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Recent Illinois Decisions

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CHARITIES—CONSTRUCTION, ADMINISTRATION, AND ENFORCEMENT—WHETHER OR NOT CHARITABLE CORPORATION WHICH HAS INSURED AGAINST TORT LIABILITY FOR NEGLIGENCE OF ITS AGENTS MAY INVOKE DEFENSE OF IMMUNITY—In the case of *Moore* v. *Moyle*,[1] the Illinois Supreme Court has taken a most significant tack from the current of Illinois decisions regarding the liability of charitable corporations for the tortious acts of their servants and agents.[2] The principal defendant therein, Bradley Polytechnic Institute, had purchased certain gymnastic equipment for use in a proposed student circus and had placed the supervision of the erection and use thereof in the hands of the individual defendants, two physical education instructors. While the equipment was under their supervision, the plaintiff fell and was injured by the collapse of the apparatus. When suing to recover for such injuries, plaintiff charged that the educational institution was fully insured, and also had other non-trust property, so that a judgment could be satisfied without impairing any charitable trust fund. The trial court dismissed the action as to the principal defendant and entered a judgment in its favor on the ground that the doctrine of *respondeat superior* did not apply to a charitable corporation. That judgment was affirmed by the Appellate Court for the Second District,[3] but was reviewed by the Supreme Court on a certificate of importance. The judgment below was reversed and remanded when a majority of that court held that the prior Illinois cases in the field merely made the defense of immunity available as a defense but did not make it operate to destroy the cause of action. The thought was expressed that the law in Illinois went only far enough to hold that trust funds of charitable corporations were entitled to be deemed exempt from liability, hence it followed that non-trust fund property, such as the proceeds of insurance, could be subjected to judgments based on ordinary rules regarding *respondeat superior*.

Needless to state, the case will prove to be one of decisive importance to much pending and possible future litigation,[4] for the court has gone a

[1] 405 Ill. 555, 92 N. E. (2d) 81 (1950), noted in 38 Ill. B. J. 581. Crampton, J., wrote a dissenting opinion. Wilson, J., also dissented.

[2] For an exhaustive review of the general problem, see annotations in 14 A. L. R. 572; 23 A. L. R. 923; 30 A. L. R. 455; 33 A. L. R. 1369; 42 A. L. R. 971; 62 A. L. R. 724; 86 A. L. R. 491; 109 A. L. R. 1199; 133 A. L. R. 821. See also Feezer, "The Tort Liability of Charities," 77 U. of Pa. L. Rev. 191 (1928); Zollman, "Damage Liability of Charitable Institutions," 19 Mich. L. Rev. 395 (1921). A review of the pertinent Illinois decisions appears in a note to Wendt v. Servite Fathers, 332 Ill. App. 618, 76 N. E. (2d) 342 (1947), in 26 CHICAGO-KENT LAW REVIEW 279.

[3] See Moore v. Moyle, 335 Ill. App. 342, 82 N. E. (2d) 61 (1948), noted in 27 CHICAGO-KENT LAW REVIEW 3, 28 CHICAGO-KENT LAW REVIEW 1 and 103, and 38 Ill. B. J. 187.

[4] Counsel for persons injured or killed in the recent Effingham Hospital fire will certainly take note of the decision.

long way toward circumscribing the unjustifiable immunity which has previously been granted to charitable corporations. However desirable the immediate result may be, it is extremely regrettable that the court did not completely abolish rather than just limit the immunity. One cannot but be persuaded by the cogent logic of the dissent that "... the crucial policy of exempting charitable institutions from tort liability is of sufficient gravity to require a further appraisal by this court of the reasons which sustain it. The issue here presented should be resolved upon the merit of those reasons rather than by the adoption of criteria which merely purport to extend or modify the doctrine and which ... can result in little but confusion in the law."[5] It is hoped that the Illinois court will soon reconsider the problem and accept the persuasive logic expressed by the Vermont Supreme Court, in another recent case,[6] where every argument for charitable tort immunity was carefully examined and effectively refuted by a court which, for the first time in that jurisdiction, refused to embark on the muddled sea of charitable immunity.

