further ordered that the Director of Insurance issue a license accordingly.

The Appellate Court, in holding the decree of December 3, 1934, to be final, cited *Chicago Life Insurance Company v. Auditor of Public Accounts,* wherein the court said: "The nature and character of the decree, as we conceive and the majority of the court think, settles the ultimate rights of the parties. It determines that the corporation is in such condition as to be liable to that proceeding. The remaining proceedings to be had, if this decree stands, will simply be in enforcement of this decree." The Supreme Court in the Chicago Life case regarded the decree as so far final that a writ of error would lie to bring it in review before the Supreme Court.

The Appellate Court in *People ex rel. Lowe v. Old Colony Life Insurance Company,* said, "The essential and primary object of this proceeding is the liquidation of the assets of the defendant, and the decree is final upon that question," citing *Chicago Life Insurance Company v. Auditor of Public Accounts.*

It is difficult if not impossible to lay down any rule applicable to every case separating into classes those orders which are final and those which are only interlocutory. In *Price v. Springer,* the court said, "The courts are often called upon to exercise judgment in a given case and decide whether or not an order is final or interlocutory from the peculiar circumstances of that case." In *Goetz v. McCormick,* the Appellate Court states that the adjective "final" was not exclusively determinative, that the test was not one of mere words but rather of substance and intention. If the substance of the litigation and the merits of the controversy have been finally adjudicated, the judgment is final.

In several cases, the Supreme Court of Illinois has in broad terms stated the proposition that, until a final decree, all pre-

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3 100 Ill. 478 (1881).
4 270 Ill. App. 403 (1933).
6 241 Ill. 230, 89 N. E. 296 (1909).
7 213 Ill. App. 33 (1918).
8 Barber v. Tolman, 176 Ill. App. 123 (1913), where the court said, "If a reference to a master the things to be done, or the facts to be ascertained, are in execution of the decree, then the decree is final; but if the things to be done or the facts to be ascertained are preparatory to a decision and final decree, then the decree is interlocutory." For examples as to those decrees considered final see note, 60 Am. Dec. 427.
viously rendered decretal orders are before the court for review and may be altered, modified, or vacated as the circumstances may require. In an exceptional case, even though a judgment or decree is final, a court may, because of subsequently occurring events, vacate an original judgment. Relief from this class of final judgments was, at common law, frequently granted by the writ of audita querela. At the present time, in some states, a motion similar to that obtained by the ancient writ of audita querela has superseded, or been given in addition to, the older remedy. The defendant company's attorneys argued that audita querela was applicable to the instant case. It would seem that the Illinois court recognizes the remedy existent by petition or motion in the nature of a writ of audita querela where proper facts exist. The Appellate Court found the writ or motion inapplicable in the instant case. Its decision was based solely on the statute. Section 3 of the Insurance Law of 1935, providing for the appointment of a receiver to carry on the business of the company until such ground for appointment shall have been removed, also provides for the removal of a receiver and for the granting to the company the right to resume business. Section 4 of the same act, providing for the liquidation of an insurance company, contains no provision permitting the insurance company to resume business either on its own or on motion of the Director of Insurance. Both the original petition and the

9 Hawkins v. Taber, 47 Ill. 459 (1868); Gibson v. Rees, 50 Ill. 383 (1869); Jeffery v. Robbins, 167 Ill. 375, 47 N. E. 725 (1897); Price v. Springer, 241 Ill. 230, 89 N. E. 296 (1909); Weil v. Mulvaney, 262 Ill. 195, 104 N. E. 273 (1914).
10 Heckling v. Allen, 15 F. 196 (1882); Scheer and wife v. Keown, 34 Wis. 349 (1874); Aetna Life Insurance Co. v. McCormick, 20 Wis. 265 (1866).
12 Chambers & Garvin v. Neal, 13 B. Mon. (Ky.) 256 (1852); Dunlap v. Clements, 18 Ala. 778 (1851); Marsh v. Haywood, 6 Humph. (Tenn.) 210 (1845). See also Clark v. Rowling, 3 N. Y. 216 (1850).
17 It should be noted that in the insurance code of 1937 there is a material change in the wording of Sec. 496 of the act in force on December 3, 1934. By the Act of June 29, 1937, Art. XIII, sec. 188, Ill. Rev. Stat. 1937, Ch. 73, § 800, it is provided that an order to show cause why an order to liquidate or rehabilitate may issue upon the happening of any of the enumerated events. In sec. 192, of the Act of 1937, Ill. Rev. Stat. 1937, Ch. 73, § 804, the director
court's order based upon the Master's findings contemplated the objective covered by Section 4—liquidation and dissolution and not temporary receivership and reinstatement as would have been possible under Section 3.

