June 1944

Discussion of Recent Decisions

Chicago-Kent Law Review

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

Part of the Law Commons

Recommended Citation
Available at: https://scholarship.kentlaw.iit.edu/cklawreview/vol22/iss3/4

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

BANKS AND BANKING—OFFICERS AND AGENTS—WHETHER OR NOT STOCK OF A BANK DIRECTOR DEPOSITED PURSUANT TO STATUTE FOR PURPOSE OF QUALIFICATION AS A DIRECTOR MAY BE GARNISHEED THEREBY PRODUCING A FORCED RESIGNATION—In the recent case of Molner v. South Chicago Savings Bank,¹ the plaintiff was a judgment creditor of a director of the defendant bank. Pursuant to the banking laws of Illinois,² under which the defendant bank was organized, the director had deposited with the bank cashier certain unendorsed and unassigned certificates of stock owned by the director in his own right and free of encumbrance. The plaintiff, as judgment creditor, sought to reach such stock by garnishment proceedings. The bank answered that, inasmuch as the stock certificates were deposited pursuant to statute, such property could not be taken on garnishment. It was argued by the defendant that this result followed because, according to the statute, a director "who ceases to be the owner of capital stock of such bank . . . or becomes in any form disqualified, shall vacate his

¹ 138 F. (2d) 201 (1943). Major, C. J., wrote a dissenting opinion.

213
The defendant's contention was upheld in the trial court, but on appeal the Circuit Court of Appeals for the Seventh Circuit reversed and held that the stock certificates were subject to garnishment.

It was not necessary, at common law, that a director be a stockholder, as a director was considered to be merely an agent of the corporation which, through its shareholders, was free to choose whom it saw fit to serve in such capacity. That doctrine, however, has been subject to modification and, if the general law or the by-laws of the particular corporation require it, the director would be ineligible to act if not a shareholder. It has been held though, at least under general corporation statutes making stock ownership a necessary qualification, that the holding of bare legal title to the stock is sufficient. In the case of banks, however, it would seem that an even better title should be required, and in this state the statute specifically provides that the qualifying shares must be owned by the director “in his own right.”

Bearing upon the problem of the instant case is the question of whether or not a director may resign at will and withdraw his stock certificate deposited pursuant to law. Such point is important since it is a well-settled principle of law that one endeavoring to use garnishment proceedings can acquire no rights superior to those of his judgment debtor. If, therefore, the director could not recover the stock certificates until his term of office ended, his judgment creditor should have no greater rights to the same. That question has not, as yet, been decided by the state courts of Illinois.

Under a provision of the National Banking Act fixing the term of office of a bank director at one year or until his successor in office has been elected, it has been held that a director may resign at his election prior to the end of his term of directorship. Such cases, of course, are not decisive of questions arising under state banking laws, particularly since the National Banking Act merely provides that a director be a stockholder and does not require the deposit of his qualifying shares with the bank cashier or other officer. In fact, it has been held under a state

---

8 Ibid.
5 People v. Ittner, 165 Ill. App. 360 (1911); Fletcher, op. cit., II, § 299.
6 People v. Lihme, 193 Ill. App. 341 (1915).
11 Briggs v. Spaulding, 141 U. S. 132, 11 S. Ct. 924, 35 L. Ed. 662 (1891); International Bank v. Faber, 86 F. 443 (1899); Movius v. Lee, 30 F. 298 (1887). The leading case of Briggs v. Spaulding, supra, has been severely criticized: see note in 17 Yale L. J. 33.
DISCUSSION OF RECENT DECISIONS

law that a director who has sold his stock and tendered his resignation is still a de facto officer until his resignation has been accepted, especially if the circumstances prove that he continued to act on behalf of the bank.\(^\text{13}\) It must be remembered that the position of director with a bank is one which is founded on reciprocal acts requiring, as it does, the consent of the director as well as of those selecting him. Consequently it would seem to follow that an attempted resignation would be a nullity unless there has been assent thereto by the corporation, as well, perhaps, by the state officer having supervision over banks. It has, accordingly, been held that the resignation of a director presented to the president but not passed on by the board of directors was ineffective.\(^\text{14}\) It might then be argued that disposition of the qualifying shares, whether by voluntary sale or by garnishment, should not produce a resignation without concurrence therein by the bank. But in this state, seizure of the director's shares, whether accompanied by a formal resignation or not, would seem to have a bearing on his ability to continue to serve as a director since he would then no longer possess the requisite qualification laid down in the statute.

More important, though, is the question whether such shares may be seized at all by a creditor of the director. When considering the purpose of statutes such as is here involved requiring the bank director to be a stockholder, it was once said that such statutes provided "a method frequently resorted to for securing the fidelity of directors in the exercise of their duties."\(^\text{15}\) Such view was amplified in Hess v. Kismet State Bank,\(^\text{16}\) where the Kansas Supreme Court said the main purpose of such laws was "for the protection of depositors and creditors of the bank."\(^\text{17}\) The statute there involved required that the directors, the cashier, and the managing officers should own stock not in any way pledged or hypothecated. It may well be concluded, therefore, that the main purpose of the Illinois provision is to provide a degree of protection to those who do business with the bank. By limiting the right of the director to resign and by requiring that he deposit shares of stock some slight protection for such persons is afforded and the language used would indicate that more than mere ownership of stock was intended.

The holding in the instant case, by permitting the individual creditor of a director to reach such shares, deprives the customers and depositors of the bank of this protection. While the general purpose of garnishment statutes is to protect creditors and prevent judgment debtors from escaping from the obligation to pay their just debts, it would appear that the policy of the banking act should prevail in situations like the present one.

A. C. SCHWARZ, JR.

---

\(^{13}\) Benedum v. First Citizens' Bank, 72 W.Va. 124, 78 S.E. 656 (1913).
\(^{16}\) 106 Kan. 701, 189 P. 919 (1920).
\(^{17}\) 106 Kan. 701 at 703, 189 P. 919 at 920.
Banks and Banking—Stockholders—Right of Shareholder who has Paid Super-added Liability to Obtain Refund After Creditors Whose Claims Arose During Period of Stock Ownership Have been Paid in Full from Such Fund or from the Assets of the Closed Bank—In Holderman v. Moore State Bank,\(^1\) a suit to recover the super-added liability of the shareholders of a closed state bank, a petition was presented by certain shareholders for a refund of a part of the capital stock assessment made against them on the ground that by reason of the payment thereof and by reason of sums realized from the assets of the closed bank more than enough had been collected to satisfy the claims of the creditors whose rights arose while the petitioners were shareholders. Such petition was stricken by the trial court when it appeared that certain other creditors of the closed bank had not yet been paid in full because it held that, until those claims were satisfied, no refund was warranted. In reversing such decision, the Illinois Supreme Court concluded that if the facts supported the allegations of the petition a refund was properly due the petitioners for any overpayment they may have made, the same being treated as involuntary in nature.\(^2\)

Although the Illinois Supreme Court has construed the banking article of the state constitution on many prior occasions, the instant case presented for the first time the specific question of the right to a rebate thereunder.\(^3\) That article declares that every stockholder in a banking corporation “shall be individually responsible and liable to its creditors, over and above the amount of stock by him or her held, to an amount equal to his or her respective shares so held, for all its liabilities accruing while he or she remains such stockholder.”\(^4\) In the light of such language the right to a refund must, of necessity, depend on the resolution of two subordinate problems. They are, first: just which creditors are to receive the benefit of the stockholder’s added liability; second, should the general assets of the closed bank be available to help reduce that liability?