DIVORCE—DEFENSES—WHETHER CONDONATION OF EXTREME AND REPEATED CRUELTY WILL BE REVOKED BY A SUBSEQUENT DESERTION ON PART OF FORGIVEN SPOUSE—A new problem involving aspects of divorce law was presented to, and resolved by, the Illinois Appellate Court for the Fourth District in the recent case of *Middleton* v. *Middleton*.[1] The complaint there charged extreme and repeated cruelty as ground for divorce but acknowledged that the plaintiff's acts of cohabitation with defendant subsequent thereto amounted to a condonation. Plaintiff, therefore, specially charged that an alleged wilful desertion of plaintiff by defendant for a period of one day prior to suit[2] operated to revoke the previous condonation and thereby reactivated plaintiff's right to a divorce on the ground of the prior cruelty. A temporary injunction was granted immediately upon suit, designed to restrain the defendant from molesting the plaintiff or from re-entering the premises of their domicile. After receiving plaintiff's evidence in support of her complaint, the trial court granted the defendant's

5 See dissenting opinion of Crampton, J., in 405 Ill. 555 at 568, 92 N. E. (2d) 81 at 88.

6 Foster v. Roman Catholic Diocese of Vermont, — Vt. —, 70 A. (2d) 230 (1950). Among other things, this court makes the most poignant observation that a "charity should not be permitted to inflict injury upon one without redress in order that it may do charity to others." See — Vt. — at —, 70 A. (2d) 230 at 235.

1 339 Ill. App. 448, 90 N. E. (2d) 248 (1950).

2 The desertion was alleged to have occurred on April 18th and suit was begun on April 19th of the same year. To constitute a separate cause for divorce, the desertion must be wilful and for the space of one year: Ill. Rev. Stat. 1949, Vol. 1, Ch. 40, § 1.

motion to dismiss the suit for lack of proof. On appeal, that order was affirmed when the Appellate Court concluded that the proof failed to show any additional misconduct on the defendant's part beyond a brief quarrel leading to defendant's removal of himself and his clothing from the family domicile and that the presence of the temporary injunction literally operated to prevent defendant from returning to the family domicile or making any move toward reconciliation. It was, therefore, decided that the condonation had not been effectively revoked.

While a majority of cases from other states do recognize that a desertion for a period less than the statutory one will operate to revoke a prior condonation,[3] the case at hand is the first one in which the question has been presented to a reviewing court of this state. Prior decisions have expressed the view that condonation for previous acts of cruelty is granted on the implied condition that the offending party will thereafter treat the other with conjugal kindness,[4] but whether or not a revocation of the condonation has occurred has been said to depend upon the particular facts and circumstances of each case. Emphasis was here laid on the fact that the defendant had, on several occasions in the past, left his home for varying periods of time but had always returned of his own accord, and there was no evidence of any extra-marital misconduct by him during his absence. When it appeared that plaintiff's attitude at the time of defendant's leaving might be said, to some extent, to have disclosed a degree of willingness to participate in the quarrel and the subsequent departure of the defendant, the court felt constrained to say that the circumstances were not of such nature as to justify a right to revoke the prior condonation.[5] It might be pointed out that a person in the position of the plaintiff should, in all equity, have respectful precaution toward coming into court with clean hands, so that plaintiff's own acts could well be considered as a contributing factor to the desertion. There is enough in the case, however, to indicate the possible adoption of the majority view by this state should the aggrieved spouse be able to show absence of fault and a period of desertion sufficiently long to indicate a lack of intention to return, even though the period be not long enough to constitute a separate and distinct cause for divorce. A highly unfortunate result would follow if it should be necessary to show a complete period of desertion to nullify a prior condonation. If that were so, the injured spouse would be faced with the proposition that a condonation once given could be abrogated only on the basis of a repetition of a type of marital misconduct similar to the one which had been forgiven.

