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## Property - Survey of Illinois Law for the Year 1946-1947

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mitting the exercise of jurisdiction if and when it could be acquired.<sup>31</sup> The net result would have been that "no decree would ever be final on the question of alimony short of an express waiver, a denial of alimony, or a recital of alimony or property settlement."<sup>32</sup> The entire series of bills did contain many desirable features beside the one mentioned, so it is to be hoped that they will be re-enacted after elimination of the unconstitutional features. One measure which appears to have survived grants to the court the power to restrain any third person, party to the suit, from doing or threatening any act calculated to obstruct a reconciliation of the parties to the marriage.<sup>33</sup>

## VI. PROPERTY

### REAL AND PERSONAL PROPERTY

By far the most important contribution to the law of real property was made by legislative action in adopting a new act dealing with rights of entry and possibilities of reverter such as arise after conveyance of a fee simple on condition subsequent.<sup>1</sup> The general purpose of that statute is to provide a means by which such rights may be released or destroyed, a purpose the desirability of which cannot be questioned, particularly by any practitioner who has been faced with passing upon the validity of a title encumbered thereby. Issues will undoubtedly arise as to the constitutionality of such statute insofar as it may be applied to deeds executed before the enactment thereof. In that respect, reference is made to an excellent discussion on the subject appearing elsewhere which contains so complete a treatment of the entire subject that repetition would be pure superfluity.<sup>2</sup>

Except for that statute, debatable legal questions growing out of ownership of land or rights therein have been relatively

<sup>31</sup> Laws 1947, p. 818, S. B. 417; Ill. Rev. Stat. 1947, Ch. 40, § 19.

<sup>32</sup> See Goldblatt, "Matrimonial Law," 36 Ill. B. J. 104 at 105. A reading of this article is recommended.

<sup>33</sup> Laws 1947, p. 817, S. B. 421; Ill. Rev. Stat. 1947, Ch. 40, § 13.

<sup>1</sup> Laws 1947, p. 659, S. B. 347; Ill. Rev. Stat. 1947, Ch. 30, § 37b et seq.

<sup>2</sup> See Denissen, "The Illinois Reverter Act," 36 Ill. B. J. 263-71.

few in number. In *Bruce v. McCormick*<sup>3</sup> the court refused to deviate from the rule that the statutory right of a surviving spouse to take dower in the lands of the deceased spouse<sup>4</sup> does not confer any estate or title in the land itself, prior to an election to claim such dower right,<sup>5</sup> hence a conveyance by the surviving spouse within the ten-month period and before election has occurred passes no interest in the land. In that case, the attempted conveyance was made by quit-claim deed. Whether the same result would have been achieved had a warranty deed been used is a matter of speculation.<sup>6</sup>

An issue of some importance to holders of easements was dealt with in *Cook County v. Vander Wolf*<sup>7</sup> wherein the public authority sought to acquire several adjacent tracts of land for the laying out of a state-aid highway. One of the defendants sought an assessment of the amount of damage accruing to that portion of the property not taken. A verdict was obtained on which the particular defendant then sought judgment in his favor, but the public authority contended that as there were reciprocal easements for right of way in favor of adjoining owners over the land in question this demand should not be granted. The trial court adopted the county's argument and ordered the judgment paid to the county treasurer for the benefit of the owner or owners of the land as their interests might appear. Upon appeal, the Illinois Supreme Court affirmed that decision. It did say, however, that one "holding an easement in a strip of land as a right of way, merely, sustains no damage in consequence of the taking of the land for a street. When the land is taken and maintained as a street by the public authorities the owner's easement of a way is not impaired but still exists, as he has all the right of way before enjoyed."<sup>8</sup> For that reason, the owner of the right of way was

<sup>3</sup> 396 Ill. 482, 72 N. E. (2d) 333 (1947), noted in 25 CHICAGO-KENT LAW REVIEW 324.

<sup>4</sup> Ill. Rev. Stat. 1947, Ch. 3, § 162.

<sup>5</sup> *Ibid.*, § 171.

<sup>6</sup> Ill. Rev. Stat. 1947, Ch. 30, § 6. See also 25 CHICAGO-KENT LAW REVIEW 324, particularly pp. 327-8.

<sup>7</sup> 394 Ill. 521, 69 N. E. (2d) 256 (1946). Murphy, J., dissented without opinion.