While it may be argued that the decree of December 3, 1934, was not final in that it did not provide for dissolution of the defendant company but was in fact only an order leading up to final relief (hence really an interlocutory order), it would also seem that under Section 4, providing that "the rights and liabilities of any such company and of its creditors, policyholders, stockholders, and members, and of all other persons interested in its assets shall, unless otherwise directed by the court, be fixed as of the date of the entry of the order directing the liquidation of such company" brings the decree of December 3, 1934, within the scope of the remarks of the court in *Chicago Life Insurance Company v. Auditor of Public Accounts.*

By the same order of the lower court vacating and setting aside the decree of liquidation the Director of Insurance of the State of Illinois was commanded to issue a license to the defendant company to resume business in the State of Illinois. In this connection the Appellate Court further held that the order, which, without considering and determining that the defendant company showed full compliance with the statutory requirements, directed the insurance director to issue such license, was without authority. In the absence of such affirmative showing, the order of the lower court was clearly erroneous and was properly reversed.

W. J. DAVIS

**LIFE INSURANCE—DEATH OF BENEFICIARY—THE EFFECT OF ONE OF FIVE NAMED BENEFICIARIES PREDECEASING THE INSURED UPON THE DISTRIBUTION OF THE PROCEEDS OF A LIFE INSURANCE POLICY.—**In the recently decided case of *The Lincoln National* is empowered to apply to the court in the same proceeding for an order directing the liquidation of the property, business and affairs of such company, if the director shall find further efforts to rehabilitate to be futile. The same section also provides for the termination of the conduct of the business by the director if at any time the director shall find that the causes and conditions which made such proceeding necessary have been removed and he petitions the court for termination.

18 See Barber v. Tolman, 176 Ill. App. 123 (1912).
19 100 Ill. 478 (1881), in which the court said, "The nature and character of the decree, as we conceive and the majority of the court think, settles the ultimate rights of the parties. It determines that the corporation is in such condition as to be liable to that proceeding. The remaining proceedings to be had, if this decree stands, will simply be in enforcement of this decree."
Life Insurance Company v. Trost; the life insurance policy and the application therefor provided that five named children of the insured should be beneficiaries (equally) and, "If no designated beneficiary shall survive the insured, the proceeds will be paid to the executors, administrators, or assigns of the insured." One of the children predeceased the insured, and the insurance company filed a bill of interpleader to determine which claimant had the right to the proceeds of the policy, the surviving beneficiaries, the surviving heirs of the deceased beneficiary, or the administrators of the estate of the insured. It should be noted that the administrator of the estate of the deceased beneficiary was not made a party.

The lower court held that the surviving beneficiaries were entitled to share equally the entire proceeds of the policy. Only the administrators of the insured’s estate appealed, and as a result the appellate court confined itself to the sole question whether the surviving beneficiaries or the administrators of the insured’s estate had a better right to the proceeds. The appellate court affirmed the decision of the trial court.

The ultimate question to be determined in the opinion of the court was whether the insured established a gift to the beneficiaries as individuals or as a class, for the result of the latter would be to exclude everyone but the surviving beneficiaries from sharing in the proceeds. Where a class gift is created in a will, it is held that the ascertainment of those who belong to the class and who are consequently entitled to participate in the distribution of the gift is postponed until the death of the testator, and the fund goes to the survivor or survivors of the designated class. The same effect is given to a policy of life insurance, for although such a policy is not a testament, it is in the nature of one.

Prima facie, a gift to individuals described by name is not a gift to a class, but such a presumption is far from conclusive and

3 Mutual Life Ins. Co. v. Devine, 180 Ill. App. 428 (1913); Lancaster v. Lancaster, 187 Ill. 540, 58 N. E. 462 (1900); McCartney v. Osburn, 118 Ill. 403, 9 N. E. 210 (1886); Rudolph v. Rudolph, 207 Ill. 266, 69 N. E. 834 (1904); Kellett v. Shepard, 139 Ill. 433, 28 N. E. 751 (1891).
4 Brace, Admr. v. Charlrand et al., 16 Colo. 19, 26 P. 152, 12 L. R. A. 209 (1891). Furthermore, because of the striking similarity between wills and policies of life insurance, it is held that contracts of life insurance are to be constructed by the same rules applicable to the construction of wills. Mutual Life Ins. Co. v. Devine, 180 Ill. App. 428 (1913); Continental Life Ins. Co. v. Webb, 54 Ala. 688 (1875); Duvall v. Goodson, 79 Ky. 224 (1880).
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may be rebutted. In construing a will, the court gives paramount consideration to the intent of the testator, and while an insurance policy is a contract in which the intent of both parties, not merely one, is controlling, it would not be seriously contended that the insurer would have any intent regarding the disposition of the proceeds except to abide by the disclosed intention of the insured. Hence, if the insured showed an intent to make a gift to a class, that intent should be given effect.