[3] See 17 Am. Jur., Divorce and Separation, § 213; 27 C. J. S., Divorce, § 62.

[4] Ollman v. Ollman, 396 Ill. 176, 71 N. E. (2d) 50 (1947); Young v. Young, 323 Ill. 608, 154 N. E. 405 (1926); Abbott v. Abbott, 192 Ill. 439, 61 N. E. 350 (1901).

[5] Abbott v. Abbott, 192 Ill. 439, 61 N. E. 350 (1901).

EMBEZZLEMENT—ELEMENTS OF OFFENSE—WHETHER FAILURE TO PUT SUFFICIENT FUNDS INTO A DIVIDEND ACCOUNT, AND COMMINGLING OF FUNDS IN SEPARATE DIVIDEND ACCOUNTS, AMOUNTS TO AN EMBEZZLEMENT BY A LIQUIDATION TRUSTEE—In the recent case of *People* v. *Barrett*,[1] a successor trustee under a plan of reorganization of a bank declared a 10% dividend for certain liquidating certificate holders. He deposited a sufficient sum of money in an account for the payment of this dividend. Approximately two and one-half years later he declared a similar dividend for the same persons, but this time he deposited an amount short of that required to pay such dividend and commingled the second fund with the funds still remaining on hand from the unpaid portions of the first dividend, the total being insufficient to pay both in full. This same process was repeated still another year and one-half later when a third dividend was declared. The result of these transactions was that, instead of depositing a total of approximately $280,000 which would have been necessary to pay all three dividends, the trustee deposited approximately $212,000. For these acts and omissions, the trustee was indicted for embezzlement under an indictment which charged the taking of funds belonging to the unpaid certificate holders of the first dividend. The theory of the prosecution was that the defendant had wilfully converted the unpaid sum of the first dividend to his own use by applying it to the discharge of his obligations under the second and third dividends. The trial court found him guilty and entered sentence but, on error to the Supreme Court, the judgment was reversed and the cause remanded when the upper court held that the acts were not sufficient to manifest the necessary criminal intent required to make the defendant guilty of the crime charged.[2] It laid particular stress on the requirement of secrecy and cited *People* v. *Parker*[3] for the view that while the acts of the trustee might be acts of maladministration, amounting to a breach of trust, they would be insufficient to support conviction unless it could be shown that he had converted the money to his own use or had secreted it with intent so to use.[4] Agreeing with the holding in *People* v. *Ervin*,[5] the court said the criminal intent had to be proven as a necessary

[1] 405 Ill. 188, 90 N. E. (2d) 94 (1950).

[2] It is understood that at a subsequent trial without a jury, after remandment, the defendant was acquitted.

[3] 355 Ill. 421, 174 N. E. 529 (1930).

[4] As collateral evidence of the trustee's lack of intent, the court pointed to his offer in open court to make good the loss sustained by the certificate holders of the first dividend. Other factors were said to be (1) that he made no personal use of the money, (2) that the transactions did not benefit him in the slightest degree; (3) that his acts were only for the benefit of the certificate holders; (4) that there was no secrecy in his dealings; and (5) that notices of the dividend were sent to all certificate holders.

[5] 342 Ill. 421, 174 N. E. 529 (1930).

element of the crime of embezzlement; that great latitude should be allowed in proving such intent; but that the defendant should also be allowed to show facts and circumstances designed to rebut the presumption that he had committed the crime.

