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AUTOMOBILES—INJURIES FROM OPERATION, OR USE OF HIGHWAY—WHETHER STATUTORY PROVISION FOR SUBSTITUTED SERVICE ON RESIDENT MOTORIST WHO LATER BECOMES A NON-RESIDENT IS VALID AND POSSESSES RETROACTIVE EFFECT—Plaintiffs, in the case of *Ogdon* v. *Gianakos*,[1] were the administrators of the estate of a decedent who had been killed in an automobile accident occurring in Illinois. The defendant, at the time of the accident, was a resident of the state but, subsequent thereto, became a non-resident. Following the accident, the legislature of the state amended the applicable statute to provide for substituted service of process upon resident motorists who should become non-residents prior to service of summons.[2] The action was instituted after the passage of this amendment and service of process was had in accordance therewith. Defendant did not appear personally, was represented by an attorney appointed by the court, had verdict against him, but secured a judgment notwithstanding the verdict in his favor on motion made for that purpose. The Appellate Court for the Third District reversed this judgment, but it did order the trial court to quash the return on the ground that the statute, as amended, did not possess retroactive effect. On leave to appeal,[3] the Illinois Supreme Court reversed this holding[4] when it concluded that the statute, as amended, was both valid and retroactive in character.

Basing its conclusion on the idea that statutory amendments of the kind in question constitute a valid exercise of the police power and that the consent of the defendant, whether express or implied, is no longer necessary to bring a defendant within the jurisdiction of a trial court, the Illinois Supreme Court appears to have announced a change in the concept supporting service statutes.[5] The erstwhile agency theory, once made the controlling element to save these statutes from constitutional attack, has now been made a yield to a power theory stemming from the mere fact that a plaintiff has suffered an injury arising from the defend-

1 415 Ill. 591, 114 N. E. (2d) 686 (1953), reversing 348 Ill. App. 576, 109 N. E. (2d) 628 (1952).

2 Ill. Laws 1949, p. 1134; Ill. Rev. Stat. 1953, Vol. 2, Ch. 95½, § 23.

3 Granted pursuant to Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 199.

4 The cause was remanded to the trial court for the purpose of procuring a ruling on defendant's motion for judgment notwithstanding the verdict.

5 A similar expression by the United States Supreme Court appears in the opinion in Olberding v. Illinois Central Railroad Co., — U. S. —, 74 S. Ct. 83, 98 L. Ed. (adv.) 7 (1953), reversing 201 F. (2d) 582 (1953), where it was said that the fictitious consent under statutes providing for substituted service would not operate to waive federal venue provisions.

ant's use of the state highway.[6] The court appears to have stood on firmer ground when it declared the provision for substituted service applicable to the defendant, even though passed after the cause of action had arisen, for statutes of this type are procedural in character and the law is clear that no one has a vested right in any particular procedural provision if it is constitutional in all other respects. To say the least, the construction given to the amendment in question effectively blocks another avenue of escape from liability previously open to those who may have used the highways of Illinois to the detriment of its citizens.[7]

DIVORCE—ALIMONY, ALLOWANCES AND DISPOSITION OF PROPERTY—WHETHER A FOREIGN ANNULMENT OF SECOND MARRIAGE FOR IMPOTENCY OPERATES TO REVIVE AN EARLIER OBLIGATION TO PAY ALIMONY—According to the facts of the recent case of *Linneman* v. *Linneman*,[1] plaintiff had secured an Illinois divorce from the defendant who was at that time, among other things, ordered to pay plaintiff periodic alimony until her death or remarriage. Plaintiff subsequently remarried in Illinois and thereafter took up residence in California. Following this remarriage, defendant ceased to pay alimony. About one year later, plaintiff procured a California decree of annulment of the second marriage, based on the impotency of her spouse, and then demanded that defendant resume the payment of alimony to her. Upon his refusal to do so, plaintiff petitioned the Illinois court to hold defendant for his contemptuous disregard of the Illinois decree. This petition was dismissed by the trial court, and the dismissal was affirmed by the Appellate Court for the First District on plaintiff's appeal to it, on the ground the Illinois court was not obliged to give credit to the California decree annulling the second marriage inasmuch as the plaintiff, had she sued in Illinois, would have been entitled to no more than a divorce for the cause alleged. As the alimony obligation had been terminated by the second marriage,[2] the subsequent annulment thereof was deemed insufficient to revive the obligation.