The intent of the insured is to be derived from the entire instrument taken in connection with the relation and situation of the parties. The only expressed intention is the statement in the policy and application therefor providing that if no designated beneficiary should survive the insured, the proceeds were to be paid to the insured’s executors, administrators, or assigns. This apparently means that if all the named children die before the insured, the proceeds shall be so payable.

However, the policy makes no express provision for the contingency which did happen, the death of one child. Under the circumstances there are three possible intentions the insured may have had: first, that the deceased beneficiary’s share should go to the surviving beneficiaries; second, that it should go to the administrators of the insured’s estate, or third, that it should pass to the heirs, or more logically the personal representatives of the deceased beneficiary. Because the third group was not represented on appeal, the appellate court did not give any consideration at all to the last possibility except to say that if the authorities were conclusive to the effect that the “children, heirs, or representatives of the deceased child of the insured” should share in the proceeds of the policy, those authorities do not support the attack by appellants, who are representatives of the estate of the deceased insured.

No cases have been found with the identical facts of the instant case. The closest in analogy are those cases where the assured made the policy payable to the surviving spouse and, in

5 Blackstone v. Althouse, 278 Ill. 481, 116 N. E. 154 (1917).
7 When the insured survives the named beneficiary in a life insurance policy which makes no provision for such a contingency, although there is a conflict, the prevailing view is that the interest of the deceased beneficiary, being vested, becomes assets of his estate and passes to his representative. Shepard & Co. v. New York Life Ins. Co., 87 Conn. 500, 89 A. 186 (1913); Connecticut v. White, 189 Ky. 185, 224 S. W. 764 (1920); Block v. Valley Mut. Ins. Ass’n, 52 Ark. 201, 12 S. W. 477, 20 Am. St. Rep. 166 (1889); Hooker v. Sugg, 102 N. C. 115, 8 S. E. 919, 3 L. R. A. 217, 11 Am. St. Rep. 717 (1889); Swan v. Snow, 11 Allen (Mass.) 224 (1855); United States Trust Co. v. Mutual Ben. Life Ins. Co., 115 N. Y. 152, 21 N. E. 1025 (1889).
the event of her death, to his children, and if there be no surviving children, then to the executors, administrators, and assigns of the assured. Here, of course, the children are not specifically named, and a class gift may more readily be found to be intended.

In the instant case, since the beneficiaries are specifically named, the gift is not, prima facie, a gift to a class, and to rebut this conclusion, the court relied, first, on "the well-known fact that life insurance is purchased for the benefit of the living and not the dead," and, second, upon the language which passed the proceeds to the estate of the insured in the event no designated beneficiary survived, from which, the court said, "a clear implication arises . . . that if any survive, such survivors shall receive the proceeds of the policy." As a result of this inference, the court held that the surviving beneficiaries, as the surviving members of the class, were entitled to receive and to share the entire proceeds to the exclusion of all other claimants.

Even if we grant that there is a possible implication of an intent to make a class gift, it is not as clear an implication as the court indicates, and since the only question raised by the appeal was whether the right of the administrators of the estate of the insured was paramount, the court might well have answered it in the negative without deciding the right as between the other claimants and thus establishing a precedent which might be misapplied in the future.

E. B. Miller

Parent and Child--Support of Child--Duty of Natural Father to Support Child after Adoption.—The duties of the natural parent toward his child after adoption of the latter by another person have recently been made the basis of conflicting decisions in the highest tribunals in Illinois and New York. The holding in the Illinois case leaves the natural parent still responsible for his child’s support, while the New York decision

8 Succession of Roder, 121 La. 692, 46 So. 697, 15 Ann. Cas. 526 (1908); Lane v. De Mets, 13 N. Y. S. 347, 59 Hun. 462 (1891); Elgar v. Equitable Life Assur. Soc. of U. S., 113 Wis. 90, 88 N. W. 927 (1902). In Succession of Roder, supra, the court construed the language in the case of Continental Life Insurance Co. v. Palmer, 42 Conn. 60 (1875), to mean that the following clause “payable to the children or if there be no such children surviving, then to the executors, administrators, and assigns of the insured” would be such language as to show clearly that the surviving children take the entire proceeds.