The case was marked by a strong dissent from Justice Daily who indicated that, in his opinion, the defendant's conduct in supplying the deficits in the second and third dividend funds from the funds belonging to the first dividend owners disclosed an intent to convert the funds to his own use.[6] He implied that the acts were secretly done from the fact that the beneficiaries had no knowledge thereof. One would assume, as the dissenting judge indicates, that in rendering its decision the majority of the court looked more nearly to what the trustee did not do instead of to what he did do.[7]

EVIDENCE—JUDICIAL NOTICE—WHETHER OR NOT A COURT SHOULD TAKE JUDICIAL NOTICE OF THE SCIENTIFIC FACT THAT A HUMAN BEING CANNOT CONTRACT TRICHINOSIS BY CONSUMING PORK WHICH HAS BEEN PROPERLY COOKED—The Appellate Court for the First District, by the decision in the case of *Nicketta* v. *National Tea Company*,[1] has virtually put an end to litigation heretofore begun by domestic consumers of pork against the sellers of that product to recover damages for having contracted the dreaded food disease of trichinosis. The plaintiffs there claimed they had purchased fresh pork from the defendant for home consumption and, after eating it, had become infected with the disease. The complaint charged the existence of an implied warranty between the parties that the fresh pork would be fit for human consumption after it had been properly cooked and that the product purchased had been so processed, despite which plaintiffs had contracted trichinosis. The defendant filed a motion to dismiss the complaint, claiming it to be an irrefutable scientific fact that properly cooked pork could never be the source of the disease, so that, if the plaintiffs had suffered as claimed,

6 See Spalding v. People, 172 Ill. 40, 49 N. E. 993 (1898).

7 A question as to whether or not the period of limitation on prosecution had run was also involved. The court decided that the three-year period fixed by Ill. Rev. Stat. 1949, Vol. 1, Ch. 38, § 630, had not expired even though the second deposit occurred more than three years prior to the indictment. Following the view expressed in People ex rel. Nelson v. People's Bank & Trust Co., 353 Ill. 479, 187 N. E. 522 (1933), the court said that a trustee is presumed to use his own money before that of the trust fund, so that the embezzlement would not be completed until the entire deposits for all three of the dividends had been used up. The court ruled out a possible application of the "first in first out" doctrine relating to bank deposits on the basis that such doctrine rests on a debtor-creditor relationship.

1 338 Ill. App. 159, 87 N. E. (2d) 30 (1949).

it must have been because the pork was not adequately processed. Upon that basis, it was urged that plaintiffs were in no position to take advantage of the implied warranty as they could not, then, show any breach thereof. The trial court, upon the hearing of the motion, took judicial notice of the scientific fact so alleged to exist and, on the basis thereof, dismissed the action. On appeal, that judgment was affirmed.

Trichinosis, a disease caused by the parasitic worm *trichinella spiralis,* can only be acquired by human beings through the consumption of pork or pork products which contain trichinae. Once an individual becomes infested, the result is a period of prolonged suffering which may, in severe cases, cause death.[2] It has, however, long been well established by authoritative scientists, as well as by governmental tests, that the trichinae cannot survive a heat in excess of 137° Fahrenheit, so that the consumer of pork or pork products may adequately safeguard himself by properly cooking the meat before eating it.[3] Accordingly, as far as the world of science has been concerned, the presence of trichinosis in a human being is regarded as conclusive evidence that the individual has consumed infested raw or improperly processed pork.

Acceptance of this scientific fact by way of judicial notice, at least in the pleading stage of a case, is novel in the law of Illinois. Obviously, a litigant claiming to be the victim of trichinosis should not be allowed to recover as he cannot have brought himself within the scope of the existing implied warranty, to-wit: that pork when properly cooked will be fit for human consumption.[4] Until now, however, trial courts have permitted the taking of evidence in such suits and have then submitted the issue to the jury for determination. In those cases where a finding for the plain-

[2] Schwartz, "A Disease Caused by Eating Raw Pork," U. S. Dept. of Agriculture, Leaflet No. 34 (1941).

[3] See "Trichinosis and Nonclinical Infections with Trichinella Spiralis," a report by a special committee of the Advisory Council of Meat Research, in Am. Med. Jour., Vol. 114, p. 35, particularly note 1. No feasible tests to determine the presence of trichinae, without rendering the meat unusable, appear to exist: McCoy, Miller and Friedlander, "The Use of An Intradermal Test in the Diagnosis of Trichiniases," Journ. of Immunology, Vol. 24, No. 1 (Jan., 1933).