The plaintiff had relied on the recent case of *Sutton* v. *Leib*[3] as authority for the contention that the Illinois court was obliged to give full

[6] As to what constitutes use of the highway, see Brauer Machine & Supply Co. v. Parkhill Truck Co., 383 Ill. 569, 50 N. E. (2d) 836 (1943).

[7] See the recent case of Dart Transit Co. v. Wiggins, 1 Ill. App. (2d) 126, 117 N. E. (2d) 314 (1954), where it was held that the cause of action need not be one sounding in tort. The case also holds that the injured plaintiff, as well as the defendant, may be a non-resident and still have the benefit of the state statute when suing in the jurisdiction where the cause of action arose.

[1] Ill. App. (2d) 48, 116 N. E. (2d) 182 (1953).

[2] See Ill. Rev. Stat. 1953, Vol. 1, Ch. 40, § 19.

[3] 199 F. (2d) 163 (1952). For earlier aspects of the case, see 342 U. S. 402, 72 S. Ct. 398, 96 L. Ed. 448 (1952), noted in 30 CHICAGO-KENT LAW REVIEW 266.

faith and credit to the California annulment. In that case, a Nevada marriage had been annulled by a New York court on the ground that bigamy was involved. The plaintiff there, as in the principal case, thereafter sought to revive an obligation to pay alimony previously decreed by an Illinois court in a divorce action and the United States Supreme Court held that the Illinois court had to give recognition to the New York annulment, resulting in the revival of the obligation to pay alimony. The cited case was, however, held to be inapplicable in that, while bigamy is a common ground for annulment, impotency is such only in certain states and is not so in Illinois.[4]

The narrow interpretation so given to the holding in the Sutton case raised an issue as to whether the law of California or of Illinois should govern with respect to the annulment of the second marriage. The court reasoned, both from Illinois and California authority, that any question as to the validity of the second marriage should be governed by the law of the state where the marriage was celebrated,[5] hence it treated the California action attacking the validity of the Illinois second marriage as being governed by Illinois substantive law. Concluding that annulment was more relief than would be granted in Illinois for impotency, the court achieved the result that it was not bound by the California decree. It appears to have overlooked the thought that the same argument would appear to be true of the Sutton-Leib situation for, while annulments have been granted in Illinois where bigamy has been found present,[6] the legislature has also specified the presence of a prior marriage undissolved as a ground for absolute divorce.[7] If Illinois tests are to be applied in such cases, there is reason to believe that logical distinctions should be drawn between invalid and valid second marriages,[8] with necessary revi-

[4] While impotency is generally considered to be a matter bearing upon capacity to contract a valid marriage, hence an equitable ground for recission, the court appears to treat the action of the Illinois legislature in specifying impotency as a ground for absolute divorce, as described in Ill. Rev. Stat. 1953, Vol. 1, Ch. 40, § 1, as equivalent to a declaration that such marriages are valid in inception. While they are nowhere considered to be absolutely void, they should be treated as being voidable, at least, because of the fraud perpetrated on the innocent spouse.

[5] See Reifschneider v. Reifschneider, 241 Ill. 92, 89 N. E. 255 (1909), and Cal. Civ. Code, § 63.

[6] Hunt v. Hunt, 252 Ill. App. 490 (1929).

[7] Ill. Rev. Stat. 1953, Vol. 1, Ch. 40, § 1, states: "In every case in which a marriage has been . . . contracted and solemnized . . . and it shall be adjudged . . . that either party . . . had a wife or husband living at the time . . . it shall be lawful for the injured party to obtain a divorce and dissolution of such marriage contract."

[8] In Gaines v. Jacobsen, — App. Div. —, 127 N. Y. S. (2d) 909 (1954), another Sutton-Leib situation, the court drew the only logical conclusion it could with respect to the efficacy of a second marriage based on a Nevada divorce, but nevertheless came up with the result that the annulment thereof did not revive an obligation to provide for support which rested on private agreement rather than on a judicial decree. Dore, P. J., wrote a dissenting opinion.

sion being made in the statute on the basis of that distinction. At present, it confuses those cases in which divorce would be proper with those wherein annulment, rather than divorce, would be more appropriate.