If the words “its creditors” as used therein mean all creditors, then the fact that full payment had been made to those who became such during the period of stock ownership would not be sufficient to relieve the shareholder. Until all creditors were paid, a refund would clearly be improper. If, however, the additional language “accruing while he or she remains such shareholder” serves to limit the class of creditors, then,

\(^1\) 383 Ill. 534, 50 N.E. (2d) 741 (1943).

\(^2\) To the argument that payment made under a misapprehension of law could not be recovered, the court answered that as the money was paid to an officer of the court it would “require its officers to disregard technical rules and do what honest people ought to do.”—383 Ill. 534 at 545, 50 N.E. (2d) 741 at 746. See also Sando v. Smith, 237 Ill. App. 570 (1925), at 580. The burden of proof as to the alleged overpayment was, however, placed on the petitioning shareholders: 383 Ill. 534 at 547, 50 N.E. (2d) 741 at 746.

\(^3\) In People ex rel. Barrett v. Farmers State Bank, 371 Ill. 222, 20 N.E. (2d) 502 (1939), the question concerned the right to a rebate after all the debts of the closed bank had been fully paid.

upon satisfaction of the claims of that class, further liability should end and surplus funds should be returned. The significant word is "accruing" as used in this article. It may have been used as one of limitation to describe a class, or it may have been intended to serve as a maximum limit upon the measure of the stockholder's liability. If it possesses the latter meaning, it serves merely to fix the amount the shareholder may be called upon to pay, but would not entitle him to designate the way in which the creditors are to share therein.

At common law, a stockholder had no such liability as is here involved. Consequently, a few Illinois courts, applying the theory that the obligation was designed to aid the common law, have construed the provision liberally. The case of *Queenan v. Palmer*, for example, held that a charter or statute making the shareholders of a corporation individually responsible in an amount equal to their stock, to make good losses to depositors and others, would be construed to make the stockholders liable to all creditors who might suffer from the default or failure of the corporation to pay its debts. In *Burket v. Reliance Bank & Trust Company* the court held that the constitutional provision had the effect of measuring the liability rather than designating which creditors were entitled to share in payments made by stockholders for the period in which the liability accrued and, therefore, the stockholders had no interest in the distribution of funds which they were compelled to pay in satisfaction thereof. It was in *Heine v. Degen*, though, that the court spoke most strongly in favor of this position for it there ruled that since the constitutional liability of the stockholders was a liability to the creditors and not to the bank, such liability was for the benefit of the creditors generally and the liability of a particular stockholder, although measured by the liabilities accruing during his ownership of stock, was not to creditors of that period alone. Such view has also been adopted in at least two other states.

But the extreme language used in these decisions was repudiated in the instant case as being foreign to the accepted purpose of the super-added liability. Such purpose had originally been declared, in the leading case of *Golden v. Cervenka*, to impose on a stockholder liability only to those who were creditors and only for such obligations as were incurred while he was a stockholder. As a consequence, in *Hillmer v. Chicago Bank of Commerce*, the court decided that, where the par values of

---

5 Golden v. Cervenka, 278 Ill. 409 at 418, 116 N.E. 273 at 278 (1917).
6 117 Ill. 619, 7 N.E. 613 (1886).
7 117 Ill. 619 at 630, 7 N.E. 613 at 618.
8 366 Ill. 98, 7 N.E. (2d) 850 (1937).
9 See also Comstock v. Morgan Park Trust & Savings Bank, 363 Ill. 341, 2 N.E. (2d) 311 (1936).
10 362 Ill. 357, 199 N.E. 832 (1936).
12 278 Ill. 409, 116 N.E. 273 (1917).
13 375 Ill. 266, 31 N.E. (2d) 309 (1941).
shares were reduced and certain stockholders who held stock before and after the reduction had settled their constitutional liability at the higher rate, the excess payments resulted in a discharge of the other shareholders on stock owned during the same period. Such view was also followed in Sanders v. Merchants' State Bank of Centralia,14 People v. Farmers State Bank of Irvington,15 and in Comstock v. Morgan Park Trust & Savings Bank.16

The better view, therefore, seems to be that only those creditors whose claims arose during the period of stock ownership are entitled to the benefit of the added liability and the same should not be regarded as a general fund available to all creditors.17 Any overpayment should, then, be returned and has been so ordered returned in other states prior to the instant decision. Cases may be found in Minnesota,18 New York,19 Oregon,20 and in Wisconsin21 directing the return of such overpayments under provisions similar to that found in Illinois.

The second problem involves the right of the shareholder to require that the general assets of the closed bank be taken into consideration in order to help reduce his liability or to determine the extent of the refund due him. If the shareholder was merely secondarily liable there could be no doubt of his right to require the creditor to exhaust his remedy against the principal debtor first,22 but in this state the liability has been declared to be a primary one,23 hence the creditor may seek a decree against the shareholder personally and is not obliged to proceed against the closed bank.24 It is obvious, though, that the creditor is entitled to but one satisfaction25 and whether he receives the same from the shareholder or from the bank would be a matter of no consequence to himself.

If a particular creditor is paid from the fund provided by the shareholders, the claims against the closed bank are accordingly reduced thus leaving more assets available to discharge the sums due to creditors not so well favored. The latter, then, on the theory of marshalling assets,26 might have a right to insist that such be done. The possibility of a refund would then be reduced and the net effect would be to extend the scope of the shareholder's liability, if not directly at least indirectly, to benefit those not encompassed within its limits. Particularly is this true

14 349 Ill. 547, 182 N.E. 897 (1932).
16 363 Ill. 341, 2 N.E. (2d) 311 (1936).
19 Broderick v. Adamson, 262 N.Y.S. 582 (1933).
21 Schwenker v. Bekkedal, 204 Wis. 546, 236 N.W. 581 (1931).
22 In re Bank of Winslow, 36 Ariz. 507, 287 P. 444 (1930).
See also Schalucky v. Field, 124 Ill. 617, 26 N.E. 904 (1888).
24 Queenan v. Palmer, 117 Ill. 619, 7 N.E. 613 (1886).
if the court having charge of the liquidation proceedings should distribute any funds realized from the bank's assets in other than a uniform fashion to its creditors. As the shareholder has no right to inquire into the distribution of the fund raised from the super-added liability, it would seem he would lack any right to inquire into the manner of distributing the bank's assets provided they were paid to its creditors. The existence of such assets should not, therefore, be taken into consideration in determining the super-added liability.

