December 1935

Tenancy by the Entirety in Illinois

Walter B. Smith

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/vol14/iss1/2

This Article 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 jwenger@kentlaw.iit.edu, ebarney@kentlaw.iit.edu.
TENANCY BY THE ENTIRETY IN ILLINOIS

WALTER B. SMITH

THAT estates by the entirety are non-existent in Illinois is a belief generally accepted without controversy. Whether or not this estate can be created in Illinois or whether the estate has been abolished by the construction placed on the Married Woman's Act of 1861 is the subject of the present enquiry. To approach this subject intelligently, it is necessary to mention the five joint estates which were acknowledged by the common law and, as a part of it, were embodied in our American law.

The first of the joint estates, "coparcenary," was the estate passing to the heirs of an intestate ancestor. It was never commonly known in this country, except perhaps in Maryland, and is now everywhere identical with tenancy in common. The second estate, "in common," originally arose only in case of purchase, but is now also recognized as arising by descent, thus replacing the estate in coparcenary. "Joint tenancy," the third estate, has been abolished by statute in many of our states. In Illinois it was considered as non-existent for a time but was later restored and is recognized as a valid estate. "Partnership," the fourth estate, was at all times a tenancy in common, save for certain exceptions for the

1 Member of Illinois Bar; alumnus of Chicago-Kent College of Law; Professor of Law at Chicago-Kent College of Law.
benefit of the partnership creditors, and has now been greatly modified in many of the states by statute. The fifth estate, "entireties," remains for our special consideration at this time. Can this estate exist in Illinois, or should the dictum in an opinion rendered some years ago be regarded as abolishing the possibility of creating such an estate?

We must first consider the points wherein this fifth estate differs from the others: (1) It was created only by deed or will, that is, by purchase. (2) It existed only in a title conveyed to two who were at the time husband and wife. (3) It was not severable by conveyance or mortgage by either of the two during the life of both, nor by partition proceedings by one against the other, nor was it subject to levy and sale on a judgment against either of the two tenants. (4) It could be terminated in three ways only—by the death of one of the two tenants, by conveyance in which both joined, or by divorce of the parties. (5) In case of the death of either, the other tenant became the sole owner; not by the passing of any new title, but by virtue of the conveyance to the two tenants as one, husband and wife being considered in the common law as composing a single entity; hence the name of the estate.

Tenancies by the entirety have been recognized in Illinois from the earliest days. Numerous cases arose from conveyances made prior to passage in 1861 of the Married Woman's Act, which provided one of the elements in the decision under which it has been held that tenancy by the entirety is abolished in this state.2

From Cooper et al. v. Cooper et al.,3 a case arising subsequent to the passage of that act, it appears that, in 1865, a conveyance was made to William Cooper and his

2 Mariner v. Saunders, 10 Ill. (5 Gilm.) 113 (1848); Lux v. Hoff, 47 Ill. 425 (1868); Almond et al. v. Bonnell, 76 Ill. 536 (1875); Harrer et al. v. Waliner, 80 Ill. 197 (1875).
3 76 Ill. 57 (1875).
wife and the heirs of her natural body of several tracts of land. The granting clause was to the parties of the second part, their heirs, and assigns; and the *habendum* used the same language. When Cooper died, a bill for partition was filed by certain of his heirs against the widow and the remaining heirs. Property acquired by another conveyance was also involved in the decision; and the record gives the points of decision in the trial court regarding matters raised in the conveyance of that other property, but it is silent as to such rulings concerning the deed here mentioned. The lower court, however, ordered dismissal of the bill. On appeal, the Supreme Court took the position that because of the Married Woman's Act all reason for holding that a conveyance to man and wife created a tenancy by the entirety was removed, the maxim, *cessante ratione legis, cessat ipsa lex*, applying in full force.

The decision in the Cooper case has been cited on the point now under consideration in only three cases, namely, Mittel et al. v. Karl et al.,\(^4\) *The Insurance Company of North America v. Hofing*,\(^5\) and Keller v. Bading.\(^6\)

The first of these cases, *Mittel v. Karl*, arose on a deed made in 1875 to A and B, her husband, "and the survivor of them, in her or his own right." The court decided that the deed conveyed an estate for life with contingent remainder in fee to the survivor. It is clear that the limitation over in the granting clause negatives any creation of an estate by the entireties.

The Hofing case arose out of a fire loss on an insurance policy issued to Jacob Hofing. The building stood on ground conveyed about 1868 to Hofing and wife. The court held that the error by the insured in representing himself to be the sole owner of the building did not

\(^4\) 133 Ill. 65, 24 N. E. 553 (1890).
\(^5\) 29 Ill. App. 180 (1888).
\(^6\) 64 Ill. App. 198 (1896).
vitiates the policy, but the nature of the tenancy, whether by the entireties or in common, had no possible bearing on the decision.

In the Keller-Bading case, the matter in controversy was whether certain condemnation money should be paid to a mortgagee under a mortgage executed by husband and wife, or to the mortgagors, who were stated by Judge Gary, the writer of the opinion, in his usual terse language, to be "tenants in common." Inasmuch as the entire amount involved was paid to the mortgagee to apply on the mortgage debt, the nature of the tenancy of the mortgagors had no bearing upon the question before the court, and that part of the opinion is purely dictum.

The Cooper case holds that the estate of tenancy by the entirety does not now arise in Illinois, it being no longer needed since the old common law fiction that man and wife were one person is no longer in force in this state. However, in twenty-nine of our states, the estate of entireties is recognized; in twenty-five of these, all disabilities of a married woman as to her property rights have been removed; and, in three of the other four states, the married woman's rights are greatly enlarged. In the state of Florida, for example, where a modified reduction of the married woman's disabilities exists, joint tenancy is abolished by statute; and yet a conveyance to husband and wife in joint tenancy was construed to be a tenancy by the entirety. The majority of the states do not recognize the reason—removal of disabilities from a married woman—as a cause for declaring the estate abolished.

In a Kansas case, the court specifically holds that the statutes relating to married women have not changed the rule in that state. It was stated that a deed might be executed to husband and wife which would convey to them, if the language of the deed explicitly said so, any

7 Citing Cooper v. Cooper, 76 Ill. 57 (1875).
of the estates in common or in joint tenancy or a tenancy in entirety, for "such has always been the law, and property owners can generally convey their property just as they please." In the case cited, the court raises the following points:

Now, how such act changes or modifies the rule of the common law in this regard, it is difficult to understand. That act was passed, ... presumably, for the benefit of married women, and not to take away from them any of their rights and privileges. Now, nine-tenths of the married women of this country are younger than their husbands, and the life tables, ... show that the expectancy of life for women is greater than that for men of the same age and health. ... Hence, in the great majority of instances, married women must survive their husbands. Now, if the Married Women's Act transforms an estate in entirety into an estate in common, then it will, in a great majority of instances, divest married women of one-half of their estates. Without the act, a married woman, holding with her husband an estate in entirety, would, when he dies (if she survives him) take the entire estate; but, with the act, if it is to be construed as the defendant in error would desire to have it construed, she would take under such circumstances, only one-half of the estate, and must lose the other half. As it will be shown hereafter, this act has nothing to do with the estate which either the husband or the wife shall hold, but only with the possession, control, and enjoyment by married women of their own separate property. ...

In a New Jersey case9 the court said that a conveyance of land to husband and wife after the passage of the Married Woman's Act does not create a tenancy in common. It gives her the right during their joint lives to hold in her possession half of the estate, the right of survivorship still existing as at common law. The court further stated that to constitute a tenancy in common between husband and wife there must be in the conveyance an expression of intention so to do.

In Diver v. Diver,10 the Pennsylvania court said:

9 Buttlar v. Rosenblath, 42 N. J. Eq. 651, 9 A. 695 (1887).
10 56 Pa. St. 106 (1867).
But it is said the Act of 1848, by destroying the legal unity of the husband and wife, has converted such an estate into a tenancy in common; that is, that such a deed conveys a different estate from that which the same deed would have created, if made prior to the passage of the Act. To this we cannot assent. It mistakes alike the letter and the spirit of the statute, imputing to it a purpose never intended. The design of the legislature was single. It was not to destroy the oneness of husband and wife but to protect the wife’s property, by removing it from under the dominion of the husband.... All this [the language of the act] had in view the enjoyment of that which is hers, not the force and effect of the instrument by which an estate may be granted to her.

In Kansas, since the decision in the Baker case, the legislature, by act passed in 1891, has abolished the common law right of survivorship in conveyance to two or more persons. The Supreme Court of that state, in the case of Withers v. Barnes et al., with regard to a deed made since the Statute of 1891 specifically granting an estate to two grantees "or the survivor" said that the Statute of 1909 abolished joint tenancies and the doctrine of survivorship by operation of law, but that it would be far-fetched, indeed, to hold that the grantor of a fee could not purposely make a conveyance which would confer common ownership on two grantees or the entire fee on one of them upon the death of the other.

Decisions along the same line are found in many of the states. For example, it was held in Maryland in Marburg et al. v. Cole that statutes abolishing joint tenancy are of no effect as to a tenancy by the entirety, as such an estate is not an estate in joint tenancy. In Bertles v. Numan, the New York court held that the Married Woman’s Acts do not change an estate by the entirety to a tenancy in common. In overruling an ear-

12 95 Kan. 798, 149 P. 691 (1915).
13 49 Md. 402 (1878).
14 92 N. Y. 152 (1883).
lier decision\textsuperscript{15} to the contrary, the court said:

It is said that the reason upon which the common-law rule under consideration was based has ceased to exist, and hence that the rule should be held to disappear. It is impossible, now, to determine how the rule, in the remote past, obtained a footing, or upon what reason it was based, and hence it is impossible now to say that the reason, whatever it was, has entirely ceased to exist. There are many rules appertaining to the ownership of real property originating in the feudal ages, for the existence of which the reason does not now exist, or is not discernible, and yet, on that account, courts are not authorized to disregard them. They must remain until the legislature abrogates or changes them, like statutes founded upon no reason, or upon reasons that have ceased to operate.

It was never, we believe, regarded as a mischief, that under a conveyance to husband and wife they should take as tenants by the entirety, and we have no reason to believe that it was within the contemplation of the legislature to change that rule. Neither do we think that there is any public policy which requires that the statute should be so construed as to change the common-law rule. It was never considered that that rule abridged the rights of married women, but rather that it enlarged their rights, and improved their condition. It would be against the spirit of the statutes to cut down an estate of the wife by the entirety to an estate as tenant in common with her husband. If the rule is to be changed, it should be changed by a plain act of the legislature, applicable to future conveyances; otherwise incalculable mischief may follow by unsettling and disturbing dispositions of property made upon the faith of the common-law rule. The courts certainly ought not to go faster than the legislature in obliterating rules of law under which many generations have lived and flourished and the best civilization of any age or country has grown up.

This latter decision is followed in \textit{Zorutlein v. Bram}.\textsuperscript{16} In \textit{Robinson v. Eagle and Wife},\textsuperscript{17} the court holds that the Married Woman’s Acts related solely to the separate property of the wife. In Michigan the court, in \textit{Fisher}
v. Provin,\textsuperscript{18} holds that such acts have no effect on the rule of survivorship in a deed to husband and wife. \textit{McDuff et al. v. Beauchamp}\textsuperscript{19} states that this act applies only to estates which she holds as if she had no husband. All the foregoing cases arose on deeds made after the passage of the Married Woman's Acts.

In \textit{Carver et al. v. Smith et ux.},\textsuperscript{20} the following facts and decisions appear: Smith and wife held title to land by deed made in 1882 conveying to both. Execution was issued against the husband, whereupon he and his wife filed a bill to enjoin, to which the creditor filed a demurrer, which was overruled. An appeal followed, and the court, in its decision, used the following language:

The appellants' proposition is as follows: Under the former law of Indiana a husband and wife took by entireties, because they were legally one person, but, under the statutes of 1881, they are not legally one person, therefore they can no longer take by entireties. . . .

The court called attention to a provision of the statutes of 1843, 1852, and 1881 which expressly excluded conveyances to husband and wife from the section which provided that a conveyance to two or more persons should be construed to create estates in common and not in joint tenancy and cited an unbroken line of decisions from 1863 to 1881 which recognized the validity of the statutory law as to entireties. The provisions of the Married Woman's Act of 1881 were quoted, and to the query of the appellants as to how these provisions could be reconciled with the idea of unity the court responded:

Conceding that they can not be, and admitting that the old common law upon entireties was founded originally upon the legal unity of husband and wife, yet it does not follow that the statute of Indiana was enacted in 1807 and re-enacted in 1843 and in 1852 for any such technical reason. . . . And it certainly

\textsuperscript{18} 25 Mich.: 347 (1872).
\textsuperscript{19} 50 Miss.: 531 (1874).
\textsuperscript{20} 90 Ind.: 222 (1883).
does not follow that a long established rule of property, declared by the Legislature, is abrogated by the mere fact that the reason alleged for the common law rule existing before the statute has failed.

When husband and wife take by entireties, neither of them holds any of the property separately; ... 

It is evident that the legislature of 1881 did not intend to repeal the statutes establishing tenancies by entireties. They simply intended to enlarge in some particulars the separate power of the wife, which already existed under the acts of 1852 and the years following.

The court affirmed the judgment of the trial court in overruling the demurrer.

In Chandler, by Moore, Guardian v. Cheney,21 the Supreme Court of Indiana, in affirming an injunction of a foreclosure of a mortgage made by the husband alone, said:

It should be the earnest desire of every husband and father to provide a home for his wife and children and a place of repose for himself in his declining years. . . . An estate by entireties is better calculated to produce an unity of feeling and interest than any other. It is a bond of union between husband and wife. The homestead does not belong to one to the exclusion of the other. There is no feeling of dependence on the part of the husband, as when the title is vested in the wife, and yet it makes each dependent on the other and produces a feeling of conciliation and forbearance. It makes the husband, the wife, and the children feel a joint and common interest in improving, adorning, and preserving their common home. . . . It is the common home of all the household during the joint lives of the husband and wife; and upon the death of either, the survivor takes the whole estate, and thus it continues to be the homestead.

But if the doctrines contended for by the appellant are correct, then the wife may be deprived of the joint enjoyment of the

21 37 Ind. 391 (1871).
property during their joint lives, and her right of survivorship
may be destroyed. For if the husband can, without the consent
and concurrence of the wife, convey and encumber the estate, she
may be deprived of her right of joint enjoyment; and if the
property . . . can be seized and sold upon execution, the right of
survivorship may be defeated.

It must be admitted that the common law estate by
entireties has been recognized in Illinois and has never
been expressly abolished by statute. Under the common
law, the wife became the owner of "property," an estate
in fee, if conveyance were made to her and her husband.
The Married Woman’s Act of 1861, the first passed in
Illinois, provides:

That all the property . . . belonging to any married woman, as
her sole and separate property, . . . shall, notwithstanding her
marriage, be and remain . . . her sole and separate property,
under her sole control, and be held, owned, possessed and en-
joyed by her the same as though she was sole and unmarried;
and shall not be subject to the disposal, control or interference
of her husband. . . .

It will be seen that this statute made no attempt to
alter the form or effect of conveyances or of estates pass-
ing by them, but only to free the married woman’s "sole
and separate" property from the old incident arising
under the common law—the right of the husband to take
to himself the possession, control, and rentals of his
wife’s land. The Act did not change the law regarding
the manner of execution of a deed by the wife, nor did
the Act of 1869 relating to married women free her from
the disabilities, but while she could convey, her husband
was required to join in the deed. It was not until the
Act of March 30, 1874, went into effect that a married
woman could sell and convey her real property to the
same extent and in the same manner as could her hus-

22 Public Laws, 1861, p. 143.
23 Lewis v. Graves, 84 Ill. 205 (1876).
24 Thompson v. Minnich, 227 Ill. 430, 81 N. E. 336 (1907).
Neither of these two later laws attempted to make any change in the tenure or tenancy arising under a conveyance, but only in the power of the wife to convey and the method of exercising the power.

The statute concerning joint rights and obligations differs from those in other states (where conveyance to two or more persons is conclusively made a tenancy in common, unless the contrary appears in the instrument) and provides that no estate in joint tenancy save to executors and trustees shall be claimed under any conveyance unless the premises are expressly declared to pass not as tenancy in common but as joint tenancy. This statute has been in force in substantially the same language since 1827, having been re-enacted a number of times. It was in force during all the period noted earlier in this article when tenancies by the entireties were recognized by our Supreme Court, and can by no straining of language be held ever to have included such an estate.

Our statutes permitting a joint tenancy between husband and wife do not give the wife the same protection as does the tenancy by the entireties, for the husband can sever the estate in joint tenancy by a conveyance or mortgage of his interest (an undivided half); and his interest may be taken by his creditors on a judgment against him, thus depriving the wife of her right of survivorship in the entire estate and making her tenant in common with strangers. Estates by entireties usually are not destructible in such ways, although in those states where they are still recognized little uniformity is found in the recognized methods of destruction of the estate. In some states, divorce will sever the estate, which was the effect at common law, while in some it will not. In some states it may be destroyed by a judgment creditor; some states will not permit this effect. Some states permit a mortgagee, under a mortgage made by a

\[25\] Hogan v. Hogan, 89 Ill. 427 (1878).
single tenant, to foreclose and acquire the life estate of the mortgaging tenant with the right of survivorship, should such tenant survive the other. There seems to be no standard by which the destructability can be ascertained or the existence of the estate can be measured save in those states which have statutory provisions on this point.

In most of the states where entireties exist, married woman's acts have been passed freeing married women from the old disabilities of the common law as to her property rights; yet the estate is still recognized by decision and in some cases by specific statute. In some states, we find the wife entitled after the death of the husband to an accounting as to rents collected during the marriage. We find only one state, Maine, taking the same position that Illinois has taken on the question, namely, that the passage of married woman's acts have abolished the reason for the estate.

Following the reasoning of the Baker case in Kansas, heretofore referred to, it is submitted that there is nothing in statute or decision (other than the statement in the Cooper case that the reason for the estate has passed) abolishing the estate as such. No reason is perceived why a deed to husband and wife especially stating that the title is to pass to the grantees as tenants by the entireties would not result in the establishing of such tenancy, in which the wife would take her interest in the property free from danger of its termination by any act of the husband in which she did not join.

The estate is a beneficent one, insuring to the wife the continuance of its passing to her should she survive, without the intrusion of strangers, grantees, judgment creditors, or other persons during the life of the husband. No person is injured by the existence of the estate—creditors are not defrauded, and the children are as secure in their succession as in any other title, since the
only method of defeating their interest would be a sale by both parents. Domestic differences, save an actual divorce, can have no effect on the continuance of the right of survivorship. It is believed that the recognition of this estate in its original common law form would not only be justified but would be beneficial to the community.
TAXATION OF POWERS OF APPOINTMENT
UNDER THE ILLINOIS INHERITANCE
TAX LAW

FREDERICK O. Dicus*

A DECISION rendered in 1934 by the Supreme Court of the State of Illinois dealing with the question of the taxation of powers of appointment caused considerable confusion among practitioners and fiduciaries as to the present status of the law.¹ The complications created by this decision, in the light of recent statutory amendments, and by the lack of judicial precedents in this state have proved somewhat bewildering to those who by force of circumstances have been confronted with this problem. It is hoped, therefore, that the following discussion will clarify the issues involved and suggest a satisfactory answer to most of the many questions which have arisen.

We are principally concerned with the question whether property passing under a power of appointment should be presently taxed in the estate of the donor, or whether the tax should be postponed and collected in the estate of the donee of the power, and if the former is true, whether the tax should be assessed upon the supposition of exercise or of non-exercise of the power.

We are confronted at the outset with the necessity of reviewing thoroughly the cases and statutes in the state of New York, from which the Illinois Act was adopted in the first instance, and the amendments to it which have been followed in many respects in this state. It is a familiar rule of statutory interpretation that when a statute is adopted from another state, the legislature will be presumed to have adopted it in the light of the judicial construction theretofore placed upon it by the

* Member of the Illinois Bar; alumnus of Chicago-Kent College of Law.
¹ People v. Linn, 357 Ill. 220, 191 N. E. 450 (1934).
courts of the foreign state.\(^2\) Because of this legal principle and the relationship between the statutes of Illinois and New York on this subject, the decisions of the latter state become singularly important in this discussion.

Obviously it is uncertain, until the exercise or non-exercise of the power, to whom the property will pass. At common law an appointee was deemed to take the property directly from the donor, although until the appointment was made the appointee remained unknown, or at least his interest was contingent.\(^3\) The common law rule, which still exists in several states, has been abrogated in most states by statutory provisions regarding the taxation of contingent interests at the highest rate. The rules developed by the common law were intended to circumvent another ancient rule that the title to property could not be held in abeyance.\(^4\) The donee of the power merely acted for the donor to the extent of the power conferred upon him,\(^5\) and until the interest over was finally disposed of by the exercise of the power, the estates limited upon default of exercise were considered as vested subject to being divested.\(^6\) This brief statement of the common law rules applicable to powers of appointment is made only as a background for the statutory alterations for tax purposes which are about to be discussed.

To deal with the present problem more comprehensively, it is wise to consider fully the changes which have


\(^4\) Sugden on Powers (8th ed.), Ch. 1, sec. 1.

\(^5\) See In re Luques Estate, 114 Me. 235, 95 A. 1021; U. S. v. Field, supra, n. 3; Kidder, State Inheritance Tax and Taxability of Trusts, p. 41.

\(^6\) Sugden on Powers (8th ed.), Ch. 13, p. 622.
been effected in the New York law. The first provision in the New York statute for the taxation of powers of appointment appeared in 1897 when section 220 of the Tax Law was amended to provide for a taxable transfer resulting from the exercise or non-exercise of the power in the estate of the donee. This provision, which was identical with that in Illinois prior to the 1933 amendment, provided as follows:

Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property, made either before or after the passage of this chapter, such appointment when made shall be deemed a transfer taxable under the provisions of this chapter in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will, and whenever any person or corporation possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a transfer taxable under the provisions of this chapter shall be deemed to take place to the extent of such omission or failure, in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise the power, taking effect at the time of such omission or failure.

The first portion of the foregoing section changed the common law rule and provided that the exercise of the power should constitute the transfer deemed to be taxable under the Act; that is, that the tax should be levied in the estate of the donee rather than in the estate of the donor of the power. By force of the statute, the appointee is deemed to take the property from the donee and not from the donor for the purposes of taxation, the property passing as part of the donee's estate upon the exercise of the power. This provision has been subjected

7 Laws of 1897, C. 284, p. 150.
8 See n. 5, ante.
9 In re Dimock's Estate, 168 N. Y. S. 584 (1918); In re Turner's Estate, 222 N. Y. S. 645 (1927).
TAXATION OF POWERS OF APPOINTMENT

... to scrutiny on constitutional grounds and has been upheld repeatedly.\textsuperscript{10} Although, for tax purposes, the transfer is deemed to be effected by the appointment, still the title is actually derived from the donor.

The second portion of section 220 provided that when there was a failure or omission to exercise the power, a taxable transfer in the estate of the donee should be deemed to take place, which again was a statutory alteration of the common law for tax purposes.\textsuperscript{11}

The provisions of this section standing alone would cause no dilemma, and in such cases the taxing authorities would postpone the assessment until the donee of the power appointed the property or there was a failure to exercise.\textsuperscript{12} When this portion of the statute is construed in connection with section 230 of the same act, the legislative intent is not clear, and it is this vexatious predicament with which we are chiefly concerned.

In 1899 section 230 of the New York Law was amended to provide:

... when property is transferred in trust or otherwise, and the rights, interests or estates of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of said contingencies or conditions would be possible under the provisions of this article. ...\textsuperscript{13}


\textsuperscript{12} Under a statute similar to section 220, Massachusetts postpones the tax and assesses it in the donee's estate. There is no statute, however, providing for the taxation of contingent interests. See Minot v. Stevens, 207 Mass. 588, 93 N. E. 973 (1910).