[4] The writer of the note in 16 Temple L. Q. 80 has suggested that the meat packing industry should shoulder the financial burden caused by the disease. A complete analysis of the economic and social implications of such a proposition would be necessary before it could be accepted as a solution. If that procedure were to be adopted in trichinosis cases, it would be equally sound to urge acceptance thereof in all negligence problems, thereby putting all cost of carelessness on society at large rather than on the careless individual. Courts have generally refused to extend the implied warranty beyond the point that it covers wholesomeness of meat which has been properly processed: Ketterer v. Armour & Co., 247 F. 921 (1917); Feinstein v. Daniel Reeves, Inc., 14 F. Supp. 167 (1936); Zorger v. Hillman's, Inc., 287 Ill. App. 357, 4 N. E. (2d) 900 (1936); Cheli v. Cudahy Bros. Packing Co., 267 Mich. 690, 255 N. W. 414 (1934); Tavani v. Swift & Co., 262 Pa. St. 184, 105 A. 55 (1918); Yachetti v. John Duff & Sons, Ltd. (1942), Ont. Rep. 682.

tiff has been made, a reversal of the decision has occurred on appeal on the ground that the verdict was contrary to the evidence.[5] Reviewing courts have there given judicial recognition to the fact that one cannot contract the disease except through his own carelessness, but judicial recognition of the doctrine was belated.[6] In the instant case, recognition occurred at the proper moment with a consequent saving of time, money and effort in the conduct of needless and expensive litigation.

LIMITATION OF ACTIONS—PLEADING, EVIDENCE, TRIAL, AND REVIEW—WHETHER EXPIRATION OF TIME LIMIT FOR COMMENCEMENT OF ACTION SERVES TO BAR THE FILING OF A COUNTERCLAIM FOR WRONGFUL DEATH—The case of *Wilson* v. *Tromly*[1] serves notice on those who would wait until they are sued, before asserting any claim based on the Injuries Act[2] which they might have against the plaintiff, that such delay may well prove fatal to such claim. The action therein arose out of a collision which occurred in Illinois on September 7, 1946, with fatal result to both drivers. On September 4, 1947, within the year permitted by law, suit was filed by the plaintiff as administrator for the estate of the Indiana decedent. The defendant, administrator of the estate of the Illinois decedent, brought no original suit but did, on October 4, 1947, within what would ordinarily be an appropriate time, file an answer containing a counterclaim for wrongful death. A motion to strike the counterclaim was granted on the ground that the latter was barred by law inasmuch as it purported to assert a claim not filed until after the expiration of one year from the date of death.[3] A judgment that the defendant take nothing under the counterclaim was affirmed by the Appellate Court for the Fourth District and, on leave to appeal, the judgment was again affirmed by the Supreme Court. The latter held that a counterclaim for wrongful death, being in effect an independent cause of action, had to be filed within the time limit prescribed by statute, which time limit was a condition of liability and not merely a limitation on the remedy. For that reason, the saving provisions of the Limitation Act[4] were said not to apply.

While the decision is one in which, for the first time in Illinois, it has

5 Ketterer v. Armour & Co., 247 F. 921 (1917); Weihardt v. Krey Packing Co., 264 Ill. App. 504 (1932). See also Lucey v. Harstedt, 270 App. Div. 900, 61 N. Y. S. (2d) 157 (1946), affirmed in 296 N. Y. 810, 71 N. E. (2d) 775 (1947).

6 On the general subject of judicial notice, see 20 Am. Jur., Evidence, § 97.

1 404 Ill. 307, 89 N. E. (2d) 23 (1949), affirming 336 Ill. App. 403, 84 N. E. (2d) 177 (1949), noted in 28 CHICAGO-KENT LAW REVIEW 28-9.