Payments made therefrom may, however, according to the instant case operate fortuitously to lessen such liability or even to extinguish it. As between the shareholder and his particular creditor such a result is manifestly fair as payment from either source is all the latter should expect. Whether the same is true as to the other creditors, who presumably did business with the bank in expectation that its general assets would serve as security for payment, is another question. In the absence of protest on their part, the result achieved would seem just.

It need scarcely be pointed out that all such problems would be eliminated if the super-added liability provision did not exist. At least thirty-one states, within the last decade, have abolished double liability, either absolutely or upon compliance with certain conditions, as has also the federal government in the case of the national banks. Short of constitutional amendment, such is not possible in Illinois, but a simple note will serve to illustrate how shareholders feel on the subject. The lessons of the depression, moreover, have tended to discourage investment in state bank shares by persons financially responsible. The prime intention of the framers of the constitutional provision in question, then, seems faced with indirect, if not direct, defeat.

J. E. Reeves

Constitutional Law—Right to Justice and Remedies for Injuries—Whether or Not "Guest" Statute, Limiting Liability of Driver for Injury to Guest, Applies to Wrongful Death Action and also Whether Such

30 The Auditor of Public Accounts reported that during the biennium from June 30, 1936, to June 30, 1938, there was a net decrease of 32 in the number of state banks in Illinois. Of this group, 22 were voluntarily liquidated, one consolidated with a national bank, and 11 were converted into national banking associations: Blue Book of the State of Illinois, 1937-38 (Springfield, 1938), 524. In an effort to lessen such liability, the legislature also adopted a special statute of limitations in 1941: Laws 1941, Vol. I, 272; Ill. Rev. Stat. 1943, Ch. 16½, §§ 6a-6h. A proposal to revise the state constitution on this point was submitted to the electorate on Nov. 5, 1940. Out of a total vote of 4,262,198 cast, only 1,138,306 ballots were marked on the subject of the amendment, hence the proposal failed. Of those voting, however, the ratio of affirmative votes was more than double the negative, being 775,170 affirmative against 363,136 negative.
Statute Violates Federal and State Constitutional Provisions Regarding Due Process and Preservation of Remedies—The plaintiff, in Clarke v. Storchak, as administratrix for her deceased husband's estate, sued to recover for the wrongful death of decedent while riding in defendant's automobile. The complaint charged both ordinary negligence and wilful and wanton conduct. Defendant's answer denied the allegation as to wilfulness and, for a further defense, pleaded that the decedent was riding as a guest hence no cause of action could be maintained for ordinary negligence. Plaintiff, by way of reply, asserted that her action was based on the Injuries Act and that the same was not affected by the provisions of the so-called "guest" statute, or if it was, then the latter statute was unconstitutional since it violated both the Federal and the State Constitutions in several particulars. A motion by defendant to strike such reply was granted and, at the ensuing trial, the issues were confined to questions of wilful and wanton conduct on defendant's part. The jury specially found that the deceased was a guest and also found that defendant was not guilty of wantonness. Upon such finding, judgment in the trial court was rendered in favor of defendant, which judgment on appeal was affirmed. In arriving at such decision, the Illinois Supreme Court concluded that the limitations imposed by the Motor Vehicles Act were not only constitutional in character but were equally applicable to suits for wrongful death as well as those brought by surviving victims.

No right of action for wrongful death existed at common law, and remedy is provided today only by virtue of statute. It should be remembered, though, that the right of the representative to sue depends upon

1 384 Ill. 564, 52 N.E. (2d) 229 (1944).
2 Ill. Rev. Stat. 1943, Ch. 70, § 1.
4 The claim of unconstitutionality rested upon the theory that the statute in question violated the Fourteenth Amendment of the United States Constitution as an attempt to deprive plaintiff of due process of law. Violation of the State Constitution was charged on the ground that the statute embraced more than one subject in its title, contrary to Ill. Const. 1870, Art. IV, § 13, and also because it deprived plaintiff of that certain remedy for injuries and wrongs guaranteed by Art. II, § 2 and § 19 thereof.
5 Direct appeal was permitted as the court found the question of the constitutionality of the statute had been directly raised by the pleadings and passed upon by the trial court: Ill. Rev. Stat. 1943, Ch. 110, § 199(1). Jenisek v. Riggs, 381 Ill. 290, 44 N.E. (2d) 902 (1942), was distinguished on the ground that the question of constitutionality of the identical statute here involved was not raised until motion for new trial. The Appellate Court, upon transfer, refused to inquire into the precise points concerned in the instant case: Jenisek v. Riggs, 320 Ill. App. 158, 50 N.E. (2d) 121 (1943).
8 The first Illinois statute was enacted in 1853: Laws 1853, p. 97. It was amended in 1903 by increasing the maximum limit of recovery to $10,000 and by reducing the period within which suit might be brought to one year: Laws 1903, p. 217. In
the existence of the same facts as would be required to support action by the deceased victim had he survived and brought suit in his own name. Similarly, the legislature would be free at any time to abolish the statute if it saw fit, or to impose any lawful conditions it might choose at least as to the future. Since the right to sue is not absolute, it follows that if the legislature has validly placed limits thereon, the plaintiff is bound thereby. The provisions of the so-called "guest" statute would clearly constitute limitations on the right of action had the victim survived, for they would serve to deny recovery to one riding in an automobile if he was a non-paying passenger and the driver was not guilty of wilful or wanton misconduct. If such provisions are valid, they would, in the same way, limit the possibility of recovery by the legal representative in the wrongful death cases.

The principal criticism of the pertinent statute involved in the instant case was founded on that provision of the Illinois Constitution which declares that: "Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person. . . ." It was argued that the "guest" statute deprived plaintiff of that "certain remedy" which had heretofore been enjoyed in wrongful death cases, to-wit: to recover whenever the death was caused by defendant's fault whether produced by mere carelessness or by his wilful conduct. Such argument was met by the assertion that no vested right was thereby conferred but that the guarantee was subject to the over-riding power of the state to make reasonably necessary changes when required to effectuate the police powers enjoyed by the sovereign government.

It is on this theory that "guest" statutes have been upheld in other jurisdictions, particularly where the driver has not been freed from all liability.

1935 the statute was again amended to deny the right of action for death occurring outside the state if a cause of action existed at the place of death and service could be obtained there: Laws 1935, p. 916.