\textsuperscript{13} Laws of 1899, C. 76, p. 100.
It was also provided that if, on the happening of the contingency or condition, the property should be transferred to a person exempt from taxation, or taxable at a rate less than that imposed, such person should be entitled to a refund equal to the difference between the amount paid and the amount which said person should pay.

It should be observed that section 230 applies generally to contingent interests and does not specifically mention powers of appointment. Framed in this general manner, the foregoing section indicates the intent of the legislature to assess the tax in the estate of the grantor or testator "at the highest rate" possible upon the happening of any contingency or condition limited in the will, in order to avoid the possible difficulties in assessing and collecting an additional tax at the time the contingent interest ultimately vests.

The first leading case in New York involving the interpretation of these statutory provisions was In re Howe,\textsuperscript{14} decided in 1903, which held that the inheritance tax was to be postponed until the exercise or non-exercise of the power by the donee created a taxable transfer within the meaning of section 220. The facts of the case were that Elizabeth L. Howe, the testatrix, created a testamentary trust giving to Leavitt Howe a life estate and a general power of appointment over the remainder, provided that if there was not a valid exercise of the power the remainder should go to his children and their heirs. A similar trust was created for Edward Howe. The executors of the estate contended that it was the exercise of the power and not its creation which effected the taxable transfer under the provisions of subsection 5 of section 220, C. 284, p. 868 of the Laws of 1896, as

\textsuperscript{14} 86 App. Div. 286, 83 N. Y. S. 825 (1903), affirmed in 176 N. Y. 570, 68 N. E. 1118 (1903).
TAXATION OF POWERS OF APPOINTMENT

amended.\textsuperscript{15} The State contended, however, that the amendment of section 230 by the Act of 1899, providing for the immediate taxation of contingent interests, repealed by implication the section relied on by the executors, and that a tax should therefore be presently levied at the highest rate. Justice Bartlett, writing for the court, stated that the amendment did not by implication repeal section 220, and that the tax should be postponed until the exercise or non-exercise of the power in the estate of the donee, thus giving full effect to the fifth subdivision of section 220 of the New York Tax Law.\textsuperscript{16}

This case, which is the first expression by an appellate court in the state of New York under the statutes as then in existence, annunciates the law in that state until 1911, at which time both sections 220 and 230 were amended, the effect of which amendments, according to subsequent decisions, was to change the law and to supersede the

\textsuperscript{15} See Matter of Seaver, 63 App. Div. 283, 71 N. Y. S. 544 (1901), and Matter of Walworth's Estate, 66 App. Div. 171, 72 N. Y. S. 984 (1901), relied upon by the executors to the effect that it is not the creation but the exercise of the power which creates the taxable transfer.

\textsuperscript{16} "The phraseology of this amendment of 1899 is not such as necessarily to embrace a case like the present, where a testamentary power of appointment is bestowed upon the life beneficiary of a trust. ... It is to be observed that the amendatory statute ... makes no change whatever in any section of the transfer tax law, except section 230. It leaves unchanged section 220, the fifth subdivision of which, relating to powers of appointment, has already been quoted. The effect of the amendment, therefore, was the same as though one statute had been enacted containing subdivision 5 of section 220 and section 230 as changed in 1899. We thus have, in contemplation of law, an act of the Legislature containing specific directions as to the taxation of estates in regard to which a power of appointment is conferred upon the original transferee; and I do not see how it can well be held that a subsequent provision in the same statute in regard to the taxation of transfers of property where the estates of the transferees are dependent upon contingencies or conditions effects a repeal by implication of the specific provisions relating to transfers through the instrumentality of the donee of the power. Neither the Matter of Vanderbilt's Estate, 172 N. Y. 69, 64 N. E. 782, nor the Matter of Brez's Estate, 172 N. Y. 609, 64 N. E. 958, bears upon the question in controversy here. Those decisions relate wholly to the effect of section 230 of the transfer tax law, and the opinions contain nothing in conflict with the views which have been expressed."
doctrine of the Howe case.\textsuperscript{17}

In 1911 the portion of section 220 providing for a taxable transfer in the estate of the donee upon the omission or failure to exercise the power was stricken.\textsuperscript{18} Section 230 was also amended to provide for the entry of a temporary order by the surrogate assessing the tax, the order to become final after a reassessment upon the happening of the contingency or condition.\textsuperscript{19}

It should be noted that there was nothing in the amending act of 1911 which made section 230 specifically applicable to powers of appointment, the general nature of the section being retained as in its original form.

The amendment to section 220 followed an opinion handed down by the Court of Appeals in 1905 in \textit{Matter of Lansing},\textsuperscript{20} which held that the omitted portion was unconstitutional in that it endeavored to predicate a tax on a transfer which could never take place.\textsuperscript{21} In other

\textsuperscript{17} Prior to In re Howe there was some conflict as to the proper interpretation to be given to the New York statutes. In re Field's Estate, 36 Misc. 279, 73 N. Y. S. 512 (1901), and In re Howell's Estate, 34 Misc. 432, 69 N. Y. S. 1016 (1901), gave effect to section 220 and postponed the tax, which principle was subsequently adopted by the Howe case. However, the case of In re LeBrun's Estate, 80 N. Y. S. 486 (1902), held that the property subject to the power was presently taxable under section 230 as amended. The court stated, on the authority of Matter of Vanderbilt, 172 N. Y. 69, 64 N. E. 782 (1902), reversing 68 App. Div. 27, 74 N. Y. S. 450 (1902), and Matter of Brez's Estate, 172 N. Y. 609, 64 N. E. 958 (1902) (both of which were discredited by In re Howe) that the transfer subject to tax was the passing of title or interest out of or from the estate of the decedent, even though the transferee is not ascertainable at the time, and without regard to how obscure, remote, or contingent the remainder might be. The court stated that it had not overlooked section 220 in reaching its decision. This may be seriously questioned.

\textsuperscript{18} Laws of 1911, C. 732, sec. 1.

\textsuperscript{19} Laws of 1911, C. 800, sec. 1.

\textsuperscript{20} 182 N. Y. 238, 74 N. E. 882 (1905), modifying 103 App. Div. 596, 92 N. Y. S. 1132 (1905). But see Minot v. Stevens, 207 Mass. 588, 93 N. E. 973 (1911), wherein the constitutionality of a similar provision was upheld. See also Gleason & Otis, Inheritance Taxation (3d ed.), p. 174.

\textsuperscript{21} Justice Vann, writing for the court, stated: "Where there is no transfer there is no tax, and a transfer made before the passage of the act relating to taxable transfers is not affected by it, because, as we held in the Pell case, such an act imposes no direct tax, and is unconstitutional, since it diminishes the value of vested estates, impairs the obligation of contracts, and takes private property for public use without compensation."
TAXATION OF POWERS OF APPOINTMENT

words, if the power were not exercised the transfer would not take place in the estate of the donee as provided by the statute, but would relate back to the estate of the donor.

Before considering the cases which arose subsequent to these important amendments, a qualification of the rule laid down in the case of In re Howe should be mentioned. In 1912 an opinion was written by the Court of Appeals in Matter of Burgess, which limited the postponement of the tax to those cases where the power of appointment was absolute and it was certain that the property would pass upon the exercise or non-exercise of the power. After expressing affirmation of the principle annunciated in the Howe case, the court distinguished the cases on their facts and held that the power was not absolute, and for that reason taxed the remainder in the estate of the donor.

The effect of the amendment of 1911 was not immediately reflected in the decisions which followed. Except for the modification made by Matter of Burgess, the rule established by In re Howe was followed and approved on several occasions.

23 "The embarrassment as to the taxation of the remainders in the residuary estate is caused by the fact that it is not certain whether there will be any power of appointment to be exercised over the whole or any part of the residuary estate. The executors are to divide the property into as many shares as there may be living daughters or issue of a deceased daughter at the death of the widow. If at such time any daughter shall have died, leaving issue then surviving, such issue will inherit directly under the will, and not by virtue of the exercise or non-exercise of any power of appointment, and such inheritance will comprise a part or the whole of the property, dependent on whether any of the other daughters shall survive that period. If none of the daughters shall live until that time, none will have any power of appointment. The result would be that, if the rule of Matter of Howe, supra, was applied to the present case, the remainders might escape taxation altogether. For that reason, the learned courts below held that the rule applies only where there is an absolute gift of a power of appointment, so that the property is certain to pass, either under the exercise or non-exercise of the power of appointment, and that the case before them was not within the rule. In this view we concur." 204 N. Y. 265, at p. 270 (1924).
24 Followed by In re Turner's Estate, 143 N. Y. S. 692, 82 Misc. 25 (1913).
In 1916 the Surrogate's Court wrote an opinion in the case of *In re Neher's Estate*, where the will gave the life tenant a power of appointment over one-half of the remainder. It is apparent from the opinion that no significance was then attached to the amendments which were subsequently held to change the doctrine of *In re Howe*.

In the same year *In re Moore's Estate* held that the tax was postponed. As late as 1919 the Surrogate's Court in the case of *In re Stebbins' Estate* postponed the tax where the decedent's son had a life estate in one-fifth of the residuary estate with a special power of appointment, which was deemed by the court to be absolute in nature. The Howe case and *Matter of Burgess* were cited and relied upon.

It was not until 1921 that it was held that the tax should be assessed and collected in the donor's estate. *In re Canda's Estate* was the first to deviate from the rule followed by the line of cases heretofore noted. The Appellate Division, however, held that no tax was due at all and that there was no need to decide the question.

---

25 95 Misc. 69, 158 N. Y. S. 454 (1916).
26 "The one-half of the remainder over which the widow has a power of appointment is not presently taxable. [Citing Matter of Howe.] The amendment of section 230 of the Tax Law ... did not change the language of the statute, so as to make the principle of the decision in the Matter of Howe inapplicable, as that amendment provided only for the entry of a temporary order by the surrogate. That part of section 230 which provides for the imposition of a tax at the highest rate was in force at the date of the decision in the Matter of Howe, supra. Therefore that decision is still controlling, and a remainder which is subject to an absolute power of appointment is not taxable until the power is exercised." 158 N. Y. S. 454, at p. 455 (1916).
27 162 N. Y. S. 213 (1916).
30 114 Misc. 161, 185 N. Y. S. 903 (1921).
31 The court stated: "The amendments of 1911 to section 230 and the additional provisions for interest or income in favor of the beneficiaries in section 241 require that the tax shall be presently imposed and not suspended. There is nothing peculiarly sacred about estates which are transmitted by means of powers, and there is no sound reason why they should not be governed by the same rules which control the devolution of estates by other methods."
as to the time of assessment.\textsuperscript{32} The opinion of the lower court is not, therefore, authority on this point.

\textit{In re Duff's Estate}\textsuperscript{33} followed shortly thereafter and reaffirmed the point that the taxable transfer took place in the estate of the donor, although under the peculiar circumstances involved it is not a clear-cut authority as to the present taxability in the donor's estate.\textsuperscript{34}

The next case decided was \textit{In re Trumbull's Estate}.\textsuperscript{35} A trust under the decedent's will was created, a life estate and a general power of appointment being given to his son. In default of appointment the remainder was to go to the issue of the son living at his death. The court held that the remainder was presently taxable for two reasons: first, that the power was not absolute as the donee was not the owner of the legal title under the real property laws of that state (a factual differentiation from \textit{In re Howe}); second, that the amendments to sections 220 and 230, and the addition of section 241\textsuperscript{36} by the Act of 1911 effected a change in the law as set forth in the Howe case. The court stated:

\ldots Section 241 of the Tax Law \ldots makes clear the legislative intent of requiring prompt payment of taxes at the highest rate at which they may be taxed, and the immediate imposition of taxes on remainders subject to conditions and contingencies. \textit{Matter of Zborowski}, 213 N. Y. 109, 107 N. E. 44, \textit{In re Parker's Estate}, 226 N. Y. 260, 123 N. E. 366.\textsuperscript{37}

By the same amendment in 1911 this legislative purpose was em-

\textsuperscript{32} 197 App. Div. 597, 189 N. Y. S. 917 (1921).
\textsuperscript{33} 114 Misc. 309, 186 N. Y. S. 259 (1921).
\textsuperscript{34} The donor died in 1904 and the donee in 1918. The power had been ineffectively exercised. It was held that inasmuch as the order in the donor's estate did not mention the remainders it was not a binding adjudication as to the liability for present or future taxation. The court, therefore, decided the tax was assessable in the estate of the donor because of the unconstitutionality of section 220 as decided by \textit{In re Lansing}, 182 N. Y. 238, 74 N. E. 882 (1905), and that the transfer took place in the estate of the donor.
\textsuperscript{36} Discussed later herein.
\textsuperscript{37} Where reference is made to \textit{In re Parker's Estate}. 
phasized by providing in section 230 of the Tax Law for the entry of a temporary order. These amendments, and the recent decisions of the Court of Appeals, supra, have entirely overcome the force and reason expressed in the opinion of In re Howe's Estate, . . . which held that taxation should be suspended where the power given was absolute. At the time of the latter decision, subdivision 6 of section 220 of the Tax Law provided for the taxation in the estate of the donee of the property affected by the exercise (or nonexercise) of the power. Apparently the court regarded this language as assuring the taxation of the property in the grantee's estate only. Subsequent to this decision in 1904, the Court of Appeals held that the statutory provisions for the tax in the donee's estate on the nonexercise of the power were unconstitutional. In re Lansing's Estate, 182 N. Y. 238, 74 N. E. 882. It will be noted that the provisions of section 241 were not effective until July 28, 1911.

The language of the court in the foregoing opinion and in the two cases following should be carefully noted.

It was in 1922 that the first leading case was decided in which an opinion was handed down by an appellate court. In that year the Appellate Division reviewed the case of In re Cole's Estate. The testator had created a testamentary trust giving to his daughter a life estate and a general power of appointment over the remainder. In the event there was not a valid disposition or exercise of the power the remainder was to go to the daughter's children. The residuary estate was bequeathed to trustees for the benefit of the testator's son for life, with a power of appointment over the remainder of the trust, and to his issue in default of appointment. The Surrogate held that it was the exercise of the power and not its creation which provided the taxable transfer and that the tax, therefore, was not presently payable in the estate of the donor of the power. This position was reversed when the case went to the Appellate Division, the court stating:

Respondent seeks to sustain that portion of the order appealed from relating to the present taxability of the remainders by the decisions in *Matter of Howe's Estate, . . .* and *Matter of Burgess' Estate . . .*, while it is urged by the appellant under the amendments to the Tax Law (sections 230 and 241), made by chapter 800 of the Laws 1911, and the recent decisions of the Court of Appeals (*In re Zborowski's Estate, . . .; Matter of Howe's Estate*, supra), which held that taxation should be suspended where the power given was absolute (*Matter of Trumbull's Estate, . . .; Matter of Parker's Estate, . . .*), that it is entirely possible that the powers of appointment will not be exercised, and that the taxation will therefore ultimately be assessed against the donor's estate (*Matter of Canda's Estate, . . .*). The decision in *Matter of Howe's Estate* seems to indicate that it is based upon the ground that section 230 did not by implication repeal subdivision 6 of section 220 of the Tax Law; but the conclusion reached by Judge Cardozo, 226 N. Y. 260, 123 N. E. 366, indicates that it was the intention of the Legislature to provide for the present taxation of remainders limited upon conditions and contingencies.

An appeal was taken to the Court of Appeals, which affirmed the opinion of the Appellate Division. Because of the importance of this decision, the full opinion of Justice McLaughlin pertaining to this question is quoted.

Whether the remainders in these two trusts are presently taxable is one of the questions presented. Its solution necessarily turns upon the construction to be put upon section 220, subd. 6, of the Tax Law (Consol. Laws, c. 60), when the same is read in connection with section 230 of the same act, as amended by Chapter 801 of the Laws of 1911. These two sections are, apparently, in hopeless conflict, but, when read in the light of judicial construction placed upon them, it seems to me that each can be given full force and effect, and in such a way as not to make them inconsistent. Undoubtedly, if section 220 be considered in and by itself without reference to section 230, Tax Law, (Consol. Laws, c. 60; Laws 1909, c. 62), then these remainders are not presently taxable, and a tax cannot be imposed

40 138 N. E. 733, at p. 734 ff.
until the power of appointment has been exercised. (Matter of Burgess, 204 N. Y. 265, 97 N. E. 591; Matter of Howe’s Estate, 86 App. Div. 286, 83 N. Y. Supp. 825; affirmed, 176 N. Y. 570, 68 N. E. 1118.) But after these decisions were made section 230 was amended (Laws 1911, c. 800; Laws 1916, c. 550) so as to seemingly change the law on that subject, so that section 230, after those changes were made, provided:

“... When property is transferred in trust or otherwise, and the rights, interests or estates of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of said contingencies or conditions, would be possible under the provisions of this article and such tax so imposed shall be due and payable forthwith by the executors or trustees out of the property transferred, and the surrogate shall enter a temporary order determining the amount of said tax in accordance with this provision; provided, however, that on the happening of any contingency whereby the said property, or any part thereof, is transferred to a person or corporation exempt from taxation under the provisions of this article, or to any person taxable at a rate less than the rate imposed and paid, such person or corporation shall be entitled to a return of so much of the tax imposed and paid as is the difference between the amount paid and the amount which said person or corporation should pay under the provisions of this article. . . .”

When this statute was enacted the Legislature must be presumed to have known what construction had theretofore been put upon the statutes by the courts; in other words, it was charged with knowledge of certain legal principles in framing the statute. The general rule, as I understand it, is that when the Legislature amends or enacts anew a statute, it will be assumed that it had full knowledge of all the judicial decisions theretofore made interpreting the statute as then existing, and that being so, the new enactment must be read in the light of such previous interpretation. Orinico Realty Co. v. Bandler, 233 N. Y. 24, 134 N. E. 823; Komanda & Co. v. United States, 215 U. S. 392, 30 Sup. Ct. 136, 54 L. Ed. 249; Ceasar v. Bernard, 156 App. Div. 724, 141 N. Y. Supp. 659, affirmed, 209 N. Y. 570, 103 N. E. 1122.

This view was clearly expressed by Justice Miller, speaking for this court in Matter of Zborowski’s Estate, 213 N. Y. 109,
112, 116, 107 N. E. 44, 45, where he said: "The Legislature has unmistakably expressed the intention that all transfers shall be assessed for the purpose of taxation as of the date of the transfer, and, however unjust that may be thought to be, it is not open to objection on constitutional grounds. . . . In one aspect it may be unjust to the life tenant to tax at once the transfer, both of the life estate and of the remainder, though contingent, and it may seem unwise for the state to collect taxes which it may have to refund with interest, but those considerations are solely for the Legislature, who are to judge whether they are more than offset by the greater certainty which the state thus has of receiving the tax ultimately its due under the statute. However unwise or unjust it may seem in a particular case like this for the state to collect the tax at the highest rate when in all probability the remainder will vest in a class taxable at the lowest rate, it is the duty of this court to give effect to the statute as it is written."

This authority was followed in Matter of Parker's Estate, 226 N. Y. 260, 123 N. E. 366. Each of these remainders, therefore, was properly assessed, and at the rate stated, and the order appealed from, to this extent, is affirmed.

The fact that the Court of Appeals stated that section 230 was amended so "as to seemingly change the law on that subject" should be carefully noted. It should also be observed that the court has quoted from and relied upon Matter of Zborowski's Estate and Matter of Parker's Estate as indicating the intention of the Legislature in amending the Tax Law. A further discussion of these salient features of this decision is reserved at this point.41

The most recent case arising in New York overruling the decision reached in the Howe case is In re Davison's Estate, decided in 1929.42 The important issue in the case involved the question of perpetuities which is not here discussed. The facts of the case were that the testator set aside two-thirds of his estate for the creation of trusts, one share to go to each child surviving him,

41 These matters will be mentioned later herein.
42 134 Misc. 769, 236 N. Y. S. 437 (1929).
or if any child predeceased him to the children of such child per stirpes. Upon the death of each beneficiary his portion was to be divided among his children, provided, "Should he leave none, or should any child of mine or child predeceasing me die leaving no such child, then I direct that the respective shares or portion be paid unto the person or corporation in such manner, as the last beneficiary of the income of such share or subshare shall direct by duly executed and probated last will and testament, and in default of such appointment, or insofar as the same, if made, shall not be effectual then such share or subshare shall be paid to the persons who shall then constitute the heirs at law of such last beneficiary." The opinion of the court with reference to the question involving the power of appointment is brief, and is quoted in full.

There remains for consideration on this phase of the problem only the question of the death of a primary or secondary life tenant without issue, which is the phase of the matter involving the propriety of the transfer tax assessment. If any life tenant leaves issue, such issue will take under the terms of the will; the taking being either in trust or outright, depending on the considerations just discussed. Failing such issue, however, the life tenant is given a power of appointment, the manner of exercise of which cannot presently be determined, and which, conceivably, may be in favor of a person in the 5 per cent class. Thus it is entirely possible that any one of the present life beneficiaries might have no children living at his or her decease (Ruth D. Stewart has none at the present time), and that he might exercise the power of appointment in favor of a stranger. It follows, therefore, that the remainders are presently taxable at the highest rate. Tax Law, sec. 230, Matter of Cole's Estate, 235 N. Y. 48, 138 N. E. 733; Matter of Kenly's Estate, 133 Misc. Rep. 718, 233 N. Y. S. 681; Matter of Sperling's Estate, supra. [133 Misc. 834, 234 N. Y. S. 119 (1928).]

It is to be noted from the short opinion that the court has not entered into an independent discussion of the principles involved, and has considered the question
closed by the authorities cited. The real basis for this opinion is found in *Matter of Cole*, inasmuch as the last two cases cited by the court are foreign to the subject at hand and do not involve the question of the present taxability of a power of appointment.

After examining all of the New York cases on this subject which have effected a reversal of the doctrine adopted in the Howe case, one may justifiably ask upon what basis *In re Howe* has been overruled. Much has been said in the opinion referred to as to the effect of sections 230, 241, 222 and the cases of *Matter of Zborowski's Estate* and *Matter of Parker's Estate*, and although section 220 as amended in 1911 has been mentioned, the full significance of its terms and provisions has been overshadowed by the repeated references to other statutory provisions and cases which, it is submitted, have no effect upon the question at all. Quotations have been made freely, and in many instances at length, for it is believed that the vagueness of the opinions can be most convincingly presented in that fashion.

Upon what basis has *In re Howe* been overruled? What is the effect of the amendments to section 230? What is the effect of sections 222 and 241? After we have attempted to answer these questions, we shall undertake to discuss in greater detail the provisions of section 220 as amended in order to show that the correct basis for nullifying the Howe case lies in and only in the amendment to this section. The political and social philosophy to be extricated from the other provisions of the statute mentioned may justify the ultimate decision in view of the fact that the state is assured greater certainty in the collection of the tax, but this philosophy does not seem to be sufficiently cogent to warrant and justify its application as the principal basis for the

43 See Kidder, State Inheritance Tax and Taxability of Trusts, p. 58, wherein he discusses some of the hazards incurred in postponing the tax.
change made in the face of express statutory regulation with reference to powers of appointment.

*In re Trumbull's Estate* was based upon the amendments to sections 241 and 230, which together with "the recent decisions of the Court of Appeals, have entirely overcome the force and reason expressed in the opinion of *In re Howe's Estate.*" (It was first decided by the court, however, that the power of appointment under review was not absolute, and that *Matter of Howe's Estate*, therefore, "would in no event be applicable to this estate for there the power was absolute.") The recent decisions referred to are *In re Parker's Estate* and *Matter of Zborowski's Estate.*

The Parker case, however, is not authority for the question under consideration inasmuch as the court was there concerned only with the question of whether the contingent remainder should be added to the residuary estate, both of which might conceivably vest in the same person, in computing the amount of tax presently payable.  