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relieves him entirely of all duty toward both the child and the public.

The problem presented in the Illinois case, which involved a minor child, arose out of a contempt proceeding brought to compel the defendant, the divorced husband of the plaintiff, to contribute to the support of their minor child. The child had been adopted by its maternal grandparents two days before the natural parents were divorced; consequently, the original decree was silent on the subject. After the death of the adoptive father and subsequent remarriage of the adoptive mother, the natural mother adopted her own child. Defendant, the natural father, resisted the supplemental proceedings in the divorce case to reimpose liability on him but was ordered to support the child, and, for failure to comply therewith, he was held in contempt. The Supreme Court of Illinois rejected the defendant's contention that the adoption proceedings had relieved him of his duties to the child and in approving the contempt order pointed out that adoption is a statutory proceeding in derogation of the common law, that the statute must be strictly construed, and that since the language of the act does not expressly relieve the natural parent of his alleged common law duty to support his child, that duty still continued even after the adoption decree.²

The language of the Illinois Statute expressly relieves the child of the duties owed by it to the natural parents, presumably transfers the same to the adoptive parents, and likewise presumably imposes certain obligations, such as the duty to support, on the adoptive parents. This would seem to be the intention of the legislature, though the language used is not precise. Such a view has been asserted by the Supreme Court of Illinois in the

1 Dwyer v. Dwyer, 366 Ill. 630, 10 N. E. (2d) 344 (1937), reversing 286 Ill. App. 588, 4 N. E. (2d) 124 (1936). See also 15 CHICAGO-KENT REVIEW 70.
2 In McNemar v. McNemar, 137 Ill. App. 504 (1907), an action brought by natural parent against the adoptive parent for value of support furnished his own child, the court said: "The relation of parent and child is not ended by the adoption, but fostered instead..." and held that no recovery could be had in the absence of an express agreement to pay for the same. It is submitted that the same decision would have been reached regardless of the relationship plaintiff bore to the minor, and the language is, therefore, mere gratis dictum.
5 Ill. Rev. Stat. 1937, Ch. 4, § 5, reads: "A child so adopted shall be deemed, for the purpose of... other legal consequences and incidents of the natural relation of parents and children, the child of the parents by adoption, the same as if he had been born to them in lawful wedlock..."
case of *Ryan v. Foreman*\(^6\) in the following language: “The legal consequences and incidents arising from the relation of parent and child are many, and change, as time goes on, with changes of society, and vary according to the circumstances and means of the parties. They include the right of support, education and care from the parent by adoption.”\(^7\)

No actual case has arisen in Illinois under which such adoptive parent was charged with the support of an adopted child, either in a suit brought for that purpose, or in a proceeding under the Pauper’s Act,\(^8\) but the fact that rights have been conferred on the adoptive parent by the adoption proceeding logically supports the inference that duties such as those mentioned should also attach.

It is likewise true that the Illinois Adoption Act does not expressly release the natural parent of the duties which attached to him at the time of the child’s birth, but it should be remembered that these duties have only sprung into existence in fairly recent times, prior to which the parent’s duty to support was treated as being merely a moral obligation\(^9\) or, at best, one enforceable only by the state in a proceeding brought for that purpose.\(^10\) Where recognition is given to the parent’s obligation to a third person who furnishes necessaries to his minor child, the duty of support is treated as being correlative to, and arising from, the parent’s right of custody, services, and earnings; in the absence of this right, except when lost through the parent’s own fault, the duty disappears,\(^11\) though apparently it may still be enforced by the state even after majority has been attained if the child should later become a public charge.\(^12\)

It results, therefore, that the Illinois Supreme Court, in deciding as it did in the instant case, has failed to follow the maxim *cessante ratione*...
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legis, cessat ipsa lex, for clearly, by means of adoption, the natural parent has been expressly deprived of those rights which, it has been seen, were held to be essential in order to impose upon him the duty of support.  

The contrary New York decision involved the interpretation of the local statutes imposing an obligation on the relatives of an indigent person to provide for the support of such person. The petitioner therein was an adult child of the defendant. During her minority she had been adopted by others who were unable to provide her with support, and being incapacitated by reason of illness, the petitioner was likely to become a public charge. The New York Court of Appeals reversed the order of the trial court, which directed the natural parent to furnish such support, pointing out that the adoption statute of that state expressly ended all parental duties owed by the natural parent up to the time of the adoption and that the Pauper’s Law relied upon had to be read in the light of such absolute severance between parent and child. Since the adoption had ended all relationship between petitioner and defendant, it followed that the natural parent was no longer one of the class named in the Pauper’s Law as chargeable with the support of the indigent person; hence, the defendant was excused from such duty.