11 One argument against validity of the statute in question was that the provisions thereof were not germane to the general title, hence violated Ill. Const. 1870, Art. IV, § 13. The court decided the provisions were referable to one general scheme or purpose so were valid under the authority of Campe v. Cermak, 330 Ill. 463, 161 N.E. 761 (1928), and People ex rel Kell v. Kramer, 328 Ill. 512, 160 N.E. 60 (1928).


13 People v. John Doe of Rosehill Cemetery Co., 334 Ill. 555, 166 N.E. 112 (1929); City of Aurora v. Burns, 319 Ill. 84, 149 N.E. 784 (1925); State Public Utilities Commission v. City of Quincy, 290 Ill. 360, 125 N.E. 374 (1919).

liability.\textsuperscript{15} In only one state has a “guest” statute been declared invalid as violating constitutional rights, but the holding there depended upon a specific provision in the state constitution authorizing suit for wrongful death whether arising from negligence or from other forms of conduct.\textsuperscript{16} In the absence of such a specific limitation on the point, and there is none such in Illinois, the legislature should be free to exercise the police power of the state if it determines there is need for a reasonable application thereof. In the case of the “guest” statutes, it has also been held that the division between non-paying and paying passengers does not amount to a denial of the equal protection of the laws.\textsuperscript{17} Even if the remedy for injury were a common-law one, such may be constitutionally circumscribed by statute provided the remedy is not eliminated in all circumstances\textsuperscript{18} and the restriction is not discriminatory within the class of persons affected.\textsuperscript{19} Certainly, the victim has no vested right prior to the infliction of injury, hence he cannot well complain if legislation, effective before the injury occurs, restricts his recovery in the interest of the sovereign police power.\textsuperscript{20}

The Illinois statute in question, when tested by such principles, is obviously constitutional as it does not grant absolute immunity for the wrongdoer, treats all non-paying passengers in the same equal fashion, is not retroactive in operation, and bears evidence of a considered exercise of the police power. The flow of collusive claims which arose from automobile accidents whenever the driver carried liability insurance was sufficiently marked to cause the United States Supreme Court to say: “We are not unaware of the increasing frequency of litigation in which passengers carried gratuitously in automobiles, often casual guests or licensees, have sought the recovery of large sums for injuries alleged to have been due to negligent operation. In some jurisdictions it has

\textsuperscript{15} An early Oregon statute was held invalid, because the operator was freed from all liability, in Stewart v. Houk, 127 Ore. 569, 271 P. 998, 61 A.L.R. 1236 (1928), petition for rehearing denied in 127 Ore. 597, 272 P. 893 (1928). A subsequent statute of that state was approved when it preserved liability in case of willful or reckless fault: Perozzi v. Ganiere, 149 Ore. 330, 40 P. (2d) 1009 (1935). See also Coleman v. Rhodes, 35 Del. 120, 159 A. 649 (1932).

\textsuperscript{16} Ludwig v. Johnson, 243 Ky. 533, 49 S.W. (2d) 347 (1932). A Delaware statute was held unconstitutional on the ground that a complete denial of liability went too far, though the court acknowledged that some limitation on liability would be regarded as valid: Coleman v. Rhodes, 35 Del. 120, 159 A. 649 (1932).


\textsuperscript{18} Shea v. Olson, 185 Wash. 143, 53 P. (2d) 615 (1936).


\textsuperscript{20} Perozzi v. Ganiere, 149 Ore. 330, 40 P. (2d) 1009 (1935). See also note on Fearon v. Treanor, 288 N.Y.S. 368 (1936), in 15 CHICAGO-KENT REVIEW 188, and note on Pennington v. Stewart, 212 Ind. 553, 10 N.E. (2d) 619 (1937), in 16 CHICAGO-KENT REVIEW 182. A comparable Illinois statute, Ill. Rev. Stat. 1941, Ch. 38, §§ 246.1-246.6, was declared unconstitutional in People v. Mahumed, 381 Ill. 81, 44 N.E. (2d) 911 (1942), but on the narrow ground that the purpose of the act was not clearly disclosed by the title. The point here concerned was not discussed.
DISCUSSION OF RECENT DECISIONS

been judicially determined that a lower standard of care should be exacted where the carriage in any type of vehicle is gratuitous. . . Whether there has been a serious increase in the evils of vexatious litigation in this class of cases, where the carriage is by automobile, is for legislative determination, and, if found, may well be the basis of legislative action further restricting the liability.21 That court also observed that "In this day of almost universal highway transportation by motor car, we cannot say that abuses originating in the multiplicity of suits growing out of the gratuitous carriage of passengers in automobiles do not present so conspicuous an example of what the legislature may regard as an evil, as to justify legislation aimed at it, even though some abuses may not be hit."22 Whether "guest" statutes, where constitutional, will continue to serve the purpose for which they were intended is a matter not so free from doubt. Since the existence of wantonness, or other basis for liability in guest cases, is a matter of fact rather than one of law, a lenient jury could well stretch the language used in any specific statute purporting to limit liability so as to permit recovery.23 If popular feeling is adverse to the legislative conception of a reasonable exercise of the police power, such statutes might well be undermined if not actually nullified unless the courts are alert to prevent the same by exercising control over the jury through the power to set aside verdicts which do not conform thereto.

W. W. Valentine

DEEDS—CONSTRUCTION AND OPERATION—WHETHER PROVISION IN PRELIMINARY SALE CONTRACT FOR AN EASEMENT IS "MERGED" BY THE SUBSEQUENT EXECUTION OF A DEED WHICH CONTAINS NO SUCH EASEMENT PROVISION—In the case of Chicago Title and Trust Company v. Wabash-Randolph Corporation,1 plaintiff sought a mandatory injunction to compel defendant, an adjoining landowner, to remove an obstruction from his portion of a private alley over which the plaintiff claimed a right of easement for ingress and egress. Both parties traced their title back to a common grantor, one Walker. It appeared that in 1863 Walker contracted to sell the north portion of the premises to one Farwell. The preliminary contract between them contained a reservation of a right of passage over the premises about to be sold in favor of the south portion. Pursuant to such contract, suitable reservation was included in the deed of conveyance. Subsequently, Walker agreed to sell the south portion to McKey and in that contract it was stipulated that the purchaser should leave a passageway open over the premises, conforming to that established on the Farwell tract, for the common benefit of all persons owning any portion of the entire premises. The deed which consummated that transaction, however, contained no provision for an easement. The south

21 Silver v. Silver, 280 U. S. 117 at 122, 50 S. Ct. 57, 74 L. Ed. 221 at 225.
22 Ibid., 280 U.S. 117 at 123, 50 S. Ct. 57, 74 L. Ed. 221 at 226.
23 See, for example, Nelson v. McMillan, 151 Fla. 847, 10 So. (2d) 565 (1942).
1 384 Ill. 78, 51 N.E. (2d) 132 (1943).
portion was later resubdivided and a part thereof, together with the north portion acquired by Farwell, was ultimately vested in plaintiff while the balance of the south portion was acquired by the defendants. The passageway was apparently laid out and used for many years, but about 1923 a portion of the extreme south end thereof was enclosed by erecting a small store building thereon. Plaintiff served notice of its claim under the easement and then sued to vindicate the same, relying solely on the language of the Walker-McKey sale contract. Defendant contended that since the only mention of the intention to create an easement was contained in that contract, such intention was destroyed or merged in the subsequent deed which failed to expressly reserve the right. The trial court found in defendant’s favor and dismissed the suit. On appeal, the Illinois Supreme Court reversed on the ground that since the agreement by McKey to create the easement could not have been fulfilled by the mere delivery of the deed, there had been no merger.