INSURANCE—ACTIONS ON POLICIES—WHETHER PROVISION IN AUTOMOBILE POLICY LIMITING INSURER'S LIABILITY TO CASES IN WHICH CLAIMS HAVE BEEN FINALLY DETERMINED PREVENTS RECOVERY BY INSURED FOR SUMS PAID UNDER A VOLUNTARY SETTLEMENT—In the recent case of *Piper* v. *State Farm Mutual Automobile Insurance Company,*[1] the insured sought reimbursement from the insurer for sums paid out under a settlement, voluntarily effected, with persons who had been injured in a collision with the insured automobile. The insurer denied liability under the policy[2] but particularly relied on a policy provision to the effect that no action should lie against the company unless, as a condition precedent thereto, the amount of the insured's obligation to pay should have been finally determined, either by judgment against the insured after an actual trial or by written agreement of the insured, the claimant, and the company. A trial court judgment for the insured was reversed upon appeal when the Appellate Court for the Fourth District, without the benefit of any earlier Illinois precedent, held the provision in question to be unequivocal, valid, and enforcible, hence served as a bar to the present action.

While such a policy provision as the one here involved has never before been passed upon by a court of review in Illinois, the Appellate Court was not dealing with an entirely novel legal situation for other courts, in a variety of jurisdictions, have previously considered provisions of this character.[3] It is true that there was some variation in the type of insurance policies concerned and in the phraseology of the particular provisions involved but, in each of these earlier cases, the purpose of the provision was clearly one designed to limit the insurer's liability to situations in which claims against the insured had been finally determined. The courts there concerned acted unanimously to sustain such provisions, declaring them to be not only valid and enforceable but also essential

[1] 1 Ill. App. (2d) 1, 116 N. E. (2d) 86 (1953).

[2] For an additional defense, the company alleged that the policy was not in force, having been cancelled two days prior to the collision for nonpayment of premiums. The insured appeared to have reinstated the policy two days after the accident but without giving notice to the company of the fact of an accident. This defense was not discussed as the court based its decision on the provision contained in the policy.

[3] See, for example, Thacher v. Aetna Accident & Liability Co., 287 F. 484, 28 A. L. R. 1280 (1923); Royal Indemnity Co. v. Jenkins Construction Co., 248 Ky. 839, 60 S. W. (2d) 105 (1933); Marvel Heat Corporation v. Travelers Indemnity Co., 325 Mass. 682, 92 N. E. (2d) 233 (1950); Kennelly v. London Guarantee & Accident Co., 184 App. Div. 1, 171 N. Y. S. 423 (1918); Wisconsin Zinc Co. v. Fidelity & Deposit Co., 162 Wis. 39, 155 N. W. 1081 (1916).

to the financial stability of insurance companies. As such companies do not undertake to recognize liability, or to pay, simply because claims are presented, and must refuse so to do in order to protect themselves against being forced to pay excessive damages, the decision in the instant case should not prove to be a surprising one.

PARTITION—ACTIONS FOR PARTITION—WHETHER A NINETY-NINE YEAR LEASEHOLD IS SUBJECT TO PARTITION IN ILLINOIS—The Appellate Court for the First District, in the case of *Pierce* v. *Pierce*,[1] was presented with the necessity of deciding whether an interest in a ninety-nine year leasehold would be of sufficient legal stature as to be contained within the meaning of the phrase "lands, tenements, or hereditaments," used in the Illinois Partition Act to describe interests which might be partitioned by judicial proceedings.[2] The plaintiff, owner as tenant in common of a fractional interest in the leasehold in question, instituted proceedings for partition and named the remaining tenants in common as defendants. Upon motion of these defendants, the lower court dismissed the complaint for want of equity on the ground that the quoted phrase referred to freehold interests whereas a lease, regardless of the length of the term, was personalty, hence not subject to partition under the statute. On appeal, the Appellate Court reversed and remanded this holding, electing not to follow historic definitions but instead to recognize that long-term leases had become a sufficiently common method of land holding as to be afforded the stature of real estate for this purpose.