It is true that the New York law expressly covers the point in question, while that of Illinois is silent, but it is suggested that the same result could readily have been attained by the Illinois Supreme Court had it given thought to the facts which underlie the duty of support; thus, the court could have preserved uniformity in the law.

R. L. TINDALL

15 Laws of New York 1933, Ch. 482, § 101, subsec. 4.
16 Laws of New York 1930, Ch. 14, § 114, reads: “Thereafter the parents of the person adopted are relieved from all parental duties toward, and all the responsibility for, and have no rights over such a child, or to his property by descent or succession. . . .”
17 Laws of New York 1933, Ch. 482, § 101, subsec. 4.
18 Mitchell v. Brown, 18 Cal. App. 117, 122 P. 426 (1912), wherein the court said that “after the adoption of a minor child by another, the parental obligations of the natural parents to such child cease to exist, and that the former, after such adoption, are no more legally liable for the maintenance, support, and education of the child than a perfect stranger would be.” Accord: In re Cozza, 163 Cal. 514, 126 P. 161, Ann. Cas. 1914A 214 (1912); Schlitz v. Roenitz, 86 Wis. 31, 56 N. W. 194, 21 L. R. A. 483 (1893); In re Knott, 138 Tenn. 349, 197 S. W. 1097 (1917); In re Hood’s Estate, 206 Wis. 227, 239 N. W. 448 (1931); State v. Kelly, 32 S. D. 526, 143 N. W. 953 (1913); In re Masterson’s Estate, 45 Wash. 48, 87 P. 1047 (1906).
WILLS—RENUNCIATION—WHETHER OR NOT A DEVISEE HAS A RIGHT TO WITHDRAW A PREVIOUSLY FILED RENUNCIATION OF A DEVISE.—The New York Surrogate’s Court in In re Johnston’s Will,¹ recently decided that a devisee, who had renounced a testamentary devise proffered to him, might later withdraw his renunciation and be reinstated to his position as a beneficiary. The case is one of first impression and arose when the testator left the entire residue of his estate to his sister after bequeathing legacies of only five dollars each to his children. The children made an accusation that their father acted under undue influence and threatened to contest with the result that the sister filed an affidavit renouncing her rights under the will. Subsequently the sister petitioned the court that she be permitted to withdraw the renunciation and take the estate. There was no question presented as to the renunciation being made pursuant to a contract between the petitioner and the legatees.

Although previous New York decisions had construed the offer of a gift by will as analogous to the offer in a contract and admitted the contract theory that there must be a presumptive or express acceptance,² in the instant case the court refused to follow the contract rule to its ultimate conclusion—that the rejection of an offer terminates all possibility of retraction by the offeree.³ The decision states that the original basis for the contract termination was that it was customary for the offeror, upon receiving a rejection, to enter into negotiations with another, but that such reasoning fails when applied to a will. It is logical to approach the will as a continuing offer on the part of the testator; hence, there remains in the devisee or legatee a right to withdraw any renunciation he may have entered and elect to accept the gift so long as such reversal does not adversely affect the legal or equitable right of any other person and thus give rise to an estoppel.

The Illinois courts have uniformly held that a legatee or devisee is under no obligation to accept a testamentary gift against his consent,⁴ and although there have been no cases of the withdrawal of a legatee’s renunciation, some analogy may be drawn between that question and the effect of a widow’s

¹ 298 N. Y. S. 957 (1937).
² Albany Hospital v. Hanson, 214 N. Y. 435, 108 N. E. 812 (1915); Burritt v. Silliman, 13 N. Y. 93, 64 Am. Dec. 532 (1855); In re Mahlstedt’s Will, 250 N. Y. S. 628 (1931).
³ Williston on Contracts (Rev. ed., 1936), I, § 51, and cases there cited.
⁴ Peter v. Peter, 343 Ill. 493, 175 N. E. 846 (1931); People v. Flanagin, 331 Ill. 203, 162 N. E. 848 (1928).
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statutory renunciation of dower. A few cases\(^5\) have held that where such was procured by fraud or made through a misapprehension of the law, the court has the power to allow the widow to withdraw the renunciation. However, in Coles v. Terrell\(^6\) the Illinois Supreme Court held that the withdrawal of a renunciation filed with the clerk under the statute could only be made by an order of the court. The decision did not lay down any rules by which such withdrawal order might be governed, but did infer that it was proper for the probate court to hear and grant a petition to set aside the renunciation. While it can only be a matter of conjecture, following the decisions involving the widow’s statutory rights, it may be suggested that, confronted with a similar situation, the Illinois courts would find in accord with the instant case.