2 Ill. Rev. Stat. 1949, Vol. 1, Ch. 70, § 1.

3 Ibid., Ch. 70, § 2.

4 Ibid., Vol. 2, Ch. 83, § 20.

been held that a counterclaim for wrongful death filed after the year has expired, albeit filed in an action begun in apt time, must be deemed barred, the decision is merely a logical combination of two well recognized principles. The first of such principles is that a counterclaim is to be regarded as a vehicle for the assertion of an independent cause of action.[5] The second declares that a suit brought under the Injuries Act does not come within the class of actions enumerated in the Limitations Act, being *sui generis*, hence must rest on the legislative enactment first mentioned and be governed by the statutory conditions regulating the conduct of such suits.[6] The first statement needs no comment, but, as to the second, some explanation is necessary. The saving provisions of Sections 17 and 19 of the Limitation Act[7] must be read in connection with Section 12 thereof, for that section impliedly limits the scope of the statute to those actions specifically enumerated by expressly excluding the several periods of limitation from applying when "a different limitation is prescribed by statute." It should also be remembered that statutes of limitation are generally considered procedural in character,[8] and may be waived under certain conditions, while statutes of survival are substantive in nature.[9] For that reason, strict compliance with the latter is necessary for they create rights to sue which did not exist at common law. Under no circumstances, therefore, can the provisions of the Limitation Act be said to affect the essential condition imposed by the Injuries Act that suit must be brought within one year. The fact that such action is filed in the form of a counterclaim, even when filed in a suit brought in apt time, will not extend that condition. Such a counterclaim can be sustained only if it is filed within one year from the date of death.

5 Roberts Mine & Mill Co. v. Schrader, 95 F. (2d) 522 (1938); Groton Bridge Co. v. American Bridge Co., 151 F. 871 (1907); Albrecht v. Dillon, 224 Ill. App. 421 (1922); Hoyle v. Carter, 215 N. C. 90, 1 S. E. (2d) 93 (1939); Pennsylvania Co. v. Lynch, 308 Pa. 23, 162 A. 157 (1932).

6 Hartray v. Chicago Railways Co., 290 Ill. 85, 124 N. E. 849 (1919); Carlin v. Peerless Gaslight Co., 283 Ill. 142, 119 N. E. 66 (1918); McFadden v. St. Paul Coal Co., 263 Ill. 441, 105 N. E. 314 (1914); Rhoads v. Chicago & Alton R. R. Co., 227 Ill. 328, 81 N. E. 371 (1907).

7 Ill. Rev. Stat. 1949, Vol. 2, Ch. 83, § 18, permits a defendant to plead a counterclaim barred by the statutes of limitation, while held and owned by him, to any action, the cause of which was owned by the plaintiff or person under whom he claims, before such counterclaim was so barred. Section 20 thereof permits a cause of action which survives to be brought against the administrator of the person against whom such action lay within nine months after the issuing of letters of administration.

8 Crampton v. D. V. Frione Co., 1 F. Supp. 989 (1932); Hillberg v. Industrial Commission, 380 Ill. 102, 43 N. E. (2d) 671 (1942).

9 Ehlrich v. Merritt, 96 F. (2d) 251 (1938); Sanders v. Louisville & N. R. R. Co., 111 F. 708 (1901).

PLEADING—ISSUES, PROOF, AND VARIANCE—WHETHER OR NOT A PLAINTIFF IS ENTITLED TO A JUDGMENT ON A PLEADING SETTING FORTH AN AFFIRMATIVE DEFENSE WHICH, IN EFFECT, OPERATES TO DENY THE ALLEGATIONS OF THE COMPLAINT—The complaint in the recent case of *Central States Cooperatives, Inc.* v. *Watson Brothers Transportation Company, Inc.*,[1] alleged that the plaintiff had leased certain premises to the defendant under a written agreement for a fixed term, which term had expired, and that defendant continued in possession after the expiration date without payment of any rent. Plaintiff sought a judgment for the reasonable rental value of the premises and also for statutory double rent, available in the case of a wilful holdover.[2] The defendant's answer set up, as an affirmative defense,[3] the existence of an oral rental agreement covering the period of the holdover occupation of the premises and admitted liability for the amount of rent specified in such contract, but denied all other allegations of the complaint. The plaintiff moved for and, over objection, received a partial judgment on the pleadings on the basis of such admission of liability.[4] That decision was affirmed by the Appellate Court for the First District on the ground that there could be no escape from the liability to pay the admitted amount. The Supreme Court, having granted defendant leave to appeal, reversed the decision and remanded the cause for further proceedings.