It is a well settled principle that, in the absence of fraud or mistake, all prior negotiations and agreements leading up to the execution of a deed are said to be merged therein and such agreements thereupon become functus officio. If, however, the prior agreement is collateral to the deed there is no merger. A covenant is said to be collateral to the deed when it deals with a subject matter other than the conveyance of land, or when it provides for additional acts to be performed by the vendor or vendee other than the conveyance. For example, covenants by the vendor to erect a building, to put the vendee in possession of a building situated on the premises, to convey a building on the premises, to continue the maintenance of a dam, and the like, have all been

2 The court noted that in approximately thirty instruments affecting the chain of title since 1866, no reference to the purported easement appeared in eighteen of them but some reference was made in twelve others, one as late as 1932: see 394 Ill. 78 at 83, 51 N.E. (2d) 132 at 135.
3 The claim was also advanced that if an easement had ever existed it had been lost by abandonment through agreement. The court found that, if any such agreement of abandonment was made, it did not bind plaintiff since it was made by the plaintiff’s lessee without authority.
4 In Trapp v. Gordon, 336 Ill. 102, 7 N.E. (2d) 869 (1937), the court held that the contract to create an easement was not merged in the deed because the evidence showed that the easement provision had been omitted by mistake. In the instant case, the evidence failed to disclose any such mistake.
6 Ibid.
9 Laffin v. Howe, 112 Ill. 253 (1885).
10 Shelby v. C. & E. I. R. R. Co., 143 Ill. 385, 32 N.E. 438 (1892). Although the court there seemed to base its decision on the fact that the easement there concerned was appurtenant to the land and would pass without any mention of it in the conveyance, the court did say: "If it was not in the nature of an easement appurtenant to the land, it was a collateral right secured by the contract, and not being covered by the deed, was not affected by it." See 143 Ill. 385 at 398, 32 N.E. 438 at 443. It should be noted, however, that an agreement to maintain an existing dam is different from an agreement to create an easement.
11 Tighe v. Locke, 299 S.W. 105 (Mo. App., 1926); West Paterson Sand & Gravel
treated as collateral agreements because they were covenants which "do not have to do with the title, possession, quality, or emblements of the land conveyed." 

It would seem, from such principles, that the Illinois Supreme Court, when deciding against a merger in the instant case, must have treated the easement provision in the Walker-McKey sale contract as providing for a collateral agreement. But the authorities cited by the court on that point do not sustain that position, and a number of courts in other jurisdictions have held that an easement contract such as is here involved is not collateral, hence does merge in the subsequent deed.

It may be helpful, in order to evaluate the instant case, to consider the nature of an easement and its effect on the servient estate. An easement has been defined as a right or privilege, but without right of profit, which the owner of one piece of land may have in the land of another. It is a property right and, as such, it gives the owner of the dominant tenement a restrictive use or right in the land of the servient one. For this reason, it is an encumbrance on the estate of the servient one.


The court cited the cases referred to in notes 4, 8, and 9, ante. In the Trapp case the provision for an easement had been omitted by a clear mistake. In the Biewer case the agreement referred to the subsequent delivery of possession after deed was delivered. In the Shelby case the contract called for the continued maintenance of a dam. It is submitted that in such cases the mere delivery of a deed did not, and could not, fulfill all the contractual obligations. In the instant case, the easement could, and was probably intended to, come into existence, if at all, contemporaneously with the grant. The court, however, states: "The agreement of the McKeys to establish an easement could not become effective until after delivery of the deed, therefore, by its delivery the easement provision was not merged in the deed.' See 384 Ill. 78 at 87, 51 N.E. (2d) 132 at 137 (italics added). Such language is inconsistent with an earlier statement by the court that "no easement could arise at the time of making the contract since the McKeys then had not title to encumber, but that "... when the purchase price was paid and the deed delivered, the title passed and the agreement ... to create an easement ... became effective and operated to create the burden of an easement upon each of the McKey lots." See 384 Ill. 78 at 87, 51 N.E. (2d) 132 at 136.


Wessels v. Colebank, 174 Ill. 618, 51 N.E. 639 (1898). See also 28 C. J. S., Easements, § 1.
tenement,\textsuperscript{16} hence it does affect the title and possession thereof. As such, it is properly a part of the subject matter of the conveyance. It is difficult to see, then, how it can be termed a collateral agreement.

The decision in the instant case also leads to the novel conclusion that an easement appurtenant can be created by a mere contract. Once the parties have entered into a contract calling for such an easement, even though they might later change their minds, they apparently cannot prevent the creation of this restriction by merely omitting such provision from the final deed which purports to give the grantee an unencumbered title. The intention of the parties, as clearly manifested in the recorded conveyance, is apt to be defeated by the production of an obscure sales contract which should have been regarded as extinguished by performance through the deed. If mistake or fraud were present, such result might be regarded as just, but in the absence thereof the final deed should be the only evidence of the title granted. Restrictions on the use of land are frowned upon by the courts unless adequate provision in an instrument clearly and finally expresses the intention of the parties to create such a restriction.\textsuperscript{17} For that reason, such restrictions are generally created by the formality of either a dedication or an express provision in the deed itself.\textsuperscript{18} To hold, as does the instant case, that such restrictions can be created by an informal executory contract which is not conclusive as to what the parties eventually intended but indicates only what the parties at one time agreed to convey, would not only be contrary to the general principles outlined above but would be apt to lead to much confusion.\textsuperscript{19}

**MARY JANE SACCONE**

**Extradition—Interstate Extradition—Whether or Not Asylum State Waives Jurisdiction Over Prisoner Serving Sentence by Recognizing Extradition Request of Demanding State and May Compel Return of Prisoner for Purpose of Serving Balance of Sentence—In the recent case of People ex rel. Barrett v. Bartley,\textsuperscript{1} an original petition in mandamus was presented to the Illinois Supreme Court to compel the defendant, judge of a state circuit court, to expunge an order which he had entered liberating a prisoner from the state penitentiary upon a writ of habeas corpus. It appeared that the prisoner, after plea of guilty, had been sentenced to serve a term of years in the Illinois penitentiary. Prior to the expiration of his term, and without application from the prisoner, the parole board

\textsuperscript{16} Kneip v. Schroeder, 255 Ill. 621, 99 N.E. 617 (1912); Mackey v. Harmon, 34 Minn. 168, 24 N.W. 702 (1885); Gulf Production Co. v. Continental Oil Co., 132 S.W. (2d) 553 (Tex. Sup., 1939). See also 28 C. J., Easements, § 1b.