G. O. HEBEL

WILLS—REVOCATION—MUTILATION OF WILL AS EVIDENCE OF INTENT TO REVOKE.—In Fleming v. Fleming\(^1\) the Illinois Supreme Court reaffirms the doctrine, well established in Illinois, that the partial revocation of a will is ineffectual\(^2\) and leaves the provisions of the original will in full force and effect; if such original provisions may be established from the will itself or by competent extraneous evidence.\(^3\)

In the principal case the testator, immediately before his death, had cut or torn off the lower part of the first page of his will and had drawn pencil lines through all but the last line of the severed portion. This portion was preserved and consisted of writing describing various bequests. Close at hand was an unsigned memorandum listing certain bequests differing from those in the

\(^{5}\) Lipscomb v. Allen, 298 Ill. 537, 132 N. E. 206 (1921); Pillsbury v. Early, 252 Ill. App. 620 (1929); Hanson v. Clark, 246 Ill. App. 496 (1927).

\(^{6}\) 162 Ill. 167, 44 N. E. 391 (1896).

\(^{1}\) 367 Ill. 97, 10 N. E. (2d) 641 (1937).

\(^{2}\) Wolf v. Bollinger, 62 Ill. 368 (1872); Hesterberg v. Clark, 166 Ill. 241, 46 N. E. 734 (1897); Schmidt v. Bauermeister, 279 Ill. 504, 117 N. E. 49 (1917); Casey v. Hogan, 344 Ill. 208, 176 N. E. 257 (1931); Pyle v. Murphy, 180 Ill. App. 18 (1913). For the reasoning in support of this denial of partial revocation, see 10 CHICAGO-KENT REVIEW 274 (1932); 62 A. L. R. 1376; Alvin E. Evans, “Testamentary Revocation By Act to the Document and Dependent Relative Revocation,” 23 Ky. L. J. 559 at 571 (1935). For the contrary view see Bigelow v. Gillott, 123 Mass. 102, 25 Am. Rep. 32 (1877).

\(^{3}\) The statement is made in Wolf v. Bollinger, supra, note 2, and Camp v. Shaw, 52 Ill. App. 241 (1893), that if the original wording is not determinable, the will will be enforced in all its valid parts, the obliterated portions being treated as blanks. See also Coghlin v. Coghlin, 79 Ohio St. 71, 85 N. E. 1058 (1908); Hartz v. Sobel, 136 Ga. 565, 71 S. E. 995 (1911); In re Streeton's Estate, 183 Cal. 284, 191 P. 16 (1920) applying the same doctrine to cases in which a portion of the will had been severed.
original will. The circuit court of Cook County denied probate, but the Supreme Court held that the appearance of the instrument evidenced the testator’s intent to revoke a portion of the will and gave rise to a presumption that the will, as originally drawn, should remain his will until or unless the alterations were made effective as a substitute. Since partial revocation is not recognized in this state the cause was remanded with directions to admit the will, in its original form, to probate.

The means by which a will may be revoked are exclusively statutory. Decisions under the Illinois statute have uniformly agreed that the specific acts enumerated therein must be accompanied by the intent to revoke to be effective. When the court in this case had determined, by application of the doctrine of dependent relative revocation, that the testator’s intent was not to revoke his will in its entirety it was bound also to find that there was no partial revocation and, the will being otherwise valid, to admit the same to probate in its original condition. This intent was found solely from the condition of the will itself including the severed portions thereof. The factual situation, although differing from that of any other Illinois case, adheres closely to legal principles heretofore adopted in this state.

The probate of wills which have been burned, cancelled, torn, or obliterated hinges on the determination of the testator’s intent. The mutilation, under the statute, may be accidental with no intent to revoke, or may be with an intent to revoke only the

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4 Ill. Rev. Stat. 1937, Ch. 148, § 19 provides: “No will, testament or codicil shall be revoked, otherwise than by burning, cancelling, tearing or obliterating the same, by the testator himself, or in his presence, by his direction and consent, or by some other will, testament or codicil in writing, declaring the same, signed by the testator or testatrix, in the presence of two or more witnesses, and by them attested in his or her presence; and no words spoken shall revoke or annul any will, testament or codicil in writing, executed as aforesaid, in due form of law.”

5 Burton v. Wyld, 261 Ill. 397, 103 N. E. 976 (1913); Noesen v. Erkenstown, 298 Ill. 231, 131 N. E. 622 (1921). The will is unrevoked although the performance of the statutory act is prevented by duress. Bohleber v. Rebstock, 255 Ill. 53, 99 N. E. 75 (1912).