The court, in the absence of any Illinois precedent squarely on the point, based its decision on what it determined the legislative intent to have been. In so doing, it recognized the fact that the strict, technical, feudal definition of the term "real estate," as defined by Coke[3] and Blackstone,[4] has not been followed for all purposes in Illinois, both by statute and by decision. In support of this fact, the court pointed to the statute dealing with conveyances wherein chattels real[5] are included within the definition of "real estate,"[6] as well as to the Judgments and Decrees Act which defines real estate as including leasehold estates.[7] Faced with the

1 351 Ill. App. 336, 115 N. E. (2d) 107 (1953). Leave to appeal has been granted.

2 Ill. Rev. Stat. 1953, Vol. 2, Ch. 106, § 44.

3 1 Co. Litt., 219.

4 2 Bl. Com., 386.

5 The case of Shedd v. Patterson, 312 Ill. 371, 144 N. E. 5 (1924), declares that a leasehold estate for a long term of years is a chattel real to be classed as real estate. But see Orchard v. Wright-Dalton-Bell-Anchor Store Co., 225 Mo. 414, 125 S. W. 486 (1909).

6 Ill. Rev. Stat. 1953, Vol. 1, Ch. 30, § 37.

7 Ibid., Ch. 77, § 3.

obvious argument that, if the legislature had intended to include leaseholds as being within the purview of the statute in question, it would have done so expressly, as it had done in other instances, the court stated that if the fact had been called to the attention of the legislature, as it had been at other times, the legislature would, in all probability, have expressly provided for this inclusion.

Here is probably the weakest point in the decision, but it is by no means fatal to the argument in view of the modern trend away from narrow historic terminology. As an example of state policy in this regard, the court cited the case of *McIlvaine* v. *Foreman*,[8] one in which the trustees over a ninety-nine year leasehold had filed a suit asking partition of their interests. Although the case was decided against the petitioners on another point,[9] the fact that they had a sufficient interest to sustain their action was, by strong implication, taken for granted.[10] Despite a remarkable absence of precedent supporting the right of a tenant for years to bring an action for partition against his co-tenant, some encyclopedias and at least one court have spoken of this idea as being more than a mere possibility.[11]

It should be noted, however, that the court was careful to point to the fact that the present action was one in chancery and that it would be inequitable to hold otherwise than as it did. If it should be faced with a situation in which there was no statutory basis for any enlargement upon archaic distinctions in the definition of real property, it is likely the court would feel constrained to follow such older definitions, any feeling of equity to the contrary, so the instant case should be deemed to be one of limited scope.

PLEADING—SIGNATURE AND VERIFICATION—WHETHER OR NOT PERJURY MAY BE ASSIGNED ON A VERIFIED ANSWER ALTHOUGH THE SAME WAS NOT REQUIRED TO BE VERIFIED—In the recent case of *Loraitis* v. *Kukulka*,[1] a proceeding instituted on an unsworn complaint to set aside a fraudulent conveyance, the defendant filed a denial answer which, although not re-

[8] 292 Ill. 224, 126 N. E. 749 (1920).

[9] The lease was held void as being in violation of a statute interpreted by the court to forbid the formation of a corporation for the purpose of acquiring real estate for investment.

[10] See also Imperial Building Co. v. Chicago Open Board of Trade, 238 Ill. 100, 87 N. E. 167 (1908), where the court recognized that a ninety-nine year leasehold was to be considered real estate for some purposes and, by implication, might be subject to partition.

[11] Field v. Leiter, 16 Wyo. 1 at 37, 90 P. 378 at 386 (1907). See also 68 C. J. S., Partition, § 27; 40 Am. Jur., Partition, § 109.

[1] 1 Ill. (2d) 533, 116 N. E. (2d) 329 (1953).

quired to be verified,[2] was in fact verified by the defendant. Thereafter, plaintiff petitioned for the taking of a deposition from the defendant who first unsuccessfully moved to dismiss the petition and then refused to answer the questions propounded on the ground that, if he answered such questions, he might subject himself to a possible prosecution for perjury. For this refusal, he was adjudged guilty of contempt and ordered confined in jail until he did answer. On direct appeal by defendant to the Supreme Court of Illinois,[3] that court affirmed the order when it held the defendant was not justified in refusing to answer because (1) he had effectively taken an oath although not obliged to do so, and (2) had voluntarily given up all privilege to remain silent by his act in filing the answer in question.