<sup>8</sup> 394 Ill. 521 at 526, 69 N. E. (2d) 256 at 259.

said to have no interest in the compensation fund provided as a substitute for the property taken.

When conveyance pursuant to contract is refused, the purchaser seeking specific performance has, for a long time, been faced with the rule that he can be granted no more than the vendor has to convey and, if the vendor's wife does not join in the contract or agree to release her inchoate dower right, the purchaser cannot be given a clear title nor is he entitled to an abatement in the price equal to the value of such dower right.<sup>9</sup> The argument was advanced, in *Pearson v. Adams*,<sup>10</sup> that the provision in the present Probate Act establishing a means for acquiring an outstanding inchoate dower interest<sup>11</sup> had served to change the public policy of the state and thereby nullify a long line of decisions against the right to compel specific performance with abatement in price. The court, however, very properly held that a provision dealing with involuntary sales on execution and the like could have no application to voluntary transactions such as the one before it. It therefore declined to change the rule in question. In another specific performance case, that of *Kozlowski v. Mussay*,<sup>12</sup> the court was obliged to determine the size of the estate to be granted under a contract calling for the reconveyance of land by a warranty deed to the original grantor "personally but not to her heirs or administrators," if the original grantor should request such reconveyance during her natural lifetime. The court decreed that the defendants should convey the fee simple title which they had received, rather than just a life estate, following the theory that a grant to a named person will convey a fee in the absence of express limitation<sup>13</sup> and the evident purpose of the restrictive language in the contract was simply to permit the grantees to retain the land if reconveyance had not been requested by the grantor during her lifetime.<sup>14</sup>

<sup>9</sup> *Humphrey v. Clement*, 44 Ill. 299 (1867).

<sup>10</sup> 394 Ill. 391, 68 N. E. (2d) 777 (1946), noted in 35 Ill. B. J. 269.

<sup>11</sup> Ill. Rev. Stat. 1947, Ch. 3, § 189.

<sup>12</sup> 395 Ill. 81, 69 N. E. (2d) 338 (1946).

<sup>13</sup> Ill. Rev. Stat. 1947, Ch. 30, § 8.

<sup>14</sup> Minor statutory revisions affecting real property may be found. There has been an increase in the fees properly chargeable by the Registrar of Titles, Laws

Two cases dealing with doctrines of personal property are worthy of mention. One might infer that proprietors of safety deposit vaults in Illinois have exercised unusual precautions to protect their customers against the loss of valuables from carelessness, for the absence of reported cases in this state dealing with the right to control any such property points in that direction. That fact alone makes the decision in *Pyle v. Springfield Marine Bank*<sup>15</sup> particularly significant for it was there held for the first time in this state that, as between the proprietor of the vault and the discoverer of a lost bond picked up from the floor of a customer's booth, the right to possess the property until the true owner could be located was in the vault proprietor. There does not, however, appear to be any critical analysis in that case of a possible distinction between the property which can be said to be lost and that which has merely been mislaid, the former going to the discoverer while the latter being awarded to the owner of the premises upon a theory of prior possession growing out of an implied bailment. Instead, the court placed emphasis on the degree of control exercised over the premises in which the discovery took place, thereby limiting the discoverer's right to control the property to situations where the finding occurs in a "public" place. Since neither of the litigants was entitled to the lost article as his own,<sup>16</sup> the decision might be justified on the ground that the loser would be more apt to regain his property if the same was left in the control of the owner of the premises where the loss occurred.

The only recognized basis for a common-law lien on personal property was that the lien claimant had, by his skill and labor, enhanced the value of the property in question. Custom might, however, expend the operative area in which a lien might be

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1947, p. 655, H. B. 820, Ill. Rev. Stat. 1947, Ch. 30, § 104 and § 105, and the Land Registration Act has also been amended to delete any reference to "ex-officio" recorders serving as registrars of title: Laws 1947, p. 657, H. B. 629, Ill. Rev. Stat. 1947, Ch. 30, §§ 45-6. Under an addition to the statute relating to transfers of land between municipalities, it is now possible to convey to the state and for the state to negotiate to remove any restrictions on the title: Laws 1947, p. 661, S. B. 65, Ill. Rev. Stat. 1947, Ch. 30, § 158a.