---

44 A testamentary trust was established, the income from which was to go to Edith Parker for life, and at her death to her issue then living, and to the children of any issue who predeceased her per stirpes, for life. Each child or grandchild who survived to receive his or her share had a power of appointment over his or her portion of the estate. In default of appointment the remainder was to go to their heirs. The residuary estate was bequeathed to John H. Parker, a nephew, including all lapsed legacies. The residuary, therefore, might include the principal of the trust in the event the life tenant died without issue. The question before the court was whether for purposes of taxation at the highest rate the residuary and the remainder should be added together and taxed to the nephew.

A portion of Justice Cardozo's opinion, which is frequently cited and quoted, is as follows: "Remainders are to be appraised at their present value. . . . They are gifts, like present interests. In fixing their value, no distinction is to be drawn between the classes of remainders, whether vested or contingent. For the purposes of taxation, the contingency is eliminated, and the gift is classed as absolute. . . . The value of other gifts to the same legatee must be reckoned in computing the tax when the remainder is vested. The method of computation is not different when the remainder is contingent. It is argued that in providing against contingencies, we should limit ourselves to those that the testator may be supposed to have foreseen. We need not stop to inquire whether that is so. There is nothing to show that this contingency was not foreseen by the testator, and covered by his will. He might have said, in so many words, that the nephew should receive the remainder in default of issue of the life tenant. He said the same thing in
TAXATION OF POWERS OF APPOINTMENT

Nor is the case of Matter of Zborowski's Estate, cited and relied upon, support for the decision reached, as the court is there only confronted with the taxation of remainders generally, contingent and vested, and does not deal with a power of appointment at all. The consideration of that general question, of course, does not call for a construction and interpretation of the amended portion of the statute dealing with powers of appointment, with which we are primarily concerned.

Although the dicta extracted from Matter of Parker and Matter of Zborowski, regarding the desirability of the state’s collecting at the earliest possible date the greatest amount of tax which may be due under any contingency, may sound convincing in its general scope, it bears no weight in application in the light of the factual circumstances of the cases in question.

The only statement made by the court in the Trumbull case with reference to the amendment to section 220 was that In re Howe regarded that section in its original form “as assuring the taxation of the property in the effect when he provided that his nephew should be the residuary legatee. Gifts have the same value whether they are stated separately or collectively. The rate of taxation does not vary with the paragraphs of scriveners.

“This construction of the statute maintains the consistency of the law and its singleness of purpose. The state has secured itself against all contingencies, remote as well as probable. That is the dominant scheme, which it is our duty to preserve. In the case before us, the contingency is in all likelihood remote, and so the mind rebels a little against the tying up of money. But in other cases it may be less remote, and the need of protection greater. Whether in improbable contingencies the risk justifies the burden it is not for us to say. That is a question for the Legislature. Our duty is done when we enforce the law as it is written.” Matter of Parker, 226 N. Y. 260, 123 N. E. 366 (1919), reversing 185 App. Div. 300.

45 The income of a residuary trust was to go to the son of the testatrix until he reached the age of 21, at which time he was to receive the principal. If the son should die before reaching 21, the principal was to go to his issue, and if no issue, to named persons who were in the highest taxable class. The court referred to section 230 and stated, on page 112: “The Legislature could not have used plainer language to express a purpose to impose a tax on all transfers immediately upon the death of the transferor regardless of the fact that particular transfers may be of contingent estates in remainder which may not ultimately be taxable at all.” Matter of Zborowski's Estate, 213 N. Y. 109, 107 N. E. 44 (1914), reversing 163 App. Div. 947. See also portion of opinion quoted by the court in In re Cole’s Estate, supra.
grantee's estate only,'" and that the omitted portion was declared unconstitutional after the decision in the Howe case was handed down. There is no discussion as to the effect the remaining portion of section 220 might have.

The second leading case, In re Cole's Estate, is likewise based upon In re Parker's Estate and Matter of Zborowski. That the court has been confused and has given undue consideration to the general language in those two cases is obvious from the opinion itself.

The court recognized the conflict which existed between sections 230 and 220, and stated that if the latter were considered by itself the remainders could not be presently taxed, citing Matter of Burgess\textsuperscript{46} and In re Howe's Estate. In the next sentence, however, the court stated, "But after these decisions were made, section 230 was amended... so as to seemingly change the law on that subject." The court therefore held that the temporary order provision of the 1911 amendment to section 230 completely overruled the effect of section 220 in its amended form. The suggested uncertainty would seem to be warranted in view of the inapplicability of that section of the statute as subsequently pointed out. The opinion of the Court of Appeals is unsatisfactory in clearly establishing the basis upon which it is founded, and were it not for the opinion written by the Appellate Division\textsuperscript{47} the decision would be lacking in merit.

The third and last leading case, In re Davison's Estate, refers to section 230 and Matter of Cole's Estate to support the decision. The other two cases cited, Matter of Kenly's Estate,\textsuperscript{48} and Matter of Sperling's Estate,\textsuperscript{49} are as foreign to the subject under discussion as the Zborowski case, none of which involves the taxation of a power of appointment.

\textsuperscript{46} Supra, n. 22.
\textsuperscript{47} 202 App. Div. 546, 195 N. Y. S. 541.
\textsuperscript{49} 133 Misc. Rep. 834, 234 N. Y. S. 119 (1928).
What is the effect of the amendments to section 230 of the New York Tax Law? The principal alteration in section 230 made by the amendment of 1911 was the addition of the provision that "the surrogate shall enter a temporary order determining the amount of said tax in accordance with this provision." The remaining provisions of this section provide that within six months after the happening of the contingency or condition upon which the remainder is limited, the representative of the estate shall make application for a final determination of the tax. In the event the tax as redetermined is less than that originally paid, a refund of the difference is to be made. Provision is also made for the deposit of a bond to cover any subsequent assessment in the event the personal property is less than the amount of tax required in the first instance. After the final determination, the court is to enter a "final" order assessing the tax.

Considerable importance has been attached to the "temporary order" provisions of this section by the cases referred to. Whatever may be the name, the procedure in the final analysis is not different from that employed in Illinois where the original order is final in its nature but is subsequently abrogated when the tax is reassessed and finally determined upon the happening of the contingency or condition. The original order in each instance accomplishes the necessary results and is sufficiently elastic to allow modification and a final determination at a later date.

The procedural provisions of section 230 may be significant in many respects, but the manner in which they change the substantive provisions of other sections is not apparent from the statute itself or from the judicial comments which have been made. As was said by the court

in the matter of *In re Neher's Estate*.51 "The amendment of section 230 of the Tax Law... did not change the language of the statute so as to make the principle of the decision in the *Matter of Howe* inapplicable, as that amendment provided only for the entry of a temporary order by the surrogate."

What does seem significant in this section is the absence of any reference to powers of appointment. Had the Legislature intended to include all cases involving a power of appointment within the general provisions of section 230, it would have used express language of inclusion. The absence of specific exclusion of this class of contingent remainders certainly does not imply inclusion in view of the fact that powers of appointment are specifically dealt with in section 220.

It is submitted that the amendment to section 230 providing for the entry of a temporary order did not warrant the construction and effect given to it—that the tax in all instances should be presently assessed in the estate of the donor.

What effect have sections 222 and 241 of the New York Tax Law? These two sections which have been cited and relied upon have no effect upon the principle involved. Section 241 was amended in 1911 to provide that the Tax Commission shall deposit in a sound bank all tax monies which are collected on contingent interests at the highest rate, and shall hold the same until the contingency or condition occurs, at which time the amount by which the tax as finally determined exceeds the amount of the deposits is to be turned over to the representative of the estate, and the balance, if any, is surrendered to the State Treasurer.52 It was the purpose of the amend-

---

51 Supra, n. 25.

52 It is unfortunate that provisions similar to those in section 241 are not to be found in the Illinois Act. Many of the difficulties encountered in obtaining refunds, and the objections on behalf of the life tenant as to the loss of income from the amount deposited, are satisfactorily eliminated.
ment to this section to eliminate the objection commonly raised that the assessment at the highest rate inflicts a hardship on the life tenant. In entering the temporary order the court determines the lowest and the highest taxes possible under the contingencies expressed in the will, the difference between these two sums bearing interest while deposited. The increment from the interest-bearing portion is paid to the executor of the estate who in turn distributes it in accordance with the provisions of the will. This provision is a successful expedient in surmounting the objectionable difficulties formerly incident to the collection of the tax at the highest possible rate. Its scope is general, however, and aside from indicating the intent to eradicate administrative difficulties in the assessment, it would seem to have no more application to those cases involving a power of appointment than the provisions of section 230 which deal with contingent remainders generally.

Section 222 provides that the tax on any interest limited, conditioned, or dependent upon a contingency or future event, so that the fair market value thereof cannot be ascertained at the time of the transfer, shall accrue when the beneficial interest vests in possession or enjoyment. This section was in substantially the same form at the time the Howe case was decided. It is obvious after a cursory examination that the contingencies referred to in section 222 are dependent upon the property to pass and not the person to take.

It is impossible, therefore, to see any effect these two sections have upon the specific question with which we are concerned, and a further discussion of them is not deemed requisite.

What is the effect of the amendment to section 220 of the New York Tax Law? Section 220 in its original form

provided that a taxable transfer should be deemed to take place in the estate of the donee either upon the exercise or non-exercise of the power. The latter portion as we have seen was declared unconstitutional by *Matter of Lansing* and then repealed in 1911. In spite of the repeated utterances as to the effect of other statutory provisions with reference to the doctrine of *Matter of Howe*, we can, in considering the amendment of 1911 to section 220 establish the basic principle upon which the present New York law is predicated.

The remaining portion of section 220, dealing with the taxable transfer by the exercise of the power of appointment, is still in effect, and under its terms the transfer from the donee is for tax purposes the one subjected to the duty. No statutory change whatsoever has been made which affects the treatment of this class of taxable transfers.

The unconstitutionality of the non-exercise portion of section 220 has reinstated the common law doctrine, and upon the non-exercise of the power the property passing thereby is rightfully considered as taxable in the estate of the donor, from which the passage of ownership or beneficial interest to the appointee actually takes place. In the event there is no default clause in the instrument creating the power, the property passes by intestate succession in the donor’s estate if there is a failure to or defective exercise of the power. In the absence of specific authority to the contrary, this devolution must control for tax purposes as well. If there is a remainder over in the event of non-exercise, the transfer is still effected in the donor’s estate and must there be taxed.

There is little difficulty in applying the theory of section 230 to this situation, and this must be readily admitted. It will be recalled *Matter of Howe* decided that section 230 did not impliedly or inferentially overrule and render impotent the provisions of section 220, and that
the specific language of the latter with reference to powers of appointment must therefore govern. By virtue of the 1911 amendment, the force and reasoning of Matter of Howe has been restricted and limited to the side of the question dealing only with the transfer effected by the exercise of the power. The difficulty in applying section 230 to a transfer by reason of the non-exercise having been eliminated by the amendment, it necessarily follows that to the extent the doctrine of Matter of Howe has failed, section 230 has been given effect.

This seems to be the only reasonable interpretation to be put upon the provisions of section 220 as amended, and its real effect upon the rule of the Howe case would be to limit its application to those cases where there is a general power of appointment and there is no possibility of assessing the tax upon the assumption of non-exercise of the power. Its application has therefore been restricted to the point of practical extinction.

With but one exception, the New York decisions discussed have held the tax should be assessed upon the assumption of non-exercise. In re Trumbull's Estate involved a general power of appointment with a default clause in favor of the son's issue living at the time of his death. There is not one word in the opinion indicating that the court entertained the thought that it was possible to assess the tax on the assumption of exercise. The second question raised on appeal by the executor was that "the order improperly provides that the remainder interest should be taxed against the 5 per cent. class, instead of the 1 per cent. class." To this question the court replied:

The appeal upon this ground is sustained. No provision was made in the will of decedent for the disposition of the remainders in case his son should die without issue and without having exercised the power of appointment. In this contingency the

54 191 N. Y. S. 759 (1921).
estate would vest as a reversion in the son as the sole next of kin of decedent. . . . Under the donor's will, the remainders, therefore, must ultimately pass to a person in the 1 per cent. class. . . . The tax should therefore be fixed at that rate, and the order should be modified accordingly.\(^{55}\)

Since a general power had been granted to the donee, the tax could have been assessed to a stranger had the assumption of exercise been resorted to. It clearly appears, therefore, that the tax was there assessed upon the assumption that the power would not be exercised, although the court has not in so many words made the distinction.

The opinion of the Court of Appeals in the case of \textit{In re Cole's Estate},\(^{56}\) considers only the question of the present taxability and does not mention the assumption upon which the tax is based. The court does, however, indicate that it affirmed this method of assessment by stating: "Each of these remainders, therefore, was properly assessed, and at the rate stated. . . ."\(^{57}\) By referring to the opinion of the Appellate Division in the same case, there can be no question as to the decision of the court, for it is there stated, "I am therefore of the opinion that the surrogate erred in failing to provide for the present taxation of the remainders limited upon the default in the exercise of the powers, and of issue. . . ."\(^{58}\)

Although the Surrogate in the case of \textit{In re Canda's Estate}\(^{59}\) was overruled by the Appellate Division,\(^{60}\) on the ground that no tax was due at all under the facts presented, he had correctly interpreted the statute in assessing the tax upon the assumption of non-exercise.

It would seem from the foregoing authorities that it

\(^{55}\) Ibid, p. 761. The 1\% and 5\% classes were the lowest and highest classes respectively under the New York Act.

\(^{56}\) 235 N. Y. 48, 138 N. E. 733 (1923).

\(^{57}\) 138 N. E. 733, at p. 734.

\(^{58}\) 195 N. Y. S. 541, at p. 546.

\(^{59}\) 185 N. Y. S. 903.

should have been well settled in New York that the tax could only be presently assessed upon the assumption of non-exercise after the 1911 amendment to section 220. However, the most recent case, *In re Davison's Estate*, reached a contrary decision, the court stating that it was entirely possible that the power would be exercised in favor of a stranger in the 5 per cent class, and that the remainders were therefore taxable at the highest rate.

This antithetical decision cannot be harmonized with the cases already pointed out, but it should be kept in mind that it is an opinion of the Surrogate's Court, whereas *In re Cole's Estate* was passed upon by the Court of Appeals, and *In re Trumbull's Estate* was affirmed without opinion by the Appellate Division.

By way of summary, therefore, the law of the State of New York may be stated as follows: The inheritance tax upon transfers of property passing under a power of appointment is to be presently assessed in the estate of the donor upon the assumption of non-exercise of the power.

After reviewing and discussing the cases arising in New York, the full significance of *People v. Linn*, decided by the Supreme Court of Illinois, can be more readily appreciated. It should be remembered that since the adoption of section 25 into our Inheritance Tax Law in 1909, which section provides for the immediate taxation of contingent interests at the highest rate, the general practice followed in this state has been to impose the tax in the estate of the donor of the power at the highest rate which, under the contingencies or conditions surrounding the remainder interest, could be assessed upon the assumption of exercise or of non-exercise. Certain instances have been mentioned by others in which the

61 134 Misc. 769, 236 N. Y. S. 437 (1929).
62 See opinion quoted ante.
63 357 Ill. 220, 191 N. E. 450 (1934).
tax was postponed, but they constitute the exception and not the rule. *People v. Linn* was the first decision in Illinois subsequent to the addition of section 25 to pass upon the question with which we are concerned, and for that reason great importance is attached to it.

On April 21, 1934, the Supreme Court handed down its opinion in the Linn case in which it was decided that a power of appointment was not taxable in the estate of the donor at the highest rate, but that the tax was to be postponed until the exercise or non-exercise of the power created a taxable transfer in the estate of the donee. William R. Linn, the testator, died January 28, 1930. Under the terms of his last will and testament, residuary trusts were created for the benefit of his two daughters, Mabel and Dorothy, who were given life estates and general powers of appointment over their respective trusts. The provisions of the two trusts with reference to the powers of appointment are identical, the paragraph applicable to the trust for Mabel Linn being as follows:

(e) Upon the death of my daughter Mabel said trustee shall distribute and pay over the principal of said trust estate to whomsoever my daughter Mabel shall by her last will and testament appoint to receive the same, and in default of such appointment then to her issue living at the time of her death in equal shares *per stirpes*. If my daughter Mabel shall die intestate and fail to appoint said trust estate by will and shall leave no issue surviving her, then said trustee shall distribute and pay over said trust estate to my issue surviving at the date of the death of my daughter Mabel, in equal shares *per stirpes*, and in default of such issue then to the persons who at the date of the death of my daughter Mabel would have been my heirs-at-law under the laws of the State of Illinois then in force if I had died intestate.

The County Court of Cook County had presently assessed the tax on the remainders to a nephew of the decedent. From this decision the executors of the estate appealed. The principal contention of the executors on appeal, which was sustained by the court, was that under
subsection 4 of section 1 of the Illinois Inheritance Tax Law, the remainders which were subject to the powers of appointment were not presently taxable, but that the tax should be postponed, determined and collected in the estates of the donees of the powers. The controversy which created the important issue in the case was the construction to be placed upon that subsection in the light of section 25 of the same Act. Subsection 4 of section 1 of the Illinois Act as then in effect, was identical with section 220 of the New York Tax Law prior to the amendment of 1911, and provided that the taxable transfer was deemed to take place in the estate of the donee upon the exercise or the non-exercise of the power. Section 25 of our law was also copied from section 230 of the New York statute as it existed prior to 1911, and its provisions as to the taxation of contingent interest at the highest rate are substantially the same.

The Illinois court, after considering the two sections above mentioned, decided that section 25 was qualified by subsection 4 of section 1, stating the familiar rule that the legislative intention is to be gathered from an entire act and not from a particular section thereof, and that one portion of an act may be intended to qualify, extend,

64 See ante, where section 220 of the New York Tax Law is quoted.

65 Sec. 25. "When property is transferred or limited in trust or otherwise, and the rights, interest or estates of the transferees or beneficiaries are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this Act, and such tax so imposed shall be due and payable forthwith by the executors or trustees out of the property transferred; Provided, however, that on the happening of any contingency whereby the said property, or any part thereof is transferred to a person, corporation or institution exempt from taxation under the provisions of the inheritance tax laws of this state, or to any person, corporation or institution taxable at a rate less than the rate imposed and paid, such person, corporation or institution shall be entitled to a reassessment or redetermination of the tax and to a return by the State Treasurer of so much of the tax imposed and paid as is the difference between the amount paid and the amount which said person, corporation or institution should pay under the inheritance tax laws, with interest thereon at the rate of three per centum per annum from the time of payment." Ch. 120, sec. 419, Cahill's Rev. St. 1933.
limit or abridge other portions. Since the provisions of subsection 4 are special in nature, and have reference and application to a specific class of transfers, it was decided that the generally inclusive provisions of section 25 are to that extent qualified. It is difficult to argue that a portion of the act which specifically provides that all transfers effected by the exercise or non-exercise of a power of appointment are to be taxed in the estate of the donee, should be harmoniously applicable with a provision of the same act which in general and broad terms provides that wherever a contingency controls the vesting of interest or possession a tax should be presently collected at the highest possible rate.

Importance was also attached to section 3 of the Illinois Act, which provides that all taxes imposed by the act "unless otherwise herein provided for, shall accrue and be due and payable at the death of the decedent," indicating that the Legislature had intended that there should be a postponement of the tax under certain circumstances.

Having determined that section 25 and subsection 4 of section 1 were conflicting, and that the provisions of the latter relating specifically to powers of appointment should prevail over the general language of the former, the decision of the court would seem to be well reasoned and correct. It will be remembered that, although In re Howe's Estate interpreted the effect of the addition of section 230 by the amendment of 1899 subsequent to the incorporation of section 220 in the Tax Law, and reached the same conclusion as did People v. Linn, it was there

---

stated that the effect of the amendment "was the same as though one statute had been enacted containing subdivision 5 of section 220 and section 230." Thus, the fact that in Illinois section 25 and subsection 4 of section 1 were adopted concurrently in 1909 does not alter in any way the argument resorted to in the Howe case.

The court next considered the relationship between the Illinois and New York statutes, and after referring to the sections hereinbefore discussed stated:

These apparently conflicting provisions were construed in the case of In re Howe, 86 App. Div. 286, 83 N. Y. Supp. 825; affirmed by the Court of Appeals, 176 N. Y. 570 . . . . The State contended that the enactment in 1899 of the provision which corresponds to section 25 of the Illinois act repealed by implication the provision which is the counterpart of sub-section 4 of section 1 of our act. The court held that the amendment of 1899 did not repeal or render nugatory the section enacted in 1897, and that the remainders over which the sons had absolute powers of appointment were not taxable until the deaths of the donees. . . . There is no expression or even manifestation of a legislative intent that the provisions of our act under review were not enacted in the light of the construction given them by the courts of the State of New York. When a statute is adopted from another state, the judicial construction previously placed on the statute by the courts of that State accompanies it, and is treated as incorporated therein. . . .

The appellee maintains that the contrary construction of the New York statute now obtains, and that the Howe case, supra, has been overruled by later decisions. The provisions of the New York act, adopted in sub-section 4 of section 1 and section 25 of our Inheritance Tax Act in 1909, were amended in New York in 1911 . . . .

It is manifest that the subsequent amendments to the Inheritance Tax Law of New York differ essentially from the corresponding provisions of the Illinois act in effect on January 28, 1930, the day William R. Linn died. Sub-section 4 of section 1, postponing the tax on the transfer of property subject to powers of appointment, had not been changed at that time and differed

67 See n. 16 ante.
68 The court here stated the changes made by the amending act of 1911.
materially from the New York law then in effect. The statutory provisions relating to the imposition of inheritance taxes upon transfers subject to powers of appointment were the same on January 28, 1930, as when originally adopted in 1909 from the New York law. At the date of the death of the testator, William R. Linn, section 25 of the Inheritance Tax Act was still limited by sub-section 4 of section 1, and, accordingly, the remainders of the testamentary trusts over which his daughters have absolute powers of appointment were not presently taxable.

The analogy between the statutory provisions in effect at the time *In re Howe* and *People v. Linn* were decided makes the similarity of these two decisions strikingly apparent. In each instance the statute provided that the taxable transfer should be deemed to take place in the estate of the donee upon the exercise or non-exercise of the power, and in each instance the specific treatment of powers of appointment was held to be unaffected by the sections providing for the taxation of contingent interests generally at the highest rate. Inasmuch as *In re Howe* had so construed the New York Act prior to the adoption of similar provisions in Illinois in 1909, the principle of statutory construction resorted to by the court in *People v. Linn* is convincing and conclusive.

The decision of the court in the Linn case seems to be well reasoned and correct upon the theory that section 25 is modified and limited by the specific provisions of sub-section 4 of section 1, and is equally sound in the application of the rule of statutory construction referred to. The issues presented were properly decided and the statutory provisions then in effect were properly construed. Chief Justice Orr, who was joined by Justice Farthing, dissented from the majority opinion stating that the tax should be presently assessed in the estate of the donor.69

Since the decision in the Linn case has been announced,

69 The dissenting Justices wrote a vigorous opinion in support of their contention. Although this belief was not accepted by the majority of the court, it evidences a decided disagreement with the position herein submitted as the logical basis for future decisions, and for that reason merits mention at this time.
the question has often been asked, "What is the present practice followed in this state as to the taxation of powers of appointment?" The inheritance tax on transfers subject to a power of appointment is now being presently assessed in the estate of the donor at the highest possible rate under the contingencies and conditions expressed in the will. It is immaterial whether the highest possible tax is produced by an assumption of exercise or non-exercise, for either assumption may be resorted to as a means to the desired end.