The court, in substance, pointed out that the office of a motion for judgment on the pleadings is to permit the entry of a decision against one who has failed to allege an adequate defense against a declared cause of action. The complaint in the instant case alleged a wrongful holdover and requested appropriate damages, to-wit: reasonable rent. The defendant adequately denied the existence of that particular cause of action by alleging the presence of an oral leasing agreement covering the period of the alleged wrongful possession. It cannot be denied that possession under an agreement negates a wrongful holding over. As nowhere, in the answer, did the defendant admit the particular liability charged to it, the final decision in the case would appear to be the proper one. The case has deeper significance, however, in that it aptly serves to illustrate the principle that one may not have relief under proof without allegation,

[1] 404 Ill. 566, 90 N. E. (2d) 209 (1950), reversing 336 Ill. App. 314, 83 N. E. (2d) 752 (1949), noted in 28 CHICAGO-KENT LAW REVIEW 35-6.

[2] Ill. Rev. Stat. 1949, Vol. 2, Ch. 80, § 2.

[3] Ibid., Vol. 2, Ch. 110, § 167(4), requires the defendant to plead, as an affirmative defense, any matter which would, if not so pleaded, be "likely to take the opposite party by surprise."

[4] Ibid., Ch. 110, § 181, permits the entry of a partial judgment where the defense is "to a part only *of the demand.*" Italics added.

nor under allegation without proof.[5] The necessity for adopting and pursuing a particular theory throughout a course of pleadings has not been nullified despite an apparent abolition of distinctions which heretofore existed between the prior forms of action.[6]

RECORDS—REGISTRATION OF TITLES TO LAND—WHETHER COMPLIANCE WITH THE REVENUE ACT BY A PURCHASER OF REGISTERED REALTY AT A TAX FORECLOSURE SALE OBVIATES THE NECESSITY OF ADDITIONAL COMPLIANCE WITH THE TORRENS ACT—Tax foreclosure proceedings were instituted, in the case of *People* v. *Mortenson*,[1] against realty in Cook County which had been registered under the Torrens Act.[2] Sale of the property was ordered for non-payment of taxes and it was decreed that, upon the expiration of a two-year period of redemption, whoever became the holder of the certificate of purchase would, upon compliance with the provisins of the Revenue Act,[3] be entitled to a deed. One Klopfer, not previously an owner of the property, purchased at the sale and, upon confirmation thereof, received a certificate of purchase. He subsequently proceeded in accordance with the Revenue Act, serving all necessary notices and paying all subsequent taxes levied on the property, but failed to comply with the Torrens Act in that he did not register the certificate of sale within one year from the date of the tax sale.[4] Upon expiration of the redemption period, Kolopfer sought the issuance of a deed to the premises but his application was denied by the county clerk on the ground that he had released his rights by failing to register the certificate of purchase. The Circuit Court of Cook County, still having jurisdiction over the tax foreclosure proceedings, upheld the action of the clerk. Upon direct appeal to the Supreme Court, for questions of freehold and of revenue were involved, the decree was affirmed.

The main contention of the certificate holder was that as he had fully complied with the original order, having proceeded in accordance with the Revenue Act, and because no rights of innocent third parties were involved, his failure to register the certificate of purchase in the Torrens

5 Leitch v. Sanitary District, 386 Ill. 433, 54 N. E. (2d) 458 (1944).

6 Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 155.

1 404 Ill. 107, 88 N. E. (2d) 35 (1949).