<sup>15</sup> 330 Ill. App. 1, 70 N. E. (2d) 257 (1946), noted in 35 Ill. B. J. 419.

<sup>16</sup> Ill. Rev. Stat. 1947, Ch. 50, § 28.

claimed.<sup>17</sup> It was held, in *Deitchman v. Korach*,<sup>18</sup> that a salesman working on commission would acquire no lien for his compensation on samples furnished by his employer, for he could meet neither of the tests suggested and the contract of employment was silent on the point, although it did stipulate that the ownership of the samples was retained by the employer and the goods were to be used for display purposes only.

#### LANDLORD AND TENANT

A perusal of the more significant cases falling within this category would indicate that the problems respecting the nature of the notice necessary to terminate the relationship of landlord and tenant are not all settled. In *Ziff v. Sandra Frocks, Inc.*,<sup>19</sup> for example, the problem posed was one concerning the propriety of serving a notice by registered mail. The tenant, who admitted receiving the notice, contended that as the notice was not served personally it was ineffective.<sup>20</sup> The court held otherwise, pointing out that the statute is not mandatory and that alternative means of giving notice are permissible so long as they accomplish statutory objectives.<sup>21</sup> In *Heun v. Hanson*,<sup>22</sup> the prime question was one as to the extent of notice necessary to terminate the tenancy. The original lease to the premises there concerned had been entered into some thirteen years prior and ran for a term of eleven months. At the expiration thereof the tenant continued to occupy the premises and to pay rent down to the time of bringing suit.

<sup>17</sup> *Rushforth v. Hadfield*, 7 East 224, 103 Eng. Rep. 86 (1806).

<sup>18</sup> 330 Ill. App. 365, 71 N. E. (2d) 367 (1947).

<sup>19</sup> 331 Ill. App. 353, 73 N. E. (2d) 327 (1947). See also the companion case of *Sandra Frocks, Inc., v. Ziff*, 397 Ill. 497, 74 N. E. (2d) 699 (1947) which was a suit by the tenant to compel specific performance of an option to convey the leased premises. The decision thereon accords with the action taken in the case noted.

<sup>20</sup> Ill. Rev. Stat. 1947, Ch. 80, § 10, provides: "Any demand *may* be made or notice served by delivering a written or printed . . . copy thereof to the tenant. . . ." Italics added.

<sup>21</sup> See also *Goraway v. Sheley*, 331 Ill. App. 181, 72 N. E. (2d) 632 (1947), abst. opin. Leave to appeal denied. The court in the instant case quoted from the opinion therein by saying: "The statute does not purport to restrict the making of a demand or the service of a notice to the particular methods stated in the statute."

<sup>22</sup> 331 Ill. App. 82, 72 N. E. (2d) 703 (1947).

The trial court held that because the original tenancy was for less than one year the holdover constituted a month to month tenancy terminable on thirty days' notice. The Appellate Court reversed on the ground that where a lease is for a period of less than a year but more than one month, the holding over will be construed to create another rental period for the same length as the original term. As a consequence notice of termination cannot be given at any time but must be one to coincide with the expiration of the rental period.<sup>23</sup>

The case of *Bogden v. Laswell*,<sup>24</sup> while not enunciating any new rule of law, is also important in any discussion of notice. The term involved therein was for five years and the premises were to be occupied for a tavern or other business purpose under a stipulation whereby the lessee agreed that he would not "permit or suffer any noisy, noxious or offensive trade, business or occupation . . . to be carried on in said premises." A further provision permitted the landlord, at his election, to terminate the lease for any default. It came to the lessor's attention during the term that the lessee was using the premises for gambling. Thereupon the lessor caused notice to be given by registered mail to the effect that the lease was instantly terminated. When sued for possession, the tenant argued that, if the right to declare a forfeiture existed, the lessor was obliged to give a ten-day notice.<sup>25</sup> The court, in its opinion, referred to the case of *Clark v. Stevens*<sup>26</sup> which contains an excellent discussion of the law in regard to forfeitures, both with and without notice, and declared that there was no case in this jurisdiction which required any communication to the tenant of the lessor's intention to forfeit. It therefore decided that the notice given was sufficient.

Liability of a landlord growing out of the condition of the demised premises was involved in *Crawford v. Orner & Shayne*.<sup>27</sup> The problem there raised was as to whether or not it was the duty

<sup>23</sup> Ill. Rev. Stat. 1947, Ch. 80, § 6.