Two recent cases which were before the Inheritance Tax Office of Cook County, illustrate the position taken in dealing with this class of transfers. In one estate, two

Justice Orr takes the position that there is no conflict between subsection 4 of section 1 and the provisions of section 25. Divergence from the majority upon this score is fundamental and presages possible future difficulties depending upon the persuasiveness of his argument to the other members of the bench in the light of the 1933 amendment. He states that section 25 is unlimited in scope, whereas subsection 4 of section 1 is concerned only with transfers in the estate of the donee. If it is true as he believes that the latter section is not applicable in the estate of the donor, there can be no question as to the applicability of section 25 in all cases. When the transfer mentioned in subsection 4 of Section 1 is effected by the exercise or non-exercise of the power in the estate of the donee, there will be a redetermination and refund if necessary so that he contends both sections may be harmoniously and concurrently applicable. He states that if this were not the intention of the Legislature, express language of exclusion would be found in section 25.

If there is no conflict between these two sections, it was erroneous for the majority of the court to invoke the rule that particular and specific provisions of the act must prevail over those more general in character. This conclusion, of course, necessarily follows the premise already established.

Justice Orr endeavors to negative the significance attached to In re Howe by the majority, in stating that the New York Court was principally concerned with the question of whether the adoption of section 230 impliedly overruled the provisions of section 220, stating, "It thus appears that the taxation of remainders subject to powers of appointment in estates of donors was not before the court ... in the Howe case."

Justice Orr further states that In re Howe was overruled by Matter of Cole, Matter of Parker, In re Davison's Estate, and Matter of Zborowski, and that "In the later decisions above cited, the New York courts, notwithstanding the specific provisions of subdivision 5 of section 220 (corresponding to the first part of our subsection 4 of section 1), imposing a tax on the exercise of a power of appointment by a donee, held that a remainder subject to a power of appointment is taxable in the first instance in the estate of the donor under sections 230 and 241, on the assumption that the donee might exercise the power in favor of a stranger."

70 Inheritance Tax Case No. 27164.
testamentary trusts were created, the income to be paid to cousins of the testatrix for life, and the remainders to pass as they by will should appoint. In default of appointment, the remainders were limited to named persons, who were in fact children of the life tenants. The tax was assessed upon the remainders in each instance to one child of the life tenant of each trust, being one of the individuals to whom the remainder had been limited in default of appointment.\textsuperscript{71}

Another estate reviewed in this county shortly after the one just referred to illustrates the tax being assessed upon the assumption of exercise to a stranger.\textsuperscript{72} A life estate was given to a widow with remainders over to the testator's children. In the event the widow survived all of the beneficiaries named, she was to have a power of appointment over one-third of the entire estate. There was no default clause in the will. The tax was levied upon the theory that the widow would survive all the named beneficiaries and would appoint to a person who was a stranger in blood to the testator.\textsuperscript{73}

The reason for the variance and inconsistency in method in the above estates cannot be explained in theory, but the latter represents the strict rule of assessments at the highest rate and is now unqualifiedly stated to be the

\textsuperscript{71} It should be pointed out that in People v. Linn the tax was originally assessed upon the assumption of non-exercise to a nephew (the default clause in the will limiting the remainder to persons in the first or second classes). In both of these cases the greatest possible tax could have been assessed by taxing to a stranger.

\textsuperscript{72} Inheritance Tax Case No. 27167.

\textsuperscript{73} The common law rule and the practice followed in this state is that the relationship of the appointee to the donor governs. Subsection 4 of section 1 provides that the exercise of the power shall be deemed a taxable transfer in the same manner as though the property "belonged absolutely to the donee." It would seem, therefore, that the relationship to the donee should control where the tax is levied upon the transfer effected by the exercise of the power. See the following cases so holding: Matter of Rogers, 71 App. Div. 461, 75 N. Y. S. 835, 172 N. Y. 617, 64 N. E. 1125 (1902); Matter of Walworth, 66 App. Div. 171, 72 N. Y. S. 984 (1901); In re Seaver's Will, 63 App. Div. 283, 71 N. Y. S. 544 (1901). For the common law rule see Gleason & Otis, Inheritance Taxation (3d. ed.), p. 171, citing Galard v. Winans, 111 Md. 434, 74 A. 626 (1909).
practice adopted by the members of the Attorney General's office in charge of inheritance taxation. It is unfortunate that in neither of the instances referred to was the tax sufficiently large to warrant a contest and an appeal to the Supreme Court. The desire to make law must yield to the exigencies and financial expediencies involved in any case.

We have considered only general powers concerning which, by way of summary, we may state that the assumption of exercise in practically all cases will be made, as it is then possible to tax the remainder to a stranger.

Where a special power has been given, the highest possible tax will still be assessed under section 25, but the assumption upon which it is based may vary. For instance, a power may be limited to A, B, and C, all of whom are in the first or second class for tax purposes, and in default of appointment to D, E, and F, who are also in the same class. It makes no difference here whether the tax be assessed upon the assumption of exercise or non-exercise, and either may be used as a basis for the tax. On the other hand, if F happened to be a stranger, the tax would be levied upon the basis that there would be a default in appointment, and that D and E predeceased F. It has been a common belief by many that the tax will be assessed only upon the assumption of exercise, and by others upon the assumption of non-exercise. There is no justification for this misunderstanding under the present practice, and it is certain that whichever assumption affords the highest possible tax under the theory of section 25 will be indulged in by the officials levying the tax.

As to decedents dying prior to July 1, 1933, the doctrine of People v. Linn is now controlling, and the tax will be postponed. By reason of the amendment striking out the non-exercise provision of subsection 4 of section 1, the authorities in this state have looked to the New
York decisions, and have evolved the system of taxation herein discussed to be applied to those estates wherein the decedent died subsequent to July 1, 1933, the effective date of the amendment. It is submitted, however, that the interpretation given the decisions of that state is not correct to the extent that a tax may here be assessed upon the assumption of exercise.

What effect should properly be given the amendment of 1933 to subsection 4 of section 1 in the light of People v. Linn? No specific change has been made in the law as to those cases where the power is exercised, and there is no implication that a change was intended in the remaining portion of the section by the amendment of 1933. It is still required by the statute that in the event of exercise, the taxable transfer shall be deemed to take place in the estate of the donee in the same manner as though the property belonged absolutely to him. This would necessitate the tax being postponed and collected in the estate of the donee, except in those cases where the assessment can be made upon the assumption of non-exercise. The contradiction which existed at the time the Linn case was decided, between section 25 and the exercise provision of subsection 4 of section 1, still exists. The argument used by the court in that case so far as the exercise of the power is concerned, seems to be available and applicable at this time. It does not seem logical to read into the amendment an implication that any change was intended so far as the exercise of the power is concerned. On the contrary, the omission was identical with that made in New York in 1911, and as we have seen, with the exception of Davison’s case, the decisions have limited the effect of the amendment to the non-exercise of the power.

The amendment of 1933 reinstates the common law doctrine as to those cases where there is a failure to exercise the power, so that the taxable transfer now takes place in the estate of the donor, and if it were not for the
provisions of section 25, the tax would be postponed in accordance with the practice prior to 1909.

It has been suggested that the similar amendment in New York modified and limited the ruling of In re Howe to those very few cases where the tax could not be assessed upon the assumption of non-exercise. This theoretical conclusion is applicable in this state as well. It clearly should not be assessed upon the assumption of exercise, because in that event the taxable transfer takes place in the donee's estate by virtue of the exercise provision of the statute still in force. A specific illustration will emphasize this. A creates a testamentary trust, giving a life estate to B with a general power of appointment, there being no default clause. When the estate is reviewed for inheritance tax purposes, the possibility that B might appoint to a stranger should not be the basis for assessing the tax immediately, as section 1 says the taxable transfer is to be in the estate of the donee. The tax should be assessed, therefore, upon the assumption that B will not exercise the power, and applying section 25, the tax may be presently levied at the highest possible rate under the circumstances. Now, suppose that a default clause has been attached whereby the donor provides that in the event the power is not exercised the property shall pass to X, Y, and Z, or the survivor of them. Again the tax would properly be levied on the assumption of non-exercise of the power and that X and Y would predecease Z, who would thereby take the entire remainder.

If the default clause provided that the remainder go to a local charity, it would follow that no tax would be presently assessed in the donor's estate, as the local charity would be exempt. Since no tax would be due at all in the event the power were not exercised, the assessment could only be made in the estate of the donee upon the exercise of the power. This appears to be the only instance where no tax is to be presently assessed and levied
in the estate of the donor, assuming that the tax cannot properly be predicated upon the assumption of exercise. So long as subsection 4 of section 1 provides that the taxable transfer in the event of exercise of the power is deemed to take place in the estate of the donee, no other general theory as to the taxation of powers of appointment consistent with its presence seems logical. The conflict between section 25 and the foregoing provision is as obvious now, as it was prior to the amendment, and it is this fact which makes convincing the interpretation of the amended section which has been submitted that the tax cannot be presently levied upon the assumption of exercise. However, since the non-exercise provision of subsection 4 of section 1 has been stricken, there exists no conflict between section 25 and the theory that the tax can only be assessed upon the assumption of non-exercise, and the provisions of the latter section therefore may now be applied.

If the Supreme Court, in reviewing this question when it is again presented on appeal, is to give any credence to its opinion in the case of People v. Linn, it should agree with the conclusion reached herein. The court cannot give full force and effect to the theory of that decision in all cases involving a power of appointment, inasmuch as the amendment to subsection 4 of section 1 has eliminated entirely the argument employed that the tax should be postponed in cases where the taxable transfer takes place by reason of the failure to exercise the power. Nor, on the other hand, can it be logically decided that the tax in all instances should be presently assessed in the estate of the donor, for the argument resorted to in deciding that the tax should be postponed is still correct with reference to the remaining portion of the section and is not affected by the nature of the amendment in 1933. If both of these premises are sound, and it is believed that they
are in the light of this discussion, the only course open to the court is to hold that the tax cannot be presently assessed upon the assumption of exercise. To this extent the rule in *People v. Linn* should be modified.

If the practice now employed by the taxing officials of this state is subsequently upheld by the Supreme Court, in every instance where a power of appointment has been given, the tax will be presently assessed in the estate of the donor at the highest possible rate. This means, of course, that a large sum of money will be tied up during the existence of the preceding particular estate, thus diminishing the income to be paid to the life tenant. In most instances the interest paid by the state on any refund eventually obtained cannot compensate for this loss to the life tenant.

Should the Supreme Court, however, adopt the course submitted as the logical basis for its opinion, the tax would be presently assessed upon the assumption of non-exercise in all cases. Under such a ruling, of course, it is possible to avoid the onerous assessment to a stranger by carefully limiting the phraseology of the default clause.

Where the use of a power of appointment is advisable, a special power limited to named persons or a class affords more opportunity to guard against the undesirable features of section 25 than the general power. If the power be limited to the children of the life tenant, to his descendants, or to such other persons as the testator may desire, and coupled with such a provision is a default clause with similar provisions, the scope of the contingencies involved is narrowed down to a desirable point. The testator may limit the remainder to the natural objects of the donee's bounty or to his own preferences, and name individuals who are in the first and second class for taxation purposes. Where the remainder is limited to a class in lieu of named persons, section 25, of
course, will be applied to tax the entire remainder to one. Where the special power is used, the same theory is applicable to the exercise as well as the non-exercise provisions of the instrument, and each should be so framed as to limit the remainder to those in the first or second class.

Another great advantage to be gained by the use of a special power lies in the fact that for Federal Estate Tax purposes, the property passing under a special power will not be subject to tax in the estate of the donee. Property passing under a general power of appointment, however, is subjected to a Federal Estate Tax in the donee’s estate.

It should be specifically pointed out that the possibility exists, although it is not here considered logical, that the desire of Justice Orr and Justice Farthing to interpret the existing statutory provisions as warranting the present taxability in all cases in the donor’s estate, may be adopted by other members of the bench when the matter is again presented to the Supreme Court, and that no credence will be given to the theory of the argument used in the majority opinion in People v. Linn. In such event the decision of the court would permit the taxation in the donor’s estate upon the assumption of exercise, which in turn opens the door to taxation in the third class in those cases where a general power has been used. It is to be noted that the dissenting opinion in the Linn case cited with approval In re Davison’s Estate, in which the New York court upheld the assessment in the donor’s estate upon the theory of the exercise of the power to a stranger. In order to avoid unfortunate complications in the event such a decision is forthcoming, a special power should be employed rather than a general one in all cases where it may be used satisfactorily.

74 See Article 24, Federal Estate Tax Regulations 80.
75 Ibid.
NOTES AND COMMENTS

TAXATION OF INTERSTATE ELECTRICAL UTILITIES

The tremendous growth of interstate transmission of electric energy in the last decade has given rise to conflicting claims to jurisdiction for taxing and regulating purposes. This conflict characterizes the present chaotic taxing system with its forty-nine independent taxing authorities intermingled with numberless local bodies exercising similar functions and powers. It also emphasizes the need for revising the current methods of taxing.

Only by implication are the states forbidden to burden interstate commerce. However, the grant of power to the national government was early held to imply a converse prohibition upon state authority. This was not a total prohibition, but only such as was necessary to protect interstate commerce from being unduly burdened. Obviously, property used in interstate commerce is not, per se, exempted from the taxing power of the state, but may be taxed, provided, of course, there is no discrimination.

Railroads were the first interstate utilities to question the methods of allocating their property for taxation purposes among the various taxing units through which their lines extended. The courts first evolved the formula of the "unit rule";

---

1 In 1933, for example, the national average for electricity delivered outside the state in which it was generated was about 20 per cent. Deliveries outside their boundaries varied among the states from 97.7 per cent for Maryland and 74.5 per cent for Virginia, at one extreme, to 3 per cent for Missouri at the other. More power crossed state lines in 1933 than was generated in the entire country in 1913. See table on "Interstate Electrical Energy Transactions during 1933," in the Interim Report of the National Power Survey, Federal Power Commission, 1935, at p. 46. See also the map facing p. 6 showing "Principal Generating Plants and Electrical Transmission Lines of the United States in 1934."

The principal interconnected networks or power areas include such units as (1) Vermont, New Hampshire, Massachusetts, Connecticut, and Rhode Island; (2) Pennsylvania, Maryland, Delaware, and New Jersey; (3) Alabama, Mississippi, Georgia and Tennessee; and, (4) the Pacific coast states.


3 "The Congress shall have the power ... to regulate commerce ... among the several states ..." United States Constitution, Act. I, sec. 5, clause 3.

4 See Gibbons v. Ogden, 9 Wheat. 1 (1824).

5 Cooley v. Board of Wardens of Port of Phil. et al., 12 How. 299 (1851).

that is, each state in determining the value of property subject to its taxing power may find a value bearing the same proportion to the value of the entire property as the length of the railroad or telegraph or telephone lines within the state bears to the total length of the carrier system. Such a formula must obviously be one of convenience, not of inevitable application. If the court finds that it seems to operate inequitably in a particular case, its application will be pronounced violative of due process.

The general unit rule has long been applied to telephone and telegraph lines. However, the decisions are not yet clear regarding its application to interstate electrical utilities. In *Nevada-California Power Company v. Hamilton*, more than two-thirds of the value of the corporation's total property was represented by property and property rights in California, including the power plant and water rights; less than one-third of the value was represented by property in Nevada. However, approximately 85 per cent of the transmission lines was in Nevada while the other 15 per cent was in California. Nevada imposed a tax computed on 85 per cent of the use value of the corporation's property on the theory that a like proportion of the corporation's income was derived from its holdings in Nevada. It appeared that the State of California had actually taxed the cor-

---


In *Adams Express Co. v. Ohio*, 165 U. S. 194 (1897), the rule was modified to the so-called "unit of use" formula: Property of an interstate carrier may be assessed for purposes of taxation at that value which, as a unity or single system, it has in use, to-wit, the net profits which it produces, irrespective of what may be the value of the tangible property which is owned or employed, apportionable as the amount of business done within the state is proportioned to the total amount of business done.

8 See *Pitt., etc., Railway Co. v. Backus*, 154 U. S. 421 (1894), where the large mileage in one state was over land where the construction cost was low and terminal facilities few and inexpensive, while in another state its mileage was small, but of expensive construction, with elaborate terminal facilities. See also *Union Tank Line Co v. Wright*, 249 U. S. 275 (1919); *Wallace v. Hines*, 253 U. S. 66 (1920); and *New York Tax Commission, Special Report on Allocation of Corporate Income* (1933).

9 See *W. U. Tel. Co. v. State Board of Equalization*, 91 Mont. 300, 7 P. (2d) 551 (1932), where the court treated landlines and ocean cables as an integral system. But compare *Smith v. Ill. Bell Tel. Co.*, 282 U. S. 133 (1930), where the court (for rate-making purposes) treated the telephone company as a "segregated enterprise," although it admittedly had the advantages attached to being a component part of a large system and through such relations obtained cooperation with the manufacturing, research, engineering and financing departments of the holding company.

poration on the same theory, that is, on 15 per cent of the use value of the total property. The Federal district court, later affirmed by the circuit court, declined to approve such method of apportionment, saying, "If the property in this case were homogeneous, that is, if it consisted entirely of one transmission line, if it were a telephone line, a telegraph line, or a railroad, it would be proper to pursue the method which has been used by the commission..."11 This case, thus, may consequently be explained in terms of these particular facts. Yet, are not these precise facts characteristic of any interstate electrical transaction, where the generating plant is in one state and the transmission and distribution lines spread through several states? The court frowned on this attempt to tax property, the actual tangible value of which is situated outside the state by computing the tax on the proportion of transmission lines within the state.12

However, the states have more than made up for this lost ground by developing a newer kind of tax, a tax upon the generation or distribution of electricity itself, without regard to the technical questions of the value of the network system. And, the Supreme Court of the United States has sustained it.

In Utah Power and Light Company v. Pfost,13 a Maine corporation, doing business in Idaho, Utah, and Wyoming as a generating, transmitting, and distributing electrical utility, was subjected in Idaho to a license tax measured by the production of electricity, whether consumed inside the state or sent out, at the rate of one-half mill per kilowatt hour. The argument was made by the utility company that the generation and transmission of electricity was an instantaneous act, with no noticeable time differentiation, for electricity travels at the speed of approximately 186,000 miles per second. Transmission of electrical

11 At p. 489.

12 Line 6. Compare State v. Baker, 316 Mo. 853, 293 S. W. 399 (1927), involving an intercounty (i.e., intrastate) electrical utility, where apportionment on a mileage basis was approved. See also State v. State Board of Equalization, 56 Mont. 413, 186 P. 697 (1920).

Note that this limitation against taxing property beyond the jurisdiction of the taxing authority (as imposed by the due process clause of the 14th Amendment) has never been applied to the Federal government. Burnet v. Brooks, 288 U. S. 378 (1933). Theoretically this decision is directly contrary to First Nat. Bank v. Maine, 284 U. S. 312 (1932), except that the former involved international aspects, in which there is as yet no final judicial arbiter.

energy in interstate commerce is exempt, as such, from regulation by the state,\(^{14}\) and hence it may be assumed, from the state taxing power. It was urged that since there could be no difference between generation and transmission-distribution, the law should not make one. Consequently, it was argued, a state tax imposed indiscriminately upon such generation is violative of the commerce clause. But, the court reminded counsel that, in spite of all the scientific evidence as to the nature of electricity, "taxation is a practical matter." The court observed a distinction between the generation of electricity and its transmission in interstate commerce. The one was essentially a process of manufacture, and consequently precedent (in terms of logical analysis, if not in terms of fact) to the process of interstate commerce, and therefore subject to the taxing power of the state.\(^{15}\) The electrical utility was consequently found to be engaged in two activities, legally separable. So far as it produced electrical energy in Idaho, its business was purely intrastate, subject to state taxation and control. But, in transmitting the electricity across the state line into Utah, the utility assumed the character of an interstate business regarding which state legislation is subject to the paramount authority of the commerce clause. Mr. Justice Sutherland, in speaking for the court, said:

"While conversion and transmission are substantially instantaneous, they are, we are convinced, essentially separable and distinct operations. The fact that to ordinary observation there is no appreciable lapse of time between the generation of the product and its transmission does not forbid the conclusion that they are, nevertheless, successive and not simultaneous acts. . . . The effect of turning the switch in Utah is not to draw electrical energy directly from the waterfall, where it does not exist except as a potentiality, but to set in operation the generating appliances in Idaho, which thereupon receive power from the falling water and transform it into electrical energy. In response to what in effect is an order, there is production as well as transmission of a definite supply of an article of trade. . . . We think, therefore, it is wholly inaccurate to say that appellant's entire system is purely a transferring device. On the contrary, the generator and the transmission lines perform different functions, with a result comparable, so far as the question here under con-

\(^{15}\) U. S. v. E. C. Knight Co., 156 U. S. 1 (1895), where the court said, "Commerce succeeds to manufacture, and is not part of it." Compare the NRA decision.
sideration is concerned, to the manufacture of physical articles of trade and their subsequent shipment and transportation in commerce. . . . The evidence amply sustains the conclusion that this transformation must take place as a prerequisite to the use of the electrical product, and that the process of transferring, as distinguished from that of producing, the electrical energy, begins not at the waterfall, but definitely at the generator, at which point measuring appliances can be placed and the quantum of electrical energy ascertained with practical accuracy."

The full logic of this case received its application in *South Carolina Power Company v. South Carolina Tax Commission*, where a Federal district court sustained a tax imposed upon the sale (that is, distribution) of electricity by the state to which it had been transmitted, as well as a generating tax. The court reasoned that neither tax violated the commerce clause, for one was imposed before, and the other after, the process of interstate commerce. The transformer was singled out as of decisive importance—so much so, in fact, that it was suggested that the electricity taxed at the generating plant and at the distributing plant (at opposite ends of the process, so to speak) were different commodities of commerce from the electricity passing through the transmission lines (which was admittedly in interstate commerce), for in the latter case the electricity was in high voltage. In each instance the tax was imposed upon low voltage current. And the court cited as analogous the principle of "breaking the original package." The court said:

"Electricity is produced at a low voltage. For transmission over long distances it is 'stepped up' by a transformer to a very high voltage; and all of the current transmitted in interstate commerce is thus 'stepped up' before transmission in such commerce. Before it can be used by the consumer, it must be 'stepped down' again to a low voltage; and all of the current received by complainants in interstate commerce is thus stepped down before being sold to or used by the consumer. And this 'stepping up' or 'stepping down' is not a mere change produced in the current. . . . The principle of the transformer is that the current flowing in the wires coming into the transformer sets up an induced current . . . to flow in the wires going out of the trans-

---

16 52 F. (2d) 515 (1931), affirmed without opinion in 286 U. S. 525 (1931). It was in this case that Millikan, the physicist, filed his elaborate affidavit in support of the view that the generation and transmission of electrical energy were essentially the same process—that they were instantaneous. See same case in 60 F. (2d) 528 (1932).
former; the voltage depending upon the relative number of the coils of the wires carrying the current in and those carrying the induced current out. These wires are insulated from each other, and the current going out is not the current coming in, but a new and different current, although induced by the former. . . . The current produced by induction in the transformer results from the use of the original current but is not that current, just as current produced by steam results from the use of coal but is not the coal.

"Now, so far as the production or generation tax on current is concerned, there can be no question as to its validity as applied to current transmitted in interstate commerce, we think, even though the current transmitted be conceived of as the identical current produced. The production of an article for transmission in interstate commerce is not in itself such commerce."

17 Generation and distribution taxes, measured by the amount of electricity generated or sold, thus are now clearly subject to state taxation, regardless of the interstate origin or distribution of the energy in question. For purposes of taxation, the courts have fashioned a fictitious concept of electricity. A legal fiction is not intrinsically bad, that is, it is not necessarily evil or use-
less merely because it has no basis in reality. In fact, the his-

The courts have sensed a varying analogy between natural gas and electricity, and have frequently cited cases concerning the former kind of energy, in bearing upon problems concerning the latter, which may have some value in view of the relative scarcity of definite precedents in the field of electrical utility taxation.

In Hope Natural Gas Co. v. Hall, 274 U. S. 284 (1927), a state tax imposed on natural gas at the producing well was sustained, although a considerable portion of the gas so taxed was actually transported outside the state for consumption.