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6 The use of the term “dependent relative revocation” is explained and criticized by Joseph Warren, “Dependent Relative Revocation,” 33 Harv. L. Rev. 337 (1920). Also see 74 U. Pa. L. Rev. 615 (1926). Although the term is not employed in Illinois cases, the doctrine has been recognized and applied in Wolf v. Bollinger, 62 Ill. 368 (1872); Hesterberg v. Clark, 166 Ill. 241, 46 N. E. 734 (1897); Casey v. Hogan, 344 Ill. 208, 176 N. E. 257 (1931).
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affected portion, or may be with the intent to revoke the will in its entirety. As stated in the case, this intent "may be inferred from the nature of the act, the condition of the instrument or by extrinsic evidence, but it must, in some competent way, be made to appear." Mutilation of a will, when done by the testator or at his direction, gives rise to a presumption that the mutilation was done with intent to revoke the entire instrument. The contestants based their case on this presumption and on the contention that the burden placed on the proponents to explain any alterations in the will had not been sustained. The court, upon adequate authority, found that the presumption was effectively rebutted and the burden sustained by the condition of the will itself.

The position of the Illinois court is in line with the great weight of authority. It has been established in England and adopted in Illinois that the condition in which the testator left his will may furnish sufficient evidence of his intention. The question of whether or not partial revocation is possible depends on the construction of the statutes of the various states. In those states in which the revocatory portion of the statute refers to any clause or portion as well as to the entire will, partial revocation is permitted. Where no reference is made except to the will as an entirety, partial revocation is denied.

H. SIMPSON

7 Wolf v. Bollinger, 62 Ill. 368 (1872); Bailey v. Koehler, 305 Ill. 25, 136 N. E. 869 (1922); Cantway v. Cantway, 315 Ill. 244, 146 N. E. 148 (1924); Page on Wills (2d ed. 1926), I, 1318, sec. 774, and case cited therein; McIntyre v. McIntyre, 120 Ga. 67, 47 S. E. 501 (1904); note, 62 A. L. R. 1372. The presumption may be rebutted. Burton v. Wylde, 261 Ill. 397, 103 N. E. 976 (1913). The presumption of revocation applies to lost wills when the will was in testator's possession. Griffith v. Higinbothom, 262 Ill. 126, 104 N. E. 233 (1914); Holler v. Holler, 298 Ill. 418, 131 N. E. 663 (1921). Interlineations, erasures, or other alterations made prior to the execution of the will are effective. Lurie v. Radnitzer, 166 Ill. 609, 46 N. E. 1116 (1897); Hutchison v. Kelly, 276 Ill. 438, 114 N. E. 1012 (1916); Martin v. Martin, 334 Ill. 115, 165 N. E. 644 (1929). But the law furnishes no presumption as to when or by whom such alterations were made. Webster v. Yorty, 194 Ill. 408, 62 N. E. 907 (1902); Hutchison v. Kelly, 276 Ill. 438, 114 N. E. 1012 (1916); Schmidt v. Bauermeister, 279 Ill. 504, 117 N. E. 49 (1917); Prior v. Jacobson, 327 Ill. 25, 158 N. E. 401 (1927). But where the alterations consist of additions to supply the sense of the instrument, as in Martin v. Martin, 334 Ill. 115, 165 N. E. 644 (1929), the presumption is that such alterations were made prior to execution.

8 See cases cited in 62 A. L. R. 1371.


10 62 A. L. R. 1376 and cases cited therein.

11 62 A. L. R. 1380 and cases cited therein.
WILLS—TAKING AGAINST WILL—APPLICABILITY OF THE ILLINOIS DOWER STATUTE TO AN ESTATE CONSISTING SOLELY OF PERSONAL PROPERTY.—The case of In re Estate of Judd,\(^1\) concerns itself with the question whether the provisions of the Dower Act of 1874, as amended in 1927, are applicable to an estate consisting only of personal property or whether it is essential that there be real property in the estate. This is the latest case on a subject which has been unsettled for some time.

In 1874 the entire statute in relation to dower was revised and reenacted. The effect of this revision and re-enactment was to work an implied repeal of the prior law and to supersede and take the place of the prior statutes.\(^2\) The act in the new form then remained unchanged until 1925, when a few changes were made in sections 10 and 12; but the changes in no way affected the problem under consideration.