\textsuperscript{17} Voorhees v. Blum, 274 Ill. 319, 113 N.E. 583 (1916).

\textsuperscript{18} Loomis v. Collins, 272 Ill. 221, 111 N.E. 999 (1916). See also 18 C. J., Deeds, § 449.

\textsuperscript{19} The right to the easement, in the instant case, could possibly have been established by prescription, but that question was not apparently presented to the court.

\textsuperscript{1} 383 Ill. 437, 50 N.E. (2d) 517 (1943).
DISCUSSION OF RECENT DECISIONS

granted a conditional parole. Before the same had become effective, the governor honored an extradition requisition by the State of Wisconsin. Upon surrender of the prisoner to that state, he was tried, convicted, sentenced, and served a term in its state prison. At the time of his release therefrom, no request for his surrender being pending, he was allowed to go to Ohio where, for a subsequent offense, he was confined in the penitentiary of that state. While so detained, the Illinois parole authorities requested surrender of the prisoner for an alleged violation of parole. After the prisoner's return to Illinois pursuant to such request, he sought and secured his discharge on habeas corpus. It was this order which the relator in the instant case sought to have expunged. Such request was, however, denied when the Supreme Court concluded that the conduct of the governor in releasing the prisoner to the state of Wisconsin amounted to a pardon of the unexpired portion of the prisoner's sentence.

Had the conditional parole in the instant case been applied for by the prisoner, or had he been released pursuant to its terms, there could probably be no doubt of the right of the state to compel the prisoner's detention for the balance of the original sentence as a parole violator.\(^2\) The court, however, found that the parole had never become effective and all that was accomplished was a transfer of the prisoner from one place of detention to another. Such finding raised the question of the legal effect of the act of the governor in surrendering the prisoner to another state without reservation. That question does not appear to have received extensive consideration, nor has it been given a unanimous answer.

In the absence of an outright pardon, decisions exist holding that the release of a prisoner undergoing sentence on an extradition warrant amounts only to a temporary release from custody and that, as a consequence, jurisdiction may be resumed when the purpose of extradition has been satisfied. In *Johnson v. Lowry*,\(^3\) for example, a Georgia court took the attitude that the penitentiary was not a place of sanctuary, hence release of the prisoner to stand trial elsewhere did not result in loss of jurisdiction over him. An enlightening opinion by the justices of the Supreme Judicial Court of Massachusetts also indicates that a release of a prisoner does not amount to a waiver of the right to demand fulfillment of punishment unless a formal pardon accompanies the release.\(^4\) There is also language in the Texas case of *Ex parte Hobbs*\(^5\) which would tend to support such view for the court there said: "This jurisdiction, being operative, takes precedence of the one claimed until its purpose

\(^2\) At the time of his surrender to the Wisconsin authorities, the prisoner signed a statement in which he pledged himself to "comply honestly" with all the conditions of the parole. If such document were effective, his subsequent conduct in Ohio was a clear breach of such pledge: People v. Decker, 382 Ill. 404, 47 N.E. (2d) 475 (1943).

\(^3\) 183 Ga. 207, 188 S.E. 23 (1936).


shall have been completed. The Governor of this State has no power, by the issuance of warrant [of extradition] to arrest its action." 6 In Pennsylvania, the issue was expressly covered by a statute which permitted the governor to grant extradition of an inmate of the penitentiary but placed a limitation thereon requiring agreement by the demanding state for the return of such prisoner to serve the balance of his term. 7 It was, therefore, held that the return and re-incarceration of the extradited prisoner did not constitute a violation of his rights. 8

On the other hand, although the precise question has never, prior to the instant case, been raised in Illinois, 9 it has been decided in the same way in at least four other states 10 and at least one case specifically holds that the surrender was tantamount to a pardon. 11 Such cases appear to be more in harmony with the concept of extradition since the executive is not bound to grant the request 12 and, if he sees fit to do so, he does not need the concurrence of the judicial department to the implied waiver of jurisdiction. 13 If the executive is willing to waive control on behalf of the state, it would seem unfair for the state to assert, at a later time, that jurisdiction could be resumed. In that regard, attention might be drawn to the decision in the case of Ex parte Guy 14 where the Oklahoma court held that conditions imposed by the governor upon the release of a prisoner were void.

The Illinois court, in the instant case, while adopting the holding of that case expressly stated that it did not mean to approve all that was said therein with regard to the power of the executive to attach conditions to the surrender of a prisoner. 15 The way would seem open, then,

6 32 Tex. Cr. 312 at 318, 22 S.W. 1035 at 1037, 40 Am. S. R. 782 at 785.
7 Pa. Laws 1933, p. 249; 19 Pa. Pub. Stat. § 121, reads: "... Provided, however, That prior to the removal of the person from this State, the executive authority of the demanding state or district shall have agreed that the person so delivered up is to be returned immediately... in the event of his or her acquittal in the demanding state...." It should be noted that this statute is not broad enough to cover return after service of sentence in the demanding state, and it was repealed in 1941.
9 Nearest to it is People v. Klinger, 319 Ill. 275, 149 N.E. 799, 42 A.L.R. 581 (1925), where the defendant, awaiting trial in Wisconsin was surrendered to the Illinois authorities. His plea that he was constitutionally entitled to a speedy trial in Wisconsin and such right was invaded by extradition was overruled, the court holding that while Wisconsin was not obliged to grant extradition, its act in so doing was a waiver of the right to detain.
13 State v. Saunders, 288 Mo. 640, 232 S.W. 973 (1921); Ex parte Middaugh, 40 Okla. Cr. 280, 268 P. 321 (1928).
14 41 Okla. Cr. 1, 269 P. 782 (1928).
15 383 Ill. 437 at 446, 50 N.E. (2d) 517 at 521.
should such be the desired purpose, to release upon a conditional parole or a conditional warrant for extradition. Recapture would then be possible, although to remove all doubt legislation similar to that in Pennsylvania might be advisable.