In East Ohio Gas Co. v. Tax Commission of Ohio, 283 U. S. 465 (1931), an excise tax imposed on corporations engaged in supplying natural gas to consumers within the state was sustained, although based on the gross receipts which included sales of gas piped in from other states. Analogous to the transformer, was found the pressure-reducing station through which the natural gas must pass before distribution. The "original package" doctrine was cited.

Note that while the court has thus sustained the taxation of both electricity and natural gas at the place of production, it has, on the other hand, held that the state has no regulatory power over the rates charged by local utilities for energy sold for use in another state and delivered at the state boundary, although admittedly the rates to local consumers might be adversely affected by the inadequacy of the former rates. See Public Utilities Commission v. Attleboro Steam & Electric Co., 273 U. S. 83 (1927).
NOTES AND COMMENTS

The history of the common law can be traced largely in terms of the rise and fall of fictions. So long as they perform some function which facilitates the accomplishment of objectives commanding general approval they are undoubtedly beneficial and necessary. But, when the attempt is made to extend their scope beyond the point of utility, they are no longer justified. To put it simply, legal concepts, or fictions, have only functional validity.

In respect to certain situations, the Supreme Court of the United States, observing the dangers of multiple taxation as applied to intangible personality, has forcefully rejected it and favored one taxing authority. Such restraints, however, in connection with interstate electrical utilities are not yet in appearance. In fact, it is just this mode of piecemeal construction and rectification by individual cases such as are here commented upon that has made the American tax structure into a virtual crazy-quilt. What is really the same kind of economic wealth (electrical energy) may now be taxed by at least three taxing authorities, the state of generation, the state of distribution, and the national government.

If the taxing authorities, in their constant search for revenue, proceed farther in the direction indicated, grave economic dangers may arise. Unless these authorities, from national government down to the smallest special district, arrange for some workable division among themselves of the tax income from the interstate electrical utilities, the business of transmitting power across state boundaries will be threatened with disintegration.

CLIFFORD J. HYNNING

WHEN COMPOUND INTEREST IS CHARGED AGAINST A TRUSTEE

In a late Connecticut case an administrator, authorized by the court to continue decedent's business for six months, man-

---


2 State ex rel. Raskin v. Schachat et al., 180 A. 502 (Conn. 1935).
aged it for a much longer time without attempting to liquidate. He paid himself a salary, and utterly failed to keep intelligible accounts. In an action on his bond by his successor, the estate being insolvent, the court charged him with lost principal, and with compound interest thereon from the time when liquidation should have been completed. Following a custom prevailing in decisions upon the question whether simple or compound interest should be allowed against a defaulting trustee, the court cited but a few of the host of cases touching the subject, and refrained from theoretical explanation of its holding.

Investigation discloses ample authority consonant with this upon similar facts, and an irreconcilable conflict, both in theory and decision, on the general question of whether simple or compound interest should be charged. Several reasons appear. First, the matter is one which is left to the sound discretion of the court, a discretion which reacts differently to varying situations. Second, compound interest was a new remedy against trustees in the nineteenth century. Naturally its development could not be uniform in all jurisdictions. Third, a single fact, unimportant at first glance, may be the controlling element in a case. Thus, where the smallness of the fund might have precluded the trustee from keeping it at interest, the court may refuse to assess compound interest in an otherwise proper case.

Factual considerations have been decisive of most of the cases, and no principle capable of general application has yet been evolved. But so many decisions have passed upon the question that the factual grounds for allowing compound interest may be outlined.

The most common case is that in which the trustee uses trust funds for his own benefit, as in his own business. It is settled that the cestui que trust may elect to take the profits actually realized. But, as a prerequisite, the profits must appear. If the trustee has lost money, or has failed to keep accounts, no profits can be made to appear. Numerous decisions accord in allowing

---

8 Clement v. Brainard, 46 Conn. 174 (1878); Clement's Appeal from Probate, 49 Conn. 519 (1882); State v. Culhane, 78 Conn. 622, 63 A. 636 (1906); Mathews v. Sheehan, 76 Conn. 654, 57 A. 694 (1904).
4 Dixon v. Storm, 5 Redf. Sur. 419 (N. Y., 1881); Wright v. Wright, 2 McCord's Eq. 185 (S. C., 1827).
5 Re Ricker, 14 Mont. 153, 35 P. 960, 29 L. R. A. 622 and note (1893).
7 Windmuller v. Spirits Distributing Co., 83 N. J. Eq. 6, 90 A. 249 (1914).
the cestui compound interest under these circumstances. In one of these, in which the trustee, empowered to enforce security, foreclosed and bid in the property for himself, and later sold at a profit, the court remarked: "The rule seems to be, that in all cases where the trustee has used the trust fund, and the court can see from the evidence that the trustee has realized large gains and profits to himself, and has failed to keep any exact account of the same, or has refused to render an account to the beneficiary, the law will require him ... to account for the original fund so used, with interest computed with annual rests."9

This "rule" just quoted was perfectly adapted to the case before the court, but falls far short of the limits of the cases charging compound interest against a trustee who has used the funds of his trust with the aim of personal gain without accounting. It leaves out the cases where the trustee has actually lost money, and the decided cases indicate that this is no obstacle to awarding compound interest.10 It also omits cases wherein the trustee attempted, but failed, actually to use the fund. A leading case has held that a trustee who invested in "speculative" stocks, with the acquiescence of the beneficiaries, and then held the title in his own name, should be charged compound interest, though he clearly derived no pecuniary benefit from this breach.11 The improper investment alone was not enough to surcharge him; the taking of title was the decisive element, as it revealed his personal object. The only common factual ground for this group of decisions seems to be actual or attempted private gain. Other misdeeds seem only to add to the propriety of the remedy.

An offense closely similar to attempted use of trust funds by the trustee is mingling of funds with his own. Mingling alone,

8 White v. Sherman et al., 168 Ill. 589, 48 N. E. 128 (1897); Lehman et al. v. Rothbarth, 159 Ill. 270, 42 N. E. 777 (1896); Ogden v. Larrabee, 57 Ill. 389 (1870); Bond et ux. v. Lockwood, 33 Ill. 212 (1864); Clement v. Brainard, 46 Conn. 174 (1878); Montjoy v. Lashbrook et al., 41 Ky. (2 B. Mont.) 261 (1842); Bobb v. Bobb et al., 89 Mo. 411, 4 S. W. 511 (1887); Lathrop v. Smalley's Ex'rs, 23 N. J. Eq. (8 C. E. Green) 192 (1872); Page's Ex'r v. Holman, 82 Ky. 573 (1885); Hurd v. Goodrich, 59 Ill. 450 (1871); Hannahs v. Hannahs, 68 N. Y. 610 (1877); note in 29 L. R. A. 628; Long v. Neeland, 118 Cal. App. 203, 4 P. (2d) 815 (1931).

9 Ogden v. Larrabee, 57 Ill. 389 (1870).


11 White v. Sherman, 168 Ill. 589, 48 N. E. 128 (1897),
without some other element, such as bad faith, does not justify a court in allowing compound interest. Thus, in a recent case, a corporate trustee which acted in good faith in allotting a mortgage already held in its own name, to a specific trust, without transferring title to itself "as trustee," was held liable to beneficiaries only for funds taken from the trust with simple interest. And in another case, an individual trustee who mingled trust funds with those of the corporation of which he was a member, was not surcharged because he took care to keep the fund invested, and made no attempt to benefit the firm. But in an Illinois case, an assignee for the benefit of creditors mingled trust money with his own, failed to keep accounts, and refused to pay a dividend to the plaintiff, a creditor. Since he could not show that he had not profited, the court presumed that he had, and charged him compound interest from the time the claim was payable.

In all these cases of mingling or attempted use, the familiar principle that a trustee shall not profit from his trust has been applied. And where the facts have been strong enough to impute to the trustee an intent, in handling trust funds, to consider his own interest at the expense of his trust obligation, compound interest usually has been assessed. But inconsistent results are reached because courts differ as to what facts warrant imputing such an intent to the trustee.

Another important group of decisions involves the failure to make proper investments. By far the great majority of these deny compound interest if the breach has been the making of unsafe or improper investments, or failure to invest at all. Such conduct has been called "simple neglect." To distinguish from this the action which they conceive to be ground for allowing compound interest, courts have used such discordant phrases as "gross negligence," "positive misconduct," "gross delinquency," and "willful violation or omission of duty." As no

---

12 In re Yost's Estate, 316 Pa. 463, 175 A. 383 (1934).
13 Cornet v. Cornet, 269 Mo. 298, 190 S. W. 333 (1916).
14 Asey v. Allen et al., 124 Ill. 391, 16 N. E. 865 (1888). But see Forbes v. Ware, 172 Mass. 306, 52 N. E. 447 (1899), where no bad faith was shown. Also see McDonald v. Hartford Trust Co., 104 Conn. 169, 132 A. 902 (1926); Brown v. Tydings, 149 Md. 22, 130 A. 337 (1925).
two courts would define these terms in the same way, no uniformity of decision can be expected, and none is found.

A New York court last year held that a trustee, who had only the normal trust duty to invest, and who loaned funds on an unsecured note which proved worthless, could have earned at least 4 per cent compounded had he invested in Liberty Bonds at the time he made the loan, and charged him at this rate.\textsuperscript{18} In a Wisconsin case, a trustee who renewed a second mortgage note on a farm, and ultimately lost the entire investment, was charged with only simple interest at the legal rate from the time his duty to convert accrued.\textsuperscript{17} But in a leading Illinois case an executor, directed by will to sell real estate and invest, and required to account, held the money without investing, and failed to account. The court charged him 6 per cent, compounded.\textsuperscript{18}

Failure to discharge a duty fixed by the trust instrument has been used as a basis for imposing compound interest, in contradistinction to failure to discharge certain general duties that are imposed on all trustees, where simple interest only is charged.\textsuperscript{19} Duties fixed by statute are placed on the same basis as duties fixed by the trust instrument. Thus non-compliance with the statutory requirements for investments by guardians and conservators has been a ground for surcharging them for unsuccessful investments.\textsuperscript{20}

"The principle of liability," one court has said, "is accountability for what has been received, or ought to have been received, or must be presumed to have been received, and not punishment for a breach of duty."\textsuperscript{21} But in an earlier opinion the United States Supreme Court remarked that "Interest is compounded as a punishment, or as a measure of damages for undisclosed profits and in place of them."\textsuperscript{22}

\textsuperscript{16} In re Ayvazian's Estate, 153 Misc. 467, 275 N. Y. S. 123 (1934).
\textsuperscript{17} Estate of Dreier, 204 Wis. 221, 235 N. W. 439 (1931).
\textsuperscript{18} Hough v. Harvey et al., 71 Ill. 72 (1873).
\textsuperscript{19} Emmet v. Emmet, 17 Ch. D. 142, 50 L. J. Ch. 341, 29 W. R. 464 (1881); Feltham v. Turner, 23 L. T. 345 (1870). The same result is reached where a court order imposes a duty to sell and invest: Winder v. Diffenderffer, 2 Bland 166 (Md., 1829); Crimp v. First Union Trust & Savings Bank, 352 Ill. 93, 185 N. E. 179 (1933).
\textsuperscript{20} People v. Birket, 342 Ill. 333, 174 N. E. 388 (1931); Hughes et al. v. People, 111 Ill. 457 (1885).
\textsuperscript{21} Forbes v. Ware, 172 Mass. 306, 52 N. E. 447 (1899).
\textsuperscript{22} Barney v. Saunders et al., 57 U. S. (16 How.) 535, 14 L. Ed. 1047 (1853).
The principle upon which compound interest has been assessed undoubtedly is accountability for what has been, ought to have been, or must be presumed to have been received. But the courts award only simple interest where the trustee, by failing to invest properly, cannot account for what "ought to have been received." And they compound the interest against him where, again failing to invest, and to account for what "ought to have been received," he also shows bad faith by taking title in his own name.

Clearly, compound interest is not always charged where it ought to have been received. Nor is it always charged when it has been, or may be presumed to have been, received. It is safe only to say that it may be charged when one of these three alternatives exists.

The principle is accountability, but the measure of accountability depends on the degree of the trustee's offense. The object is not alone to restore to the beneficiary what he has lost. Obviously he loses equally by improper investments whether the trustee takes title to himself or not. Compound interest is not charged alone as the measure of damages flowing from the trustee's breach. Its propriety depends not wholly on the plaintiff's loss, but mainly on the defendant's act. Therefore, it is imposed, with few exceptions, as a penalty. The factual ground for it, common to the overwhelming majority of the cases, is the trustee's breach of his foremost duty of absolute fidelity to his trust.

C. E. Fox

AMENDMENTS TO ILLINOIS ATTACHMENT ACT

One of the more important modifications in the statute law of Illinois made in the last session of the legislature, of especial interest to the practicing attorney, is the rather thorough and complete revision of several phases of the Attachment Act.\(^1\)

The first modification is an enlargement of the action to cover tort as well as contract cases, and to cover unliquidated as well as liquidated claims.\(^2\) The nine grounds which serve as a basis for attachment, however, remain unchanged.\(^3\) Attachment suits are extended so that they may be used in place of attachment in aid, which action is specifically repealed;\(^4\) yet it seems that this modification allows the same remedy under a different name.

\(^1\) Ill. State Bar Stats. (1935), Ch. 11.
\(^2\) Ibid., par. 1.
\(^3\) Ibid.
\(^4\) Ibid., par 31.
Having granted attachment in the case of tort or unliquidated claims, the legislature was faced with the problem of determining a manner in which to fix a bond. Paragraph 2 of the Act has been amended to accomplish this.\(^5\) In substance, it requires that the plaintiff shall apply to a judge of a court of record or a master in chancery, to have the usual affidavit as to the amount of damages indorsed by such officer, and section 4\(^6\) of the old Act is repealed and sections 4A\(^7\) and 4B\(^8\) supplied to take its place, which sections require a bond in double the sum sworn to be due;\(^9\) or the court or a judge thereof upon \textit{ex parte} motion, without notice, may authorize a bond in double the value of the property to be attached instead of double the sum sworn to be due.\(^10\)

The conditions of the bond required are substantially the same as before, with the provision that it shall run to all parties who may be interested, not only to the defendant named in the writ.\(^11\) Attachment against a joint debtor is as formerly.\(^12\) The general procedure under the Act is, insofar as is possible, brought under the Civil Practice Act.\(^13\)

A forthcoming bond in double the value of the property attached is permitted in the same manner as formerly.\(^14\) Other sections of the Act as to a suit on a bond, sustenance of live stock, disposal of perishable property, remain unchanged.\(^15\) The declaration is now a complaint and the Practice Act applies as far as expedient.\(^16\) Intervenors may appear in much the same manner as formerly, except that here, too, the rules under the Practice Act control the procedure.\(^17\) A set-off is now termed a counterclaim.\(^18\) The paragraph in aid of \textit{scire facias} is specifically repealed.\(^19\) Despite the fact that attachment in aid is specifically repealed, the statute permits proceedings in aid and

\(^5\) Ibid., par. 2.  
\(^6\) Cahill's Ill. Rev. Stat. (1933), Ch. 11, par. 4.  
\(^7\) Ill. State Bar Stats. (1935), Ch. 11, par 4 (1).  
\(^8\) Ibid., par. 4 (2).  
\(^9\) Ibid., par 4 (1).  
\(^10\) Ibid., par. 4 (2).  
\(^11\) Ibid., par. 5.  
\(^12\) Ibid., par. 7.  
\(^13\) Ibid., par. 26.  
\(^14\) Ibid., par. 14.  
\(^15\) Ibid., par. 18, 19, 20.  
\(^16\) Ibid., par. 25, 26.  
\(^17\) Ibid., par. 29.  
\(^18\) Ibid., par. 30.  
\(^19\) Ibid., par. 32.
gives further weight to the argument that only the name in such proceedings is changed.20 Appeal is as in other civil cases.21

The new and vital elements of proceedings in attachment are actions on tort or unliquidated claims, and the manner of fixing the amount of the bond.

It would seem from a reading of the statute, before judicial interpretation has been given, that all the rights and remedies which were open to litigants under the prior Act still exist, with provisions added to cover more types of causes.

J. E. Brunswick

VeNUE FOR ConFeSSION OF JUDGMENT—statutory ChanGE

At the last session, the Illinois legislature amended the Civil Practice Act1 in such manner as to require application for confession of judgment to be made "in the county in which the note or obligation was executed or in the county where one or more of the defendants reside."

The statute declares expressly the effect of failure to select the proper venue: "A judgment entered by any court in any county other than those herein specified shall have no force or validity, anything in the power to confess to the contrary notwithstanding."

This amendment, of course, represents a distinct change in the procedural law of Illinois, and while it is hardly susceptible of misunderstanding or needy of interpretation, it is considered worthy of brief mention, because of the commonness of the proceeding and the possibility that in reliance upon settled custom it may be inadvertently overlooked if special attention is not directed to it.

G. S. Stansell

20 Ibid., par. 33.
21 Ibid., par. 40.
DISCUSSION OF RECENT DECISIONS

COURT'S POWER TO TAX COSTS FOR VEXATIOUS REFUSAL TO MAKE ADMISSIONS HELD CONSTITUTIONAL.—The power of the courts to tax costs, including reasonable attorneys' fees, for the vexatious and unreasonable refusal to make certain admissions as provided by the Civil Practice Act has been held constitutional and a valid exercise of judicial and legislative powers in the recent case of Wintersteen v. The National Cooperage and Woodenware Company.

In the course of the case, sounding in tort, it became material to introduce certain rules and regulations of the Interstate Commerce Commission. Plaintiff exhibited to the defendant a copy of the rules of the commission and demanded an admission that they were in force and effect and covered the matter in controversy, pursuant to the statute. Defendant refused to make the admission. On the trial, plaintiff introduced a certified copy of the Interstate Commerce Commission rules.

After judgment, on motion duly made to tax the costs of pro-

1 Cahill's Ill. Rev. Stat. (1933), Ch. 110, par. 232, Supreme Court Rule 18.
2 361 Ill. 95, 197 N. E. 578 (1935).
3 Cahill's Ill. Rev. Stat. (1933), Ch. 110, par. 232, Supreme Court Rule 18.
curing said copy, the court allowed $11.20, the amount expended for the certified copy and, in addition, $100 as attorneys’ fees and taxed the total as costs in the case.

Defendant appealed directly to the Supreme Court on the constitutional question, attacking the statute and rules on two grounds: (1) That the statute is an attempted delegation of legislative power to the Supreme Court; and (2) that the statute and the rule of court are invalid because they violate the provisions of the state constitution prohibiting class legislation.

Mr. Justice Herrick, in a dissenting opinion, presents the arguments of appellants. On the first point, he states the well-settled rule that since costs were not recoverable at common law, there must be some statutory provision allowing them; that such statute, being in contravention to the common law, must be strictly construed; and that the determination of whether costs may be recovered is primarily a legislative question.

On this point, the majority opinion admits that the court cannot assess costs unless so empowered by the legislature, but declares that such power may be granted in general terms to the courts, which, in turn, may make rules or orders under which costs may be taxed and imposed; and that the statute and rules in the instant case are sufficiently specific to authorize the imposition of costs.

The second point urged by appellants and argued in the dissenting opinion by Mr. Justice Herrick is perhaps more serious, for it is claimed that the new Civil Practice Act does not apply to all causes equally, in that the statutory actions existing by virtue of special enactments are not controlled by the Act.

In support of this contention, the case of Manowsky v. Stephan is cited. This was an action to foreclose a mechanic’s lien under the then existing statute which provided that attorneys’ fees should be included as part of the costs. The Supreme Court in that case held that this was special legislation, saying: "It confers a right upon persons entitled to liens by virtue of the Mechanic’s Lien law and confers that right upon no others.

4 Art. IV, sec. 22.
6 Ibid; Goudy v. Mayberry, 272 Ill. 54, 111 N. E. 526 (1916).
7 Gehrke v. Gehrke, 190 Ill. 166, 60 N. E. 59 (1901).
9 15 C. J. 23.
10 Cahill’s Ill. Rev. Stat. (1933), Ch. 110, par. 129.
11 233 Ill. 409, 84 N. E. 365 (1908).
DISCUSSION OF RECENT DECISIONS

No reason exists for singling out those holding mechanics' liens and granting unto them this right, while denying it to other lienholders, such as landlords, agistors, and carriers. Legislation is not special merely because it applies only to the members of a particular class, but to make such a law valid there must be some actual, substantial difference between the individuals of that class and other persons in the State or community, when considered with reference to the purposes of the legislation. The class must be composed of individuals possessing in common some disability, attribute, or qualification, or in some condition marking them as proper objects in whom to vest the specific right granted unto them."

In the present case, however, the court distinguishes this case stating that the Civil Practice Act does not amount to special legislation because it applies to all the special actions mentioned, except as to such sections of the special statutes as are contrary to, or in conflict with, the Civil Practice Act.

It is especially interesting to note that since the decision in this case, the legislature has, by special enactment, amended each of the special statutes mentioned in the Civil Practice Act as being exempt from its operation, to make the rules of practice and procedure under the Practice Act applicable to the special actions as well. Thus, the teeth have been wholly extracted from this argument.

That the decision is fair, in accord with liberal ideas and ideals of practice, and conducive to the carrying out of the Practice Act in the spirit in which it was intended, seems indisputable.

J. E. Brunswick

PENDENCY OF PRIOR SUIT WHERE EQUITABLE JURISDICTION IS LACKING AS GROUND FOR ABATEMENT.—In the recent case of Leonard v. Bye\(^1\) the Illinois Supreme Court held that where a representative suit to enforce double liability has been brought by one party, the same may be pleaded in abatement to a subsequent suit by another party against the same defendant predicated upon such liability, even though the first court had not jurisdiction in equity to entertain the first suit.

\(^{12}\) Attachment: Ill. State Bar Stats. (1935), Ch. 11, par. 26; Ejectment: Ibid., Ch. 45, par. 50; Forcible Entry and Detainer: Ibid., Ch. 57, par. 11; Garnishment: Ibid., Ch. 62, par. 28; Habeas Corpus: Ibid., Ch. 65, par. 32; Mandamus: Ibid., Ch. 87, par. 11; Ne Exeat: Ibid., Ch. 97, par. 12; Replevin: Ibid., Ch. 119, par. 21(1).

\(^1\) 197 N. E. 546 (1935).
The court cites no Illinois case in support of the general proposition, but does cite sustaining cases from Alabama\(^2\) and Georgia.\(^8\)

In reaching its decision, the court lays down the proposition that parties purporting to be represented in a properly brought representative suit are actually bound by the results in the case until the decree rendered therein is reversed on appeal, and supports the same with Illinois cases.\(^4\)

The court then distinguishes between jurisdiction in the strict sense and in the broader sense, pointing out that, of course, if the court hearing the first suit is without jurisdiction in the strict sense, the first suit is a nullity and no bar to a subsequent suit. The court quotes from *Miller v. Rowan*\(^5\) as follows: "While jurisdiction in its proper sense means authority to hear and decide a cause, it is common to speak of jurisdiction in equity or the jurisdiction of a court of equity as not relating to the power of the court to hear and determine a cause, but as to whether it ought to assume the jurisdiction and hear and decide the cause."

The contention of the present appellant is that "the suit pleaded in abatement of the present action will not lie under general equity jurisdiction or under the 1929 amendment (Laws 1929, p. 174) to section 11 of the banking act (Smith-Hurd Ill. Rev. Stat. [1931], Ch. 161/2, par. 11), which purports to authorize such a proceeding," upon the basis that such statutory provision is unconstitutional, as in violation of due process. The court disposes of this argument by reference to the distinction noted above between jurisdiction in the strict and broader sense, deciding that equity has jurisdiction, in the broader sense, of the present controversy.

Two Illinois cases, one in the Supreme and one in the Appellate Court, are of especial interest in this connection. In the first of these, *Phillips v. Quick*,\(^6\) the Supreme Court held that a second suit was not barred where in the first suit a justice of the peace had rendered judgment for $300.09 upon a $300 demand, when the jurisdiction of such justice was limited strictly

---

\(^{2}\) Foster v. Napier, 73 Ala. 595 (1883).