<sup>24</sup> 331 Ill. App. 395, 73 N. E. (2d) 441 (1947). Leave to appeal has been denied.

<sup>25</sup> See Ill. Rev. Stat. 1947, Ch. 80, § 9.

<sup>26</sup> 221 Ill. App. 233 (1921).

<sup>27</sup> 331 Ill. App. 568, 73 N. E. (2d) 615 (1947).

of a landlord to furnish window screens sufficiently strong to support a person leaning against the same. The plaintiff was a child of three who, on a warm day, climbed on the sill of an open window and leaned against a fly-screen which admittedly did not fit securely. The screen gave way, the plaintiff fell to the ground and suffered serious injury. A judgment for the landlord was affirmed on the theory that there was no duty imposed to maintain a window screen which would be sufficient in strength to support the weight of a person leaning against it, the purpose of such a screen being merely to keep insects from entering the premises.

An interesting declaratory judgment proceeding, that of *International Hotel Company v. Libbey*,<sup>28</sup> called for an interpretation of a lease under which the lessee was to pay a minimum rent together with a percentage equal to one-third of the net earnings. The sole question was whether the lessee, in calculating "net earnings," might deduct as "ordinary and necessary" expenses certain federal income and excess profits taxes and also sums reserved, but not expended because of the war, for additions and betterments. The court considered the tax items as being comprehended within the term "ordinary and necessary" expenses for the reason that the property could not be operated successfully without the payment thereof. Such items were likened to general property taxes, were a burden to be expected in the regular course of business, so were "ordinary," and as they had to be paid in order that operation might continue, were clearly "necessary." Sums reserved for additions and betterments were excluded, however, as there was no absolute duty on the part of the tenant to make such expenditure.

The possibility of a lapse in federal rent regulation impelled the legislature to adopt a state rent control statute which provides that whenever any community, through its corporate authorities, shall adopt the act then local rent control shall be in force so long as the local commission believes rent control to be necessary but

<sup>28</sup> 158 F. (2d) 717 (1947).

in no event beyond the effective termination date of the statute. Maximum rental ceilings are provided as well as criminal penalties for violations.<sup>29</sup>

#### SECURITY TRANSACTIONS

The concern of the chancellor in preventing a creditor from taking an unconscionable advantage of a necessitous debtor has been emphasized many times by declaring absolute deeds to be nothing more than mortgages from which redemption is permissible. Much the same thought must have prompted the court, in *Dittman v. Miller*,<sup>30</sup> to reverse a decree denying to the debtor a right to redeem from an escrow arrangement under which a certificate of sale issued pursuant to execution sale had been deposited for surrender to the debtor provided he met certain stipulated terms with respect to satisfaction of the judgment. The arrangement was treated as nothing more than an equitable mortgage impressed with a right of redemption not destroyed by a failure on the part of the debtor to make the prescribed payments. The fact that the creditor would receive property worth approximately \$4000 more than the amount of the balance due him if the right to redeem was denied may have aided in the determination of the case.<sup>31</sup> Statutory right to redeem from foreclosure sale, on the other hand, is intended as a means by which junior creditors may seek further sales of the property in order to make the mortgagor's assets satisfy as many of his debts as possible. The decision in *Peterson v. Grisell*<sup>32</sup> is noteworthy for its denial junior creditors the chance to speculate on the possibility of an enhancement in values by recognizing an absolute right on the part of the holder of a certificate of sale, within the same time as is allotted to the judgment debtor, to tender the amounts due to the junior creditors and thereby defeat any statutory right of redemption from the original sale. If delay beyond that period occurs, the

<sup>29</sup> Laws 1947, p. 1159, H. B. 278; Ill. Rev. Stat. 1947, Ch. 80, §§ 48-61. There has also been a slight revision of Ill. Rev. Stat. 1947, Ch. 57, § 7, with respect to the return date on the summons issued by a justice of peace in forcible detainer proceedings.

<sup>30</sup> 330 Ill. App. 325, 71 N. E. (2d) 186 (1947).

<sup>31</sup> See *Allen v. Allen*, 242 Ill. 510, 90 N. E. 274 (1909).