E. O. DAW

TRUSTS—CONSTRUCTION AND OPERATION—WHETHER OR NOT SURVIVING SPOUSE IS AN "HEIR" WITHIN MEANING OF LANGUAGE IN TRUST INSTRUMENT PROVIDING THAT UPON DEATH OF BENEFICIARY THE TRUST RES SHOULD BE CONVEYED TO HEIRS AT LAW OF BENEFICIARY—In Bundy v. Solon1 the facts disclosed that two brothers who were business partners conveyed their business property to a trustee, at the same time entering into a trust agreement2 wherein it was provided that the survivor should be permitted to continue to conduct the business but that, at the death of the survivor, the trustee was to transfer all the property held under the deed of trust by conveying one-half thereof to the "heirs-at-law" of each brother unless otherwise disposed of by will. Following the death of the surviving partner, the trustee filed a complaint for a construction of the terms of the trust agreement, but more particularly to determine the persons to whom the property should be conveyed. The widow of one of the brothers filed an answer and a counterclaim in which she asserted she was an "heir-at-law" within the meaning and intention of the trust agreement. Children of this same brother by a prior marriage moved to strike the counterclaim on the ground that the widow was not an heir-at-law within the meaning of that term as used in the trust agreement, that term being, according to them, limited to mean children. The lower court sustained such motion and dismissed the counterclaim. On appeal by the widow, the Illinois Supreme Court reversed such decree and remanded the cause with directions to enter a decree giving to the widow a share as an "heir-at-law" of her deceased husband.

In its opinion, the court stated that "whether one is an heir-at-law is determined by statute, and generally an heir is designated as one who succeeds by descent to lands, tenements and hereditaments, or is a person appointed by law to succeed to an estate in case of intestacy."3 The court pointed out that in 1923 the Statute of Descent4 had been amended so as to allow the surviving spouse, in lieu of dower, to inherit an absolute estate consisting of a one-third part of each parcel of real and personal estate left by the deceased who died with issue surviving provided dower therein was waived in writing or by failing to elect to waive the same within one year. By reason thereof, the court concluded, the widow had the right to be considered as an heir "because such status must be

1 384 Ill. 137, 51 N.E. (2d) 183 (1943).
2 A detailed statement of the language of the trust instrument is set forth in the opinion.
3 384 Ill. 137 at 142, 51 N.E. (2d) 183 at 186.
4 Laws 1923, p. 325; Cahill’s Ill. Rev. Stat. 1923, Ch. 39, § 1.
changed by her own act,” lacking which the property was cast upon her by law.

Under the common law, courts had little difficulty in giving interpretation to the word “heir” since neither husband or wife could possibly fit that term, which included only the blood relations of the deceased ancestor. But statutes have been passed from time to time abrogating the common-law meaning thereof by giving the surviving spouse a share of some kind in the deceased spouse’s estate. For three score years, therefore, in Illinois numerous cases have held that the word “heir” or similar terms, when uncontrolled by the context and in the absence of special terminology in the instrument requiring a different construction, serve to designate that class of persons appointed by law to succeed to the estate as in case of intestacy.

The Illinois Descent Statutes, as they existed prior to 1923, provided that where the deceased spouse left no issue then the surviving spouse was to receive a one-half interest in fee in the deceased person’s lands plus all of the personality. If issue survived, however, the survivor received only one-third of the personality and none of the real estate. Consequently, at that period, if an instrument provided for a remainder to the heirs of a beneficiary, the word would be interpreted to include the surviving spouse in case the beneficiary died without issue, but would not be so interpreted if issue survived. In 1923, however, the Descent Act was amended so as to give the surviving spouse an interest in land owned by one who left issue provided the right to dower was waived. In Countiss v. Whiting, a case arising under that statute, the trust instrument had provided that in the event of the death of certain beneficiaries their share was to be paid to their “lawful heirs.” Upon the death of one such beneficiary, her husband claimed a share in her portion of the trust proceeds, but the court there held that while the word “heir” designated the person appointed by law to succeed to the realty as in case

5 384 Ill. 137 at 144, 51 N.E. (2d) 183 at 187.
6 See Zacharias, Husband and Wife as “Heir” Under Testate Succession, 12 CHICAGO-KENT REVIEW 264 (1934).
7 When used in wills, see Rawson v. Rawson, 52 Ill. 62 (1869); Richards v. Miller, 62 Ill. 417 (1872); Kelley v. Vitas, 112 Ill. 242 (1884); Potter v. Potter, 306 Ill. 37, 137 N.E. 425 (1922); Tilton v. Tilton, 382 Ill. 426, 47 N.E. (2d) 454 (1943); Richardson v. Roney, 382 Ill. 528, 47 N.E. (2d) 714 (1943). When used in trust instruments, see Emery v. Emery, 325 Ill. 212, 156 N.E. 364 (1927). When used in insurance policies, see Alexander v. Northwestern Masonic Aid Ass’n, 126 Ill. 558, 18 N.E. 556 (1888).
9 Rawson v. Rawson, 52 Ill. 62 (1869); Richards v. Miller, 62 Ill. 417 (1872); Alexander v. Northwestern Masonic Aid Ass’n, 126 Ill. 558, 18 N.E. 556 (1888); Clemens v. Munroe, 212 Ill. App. 296 (1918).
10 Gauch v. St. Louis Mutual Life Ins. Co., 88 Ill. 251 (1878). But see Walker v. Walker, 283 Ill. 11, 118 N.E. 1014 (1918), where the spouse was included despite the fact that issue survived as the will made specific reference to the Descent Act.
11 Laws 1923, p. 325; Cahill’s Ill. Rev. Stat. 1923, Ch. 39, § 1.
of intestacy, still, as the husband had not renounced his dower right, he was not to be included in such class.

In 1939, however, the statute was again amended, but this time the surviving spouse was treated as an heir enjoying a conditional estate which would become vested if the demand for dower, in lieu thereof, was not asserted within one year so that mere failure to act was deemed a waiver and operated as an election to take an absolute interest in fee as an heir. A note on the Countiss case therefore suggested that should the situation therein arise again after the adoption of the later amendment the result would probably be different since, by that act, the surviving spouse "inherits a share in the realty absolutely unless he perfects his right to dower." The instant case carries out such suggestion and may be said to make the Countiss case no longer applicable law.

Attention should be called, however, to two other trust cases decided by the Illinois Appellate Court in recent years. In each of these cases the deceased spouse died testate and, as a consequence, it was held that the surviving spouse could not share since, even if he or she did answer to the description of a "legal heir" under the Descent Act, such statute was not in point. In the case under discussion, the deceased spouse died intestate so such decisions stand unchallenged by anything decided therein. The doctrine of those cases has not, however, escaped criticism on the ground that the simple term "heir" should not have one meaning for purpose of intestate succession and another where a will is involved.

The decision in the instant case clearly refuses to make such a distinction where a trust agreement is concerned and tends to indicate that the same view would be followed if a will were involved. If the donor's, or testator's, desire is to exclude the surviving spouse it would seem advisable that such desire should be clearly and specifically expressed by the use of words that are commonly employed for that purpose. Reliance on the simple term "heir" to accomplish that result would seem unsafe.