The decisions after 1874 generally interpreted the provisions of the dower statute, relating to testate estates, as having application to estates consisting of personal property only, as well as to estates consisting of both real and personal property.\(^3\) These decisions were based in part on the courts’ construction of the act of 1874 and in part on cases prior to the act. The judges in many of these cases recognized that, while the courts may have “reached beyond the language of the statute,” it had become a sort of common law in “all cases” for the survivor to have a share in the personal estate as well as the real estate.\(^4\)

It is claimed that the legislature, by the enactment of 1874, intended to preserve the rights as first laid down in the Ordinance of 1787 and adopted at the first session of the legislature.

Beginning with the dissenting opinion in Zakroczymski v. Zakroczymski,\(^5\) and followed by the case of Clark v. Hanson,\(^6\) the courts began to give a more strict construction to the statute. In the former case the dissenting judges were of the opinion that the question had never, prior to that time, been before the court and that the cases cited in support of the view were not in point. In Clark v. Hanson, the court maintained that the only case approaching the contention that provisions in reference to testate

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4 White v. Dance, 53 Ill. 413 (1870); In re Taylor’s Will, 55 Ill. 252 (1870).
5 303 Ill. 264, 135 N. E. 398 (1922).
6 320 Ill. 480, 151 N. E. 369 (1926).
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estates applied also to estates consisting solely of personal property was Boyle's v. McMurphy, where the statements concerning the act of 1874 were dictum. Notwithstanding, the court, in the instant case, believed that the language of the statute clearly indicated an intent of the legislature contrary to that dictum.

The amendatory act of 1927 made several changes. The title of the act which formerly read, "An act to revise the law in relation to Dower," was changed to read, "An act concerning the rights in real and personal property accruing by reason of the marital relation." To section 1, which provides for the abolition of curtesy and for dower to either the surviving husband or wife, was added, "And except where the deceased spouse died intestate, the surviving husband or wife, in case the deceased spouse died leaving surviving a child or children or descendants of a deceased child or children, shall also be entitled to one-third of all the personal property owned by the deceased spouse at his or her death, after all just debts and claims against such estate are fully paid, as and for his or her absolute estate forever; or, in case such deceased spouse left no child, children or descendants of any deceased child or children, said surviving husband or wife shall be entitled to one-half of such personal estate of such deceased spouse, after all just debts and claims against such estate are fully paid, as and for his or her absolute estate forever." Sections 10 and 12 were revised to conform to the provisions of Section 1. Section 12 now provides that, in case the will is renounced, the surviving spouse may take, in lieu of dower "and of other rights given under section 1," one-half of the real and personal property remaining after payment of debts if there are no children or descendents of a child surviving and one-third if there are any children surviving. Formerly the statute provided for an election to take under the will or to renounce and to take in lieu of dower "and of any share of the personal estate which he or she may be entitled to take with such dower."

The principal case is the first to interpret the statute as amended. There the testatrix provided by her will that her residuary estate, which consisted only of personal property, be divided among her husband and her five brothers and sisters equally. There were no children or descendents of children surviving. The husband filed his renunciation of the will and claimed one-half of the estate. The probate court ruled in his favor and the ruling was affirmed on appeal. The petitioners

7 Ill. Rev. Stat. 1937, Ch. 41, §§ 1, 10, 12.
insisted that the amended act of 1927 should be construed in the light of the historical background of the statutes prior to and including the act of 1874 and also the construction placed on these statutes by the courts. In answer to this, the court said of the cases prior to the act of 1874, "Whatever other criticism may be levelled against these early decisions, they cannot be construed as holding that real estate must be involved before the surviving spouse can take an interest in the personal estate of the deceased spouse in the testate estate." The opinion continues to say that after the act of 1874 the cases made no distinction between the applicability of the dower statute to testate estates consisting of personalty alone and estates having both real and personal property, except the case of Clark v. Hanson.8 This case "definitely settled the law, contrary to former precedent." It was just to obviate the effect of this decision, the court said, that the amendment of 1927 was enacted at the very next session of the legislature, and the court believed that the changes made by that act accomplished the definite objectives of the legislature.

This view seems to be the only logical one. For in construing a statute, the intention of the legislature must be followed, and it is unlikely it was intended that the surviving spouse should be deprived of the privileges given under the act where the estate consists of personal property alone. Any other view would allow the presence of any small parcel of real estate, in an estate consisting largely of personal property, to determine whether or not a surviving spouse should gain anything by renunciation. There could hardly be any point in the legislature's allowing the surviving spouse the right of renunciation and election where the decedent died possessed of real estate and personalty and not insuring these same rights where the decedent died possessed of personalty alone.

B. G. OTTENHOFF

8 320 Il l. 480, 151 N. E. 369 (1926).