No question can be made over the fact that a person who wilfully swears to a civil pleading, knowing it to contain false statements with regard to material aspects of the case, thereby exposes himself to a prosecution for perjury,[4] as well as other possible consequences,[5] provided the pleading be one which, by law, the party was bound to verify under oath.[6] The exact point here concerned, however, one dealing with the effect to be given to a verified answer when verification was not positively required by law, goes beyond the fundamental premise mentioned and treats with the consequence to be attached when the pleading is one which may, rather than must, be verified. It has elsewhere been held that, in cases dealing with the verification of initial pleadings, the fact that a party is free to swear thereto or not is not material to the issue of perjury if, in fact, a false oath is taken for the pleading is then likely to possess an added effect not true of unsworn pleadings.[7] Despite this, there are cases achieving a contrary result where the false oath has been taken in connection with a subsequent pleading, such as in relation to an answer, provided it could be said that the verification so given added nothing to the quality of the pleading or the record.[8] The instant case, unique in Illinois, accepts the first of these two ideas as the basis for the indicated result. That result would seem to be a justifiable one inasmuch as, in this state,

2 See Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 159(1).

3 Direct appeal was deemed to be proper inasmuch as the defendant claimed the order violated constitutional rights guaranteed to him by the Fourth, Fifth and Fourteenth Amendments to the United States Constitution and by Ill. Const. 1870, Art. II, §§ 2 and 6.

4 Ill. Rev. Stat. 1953, Vol. 1, Ch. 38, § 473.

5 Ibid., Vol. 2, Ch. 110, § 165.

6 Ibid., Vol. 2, Ch. 110, § 159, specifies the instances wherein sworn pleadings in civil matters are required.

7 See People v. Godines, 17 Cal. App. (2d) 721, 62 P. (2d) 787 (1936), and Lappley v. State, 170 Wis. 356, 174 N. W. 913, 7 A. L. R. 1279 (1919).

8 The cases so holding are collected in the opinion in People v. Millsap, 85 Cal. App. 732, 260 P. 378 (1927).

the introduction of a sworn pleading at any point in the chain, whether verified under compulsion or not, possesses the effect of forcing the opponent to verify any responsive pleading.

RELEASE—PLEADING, EVIDENCE, TRIAL, AND REVIEW—WHETHER JURY, UNDER DUTY TO FIX DAMAGES IN A TORT ACTION, IS ENTITLED TO LEARN OF AMOUNT PAID FOR COVENANT NOT TO SUE—The method to be pursued in fixing the measure of damage in a personal injury action resting on the Illinois Dram Shop Act[1] became the subject of consideration in the case of *De Lude* v. *Rimek*.[2] Plaintiff had been injured in an automobile collision between his car and one driven by another who had, allegedly, become intoxicated on liquor sold him by the defendants. A settlement of the common low action had been made in the form of a covenant not to sue, which fact was pleaded by defendants in their answer. Thereafter, over objection, the existence of this covenant was established in the presence of the jury at the trial of the case. A verdict of not guilty followed and judgment in the trial court ran against the plaintiff. On his appeal, the Appellate Court for the First District held it was prejudicial error to permit the jury to learn of the covenant and a new trial was granted. The court acknowledged the right of the defendants to have the amount paid for the covenant not to sue deducted from the damages awarded to the plaintiff but said that it was the duty of the trial judge to make this adjustment as a jury would be likely to be prejudiced if it was permitted to learn of a substantial recovery from another person for the same injury.

The right of a defendant to have damage reduced correspondingly when a co-tortfeasor has paid plaintiff for a covenant not to sue for injury arising from the same circumstance may be said to have been settled by the case of *Aldridge* v. *Morris*.[3] In that case, however, the dictum was expressed that it would be proper to submit to the jury not only the evidence relating to such a payment but also an instruction informing the jury as to its right to consider such a payment in arriving at the verdict. Since the holding therein, the principle of reduction has been acknowledged in several other cases but the actual method utilized in making the adjustment has varied. In *Curtis* v. *City of Chicago*,[4] for example, on reversal of the judgment for trial court refusal to reduce damages accordingly, the trial judge was directed to reduce the judgment by an amount equal to that paid for the covenant not to sue. In the next case, that of *New York*,

1 Ill. Rev. Stat. 1953, Vol. 1, Ch. 43, § 135.

2 351 Ill. App. 466, 115 N. E. (2d) 561 (1953).