W. S. GROTEFELD

USURY—Usurious Contracts and Transactions—Whether Provision in Note Calling for Increase in Rate of Interest After Maturity Is a Stipulation as to Liquidated Damages or Involves the Element of Usury—According to the facts in the case of Randall v. Home Loan & Investment Company, the defendant loaned $800 to the plaintiff's assignor, taking a note

14 20 CHICAGO-KENT LAW REVIEW 29.
16 See 12 CHICAGO-KENT REVIEW 264 at 288, and 14 CHICAGO-KENT REVIEW 194. Logic would deny the theory that the deceased spouse must die intestate before the surviving spouse could be considered an heir. See also Tilton v. Tilton, 382 Ill. 426, 47 N.E. (2d) 454 (1943).
1 — Wis.—, 12 N.W. (2d) 915 (1944).
calling for monthly payments together with interest calculated at the rate of 9.8%. Such note further provided that if the monthly payments were not paid promptly on or before the first of each month an additional penalty of one per cent. should be added thereto. Part of the principal was paid by the deceased debtor during his lifetime. The balance was paid by the plaintiff as the assignor of the debtor's estate. But, by reason of delinquencies, penalties were also collected pursuant to the terms of the note. The plaintiff, contending that these additional penalties should be considered as additional interest, brought action to recover treble the amount of the interest so paid as a violation of a local statute fixing a maximum rate of ten per cent. Judgment for the plaintiff in the trial court was reversed on appeal to the Supreme Court of Wisconsin which held that the one per cent. penalty provision, in the absence of any proof to the contrary, was inserted for the purpose of securing prompt payment at maturity and was not to be considered as an additional interest charge.

As authority for such decision, the Wisconsin court relied on the early Illinois case of Funk v. Buck\(^4\) in which a creditor was permitted to collect interest after maturity at a rate in excess of the lawful one. Reliance upon such case as authority seems at first sight to be astonishing for it no longer represents the law of this state. It is true that Illinois cases decided under earlier Illinois usury statutes followed the general rule hereinafter mentioned.\(^5\) In 1879, however, the Illinois legislature, observing the abuse to which penalty provisions could be put and realizing that the use thereof in many cases was but a subterfuge to evade the usury law, passed a statute which declared that notes providing for "interest or compensation at a greater rate than herein specified, on account of non-payment at maturity, shall be deemed usurious."\(^6\) Pursuant thereto, Illinois courts since then have declared provisions calling for the unlawful increase of interest after maturity to be a violation thereof.\(^7\) Similar statutes have been adopted in other states,\(^8\) or the same result has been achieved by judicial construction of existing statutes.\(^9\) No such statute exists in Wisconsin, however, nor had the immediate question been passed upon by the courts thereof prior to the decision in the instant case.

\(^3\) Ibid., § 115.04.
\(^4\) 91 Ill. 575 (1879).
\(^5\) Gould v. Bishop Hill Colony, 35 Ill. 324 (1864); Lawrence v. Cowles, 13 Ill. 577 (1852); Davis v. Rider, 53 Ill. 416 (1870); Wilday v. Morrison, 66 Ill. 532 (1873).
\(^7\) Barton v. Farmers' Nat. Bank, 122 Ill. 352, 13 N.E. 503 (1887); Metzenbaugh v. Troup, 36 Ill. App. 261 (1890); McNail v. Welch, 26 Ill. App. 482 (1888); Leonard v. Patton, 106 Ill. 99 (1883).
\(^9\) Shropshire v. Commerce Farm Credit Co., 120 Tex. 400, 30 S.W. (2d) 282, rehearing denied, 39 S.W. (2d) 11, 84 A.L.R. 1269 (1931); Ulvilden v. Sorken, 58
DISCUSSION OF RECENT DECISIONS

In the absence of statutory regulation, the general rule seems to be that a stipulation in a note calling for a greater rate of interest than is allowed by law prior to maturity in the event of non-payment at maturity is not enough to render the transaction usurious if the parties, when inserting such provision, act in good faith and without intent to use the same as a device to evade the usury law. The theory behind such rule seems to be that the increase in rate after maturity is not considered by the parties as an interest charge but is either a provision for liquidated damages or else is a conditional penalty which the debtor may avoid by prompt payment of the note. While enforcement of such provision may be open to question because of its being a penalty, the courts generally have refused to consider it as an exaction of usury. Accordingly, creditors have been allowed to collect as much as thirty per cent. and even fifty per cent. after maturity. In such cases, the burden of proving the transaction to be usurious is on the debtor and there is a presumption, in the absence of proof to the contrary, that such a stipulation is only a penalty inserted for the purpose of securing prompt performance.

The fundamental purpose of usury statutes, however, is to afford the debtor with protection against unreasonable demands by the avaricious lender of money, which demands tend to stifle commerce and trade. To carry out the full purpose of such statutes, then, it would seem reasonable that the protection thereof should be extended to cover the rate of interest chargeable after, as well as before, maturity. For all practical purposes, the essence of the transaction remains the same if the loan is not repaid at maturity. The relation of debtor and creditor still exists between the parties, and the charge after maturity continues to be compensation for the use and forbearance of money just as it was prior...
Toleration of the practice of charging additional sums under the guise of liquidated damage provisions merely aids the creditor evade the usury law.

It might be argued that the debtor can still protect himself against such practices by seeking equitable relief on the ground that the excessive charge after maturity constitutes an unenforceable penalty. Whether the stipulation is a penalty one or is, in fact, an enforcible provision for liquidated damages is a question of law for the court to decide, depending on the construction placed upon the contract. That construction, in turn, depends largely on the nature of the transaction involved and the reasonableness of the amount agreed upon by the parties. If the contract is of such nature that the court could easily compute the amount of damage caused by breach and the sum agreed upon is thereby shown to be excessive, the court will regard the provision as one calling for a penalty regardless of any designation given it by the parties and will enforce only that part thereof which it considers reasonable. On this basis, a provision for an increased rate of interest after maturity within lawful limits has generally been considered to be a stipulation for liquidated damages rather than for a penalty. But equitable relief has not always been given against a provision calling for an unlawful increase of interest after maturity, for the provision has been treated as a measure for liquidated damages "accruing from day to day, of which the party can, at any time, relieve himself by payment, and therefore involving, ordinarily, no special hardship calling for interference" by the equity court. Such decisions tend to leave the debtor completely at the mercy of the creditor, or provide an uncertain protection at best.

The wisdom of enacting statutes which either expressly or impliedly forbid any excessive charge of interest after maturity is evident. They will not only carry out fully the fundamental purpose of the usury laws but will also serve to prevent the money lender from collecting indirectly, in the guise of liquidated damages, that which he is forbidden, by positive law, to collect directly.

Mary Jane Saccone

15 Weiss v. United States Fidelity & Guaranty Co., 300 Ill. 11, 132 N.E. 749 (1921).
18 Downey v. Beach, 78 Ill. 53 (1875).
19 Bane v. Gridley, 67 Ill. 388 at 390 (1873).