\(^{5}\) 251 Ill. 344, 96 N. E. 285 (1911).

\(^{6}\) 68 Ill. 324 (1873).
DISCUSSION OF RECENT DECISIONS

by statute to $100.00. The court found that the justice of the peace was entirely without jurisdiction in the strict sense of the word, and that therefore the entire suit was a nullity.

The other case, O'Malia v. Glynn, is perhaps contrary to the general rule. In that case the Appellate Court held that a suit of forcible entry and detainer, begun without the requisite statutory demand, would not bar a subsequent suit, brought while the first was still pending on appeal. The decision is brief and does not state definitely whether it regards the statutory demand as jurisdictional in the strict sense of the word, or as merely a condition precedent to the accrual of the action—if the former, the decision is sound; if the latter, it would appear that it represents a departure from the general doctrine.

It must be remembered, of course, that the rule goes no further than holding that the former action may be pleaded in abatement of the latter, and not actually pleaded in bar.

G. S. STANSELL

RECOVERY IN QUASI-CONTRACT FOR GRATUITOUS SERVICES RENDERED UNDER MISTAKE OF FACT.—In In re Marine Trust Company, decided in 1935, the Supreme Court of New York held that where the claimant had voluntarily contributed to an incompetent priest's support from a fund maintained by an archdiocese, recovery would be allowed on the theory of a quasi or constructive contract, where the benefit was conferred in ignorance of the fact that the incompetent priest had equitable title to a savings fund. This decision follows a previous New York decision of In re Agnew's Will, which allowed two doctors to recover in quasi-contract for the value of services performed in operating on one whom they mistakenly believed to be poor, their intention at the time being that the services should be gratuitous. There the court said that notwithstanding the mutual understanding of the parties that the services were to be gratuitous, in equity and good conscience recompense should be made. This earlier New York decision has been the subject of comment in at least two law reviews. The cases are of interest when it is noted that despite a gratuitous intent, recovery was allowed. There are many decisions, in-

7 42 Ill. App. 51 (1891).
1 281 N. Y. S. 553 (1935).
2 230 N. Y. S. 519 (1928).
3 24 Ill. Law Rev. 491; 14 Cornell Law Q. 239.
cluding some rendered by New York courts, which hold that there can be no recovery for benefits gratuitously conferred. The only apparent distinction between those cases and the two just cited lies in the fact that in the latter cases the plaintiff was induced to confer the gratuitous services by a mistake of fact. This leads to the further consideration of whether or not mistake of fact is sufficient basis for making an exception to the operation of the general principle barring recovery in such cases.

The courts of Kentucky and Iowa have refused to introduce an exception to the general principle in favor of a plaintiff who has conferred a gratuity under a mistake of fact. In St. Joseph's Orphan Society v. Wolpert, the Kentucky court refused to allow the plaintiff to recover for services rendered to two orphans under the mistaken belief that the orphans were without funds, the court saying: "... an executed gift or gratuity cannot be revoked by the donor, no matter what may have been the condition of the donee . . . unless the donation or gratuity were the result of fraud or mistake in its execution. And there is no reason why an executed gift of personal property shall not be revoked that does not sustain the irrevocability of gratuitous labor, care, board, or education after completion." In Hanrahan v. Baxter, the Iowa court arrived at a similar decision.

In an English case, decided in 1904, the court allowed recovery where the guardians of the poor cared for an infant pauper for six years and the infant then received a bequest. The court based its decision on the infant's common law liability. In a Massachusetts case, the court refused to allow recovery on similar facts.

Cases in which the principles of quasi-contract have been invoked to provide relief from mistake of fact, give a clear conception of the action fulfilling the purpose for which it was intended —"to meet the justice of the particular case." In the case of


5 80 Ky. 86, 3 Ky. L. R. 573 (1882).


7 In re Clabbon, 2 Ch. 465, 467 (1904).


Kelly v. Solari, in which the plaintiff, an insurance company director, was allowed to recover money paid to the defendant under a mistaken belief that a policy of insurance had not lapsed, when in fact it had, Baron Parke said: "... where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back, and it is against conscience to retain it. ..." The Maryland court, in allowing recovery of an overpayment made through mistake of fact, met the defense that the overpayment was made voluntarily by this significant language:

"A payment cannot well be said to be made voluntarily when it is made in consequence alone of a false view of facts. The assent is only induced by the conviction then prevailing in the mind, that the particular fact existed, and is scarcely to be distinguished from an assent or agreement to pay on condition that the fact did not exist. The subsequent discovery of the error destroys the whole basis of the agreement, and the parties are restored to their original condition and rights." This passage will support the statement that mistake of fact inducing an act nullifies the voluntary character of the act as a defense to an action based on quasi-contract.

Another class of cases wherein the theory of quasi-contract is invoked as a basis of recovery is that in which through the fraud of the defendant the plaintiff is induced to confer a benefit on the defendant. This principle is illustrated by those cases in which the courts have allowed a woman to recover the value of her services from a man who induced her to marry him by fraudulent representations that he was legally free to marry. In one of these cases, the Wisconsin court stated its position thus: "The doctrine of assumpsit is applied. It is inferred from the nature of the transaction, and the supposed husband is held to have assumed to pay because in point of law and equity it is just that he should pay." The court refused to follow a line of

12 In re Fox's Estate, 178 Wis. 369, 190 N. W. 90, 31 A. L. R. 420 (1922); Fox v. Dawson, 6 Martin's Rep. (La.) 94 (1820); Higgins v. Breen, 9 Mo. 497 (1845); Sanders v. Ragan, 172 N. C. 612, 90 S. E. 777, L. R. A. 1917B 681 (1916).
Massachusetts decisions which hold that the fact that the woman and man lived together negatived any implication of a promise to pay by the husband or an intention to be paid on the part of the wife.\textsuperscript{13}

From these cases involving fraud and mistake of fact it is evident that the mental state of the parties at the time of conferring the benefit is not always the determining fact. Despite the intent to confer a benefit without expectation of remuneration, recovery is allowed because the law and equity of the case demand it. The promise to pay is implied in law despite the intent of the parties, not because of it. Applying the logic underlying the decisions in those cases to the case of a gratuity conferred under a mistake of fact, the same conclusion may be arrived at as that which the New York court reached in the principal case. Also, it would seem that this conclusion is in line with the general nature of quasi-contract—an obligation arising \textit{ex aequo et bono}.\textsuperscript{14}

The practical result of the doctrine as applied by the New York courts in the two cases works no hardship on the person to be charged. The estate of the person who received the service was benefited (the benefits rendered in both cases being necessaries), the plaintiff was an appropriate intervener, and there was no change of position on the part of the person to be charged. The doctrine involved, although but scantily fortified by precedent, commends itself to reason as harmonious with general principles of equity.

J. M. Coughlan

EXAMINATION OF ADVERSE PARTY UNDER CIVIL PRACTICE ACT.—In \textit{Combs, Administrator v. Younge},\textsuperscript{1} the Illinois Appellate Court recently construed section 60 of the Civil Practice Act,\textsuperscript{2} which supplants section 6 of the Evidence Act,\textsuperscript{3} now repealed.\textsuperscript{4}

Section 1 of the Evidence Act,\textsuperscript{5} still in force, provides that no

\textsuperscript{13} Robbins v. Potter, 93 Mass. 588 (1866); Cooper v. Cooper, 147 Mass. 370, 17 N. E. 892 (1888); Ogden v. McHugh, 167 Mass. 276, 45 N. E. 731 (1897).

\textsuperscript{14} Farmers Bank & Trust Co. v. Shut & Keihn, 192 Ala. 53, 68 So. 363 (1915).

\textsuperscript{1} 281 Ill. App. 339 (1935).


\textsuperscript{3} Cahill’s Ill. Rev. Stat. (1931), Ch. 51, par. 6.

\textsuperscript{4} Smith-Hurd, op. cit., Ch. 110, par. 218.

\textsuperscript{5} Ibid., Ch. 51, par. 1.
person is disqualified as a witness in a civil action because of interest. Section 2 of the Evidence Act, also still in force, contains an exception: "No party to any civil action . . . shall be allowed to testify therein of his own motion . . . when any adverse party sues . . . as the administrator of any deceased person . . . unless when called as a witness by such adverse party . . . ."

Section 6 of the same act provided that a party to a civil action might compel his adversary to testify. The adverse party thus called became the witness of the party calling him, and was subject to cross-examination by his own attorney. This section was expressly repealed by section 94, and supplanted by section 60 of the Civil Practice Act.

Section 60 provides, in general, that any party "may be examined as if under cross-examination at the instance of the adverse party . . . and may be compelled . . . to testify . . . ."

In the case under discussion, Combs sued as administrator for his infant son, alleging that defendant had caused the boy's death by negligently running into him with an automobile. Plaintiff, as part of his evidence in chief, called the defendant to the stand. Under the new section he propounded leading questions, as upon cross-examination, and elicited defendant's testimony concerning his own negligence. When defendant attempted to explain his answers, plaintiff objected. His objections were sustained.

Defendant's counsel demanded the right to cross-examine his client. This was denied. The trial court also denied the right to re-examine him on the matters of negligence brought out by plaintiff's examination.

The appellate court held that a further cross-examination was not in order, but that the refusal to allow a re-examination was error. Its opinion was that "where an administrator sues or defends a civil action and he calls the opposite party for examination at the trial for cross-examination under section 60 of the Civil Practice Act, and such party is used as an occurrence witness by the administrator, such party becomes a competent witness to testify, on his own behalf as part of his defense, to all primary and material facts directly determining the issues in the action . . . ."

The case does not hold that under the new section the calling of the adverse party by the administrator completely removes

---

8 Ibid., Ch. 51, par. 2.
the bar against such party set up by section 2 of the Evidence Act. He still is not competent on all matters. It so happened that the present administrator called on defendant as an occurrence witness for material touching his own negligence; defendant thus became competent as to all facts relating to his negligence, which was in issue in the action.

It seems that the adverse party may be examined by his own counsel only within the scope of the cross-examination previously conducted by counsel for the administrator. This is the way other courts have interpreted similar statutes in decisions cited with approval by the Illinois court. And this seems the logical way of harmonizing section 60 of the Practice Act with section 2 of the Evidence Act, in order to assure both parties a fair trial.

C. E. Fox

SUFFICIENCY OF FACTS, AS A MATTER OF LAW, TO CONSTITUTE AN ATTRACTIVE NUISANCE.—In Uhls v. Old Ben Coal Corporation, the Illinois Appellate Court held that it was proper for the trial court to submit to the jury the question of whether or not the defendant maintained an attractive nuisance where the following facts were introduced in evidence. The defendant maintained a power sub-station in a small building on the south side of a highway, the side of which, facing the highway, was not fenced. The door to the building was closed, and the machinery not in operation. The outside equipment included three transformers, two poles about a foot in diameter, without spikes or ladder attachments for climbing, two horizontal pipes between the poles, the lower being sixteen feet from the ground, the upper, twenty feet, and various wires, insulators, and switches. The deceased, a boy twelve years of age, was accompanied by another boy, nine years old. The latter testified that the deceased climbed on to a fence post a few feet high which was near one of the poles. From there the deceased "shinnied" up the pole until he reached the lower horizontal pipe, about a twelve foot climb. The companion of the deceased testified that he asked the deceased to go to another place to play, but that the deceased said it wasn't dangerous and asked the witness to come on up; that the deceased walked out on the horizontal pipe, touched


1 281 Ill. App. 254 (1935).
an insulator, and was knocked to the ground. The companion testified that he too tried to climb the pole but could not. There was no evidence that anyone had ever previously seen children climbing the poles.

The question of what facts constitute an attractive nuisance has been before the Illinois courts several times in the past. In the light of those cases it is interesting to consider whether or not the court in the present case has shown a tendency to restrict or extend the doctrine. Although the jury ultimately decides whether or not the facts essential to the existence of the attractive nuisance have been proved, the question of the sufficiency in law of the facts presented may be brought before the court by the defendant's motion for a directed verdict.\textsuperscript{2}

In \textit{The City of Pekin v. McMahon},\textsuperscript{3} decided in 1895, the Illinois Supreme Court held the question one for the jury where a child, eight years old, fell into a water-filled pit in a vacant lot owned by the defendant, the lot being unfenced and there being a pathway across it.

In \textit{Belt Railway Company v. Charter},\textsuperscript{4} where a child, eleven years and eight months old, was injured by a turn table, the court, which reversed and remanded the case because the damages awarded were excessive, said: "An examination of the 'attractive nuisance' cases will show that in nearly every instance the child injured was less than ten years of age and incapable of exercising ordinary care. . . ."

In \textit{Stollery v. Cicero Street Railway},\textsuperscript{5} decided in 1910, where a ten year old child was found wedged in a coal conveyor maintained by the defendant on its property, which was open to the street on one side, and where the evidence showed that children were in the habit of entering the premises to reach a water-well thereon, and that the framework of the conveyor was only three feet above the ground, the court held the evidence sufficient to go to the jury, three of the justices dissenting on the ground that the evidence showed the child to be intelligent and of sufficient mental capacity to see and avoid danger.

In \textit{Stedwell v. City of Chicago},\textsuperscript{6} decided in 1921, where a child eleven years old climbed a lattice-work pillar supporting an

\textsuperscript{2} Burns v. City of Chicago, 338 Ill. 89, 169 N. E. 811 (1930).
\textsuperscript{3} 154 Ill. 141, 39 N. E. 484 (1895).
\textsuperscript{4} 123 Ill. App. 322 (1905).
\textsuperscript{5} 243 Ill. 290, 90 N. E. 709 (1910).
\textsuperscript{6} 297 Ill. 486, 130 N. E. 729 (1921).
elevated railway, and thirteen feet above the ground came into contact with the uninsulated electric wire which caused the injury, the court held the evidence sufficient to go to the jury.

In Deming v. City of Chicago,7 decided in 1926, the court held that where a boy, nine years old, was electrocuted by coming into contact with an electric wire which passed within reach of the trunk of a tree growing in the street, the lower limbs of which were within six or seven feet of the ground, the question of attractive nuisance was one for the jury.

In Burns v. City of Chicago,8 decided in 1930, a child climbed a round steel electric light pole by placing his feet on the foundation collar at the base of the pole, reaching up to a hole in the pole about four feet above and pulling himself up thereto, then reached up to the first rung, about ten feet above the ground, and from there proceeded by rungs to the top. The court held that the trial court's refusal to direct a verdict for the defendant was error, on the ground that there was insufficient evidence, as a matter of law, to prove the essential element of attraction or allurement. The attitude of the Illinois Supreme Court toward the application of the doctrine is indicated by this passage from the opinion: "Counsel for defendant in error suggest that to deny recovery in this case would be to recede from or modify a position already taken by this court. The issue presented is rather whether this court will proceed beyond such position, which might fairly be said to be well advanced. To say that whenever the claim is made that an injury to children engaged in play has been occasioned by a dangerous agency the case must always be submitted to the jury to determine whether there was an element of attractiveness present, is going too far."

In Wolczek v. Public Service Company,9 decided in 1931, the court held that the defendant's motion for a directed verdict was properly refused where a child eleven years of age was injured by coming into contact with a wire suspended from a high-tension tower, where the child climbed the tower by means of crossbeams and there was evidence that other children also climbed the tower.

In the light of the above decisions, especially those of Belt Railway Company v. Charters and Burns v. City of Chicago, is not the principal case an extension of the doctrine, or at least a

7 321 Ill. 341, 151 N. E. 886 (1926).
8 338 Ill. 89, 169 N. E. 811 (1930).
9 342 Ill. 482, 174 N. E. 577 (1931).
DISCUSSION OF RECENT DECISIONS

liberal application of it? In the principal case the facts are similar in several respects to those of Burns v. City of Chicago. In each case, the pole was difficult to climb, a companion warned the injured child, and it was in a spirit of bravado before a companion that the injured child climbed the pole.

In Burns v. City of Chicago the court, supporting the directed verdict for the defendant, stressed the fact that the pole was difficult to climb, and on that ground distinguished the case of Deming v. City of Chicago, saying that in the latter case the instrumentality in question was a tree with "conveniently accessible branches," and a boy seeing such "might reasonably be expected to give expression to his inward urge to climb."

In the principal case the court cited as sustaining its position all of the cases mentioned above except Burns v. City of Chicago. Looking at the facts in those cases, we find that in all of them the dangerous instrumentality was fairly accessible, whereas in the principal case the fact that the injured boy had to climb about twelve feet without the aid of rungs and also that his companion tried to climb the pole but was unable to do so, showed that it was very difficult to reach the dangerous instrumentality.

Burns v. City of Chicago was not mentioned in the opinion in the principal case, but if it had been brought to the attention of the court, it is difficult to see how the court could maintain its position in the face of the decision in that case. In short, it appears that the limitation on the application of the doctrine of attractive nuisance as laid down by the court in Burns v. City of Chicago has been disregarded in Uhls v. Old Ben Coal Corporation.

J. M. Coughlan

Effect of Civil Practice Act on Rule to Answer Instanter.—In the recent case of Phegley v. Kroger Grocery & Baking Company,1 the Illinois Appellate Court for the Fourth District held that the Civil Practice Act has not changed the law that under a rule to answer instanter, taken against a defendant who is not in court, either personally or by another, and who has no notice of the rule, the defendant has the whole of the judicial day on which the rule is taken in which to plead, and a default, entered prior to the close of such day, is premature.

The suit was begun in the City Court of Alton to recover damages for injuries to the health of the plaintiff, alleged to have

1 281 Ill. App. 544 (1935).
resulted from eating spoiled boiled ham purchased from the defendant. Some eight days after the return day, the defendant not having answered and the plaintiff having obtained the rule to answer instanter, an order of default was entered immediately. Defendant's motion to vacate and to be permitted to plead, filed within thirty days of such order, was denied. Defendant presented affidavits of two lawyers to the effect that they were in court when the order was rendered, and that they thereafter transacted business with the court that same day, proving the order was not the final business of the day.

In the instant case, the court compared the provisions for default under the Practice Act of 1907, and under the new Civil Practice Act, and failed "to note any distinction."

The court cites as clearly establishing the rule under the old practice, namely, that a rule to answer instanter requires a plea "before the rising of the court," the following appellate court decisions: Mercer v. Mercer, Risedorf v. Fyfe, A. W. Stevens Company v. Kehr, and Northrop v. McGee.

However, even a cursory perusal of those decisions reveals that they are either not exactly in point or do not sustain the rule for which they are cited.

Mercer v. Mercer was a divorce case, in which defendant had not only entered an appearance and waived process, but actually consented to a default being entered.

In Risedorf v. Fyfe, a personal injury case in which defendant had entered an appearance, defendant was held entitled to a motion to vacate because actual notice, as required by rules of court, had not been given him.

In A. W. Stevens Company v. Kehr, the court, while recognizing the principle that upon a rule to plead instanter the defendant has until the rising of the court, nevertheless holds that if default be taken sooner and defendant does not present a plea before the rising of the court, the earlier default is not reversible error.

In Northrop v. McGee, decided before the Act of 1907, the court does recognize the rule contended for in the instant case, but does not reverse, because defendant made no showing that

---

2 Section 57.
3 Ill. State Bar Stats. (1935), Ch. 110, par. 178.
4 271 Ill. App. 307 (1933).
5 250 Ill. App. 122 (1928).
6 93 Ill. App. 510 (1900).
7 20 Ill. App. 108 (1886).
DISCUSSION OF RECENT DECISIONS

the default was not "entered at the last instant of the session."

It therefore appears that the principal case is perhaps at variance with the decisions under the old practice, and it is respectfully submitted that the rule enunciated in *A. W. Stevens Company v. Kehr*, holding that the entrance of judgment before the end of the judicial day does not constitute reversible error unless a plea is actually offered later in the day and refused, is the better rule.

G. S. STANSSELL

**Pledge of Assets by Banks to Secure Deposits.**—The Supreme Court of Illinois has held in the case of *People ex rel. Nelson v. Wieseama State Bank*¹ that the pledge of assets by a state bank to secure deposits is ultra vires and void, except where there is a statutory grant of such power.

The receiver of the closed Wieseama State Bank filed a petition in the Superior Court of Cook County to declare invalid a pledge made by the bank of certain assets to secure the deposit of the Fernwood Park District and for an order to return to petitioner the securities deposited in escrow with the Chicago Title and Trust Company. The trial court held the pledge ultra vires and void, and ordered that the securities be returned to the petitioner. Both the Appellate and Supreme Courts upheld this view.

The Supreme Court held that no legislation is necessary to establish or preserve the state's sovereign right to a preference in the distribution of the assets of a closed bank, inasmuch as this right existed at common law, but that this preferential right does not extend to any of the political subdivisions of the state.

The court referred to sections of four Illinois statutes containing provisions for the pledge of assets by banks to secure deposits made by (1) receivers of closed banks, (2) the State Treasurer, (3) other custodians of state funds, and (4) the Chicago Park District. "The logical conclusion," the court said, "is, that if the legislature had intended to extend those provisions to other deposits it would have so provided. . . . The rule that the expression of one thing or one mode of action in an enactment excludes any other, even though there be no negative words prohibiting it, has been the settled law of this State since 1852."

The court stated that, if the power to pledge assets to secure deposits exists, "it must be found by necessary implication, in

¹ 361 Ill. 75, rehearing denied October 2, 1935.
the grant of power to do a general banking business." The decision on this point was that the power was not necessary to deposit banking and was not included in the language granting the power to do a "general banking business."

The position taken by the Illinois Supreme Court is not universally followed. The problem has often arisen where the bank has deposited collateral with a surety to indemnify it against loss on a bond executed by the bank to secure deposits of political subdivisions of states. Three cases have upheld the pledge of assets with a surety: (1) where a statute has declared that a deposit of public funds is prima facie a trust fund,\(^2\) (2) where a statute has authorized the pledging of securities of a specified class and the bank has in fact pledged bills receivable,\(^3\) and (3) where a statute empowered trust companies to receive deposits of money and other personal property and issue their obligations therefore.\(^4\) In the first two of these cases, it was declared, notwithstanding the statutes involved, that it was the public policy of the state to discriminate in favor of public funds.

In some cases,\(^5\) it has been held that a bank has the right, even in the absence of a statute, to pledge its assets to indemnify a surety who signs a bond in its behalf in order that the bank may obtain a deposit of public funds. These cases have often been cited with approval in the decisions based on statutes.

The Illinois case of *Ward v. Johnson*,\(^6\) cited as support in many cases holding contrary to the recent decision of the Illinois Supreme Court, was not mentioned in that decision. The early case involved a bank which was authorized by its charter "to receive money on deposit and pay interest therefor." In the course of the opinion the court said:

"The corporation was authorized to contract and agree with persons desiring to make deposits or loan money as to the terms. It might execute its bond, note or certificate as evidence of the indebtedness, and secure the same by pledge or chattel mortgage, or note, securities, etc., or by real estate mortgage or trust deed, just as should be mutually agreed. And there has been no reason

---

\(^{2}\) United States Fidelity and Guaranty Co. v. Village of Bassfield, 148 Miss. 109, 114 So. 26 (1927).


\(^{4}\) Cameron v. Christy, 286 Pa. 405, 133 A. 551 (1926).


\(^{6}\) 95 Ill. 215 (1880).
DISCUSSION OF RECENT DECISIONS

suggested, and we can conceive of none, why providing a system for securing loans and deposits generally in a particular way is objectionable, when it would not be objectionable to conduct a single transaction in that way."