3 337 Ill. App. 369, 86 N. E. (2d) 143 (1949), noted in 27 CHICAGO-KENT LAW REVIEW 313. Leave to appeal therein was denied.

4 339 Ill. App. 61, 89 N. E. (2d) 63 (1949).

Chicago & St. Louis Railroad Company v. *American Transit Lines, Inc.*,[5] a reduction in the amount of damages was permitted upon a petition after verdict. The views expressed therein were rejected in the still later case of *Hyde* v. *Montgomery Ward & Company, Inc.*,[6] decided by the Appellate Court for the Third District, which returned to the idea that it would be error not to permit the jury to hear of the existence of the covenant and to allow them to mitigate the damage accordingly.[7] The author of a dissenting opinion in the last mentioned case spoke for the same court when it decided the appeal in *Smith* v. *Medendorp*.[8] The plaintiff there, in the complaint, admitted that the defendant was entitled to have the sum paid for a covenant not to sue considered by the jury in arriving at the verdict. No issue was made on the point at the trial but, after verdict, a motion to reduce the verdict by the sum paid for the covenant was made and overruled and, on appeal, this action was affirmed on the ground the failure to make an issue with respect to the payment was fatal to the motion.[9]

The instant decision, in the main, follows these earlier cases in recognizing the right of defendant to have the damages adjusted to correspond with the amount paid for the covenant not to sue. It departs from them, however, in that it considers the fact that a jury could be prejudiced either for or against a plaintiff who has already recovered something for or on account of the very injuries of which he complains. To avoid that prejudice, it makes the trial judge the mathematician provided no issue of fact arises concerning the presence of the covenant itself or as to the amount paid therefor. If such an issue were to arise the jury would likely have to be informed, but then the possibility of prejudice could not be avoided. That possibility could be minimized if future covenants were to be taken in individual rather than joint form and if each covenant were drafted so as to specify the actual amount paid. In that way, provided the defendant raises the point by answer and moves for allowance of credit prior to judgment, justice could be done to all concerned.

5 339 Ill. App. 282, 89 N. E. (2d) 858 (1949), noted in 29 CHICAGO-KENT LAW REVIEW 361. The cause was reversed, for other reasons in 408 Ill. 336, 97 N. E. (2d) 264 (1951).

6 343 Ill. App. 388, 99 N. E. (2d) 382 (1951). The defendant there had pleaded the existence of the covenant in the answer but this allegation had been stricken on motion. A petition after judgment, seeking comparable relief, was also denied by the trial court.

7 An important fact issue was also presented in that case. The covenant there concerned had been executed by both the plaintiff and his wife in return for a single stated consideration paid to them. The jury would be obliged first to ascertain the portion of the consideration attributable to the plaintiff's cause before a deduction could be made.

8 343 Ill. App. 512, 99 N. E. (2d) 571 (1951).

9 The case of Burns v. Stouffer, 344 Ill. App. 105, 100 N. E. (2d) 507 (1951), would appear to suggest that, if the covenant is given to one defendant during the trial, the other defendant should seek permission to file a supplemental answer in order to lay the foundation for proof with respect thereto.

THEATERS AND SHOWS—LIABILITIES FOR INJURIES TO PERSONS ATTENDING—WHETHER OR NOT COMBINATION OF UNLIGHTED AISLE AND PRESENCE OF DEBRIS THEREIN RENDERS THEATER OWNER LIABLE FOR INJURY SUSTAINED BY PATRON—The slovenly habits of certain modern movie theater patrons would appear to have been the cause of the novel tort question presented in the recent case of *Davis* v. *Theatre Amusement Company*.[1] The plaintiff there concerned had, as a patron, entered a theater owned by the defendant and, after watching the movie for about an hour, developed a headache and decided to leave. As he was proceeding up the unlit center aisle toward the door, he slipped on an unknown object on the aisle floor and fell forward, striking his chin on the floor and suffering a permanent injury. He based his action on the theory that the defendant was negligent in failing to have a light on in the aisle and in permitting the accumulation of debris therein. Despite defendant's contention that a moving picture house must, of necessity, operate in partial darkness, so the lack of bright illumination could not be said to constitute negligence, the trial court granted judgment on a verdict in plaintiff's favor. That judgment was affirmed, on defendant's appeal, by the Appellate Court for the First District when it concluded that the patron was entitled to have enough light to be able to observe the condition of the aisle floor as he moved about inside the premises.