2 Ill. Rev. Stat. 1949, Vol. 1, Ch. 30, § 45 et seq.

3 Ibid., Vol. 2, Ch. 120, § 744.

4 Ibid., Vol. 1, Ch. 30, § 119, directs: "The holder of any certificate of sale of registered land . . . shall . . . within one year from the date of any such sale . . . present the same . . . to the registrar . . . Unless such certificate is presented and registered . . . within the time above mentioned, the land shall be forever released from the effect of such sale, and no deed shall be issued in pursuance of such certificate."

office should not act as a forfeiture of his right to a deed. The Supreme Court pointed out, however, that the fundamental legislative intent, at the time of enacting the Torrens Act, was to develop an ideal recording system wherein the interest of any person in a particular piece of realty could be registered in one location. In order to effectuate this purpose it was necessary to force all individuals who might claim title, by reason of tax sale or otherwise, to register their claims within a reasonable period of time. The necessary element of coercion was, of course, to be found in the fact that non-compliance would result in the forfeiture of all right to the realty. While the decision might seem extremely harsh, inasmuch as it inflicts a severe penalty upon one who is called upon to abide by, but fails to observe, more than one legislative requirement, it is clearly consistent with the fundamental objectives of a Torrens system of land registration.

REFORMATION OF INSTRUMENTS—RIGHTS OF ACTION AND DEFENSES—WHETHER ONE BENEFICIARY MAY HAVE A VOLUNTARY DEED IN TRUST REFORMED, AS AGAINST A CO-BENEFICIARY, SO AS TO CORRECT A SCRIVENER'S MISTAKE—In the recent case of *Reinberg* v. *Heiby*[1] it appeared that the donor had, at separate times, acquired two adjacent tracts of land having areas of four acres and twenty acres respectively. He wished the land to go, after his death, to his two daughters, plaintiff and defendant therein, in the form of two individually owned tracts of twelve acres each. To effectuate this purpose, he hired a surveyor to so divide the land and then retained a lawyer to set up a land trust with direction to the trustee, after the donor's death, to make conveyance to the daughters in accordance with his plan of distribution. The daughters were fully informed as to the plan, but the donor's lawyer, when drawing up the trust papers, inadvertently described the lands as they had originally been described when purchased rather than as the two twelve-acre plots referred to in the plat of survey. Upon donor's death, the trustee tendered to plaintiff a deed for only four acres and gave defendant a deed for twenty acres in accordance with the direction of the trust instrument as drawn, at which time the scrivener's mistake was discovered. Plaintiff sued to reform the trust agreement and the deeds to defendant and herself so as to make the same conform to the intention of the donor. The trial court ordered reformation and, on direct appeal to the Supreme Court, the decree was affirmed. The defendant had argued that as the plaintiff had paid nothing, plaintiff had lost nothing by the mistake and hence should fail. The doctrine is well established that a

[1] 404 Ill. 247, 88 N. E. (2d) 848 (1949).

court of equity will not entertain an action by a voluntary grantee to reform a deed for mistake, as against the grantor or anyone claiming under him,[2] for to permit such an action would result in enlarging the bounty of a recipient at the expense of and against the interest of the donor-grantor and would, in a sense, result in compelling specific performance of a promise to make a gift.[3] That doctrine was held inapplicable to the instant case, however, on the ground that the suit was not directed against the donor, who had parted with the entire title to the property, but was more nearly a suit to prevent one voluntary grantee from becoming unjustly enriched at the expense of another voluntary grantee, contrary to the donor's intention. The Illinois court, facing the particular situation for the first time, appropriately corrected the manifest error by limiting the use of the doctrine aforementioned to suits directed against the grantor or those claiming through or under the grantor.

[2] Marvin v. Kelsey, 373 Ill. 589, 27 N. E. (2d) 469, 128 A. L. R. 1295 (1940); Stanforth v. Bailey, 344 Ill. 38, 175 N. E. 784 (1931); Henry v. Henry, 215 Ill. 205, 74 N. E. 126 (1905); Strayer v. Dickerson, 205 Ill. 257, 68 N. E. 767 (1903).

[3] In general, see 45 Am. Jur., Reformation of Instruments, § 28.