It would seem that the Supreme Court has made some departure from the doctrine of *Ward v. Johnson*. In the instant case it has followed closely the reasoning of the Kentucky court in the leading case on the subject, *Commercial Bank & Trust Company v. Citizens Trust & Guarantee Company*, which holds that where the power to pledge assets to secure deposits is not expressly granted to a bank, it can be sustained only as an implied power, such power being one necessary to carry out powers expressly given; that such a power should be clearly essential to the proper conduct of its business; and that when such a test is applied to the claim of right, on the part of the bank, to prefer one of its depositors over another, the right should be denied. "'The exercise of such a power,'" the Kentucky court said, "'would necessarily be fraught with great possibilities for the perpetration of fraud, and would undoubtedly have a tendency to destroy the faith of the depositing public in banking institutions.'"

J. J. Lannon

**VALIDITY OF CONDITIONS ATTACHED TO BENEFICIARIES' INTEREST IN A TESTAMENTARY TRUST.**—A testator ordinarily may attach to a legacy or devise made by him any condition, whether sensible or not, so long as it is not illegal, nor opposed to public policy. In *In re Andru's Estate*, the Surrogate Court of New York was confronted with a novel set of facts limiting the beneficiaries' rights, and was called upon to decide whether or not the conditions imposed contravened public policy.

The testator had settled two *inter vivos* trusts in addition to two trusts created by the residuary clause of the will. The trustees were all given a wide latitude of powers. It was provided that the trustees should have all powers that the settlor would have in the management of his own property, and any doubt as to their authority should be construed in favor of the trustees. It was further provided in the will that all the beneficiaries must, in writing, when called upon by the trustees, acquiesce in the administration of the trust, and ratify and con-

7 153 Ky. 566, 156 S. W. 160, 164 (1913).

1 281 N. Y. S. 831 (1935).
firm all acts done by them or their successors. In the event of failure of a beneficiary to comply with this condition, it was stipulated that his interest should be forfeited. In commenting on these provisions, the court said, "Pursuit of counsel has failed to reveal in this country, or in England, a case containing so drastic an in *terrorem* provision or one dealing with the administration of the estate."

The petitioner was a life beneficiary of the trusts and had a remainder interest in the principal, subject to being divested, if he should die before the termination of the trust. It was contended by the petitioner that such limitation on his interest in the trust was void as against public policy and it was so held by the court.

Generally, a condition in a will that a gift shall be forfeited in case the beneficiary shall dispute the will, is regarded as valid and not against public policy. This condition did not, however, pertain to the contesting of the validity of the will, but to something extrinsic to it. The object of the provision was to create an estate upon a condition subsequent, the operation of which at some future time would cause the interest of the beneficiary to be divested. If the limitation were to be held valid, the beneficiaries would be required to condone the dissipation of assets, embezzlement, or even acquiesce in the embarkation of the trustees upon an illegal enterprise.

The court pointed out that conditions subsequent are construed with great strictness. The same idea was expressed by the Supreme Court of Illinois in *Dunne v. Minsor.* While conditions subsequent are not favored in the law, and courts are inclined against them in case of doubt, yet, if the intention to create such an estate is clear, and the restrictions are not opposed to a settled rule of law or public policy, courts will give effect to them. This being a condition subsequent, in that it provided for forfeiture of a vested interest by failure or refusal of the beneficiaries to ratify or acquiesce in the acts of the trustees, any doubt as to whether or not the limitation was in violation of public policy should be construed in favor of the petitioner.

---

2. 69 C. J. 1765; Rudd v. Searles, 262 Mass. 490, 160 N. E. 882 (1928); Moran v. Moran, 144 Iowa 451, 123 N. W. 202 (1909); In re Brush's Estate, 277 N. Y. S. 559, 154 Misc. 480 (1935); In re Miller, 155 Cal. 119, 103 P. 842 (1909).


---

3. 212 Ill. 333, 143 N. E. 842 (1924).
DISCUSSION OF RECENT DECISIONS

On the matter of public policy, the Surrogate Court held that the statutes enacted in New York to protect persons in the right and administration of property were enacted from the viewpoint of public interest, and therefore fell within public policy. The Illinois Supreme Court, in *Trip v. Payne*,\(^4\) when called upon to decide whether a provision in a will was void as against public policy, said, "The public policy of the state is to be found embodied in its constitution, its statutes, and decisions of court."

From the parallel ideas as expressed by the two courts, it would seem that if a similar set of facts should arise in Illinois, the opinion of the Surrogate Court would be followed.

**W. R. MacMillan**

**Extension of Time to File Appeal from Order Granting New Trial.**—Under the provisions of the Civil Practice Act\(^1\) and the rules of the Appellate Court,\(^2\) an extension of time for filing of records, abstracts and petition for appeal from an order granting a new trial, must be granted within thirty days after the entry of the order by the trial court, and the court has no power to grant a further extension after the expiration of such thirty day period, according to the opinion in the case of *Akehurst v. Summe*\(^3\) by Justice Hugo Friend, in which the eight other Justices of the Appellate Court of the First District concurred.

This is the first time that the procedure to be followed in an appeal from an order granting a new trial has ever been reviewed in Illinois. Consequently, the holding is of the utmost importance.

In this case, an order granting a new trial to the defendant was entered June 20, 1935. On July 19, 1935, twenty-nine days after the entry of the order, the Appellate Court extended, for a period of thirty days, the time within which plaintiff might file a record, abstract, and petition for leave to appeal. Thereafter, on August 16, 1935, plaintiff moved for further extension of sixty days to file her record, abstracts, and petition.

In consideration of the problem thus squarely put to them, the court said, first, that the right of appeal is purely statutory;\(^4\)

\(^{\text{1}}\) 339 Ill. 178, 171 N. E. 131 (1930).
\(^{\text{2}}\) Ill. State Bar Stats. (1935), Ch. 110, par. 205.
\(^{\text{3}}\) Rules of the Appellate Court, 1st Dist., Rule 20.
\(^{\text{4}}\) 281 Ill. App. 554 (1935).
\(^{\text{4}}\) Bondurant v. Bondurant, 251 Ill. 324, 96 N. E. 306 (1911).
second, that until the Civil Practice Act, no right to appeal from an order granting a new trial was given to litigants, but, third, that under the Civil Practice Act an order granting a new trial is now deemed to be final,5 and upon leave granted by the reviewing court, such appeal may be taken.6

The court then found that the Civil Practice Act makes no provision for extending the time to file the record, abstract, and petition but that the rules of court do so provide.7

This, of course, is clear upon a reading of the rule, but the extension of time to be allowed under the rule must be granted within the time allowed for moving the court for leave to appeal. Under no possible construction of the rule referred to, can any other decision be reached. The rule does not contemplate any further extensions of time, and the court draws the analogy to the statutory appeal granted from interlocutory orders,8 reasoning that it was contemplated by the legislature and by the court that the utmost speed was the essence of such an appeal.

The court then refers to the similar situation which in the past existed in the preparation of record for a review of fourth class cases under the Municipal Court Act.9 This Act authorized an appeal within thirty days after the entry of any final order or judgment and provided that the judge by whom such final order or judgment was entered was to sign and place on file in the case a statement of the facts appearing upon the trial or a correct stenographic report of the proceedings.

This statute was considered and discussed in the case of Lassers v. North German Lloyd Steam Ship Company.10 In that case, defendants sued out a writ of error to review a judgment entered in the Municipal Court in a fourth class case on June 5, 1909. On July 1, 1909, the court extended the time for filing a bill of exceptions to July 15. On July 14, a second extension was granted for an additional ten days, and on July 21 the bill of exceptions was filed. The Appellate Court struck the bill of exceptions on plaintiff’s motion, because it was not filed within the time allowed by the statute and granted a certificate of importance to the Supreme Court.

5 Ill. State Bar Stats. (1935), Ch. 110, par. 205, the statute reads: "... an order granting a new trial shall be deemed to be a final order ..."
6 Ill. State Bar Stats. (1935), Ch. 110, par. 205.
7 Rules of the Appellate Court, 1st Dist., Rule 20.
8 Ill. State Bar Stats. (1935), Ch. 110, par. 206.
9 Cahill’s Ill. Rev. Stat. (1931), Ch. 37, par. 411.
10 244 Ill. 570, 91 N. E. 676 (1910).
DISCUSSION OF RECENT DECISIONS

The Supreme Court in passing on the question stated that since the statement in this case was not signed or filed within any extension of time allowed by the court within thirty days of the entry of the final judgment, the Appellate Court's decision was correct. The court further states that there is no basis in the statute for the claim that having extended the time within the thirty days provided by statute, the court might, within the extended period, again extend the time; that the statute must be strictly complied with; and that the practice in the circuit court, in reference to signing of bills of exceptions and extensions of time therefor, was not in point.

In the matter of Wurlitzer Company v. Dickinson, the same question was raised, and the same decision given.

The court in the instant case concludes that the right to appeal from an order granting a new trial is not a privilege heretofore given litigants, and should be promptly exercised. Accordingly, not having followed the statute and rules to the letter, a motion for a further extension should be denied.

In so holding, the court has given a strict interpretation to the rules of practice and procedure on appeal as it had previously done in the case of The West Side Trust and Savings Bank v. Damond. In answer to criticism which might be raised because of this strict interpretation of the rules, apparently in conflict with the general liberal ideas and interpretations to be applied to the Civil Practice Act, it may be said that in so deciding, the court is following the intention of the Practice Act, which is designed for speed and not delay; that by holding litigants strictly to the rules of procedure, especially on appeal, it is forwarding its purpose. While a liberal construction may be given to the rules regarding pleadings so as not to defeat a cause of action on technicalities, the same argument cannot apply with equal force to procedure on appeal.

J. E. BRUNSWICK

DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING VERDICT UNDER CIVIL PRACTICE ACT.—In two late cases the Illinois Appellate Court has supplemented its earlier interpretation of section 68, paragraph 3a of the Civil Practice Act. The section pro-

11 247 Ill. 27, 93 N. E. 132 (1910).
12 Ill. State Bar Stats. (1935), Ch. 110, par. 205, Rules of the Appellate Court, 1st Dist., Rule 20.
13 280 Ill. App. 343 (1935); see 13 CHICAGO-KENT REVIEW 297.
1 Ill. State Bar Stats. (1935), Ch. 110, par. 196.
vides that at the close of the testimony either party may move for a directed verdict and that the court may reserve its decision on the motion until after verdict, when, if it decides as a matter of law that the party requesting the directed verdict was entitled thereto, it may order judgment in accordance with its decision, notwithstanding the verdict.

In *Herbst v. Levy,* the decision was that the discretion allowed the court in reserving its decision is not accorded where defendant makes the motion before he has introduced any evidence, i.e., where plaintiff has failed to prove his case. But in *Illinois Tuberculosis Association v. Springfield Marine Bank,* and in *Capelle v. Chicago & Northwestern Railway Company,* the court reserved its decision on defendant's motion, made at the close of defendant's case, for directed verdict, until after verdict was rendered.

In the Capelle case the lower court gave judgment for defendant notwithstanding the verdict, and was reversed because it had so decided by weighing the evidence. In the Bank case the lower court followed the Capelle decision and refused the motion because to allow it would require the court to determine a question of fact by weighing the evidence. This decision was affirmed on appeal.

The appellate court explained the change wrought by the new act, as follows: "At common law, a judgment *non obstante veredicto* could only be entered when the plea confessed the cause of action and set up matters in avoidance . . . which were, even if true, immaterial and did not constitute a defense to the action. It was a judgment for the plaintiff on the pleadings because the pleas of defendant did not present a defense. It was only rendered on the application of the plaintiff, and was never allowed on motion of the defendant."

After observing that the motion is now available to either party, the opinion proceeded: "The court in passing on the motion must decide as a matter of law, that the party requesting the directed verdict is entitled thereto. This provision of the Civil Practice Act taken in connection with Rule 22 of the Rules of Practice of the Supreme Court, which provides: 'The power of the court to enter a judgment notwithstanding the verdict

---

2 279 Ill. App. 353 (1935).
3 See note, 13 CHICAGO-KENT REVIEW 260.
5 280 Ill. App. 471 (1935).
may be exercised in all cases where, under the evidence of the case, it would have been the duty of the court to direct a verdict without submitting the case to the jury,' requires the court to be governed by the same rules in passing upon a motion for judgment notwithstanding the verdict as govern it in passing upon a motion for a directed verdict. The trial court in passing upon this motion has no more authority to weigh and determine controverted questions of fact under the Civil Practice Act than under the Practice Act of 1907.'"

The three decisions indicate the limits of the new section. First, defendant is still entitled to a directed verdict at once when plaintiff, at the close of his evidence, has not proved a prima facie case; second, after all the evidence is in, the court may reserve its decision on motion by either party for a directed verdict, until the verdict is rendered; third, after verdict, either on a previous motion for a directed verdict, or on motion for judgment notwithstanding the verdict, made by either party, the court may order judgment notwithstanding the verdict, but only when the case presented by the party favored by the verdict, regarded in its most favorable light, does not, as a matter of law, entitle him to judgment.

C. E. Fox, Jr.

SURETY AS CREDITOR OF HIS INSOLVENT PRINCIPAL AND ENTITLED TO CLAIM WHICH HE CAN SET OFF AGAINST DEBT HE OWES PRINCIPAL.—In O’Connell v. Nelson,¹ the Appellate Court of Illinois remarked that neither the Supreme nor Appellate Court had passed on the principle of law it was then considering, and that the supreme courts of other states were in hopeless conflict in regard to it.

The facts were that Nelson was indebted to the Aledo State Bank on judgment notes and was also one of the sureties on a depository bond with the bank as principal, both notes and bond having been executed prior to the bank’s insolvency. After the receiver was appointed, a judgment was first obtained against Nelson on the bond, and then on his notes. Thereafter Nelson paid the judgment on the bond. The receiver, unable to collect the judgment he had obtained against Nelson at law, brought a creditor’s bill to set aside a conveyance Nelson had made previous to the rendition of the judgment. Nelson, denying that the conveyance was fraudulent, counterclaimed by way of set-

¹ 281 Ill. App. 327 (1935).
off the amount he had paid as surety after the bank’s insolvency; and the court allowed the set-off on the pleadings.

The courts denying a set-off under these circumstances do so on the ground that a surety has no claim against his principal on which a set-off can be founded until he pays the obligation; and, since choses in action pass to a receiver subject to the right of set-off existing at the moment of insolvency, payment after insolvency gives him only a claim which will be paid out of the assets of the bank in due course of administration—assets which will be augmented by the satisfaction of his debt to the insolvent, rather than diminished by allowing a set-off amounting in effect to a preference.\(^2\)

Obviously, to be allowed a set-off in the present case, Nelson must have had a claim as a creditor of the bank before he paid the judgment rendered against him on the bond, since the Illinois law is that the rights and liabilities of creditors and debtors of an insolvent are fixed and determined at the time of the appointment of a receiver;\(^3\) and that equities thereafter created are not available as against the receiver.

The significance of the decision in *O'Connell v. Nelson* lies in the holding that a surety does have a claim against his principal the moment the principal becomes insolvent—a claim founded not on the fact of payment, but on the fact of default, since when that occurs the liability of the surety becomes absolute.

In reaching this conclusion, the court had no Illinois cases based on the same factual situation to guide it,\(^4\) but found the important premise involved in several decisions. These held that when a surety signs a bond the law raises an implied promise by the principal to reimburse the surety for any loss which he may sustain, and that when a loss occurs, this implied contract of indemnity relates back and takes effect from the time the surety


\(^3\) Hynes v. Ill. Trust & Savings Bank, 226 Ill. 95, 80 N. E. 753 (1907).

\(^4\) But see Mack v. Woodruff, 87 Ill. 570 (1877), where in a dissenting opinion Sheldon, J., says, “As the payment by the surety of his principal’s debt was a compulsory one, by force of the obligation of suretyship contracted in the lifetime of the principal, I think, as respects this question of set-off, the payments by the surety should be taken to relate back to the time his liability as surety was contracted, and be regarded, for the purpose of set-off, the same as if they had been made in the lifetime of the principal.”
became responsible; and that the relation of debtor and creditor between principal and surety commences at the date of the obligation by which the surety becomes bound and not from the time it makes payment. These principles have support in other jurisdictions. However, the real test of the surety’s status as a creditor by virtue of the implied contract of indemnity arises when he contends that he had the right of set-off against his principal the moment the latter’s insolvency made him absolutely liable, and that hence he has the same right against the principal’s assignee. Under this reasoning, the date the surety makes payment on his surety obligation becomes immaterial.

If the claim against the principal, which is alleged to exist at the moment of insolvency, cannot rest on the right of exoneration arising out of the implied contract to be indemnified, it will fail, since as subrogee the surety has no claim until payment.

Apparently the appellate court felt that if in Illinois a surety can have affirmative relief against a defaulting principal so as to avoid a conveyance made by the principal several years after the surety has paid, and so as to call in question a deed executed by the principal before the surety’s obligation was absolute, a surety who is a creditor of his principal for such purposes should be allowed the defense of set-off on the same reasoning. That is, it being established that the relationship between principal and surety is that of debtor and creditor as of the date of the suretyship, by virtue of the implied contract of indemnity, the surety’s contingent claim to be reimbursed ripens into an absolute one the moment the principal defaults by becoming insolvent, and this claim will support the right of set-off.

By finding the right of set-off to exist at the moment of insolvency, the court disposes of the charge of a preference, holding that by closing its doors a bank is equitably owed only the balance over and above the amount it owes the debtor; it is this debt which passes to the receiver and the allowance of the set-off does not amount to a preference.

5 Estate of Ramsay v. Whitbeck, 183 Ill. 550, 56 N. E. 322 (1900).
6 Choteau v. Jones, 11 Ill. 300 (1849).
8 Choteau v. Jones, 11 Ill. 300 (1849).
9 Hatfield v. Merod, 82 Ill. 113 (1876).
There is more logic and greater equity in distinguishing, as the Illinois court does, between indemnity and subrogation, because, as the Wisconsin court reasoned in a similar case, the allowance of a set-off of an unpaid but absolute obligation at the time of insolvency shows no greater favor to a surety than is shown a depositor who is allowed to set off his deposit against his debt to an insolvent bank.\(^{10}\)

The courts which support this reasoning feel that all depositors derive a greater benefit, because of the relations between the surety and the bank, though set-off be allowed, than they would were those relations absent. The basis is the same in all of the cases, that is, the implied contract of indemnity.\(^{11}\)

It has been held that the right to set off against the principal or his assignee, a suretyship obligation in advance of payment, exists only in favor of a sole surety.\(^{12}\) In the present case Nelson was not a sole surety on the depository bond but, presumably, he was the only solvent one when the principal defaulted.

**Katherine H. Johnson**

**Real Estate Valuation for Taxation Purposes.**—An unusual proposition regarding valuation of real estate for tax purposes was presented in the case of *The People ex rel. Joseph B. McDonough, County Collector, Appellee, v. The Chicago Union Lime Company, Appellant*.\(^{1}\) The appellant, hereafter referred to as the Lime Company, was the owner of an exhausted stone quarry, abandoned for quarrying purposes, the fair cash market value of which as real estate, excluding the business income from the property as an element, they contended was $12,800. The quarry, however, was actually in use as a dumping ground for hire. The assessor had previously fixed the assessed valuation at

---

\(^{10}\) City of Rice Lake v. Citizens' State Bank of Rice Lake, 204 Wis. 228, 235 N. W. 398 (1931).


\(^{12}\) Merwin v. Austin, 58 Conn. 22, 18 A. 1029, 7 L. R. A. 84 (1889).

\(^1\) 361 Ill. 304, 198 N. E. 1 (1935).
$359,000, which had been reduced by the Board of Review to the sum of $215,526.

The witnesses for the collector arrived at the market value through an estimate of its income capacity as a dumping ground over a twenty-year period. They produced evidence that in 1929, 52,628, and in 1930, 76,485 cubic yards had been dumped on the property, and that the usual dumping charge was about 30c per cubic yard. After making deductions for salaries, maintenance, taxes, etc., and providing for a sinking fund to reimburse the depletion in capital value, the fair cash market value of the property was arrived at by capitalizing the resulting annual net income, and thereby placed at $225,000.

The real question of law before the court was "whether or not the valuation and assessment were so excessive and illegal as to constitute a legal fraud." In arriving at its conclusion that it did not, the court mentioned the general principles that in fixing the value of property, the presumption is that the taxing authorities had properly discharged their duties, that the burden of proving by clear and convincing evidence a fraudulent overvaluation is on the objector, and that it is not sufficient to prove a mere overvaluation, but that the evidence must establish that such excess valuation is the result of some improper, corrupt, or illegal motive on the part of the assessing authorities, or is so grossly excessive as to constitute constructive fraud. If one considers the fact that the collector had put in evidence that in previous years the Lime Company's appraisers had arrived at valuations of from approximately $152,000 to $158,000, by a similar process, and that, therefore, the objector had not satisfactorily met the burden placed on him of establishing fraud, actual or constructive, the decision is legally sound.

However, the decision is apt to be erroneously interpreted as sustaining the method of valuation used. The generally accepted standard for tax valuation of real estate is its present actual or market value. Where the property, as in the instant case, is unique, the assessor is allowed to take into consideration all facts directly affecting the value, including advantages of location and

2 For average property the definition that: "Ordinarily 'market value' means a price fixed by sales in the way of ordinary business by willing sellers to willing and able purchasers and is established when other property of the same kind has been bought and sold without restraint or compulsion in so many instances that a value may reasonably be inferred," enunciated in Underwood Typewriter Co. v. City of Hartford, 99 Conn. 329, 122 A. 91 (1923), is commonly used.
use. There is some conflict as to the extent prospective value may be considered, but even in the more liberal view, it cannot be made the substantive basis of assessment, but can only be considered as an element that enters into or is reflected by present value.\(^8\)

In his dissenting opinion, Justice Orr voices his objection to the method used in that it "may be found a dangerous precedent in valuing property for ad valorem taxation." He pointed out that the valuation is based solely on an estimate of the property's income capacity over a twenty-year period, only two of which are past years, while the others are in the future, and therefore entirely speculative, and that to that extent it goes too far. The suggestion was made that an adjacent quarry might be used for a swimming pool, or that the one in question might be operated by a tenant (there apparently being no contract for the period mentioned), and by the use of a similar process of valuation, inequalities would necessarily arise.

The majority opinion cites the early supreme court case of *The State of Illinois v. The Illinois Central Railroad*,\(^4\) as supporting the proposition that the income capacity is a proper factor to be considered in real estate valuation for tax purposes. In that case, the State, in effect, urged that although the railroad company was not then making money, the prospective increased earnings for the future should be taken into consideration and given effect by a correspondingly increased value at the then present time. As to this the court said: "It was urged on the argument by the counsel for the State, that the prospective value of the road should be taken into the estimate, and not its income. Such value is purely speculative, it must be admitted, and we very much question if it is a proper element in the present case or any like case. The assessment is for the time being only, and the value of the property for such purposes should be limited to that time, the more especially as in the efflux of time, other valuations are required to be made."

The argument might be made that in the Lime Stone Company case, the valuation did not take into account future speculative values, but attempted only to find the present value by taking into account future income. In effect, however, is this not a mere play on words, and is not, in reality, prospective future income being considered? It should be noted that the "prospec-

\(^8\) See annotation, 24 A. L. R. 644 (1922).

\(^4\) 27 Ill. 64 (1861).
tive value” mentioned in the earlier opinion referred to the State’s attempt to show prospective increased future income merely as an element to be used in the proof of present income, and not as the sole and entire basis. When thus analyzed, it would seem that the early case, taken as a whole, strongly disapproves of the method of valuation used in the instant case. It is proper, however, to observe that the method of ascertaining the market value was not directly attacked by the objectors, and that if it had been, it does not follow that the method used therein would have been approved.

C. E. HACKLANDER

PREFERENCES UNDER THE BANK COLLECTION CODE.—Whether or not a certified check, cashier’s check, or bank draft, should be allowed as a preferred claim against an insolvent Illinois bank, has been a question of great uncertainty in the minds not only of lawyers, but of courts as well. When the Bank Collection Code was adopted in Illinois,\(^1\) it was thought by many that the problem had been clarified, but that such was not the case is now recognized, and is aptly illustrated by the diverse views of two recent opinions handed down almost simultaneously by the appellate court of Illinois.