It does not appear that the precise factual situation presented in the instant case has been passed upon before in Illinois, but the legal issue is similar to the one presented in the case of *Gibbons* v. *Balaban & Katz Corporation*.[2] It was there held that it was the duty of the owner of the theater to exercise reasonable care to light the aisles and stairways so that a patron might safely enter or leave the theater while the performance was in progress. This view was enlarged upon in the later case of *Crowley* v. *Bugg*.[3] The court there stated that, even though it was the presence of a child in the aisle of a darkened theater which caused the plaintiff to fall, that fact did not excuse the defendant from the duty imposed upon him by law to keep and maintain the aisles of the theater in a reasonably safe condition. Distinguishing the present case from those cited on defendant's behalf[4] by pointing out that, in the instant case, the jury was entitled to find from the evidence that the cluttered aisle in question was in total darkness, whereas it had been shown in the other cases that a degree of

1 351 Ill. App. 517, 115 N. E. (2d) 915 (1953). Leave to appeal has been denied.

2 242 Ill. App. 524 (1926).

3 292 Ill. App. 210, 10 N. E. (2d) 678 (1937).

4 See Rosston v. Sullivan, 278 Mass. 31, 179 N. E. 173 (1932); Falk v. Stanley Fabian Corp., 115 N. J. L. 141, 178 A. 740 (1935); Beck v. Stanley Company of America, 355 Pa. 608, 50 A. (2d) 306 (1947).

illumination of the type common to motion picture theaters was present, the court proceeded to reach a logical extension in the holdings in the earlier Illinois cases. It is now apparent that, if theater owners will operate concession booths with a consequent increase in the possibility of an accumulation of debris, they must expect to suffer an enlargement in their legal responsibilities as the price for enlargement in their business opportunities.

VENDOR AND PURCHASER — RIGHTS AND LIABILITIES OF PARTIES — WHETHER OR NOT A BONA FIDE PURCHASER FROM BENEFICIARIES UNDER A PROBATED WILL IS TO BE PROTECTED AGAINST CLAIMS OF A SUBSEQUENTLY DISCOVERED WIDOW OF THE TESTATOR—Recently, in *Petta* v. *Host*,[1] the Illinois Supreme Court was confronted with a battle of equities between a bona fide purchaser from the beneficiaries named in a probated will and a subsequently discovered heir. The novel circumstances arose because the plaintiff had been deserted in her home state by her husband who thereafter moved to Illinois, remarried without obtaining a divorce, and then died seized of Illinois land. Proceedings were had to probate the husband's will and estate, but no mention was made therein of plaintiff's existence. After the estate had been closed, the land in question was sold and eventually came into the hands of the defendant. Plaintiff, then learning of her husband's death, promptly took action to amend the probate record, to renounce the terms of the will, and to claim an interest in the realty by means of a suit for partition.[2] The trial court rendered judgment adverse to the plaintiff and, upon direct appeal,[3] the Supreme Court affirmed. While the court stated that the plaintiff had an equal equity with the defendant, hence was equally entitled to protection, it based the decision on the public interest involved in protecting the merchantability of titles passing through probate proceedings, particularly applicable in cases where the public record failed to give notice of a valid outstanding claim against the property.

While the exact factual situation appears not to have arisen previously in Illinois, the court followed an analogous line of prior decisions, rendered in this state and elsewhere. It has been established, in a majority of other jurisdictions where this problem has been encountered, that the title of a

1 1 Ill. (2d) 293, 115 N. E. (2d) 881 (1953).