In the case of People ex rel. Nelson v. Farmers and Merchants Bank,\(^2\) an individual who had a certificate of deposit of a bank, cashed it and purchased a draft payable to himself, indorsed the draft in blank, and delivered it to a third party, who presented it for payment the following day. Payment was refused because the bank had closed; the draft being subsequently returned to him, he filed a claim with the receiver and it was allowed as a general claim and approved by the court. Later he asked that the judgment be opened up and the claim allowed as a preferred one. The court refused the request on the ground that the matter had already been adjudicated, but stated that if the depositor had originally asked for a preferred claim, he would have been entitled to one. The statement, it is true, is dictum, but the matter of preference was before the court, and the statement was made with all the essential facts before it.

In the case of People ex rel. Edward J. Barrett v. First State Bank and Trust Company of Canton,\(^3\) a bank received and paid

---


\(^2\) 281 Ill. App. 354 (1935).

\(^3\) 281 Ill. App. 320 (1935).
in full a check drawn by an individual on another bank in the same city. On the same day it took the check to the drawee bank for payment, and accepted the cashier's check of the drawee bank. Before the cashier's check was cashed, the drawee bank closed and never reopened. The court refused to allow the resulting claim as a preferred one on the basis that the cashier's check was an "unconditional credit" upon the books of the drawee bank, which gave rise to the relationship of debtor and creditor, and was clearly within the exceptions of Section 13, Paragraph 2 of the Bank Collection Code.\(^4\)

The question of preferences under the Collection Code has been before the Illinois courts on several occasions. In the supreme court case of *McQueen v. Randall*,\(^5\) the court allowed a preference on a claim where a depositor of a bank drew a check, had it certified, and after the bank closed, presented it for payment to the receiver. The Illinois appellate court in *People ex rel. Nelson v. Joliet Trust and Savings Bank*,\(^6\) held that where one who has certificates of deposit cashes them at the bank, and the bank issues its draft drawn on another bank which refuses to honor the draft because the drawer bank had closed in the meantime, the legal holder of the draft was entitled to a preference.

\(^4\) The material part of the paragraph follows: "... when a drawee or payor bank has presented to it for payment an item or items drawn upon or payable by or at such bank and at the time has on deposit to the credit of the maker or drawer an amount equal to such item or items and such drawee or payor shall fail or close for business as above, after having charged such item or items to the account of the maker or drawer thereof or otherwise discharged his liability thereon but without such item or items having been paid or settled for by the drawee or payor either in money or by an unconditional credit given on its books or on the books of any other bank, which has been requested or accepted so as to constitute such drawee or payor or other bank debtor therefor, the assets of such drawee or payor shall be impressed with a trust in favor of the owner or owners of such item or items for the amount thereof, or for the balance payable upon a number of items which have been exchanged, and such owner or owners shall be entitled to a preferred claim upon such assets, irrespective of whether the fund representing such item or items can be traced and identified as part of such assets or has been intermingled with or converted into other assets of such failed bank."


\(^6\) 273 Ill. App. 138 (1933). This case was also criticized in 29 Ill. L. Rev. 891. *Contra*, Fulton, Supt. of Banks v. Rundell, 128 Ohio St. 205, 190 N. E. 457 (1934), the court saying that the act was in derogation of the common law and must be strictly construed.
Again the Supreme Court, in the case of People ex rel. Nelson v. E. C. Dennhardt, allowed a preference where a township treasurer drew a check against his deposit in the bank and presented it for payment. Instead of paying the check as requested, the payor bank issued its draft payable to the depositor in his official capacity, the bank charging the depositor's account for the amount of the draft. The draft was then deposited in another bank, but the drawer bank closed before it was collected.

In each of the cases mentioned the claimant relied on Section 13, Paragraph 2 of the Collection Code for a preference. A careful reading of the section will show that in order to qualify for a preference thereunder, there must be: an item payable by or at the bank involved; a presentment to the bank for payment; sufficient funds on deposit by the maker or drawer; a charging to the account of the maker or drawer by the bank before it is closed; and a failure of the bank to pay the item by cash or unconditional credit, which has been requested or accepted.

From a careful analysis of the facts involved in the individual cases mentioned, it becomes obvious that with the possible exception of the Dennhardt case, they do not come within the purpose or provisions of the act, and the claimants were entitled to no preference thereunder. The appellate court's decision in People v. First State Bank and Trust Company of Canton is not only in accord with the purpose and provisions of the act but has the support of decisions in other jurisdictions.

C. E. Hacklander

Right of Judgment Creditor of Heir to Contest Will.—In the recent case of In re Van Doren's Estate the Prerogative Court of New Jersey held that a judgment creditor of one who would inherit in the event of intestacy has a right to caveat the probate of a will which would prevent property from descending to such heir and becoming subject to the lien of the judgment. Apparently, no Illinois reviewing court has ever decided whether

---

8 The case can be justified by adopting the view that by taking the draft, it had not "accepted" an "unconditional credit."
9 The following case is cited and followed: South Carolina State Bank v. Citizen's Bank, 173 S. C. 496, 176 S. E. 346 (1934). The same result is reached in the following cases: In re Bank of United States, 243 App. Div. 287, 277 N. Y. S. 96 (1935); Lindsay v. Elliott et al., 77 F. (2d) 95 (1935).
or not such a creditor is a party interested in the probate of a will, as a search of the Illinois cases reveals no adjudication on this question.

The succinct reasoning of the New Jersey court is as follows: "Title to real estate vests in the heir at law immediately upon the death of the ancestor, and at the same instant the lien of a judgment against such heir attaches to his interest in the land. If, subsequently, a valid will is probated, title may go in another direction and the apparent lien of the judgment be defeated; and although it is true that the will relates back and takes effect as of the date of death, yet it must be remembered that it is necessary to probate that will in order to divest the apparent lien of the judgment. Obviously, it cannot be said that the judgment creditor would not be injured by the probate of such a will." Similar reasoning is used by the courts of Minnesota, Missouri, and Ohio.

A distinction should be made at the outset between the rights of judgment creditors having a lien upon the debtors' realty, and general creditors. Courts generally hold that a general creditor is not a person interested in the probate of a will.

In the Alabama case of Lockard v. Stephenson, judgment creditors of an heir, with liens, were seeking to contest the will which disinherited their debtor. In denying relief, the court argued that there was not the semblance of privity between the testatrix and the creditors, that she could dispose of her property as she chose, that what the heir had was only an expectancy, and that the expectancy could not be made subject to the satisfaction of the creditor's demands. In the view of the writer, what the court said was true, but irrelevant to the issue. As to what interest the heir has before the testator's death, all will agree that it is a mere expectancy, but that is immaterial when the creditor is seeking to attach his lien to the interest the heir has

---

2 In re Langevin's Will, 45 Minn. 429, 47 N. W. 1133 (1891); Watson v. Alderson, 146 Mo. 333, 48 S. W. 478 (1898); Bloor v. Platt, 78 Ohio St. 46, 84 N. E. 604 (1908).

3 Smith v. Bradstreet, 16 Pick. 254 (Mass., 1834); In re Langevin's Will, 45 Minn. 429, 47 N. W. 1133 (1891); Watson v. Alderson, 146 Mo. 333, 48 S. W. 478 (1898); Lee v. Keech, 151 Md. 34, 133 A. 835, 46 A. L. R. 1488 (1926).

4 120 Ala. 641, 24 So. 996 (1899). This case followed rather strictly as authority the case of In re Shepard's Estate, 170 Pa. 323, 32 A. 1040 (1895), where the Pennsylvania court made no distinction between judgment creditors and general creditors and mentioned nowhere that the contestants were judgment creditors, although this was stated in the opinion of the lower court, 11 Pa. Co. Ct. Rep. 133.
DISCUSSION OF RECENT DECISIONS

after the testator's death where the will is invalid. As the Missouri court said in *Watson v. Alderson*, "A lien creditor, whose lien attaches the moment that title is vested in his debtor by descent cast, although by virtue of his lien judgment he had no interest in the estate of the deceased, has the same direct and immediate interest in the probate of a will by which that title would be divested that an heir at law has. It is not interest in the estate of the deceased that authorized any person to contest a will under the statute, but interest in its devolution,—in the probate of the will that determines that devolution."

The case of *Lockard v. Stephenson* further maintained that the failure or refusal of the heir to contest the will could not subrogate his judgment creditors to that right. A similar argument was used in *Bank of Tennessee v. Nelson*, where the Tennessee court said: "If he [the heir] acquiesces in its [the will's] validity by waiving his right to object and contest it . . . how can his creditor, who has to pass through him, to reach the property, make the objection for him?" However, in the case of *In re Langevin's Will* it was said: "This right [of a judgment creditor] to resist the probate is not materially different in principle from that of a judgment creditor to assail a prior, forged, or fraudulent deed, apparently conveying the lands of the judgment debtor."

The doctrine of binding the creditor by the failure of the heir to contest the will would be a safeguard for such a fraud as that involved in *Brooks v. Paine's Executors*. There, according to the bill of the creditors, some of whom had reduced their claims to judgment and levied execution on the debtor's interest in his deceased father's estate, the heir had connived with others or, by his own act, had a spurious will presented for probate, or had acquiesced in the probate of such. On an appeal from a judgment sustaining a demurrer to the bill, the court said: "If the heir is insolvent, and is attempting to have or suffer his property disposed of to his children or others, so that his creditors will be defeated, it is a fraud upon the creditors which they are entitled to resist in the only forum and proceeding where resistance would avail them any good. They are 'interested in the probate' in the language of the statute."

---

5 146 Mo. 333, 48 S. W. 478 (1898).
6 3 Head (40 Tenn.) 634 (1859).
7 45 Minn. 429, 47 N. W. 1133 (1891).
8 123 Ky. 271, 90 S. W. 600 (1906).
In *Lee v. Keech* it was said that the interest in a debtor's property necessary to support a caveat must be "such an interest gained in the property as will give the creditor a part of the sum total rights of ownership." The interest of a judgment creditor with statutory lien, the court said, was not such an interest. Statements from Freeman on Judgment were quoted declaring that a judgment lien on land constitutes no right in the land itself but confers only a right to levy on it. Statements from the same work indicate, however, that statutes creating judgment liens abrogate the necessity of levying execution, while preserving a lien equivalent to a lien of execution, except where a prior levy may create a priority of lien.

The court, moreover, distinguished the case before it from cases where the judgment creditor had levied on the interest of the heir before probate, as in *Smith v. Bradstreet*, *Bloor v. Platt*, and *Watson v. Alderson*, cases reaching the same result as that in the instant case. Most courts, however, irrespective of the side taken, consider as one the judgment creditor with mere statutory lien and the judgment creditor who has levied on the interest of the debtor.

**J. J. Lannon**

**Civil Practice Act Held Applicable in Chicago Municipal Court when Not Inconsistent with Its Rules.**—In *Ratner et al. v. Bartholomee*, recently decided, the Illinois Appellate Court sustained the Municipal Court of Chicago in holding that the provisions of the Civil Practice Act are applicable in the municipal court unless inconsistent with express rules of that court.

---

9 151 Md. 34, 133 A. 835, 46 A. L. R. 1488 (1926).
10 2 Freeman on Judgments, sec. 915.

11 "But it is to be noted that while dependent on the right to execution, the actual issuance or levy of an execution is not essential to the existence of a judgment lien as distinguished from the lien of the execution itself, though a prior levy may result in a priority. Statutes may, however, require the issuance of execution within a specified time in order that the lien may be good as to intervening purchasers or encumbrancers, or may terminate the lien if no execution has issued within a prescribed period. And the fact that the statutory period of the life of the lien has expired does not prevent the enforcement of the judgment by execution if it is not dormant." 2 Freeman on Judgments, sec. 930.

12 16 Pick. 264 (Mass., 1834).
13 78 Ohio St. 46, 84 N. E. 604 (1908).
14 146 Mo. 333, 48 S. W. 478 (1898).
1 282 Ill. App. 298 (1935).
Plaintiffs, who had previously represented defendant as her attorneys in a divorce action in which she had been awarded attorneys' fees, brought suit in the municipal court for fees. Plaintiffs set out these facts, filed an affidavit conforming to the requirements of section 57 of the Civil Practice Act, and moved for summary judgment as allowed by that section.

Defendant contested the jurisdiction of the municipal court to award summary judgment, and filed an affidavit of defense setting out facts supporting her averment that plaintiffs had not represented her with proper skill and care, and denying any indebtedness. The municipal court granted plaintiff's motion for summary judgment.

The appellate court held that defendant's affidavit "raised an issue of fact which, under section 57 of the Civil Practice Act, required the cause to be submitted to the jury." It therefore reversed the judgment. In so doing, however, the court observed: "The question of whether the municipal court is authorized to make use of the summary judgment method prescribed by the Civil Practice Act is not . . . a question of jurisdiction, but one of practice. The use of the method is not expressly forbidden by the Municipal Court Act, nor forbidden by or inconsistent with any of the rules adopted by the judges of the court. Such use therefore is subject to review only in case it has resulted in an unjust judgment."

The decision thus definitely approves of rule 308 of the Municipal Court Rules, which expressly declares that the Civil Practice Act provisions are applicable in that court, unless inconsistent or in conflict with the court's own rules.

C. E. Fox, Jr.

\footnote{Ill. State Bar. Stats. (1935), Ch. 110, par. 185.}
BOOK REVIEWS


In "Law and the Lawyers" Professor Robinson has expanded the content of his essay, "Law—An Unscientific Science," which appeared in the December, 1934, Yale Law Journal. The result is an extremely readable and significant book-length discussion of law, lawyers, and the judicial process as viewed by a psychologist.

In the article he dealt with the pressing social necessity of treating jurisprudence as a natural science. He urged the adoption in the legal field of the methods and techniques which have made other sciences progressive although perhaps not so comforting to the conservative-minded portions of the population. In the book he reiterates this theme and proceeds to show how pragmatic philosophy and psychology can be applied to law in order to cultivate within that "cultural lag" a sense of forwardness which he deems essential if lawyers are to operate as genuine "social engineers."

The author does not attempt to draw a Utopian plan upon which the jurisprudence of the future can be modeled. He does, however, note the many ways in which the other sciences, particularly psychology, could be called in to aid this older sister in the realm of human knowledge. Moreover, he subjects the legal institution—judicial and professional—to no slight dissection in order to point out the present evils in its structure.

Professor Robinson has viewed the processes of jurisprudence and their place in society without bias for their good points or prejudice against their bad ones. From this impartial stand, he has given a clear picture of the factors which have made law a refuge for the uncertain human being who seeks certainty, but a despair to the scientific thinker who feels that human progress can come only through change. He criticizes the priestly classes who would keep the law in stagnation by insisting upon an impossible consistency. Yet he sees the error in the point of view of those who would destroy the stability which the law in its present state imparts to human affairs.
Undoubtedly many people will feel that the author has taken undue liberties with their ideals in his forthright discussion. But, if one recognizes that Professor Robinson has taken the law into the laboratories of science for analysis and is only reciting his findings, then it is possible to accept more readily the telling blows he strikes at currently accepted modes of legal reasoning. It could be anticipated that he would extend no fawning reception to the Blackstonian theory of the law, the doctrine of *stare decisis* and other similar devices, but it is surprising to read his comment on the American Law Institute’s struggles with the case law. He will probably have much to contend with before some of the changes he suggests are willingly adopted by the lawyers and jurists. Nevertheless, the book is one which immediately catches the attention of the reader and stimulates earnest thought.


It is doubtful whether the evolution of any book is more interesting than the development of this textbook from an early edition of Greenleaf On Evidence. Mr. Wigmore was a student at the Harvard Law School under Professor Thayer and at that time practically the only textbook printed in this country on evidence was Greenleaf’s. It was natural, therefore, when the sixteenth edition was contemplated, in 1899, some five or six years after Mr. Wigmore had left the Harvard Law School and had made a record for himself as a teacher of evidence, that he should be called upon to produce the new work.

The resulting text was very largely the original treatise with footnotes and additions showing the later developments of the law. It was unsatisfactory, because it had, to a large extent, departed from the original, without, at the same time, giving the editor an opportunity to develop the subject in his own way. However, he did this, when he brought out his own textbook between 1905 and 1915, and his “Pocket Code of Evidence” in 1910. In 1923 the monumental five-volume edition of his work was issued. Probably it showed more signs of distinguished ability and research than any other treatise on the law of evidence. Under every subdivision, the law was arranged chron-
ologically from the earliest decisions to those of the most recent date, and the student is able to trace the development of doctrines in detail, step by step.

There was one serious objection to this work, however. Mr. Wigmore did not follow the classifications of the subject adhered to in most other textbooks. In many instances he injected a new terminology which made his books less convenient to use. For example, it is questionable whether anything was gained by calling the law of real evidence the "law of autopic preference," or by labeling the right of a witness in a suit to go and return safely from the trial a "viatorial privilege." To talk about "analytic rules" of evidence and "prophylactic rules," is disconcerting and unnecessary. Nevertheless, the five volumes contained a mass of material which can be found nowhere else.

The present single volume, while subject also to the objection of the unfamiliar terminology in the larger work, does present in compact form the principal rules of evidence as decided by the courts. Thus, if one can overlook unusual expressions of classification, this book will assist materially in the study of the subject.


A revised and comprehensive third edition of the cases on the related subjects of Criminal Law and Criminal Procedure collected by Professor Mikell has been issued by West Publishing Company in a pleasing and useful one-volume format.

The first section of the work is identical, both as to content and pagination, with the standard third edition of Cases on Criminal Law by the same author, issued in 1933, and comment on the value thereof is purposeless at this late date.

The section dealing with Criminal Procedure, however, is entirely new and is designed to replace the second edition of the same author's case book on that subject which appeared in 1912. The contents of this section are arranged along conventional lines, following the criminal prosecution from arrest through trial to review of judgment, but the material is completely revised and much of the earlier case material has been rejected for more timely decisions. About one-sixth of the total number
of cases in this section have been decided since 1930, and over one-third of them since the first edition appeared in 1910. The work is also copiously annotated, both to cases and to articles appearing in legal periodicals, and, wherever appropriate, sections of the American Law Institute's Code of Criminal Procedure are quoted in the footnotes.

The combination volume now provides the student with a complete casebook substantially no larger than the usual one, yet comprehensive enough to give an adequate basis for training in these two related fields and particularly serviceable in those institutions where the two subjects are taught as a unit. It has, moreover, the additional advantage of being timely in its treatment of Criminal Procedure, a subject on which the law is still in a state of flux.


The subject of municipal corporations has proved to be a fertile field for the writers of texts and the editors of cases, as well as for commentators whose interests are not only legal but also social or political. No subject in law is of such growing importance as that of municipal corporations, and it is not, therefore, a surprise to find this new volume by Professor E. Blythe Stason taking an honored place in the American Case Book Series.

The author has increased the usefulness of his volume by twelve pages of what he chooses to call "Introductory Notes." These notes furnish a proper and illuminating introduction to the case material which follows. They will undoubtedly stimulate the interest of the student, both by presenting briefly a suggestion of the history of municipal corporations, and by deft concentration of material which links the historical to the present.

A bibliography following the table of cases is presented under the proper chapter headings, and is said by the author to be inclusive of the treatises and law review articles thereafter cited in the footnotes. It is, of course, in no sense a complete bibliography of the subject, nor does it include all footnote references to the A. L. R. and the L. R. A. The reference given in the bibliography to articles in the various law reviews seems particularly fortunate for the topic of municipal corporations. The
timeliness of such articles is of great importance in the consideration of municipal corporations, a subject which has exhibited an expansion, growth, liveliness, and importance second to none other in law.

In the matter of case material, we naturally find most of the old landmarks and those cases announcing fundamental propositions which have for many years been used as the basis for the growing law. But, in addition to these, there is an admirable selection of cases not decided when earlier corporation books were published. The subject matter is developed through the cases in a natural and logical sequence. Cases are well chosen, well edited, and will command attention in the field of case book literature of municipal law.


In 1915, in the short introduction to the first edition to his "Cases on the Law of Torts," Professor Hepburn wrote, "... I have had in mind especially the first-year law students... the beginning students in Torts should have some assistance at the very outset in marking the place which is occupied by Torts in the general field of the law."

It appears that Professor Hepburn cherished the rather sensible theory that beginning students might not know anything about Torts. That conviction of the author probably prompted the preparation of the material which has been included again as the introduction to the second edition. The first eighteen pages of this book are full of precious distinction. They tell why a tort is not a crime although a crime may carry a tort along with it, and why a tort is not a breach of contract although a breach of contract may give rise to a tort. In brief, they relate the field of Torts to the broad acres of the law. The floundering student, having read these pages, will find that, although "Nuisance" is a subject of Torts, the subject of Torts is less of a nuisance.

This second edition has been limited to a modification and expansion of the first edition. The significant English and
American cases of the past twenty years which illustrate the extension of old principles or the evolution of new ones have been added. Extraneous matter has been deleted both to save the student unnecessary reading and to reduce the size of the book to a portable weight.

With equal consideration for the reader, the publisher has chosen a legible black faced type and printed it on an opaque paper, so that it is possible to read one side of the sheet at a time without becoming involved with what the author has intended to save for the other side of the page. The editors have aided the reader further by carrying the general topic headings from page to page above the cases which illustrate individual points thus constantly reminding the student of the general classification into which the case he is reading fits.


The author appears to have performed successfully his stated task of "covering within the space of a single brief volume the wide-ranging field of Damages." Emphasis has been laid upon the administrative phase of the subject by treating the doctrines, distinctions, and standards of the subject as material which is used in actual practice by lawyers, judges, and jurors.

The reader's attention is directed throughout the work to the varied developments in the subject not only between the different states, but also between the United States and England. This is well illustrated in the chapter on "Counsel Fees and Other Expenses." This chapter concisely states the arguments in favor of the English system of allowing such fees as damages, and the arguments supporting the American rule of allowing court costs only (with rare exceptions). Accompanying this discussion is a summary of the reasons for the trend in the direction of the English rule.

The mechanical arrangement of the material is particularly commendable. Notes are in heavy type, and comprehensive footnotes summarize briefly the cases cited. As a whole, this volume should be a valuable aid as supplementary material to a casebook course in the subject.

While primarily a case book, this excellent work of Professor (Dean) Armistead M. Dobie is interspersed with quotations from his textbook on the same subject and contains some other explanatory material which eliminates unnecessary reading to discover elementary principles. Basic constitutional and statutory provisions appear along with the cases or are quoted by them, thus furthering the purpose of clarity and brevity and avoidance of unnecessary language or search for related material. In the same spirit, many of the cases are edited down to leave only the essential statements and reasoning of the courts. At the same time the cases themselves are well chosen with proper emphasis upon recent decisions.

Typical of the arrangement of the work is Chapter VI on Procedure at Law in the United States District Court. It begins with two cases on the purpose and scope of the Conformity Act and gives six cases on its application. Then follows the text of the 1934 Federal Uniform Procedure Act, with ample footnotes, and explained by a press release and a quotation from an American Bar Association Report. Next is presented the text of the Seventh Amendment to the United States Constitution followed by seven cases on trial by jury. The chapter concludes with four cases on rules of the district court. The footnotes either digest or quote from other cases and refer to recognized works of other authors—especially to American law review articles which Professor Dobie characterizes as "the best writing done on the subject of Federal jurisdiction and procedure."

Other chapters deal with jurisdiction of the various Federal courts, venue, the application of substantive law, and the relations of state and Federal courts. The author wisely emphasizes the removal jurisdiction and procedure of the United States District Court and devotes ninety-six pages to the ramifications of this important subject.

No attempt was made to deal with criminal procedure in the Federal courts or the specialties such as patent procedure. Some mention, however, is made of bankruptcy jurisdiction and appellate jurisdiction over decisions and orders of various Federal boards and commissions.
BOOKS RECEIVED.