2 The case also involved a dispute over a parcel acquired by the husband but sold by him some three years prior to his death. It was held, with respect thereto, that the right of the widow to claim common law dower had lapsed for failure to take affirmative action to claim the same within the time fixed by Ill. Rev. Stat. 1953, Vol. 1, Ch. 3, § 171.

3 Direct appeal, because a freehold was involved, was based on Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 199.

purchaser who buys in good faith for a valuable consideration is not to be affected by a subsequent revocation or amendment of the probate record for he is said to occupy the position of a bona fide purchaser for value and is to be protected as such.[4] Much the same rule was applied in Illinois not long ago to protect a bona fide purchaser from the effect of a subsequently discovered will which operated to divest the vendors of their supposed title.[5] Although the instant case does not deal with a situation wherein the probate of a will has been revoked, or one in which a subsequently discovered will is produced for probate, the law announced therein is but a logical extension of the doctrine designed to protect bona fide purchasers who have relied on a public record which, being fair on its face, gives no notice of a possible equity or title in favor of a third person.

WILLS—CONSTRUCTION—WHETHER A NO-CONTEST CLAUSE IN A WILL SUPPORTS FORFEITURE OF A LEGACY GIVEN TO A BENEFICIARY WHO FAILS TO DEFEND A CONTEST OF THAT WILL—A significant decision regarding the interpretation to be given to a no-contest provision in a will was recently rendered in the case of *Brunt* v. *Osterlund*.[1] The case was one in which certain legatees, named in a bequest which contained a forfeiture provision for contest of the will, had allowed a default judgment to be entered against them in an otherwise unsuccessful will contest suit. The executrix, on final report, contended that the legatees had forfeited their bequest because of this default. The legatees, under an answer denying that a right of forfeiture existed, convinced the probate court that they were entitled to the legacy and also prevailed on a trial *de novo* in the circuit court.[2] On further appeal by the executrix, the Appellate Court for the Second District also affirmed the decision, holding that a mere failure to answer or defend a will contest suit does not produce a forfeiture of a legacy inasmuch as customary provisions for forfeiture, sometimes found in wills, usually require the taking of affirmative action against the will before becoming operative.

Inasmuch as, prior to the instant decision, no Illinois reviewing court appears to have had occasion to consider the precise problem here involved, the court first turned for solution of the problem to the language used by the testator. In that connection, it has been said that the issue as to whether or not the conduct of a beneficiary amounts to a breach of the no-contest clause must depend on the particular language used by the

4 See annotation in 26 A. L. R. 270.

5 Eckland v. Jankowski, 407 Ill. 263, 95 N. E. (2d) 342 (1950), noted in 29 CHICAGO-KENT LAW REVIEW 265 (1951).

1 351 Ill. App. 556, 115 N. E. (2d) 909 (1953).

2 See Ill. Rev. Stat. 1953, Vol. 1, Ch. 3, §§ 484 and 487.

testator.[3] As the provision is usually one calling for forfeiture in case of a "contest" of the will, which ordinarily operates as a condition subsequent,[4] the court turned to the cases of *Clark* v. *Bentley*[5] and *Lobb* v. *Brown*[6] for assistance in finding the meaning intended by the testator. In the first of these cases, the will provided for forfeiture in case of a contest, alteration, or change in the provisions of the will. It was held that the making of deeds by the devisees, conveying their interests in the real estate devised in a fashion different than the testator's plan of distribution, would not work a forfeiture inasmuch as the testator contemplated some form of judicial, as contrasted with private, action.

The second case, more nearly in point, held that a failure to deny a charge of undue influence, made in a will contest suit, was insufficient to show that the legatees were aiding in the contest, hence would not work a forfeiture. It would seem to follow, then, that a mere failure to defend or the submission to an order of default should not be treated as a "contest" of the will for these are forms of negative rather than affirmative conduct. In that light, the holding in the instant case must be regarded as a correct and logical one.

[3] Cassem v. Kennedy, 147 Ill. 660, 35 N. E. 738 (1893).
[4] Nevitt v. Woodburn, 190 Ill. 283, 60 N. E. 500 (1901).
[5] 398 Ill. 535, 76 N. E. (2d) 438 (1948).
[6] 208 Cal. 476, 281 P. 1010 (1929).