<sup>32</sup> 330 Ill. App. 587, 71 N. E. (2d) 832 (1947).

certificate holder will be obliged to secure the creditor's acceptance of the funds deposited.<sup>33</sup>

Whatever the rule may be with respect to the discharge of a surety by the action of the principal creditor in releasing a portion of the security without the surety's consent, the case of *Massman v. Duffy*<sup>34</sup> clearly holds that a mortgagor, personally liable as the principal debtor, can gain no advantage from the fact that the mortgagee has seen fit to release the lien of the mortgage as to a portion of the premises which had been taken under eminent domain proceedings so long as the proceeds of the condemnation be applied toward the reduction of the indebtedness. The same case also indicates that an action to foreclose is brought in sufficient time if the complaint is filed within the applicable limitation period<sup>35</sup> even though no effort is made to serve process until after the period has expired.<sup>36</sup>

A slight change in the statute concerning mortgages has been made to delete the words "real estate" heretofore found in the provision authorizing the sheriff to execute any power of sale contained in the mortgage instrument,<sup>37</sup> a change made clearly necessary to bring that provision into harmony with another section forbidding foreclosure of real estate mortgages through power of sale.<sup>38</sup> There is also evidence of further tinkering with the limitation provision respecting the lien of real estate mortgages, at least so far as third persons may be concerned. The result has been to make the statute in question even more complicated than before.<sup>39</sup>

<sup>33</sup> See *Sutherland v. Long*, 273 Ill. 309, 112 N. E. 660 (1916), where the tender was accepted, and *McGowan v. Goldberg*, 281 Ill. 547, 117 N. E. 1045 (1917), where it was rejected.

<sup>34</sup> 330 Ill. App. 76, 69 N. E. (2d) 707 (1946).

<sup>35</sup> Ill. Rev. Stat. 1947, Ch. 83, § 11.

<sup>36</sup> *Ibid.*, Ch. 110, § 129, states that an action shall be commenced by the "filing of a complaint." *Gage v. Chicago Title & Trust Co.*, 303 Ill. 569, 136 N. E. 483 (1922), was distinguished on the ground that the factual situation there involved was not comparable to the one before the court.

<sup>37</sup> Compare Laws 1947, p. 1227, H. B. 208, Ill. Rev. Stat. 1947, Ch. 95, § 12, with Ill. Rev. Stat. 1945, Ch. 95, § 12.

<sup>38</sup> Ill. Rev. Stat. 1947, Ch. 95, § 23.

<sup>39</sup> Laws 1947, p. 1178, S. B. 314; Ill. Rev. Stat. 1947, Ch. 83, § 11b. The change would appear to be particularly important to persons holding mortgages the due date of which, as shown by the record, is more than nineteen but less than twenty years before the effective date of the amendment, if no extension agreement has been recorded since the filing of the original instrument.

## TRUSTS

The recent case of *Kane v. Johnson*,<sup>40</sup> wherein a surviving joint tenant was held to be trustee of the entire property for the benefit of the deceased joint tenant's heirs, has caused considerable local comment. When property is taken in joint tenancy with right of survivorship, it is the habit to assume that the intent of the parties is obvious and almost uncontradictable from the mere form of the conveyance, but that assumption is not always wholly warranted. Title to the property there concerned had been conveyed, for consideration, to two cousins as joint tenants. Upon the death of one of them, the survivor claimed the whole of the title by right of survivorship, but the husband of the deceased joint tenant sued to have a resulting trust declared for the use of himself and the other heirs. On the proofs submitted, it was shown that the deceased tenant had made the down payment of one-third of the price by cashier's check purchased from her own individual savings account. She signed a mortgage for the balance along with the other joint tenant. Evidence as to any payments made by the survivor was neither specific nor convincing, in fact was actually contradictory. The chancellor decreed a resulting trust and the Supreme Court affirmed. Some of the cases cited by the court seem more compelling on the facts than does the instant case, for there the dispute was solely between the joint tenants or their privies, whereas in *Mauricau v. Haugen*,<sup>41</sup> for example, the plaintiff was a judgment creditor enjoying a much stronger position than did the defendant. In none of the cases cited, however, were the rights of an innocent purchaser for value concerned. He would not be bound by the resulting trust for there would be nothing on record to put him on notice and he should be entitled to rely on the mere form of the deed. Where such is not the case, the apparent and expressed intent evidenced by the joint tenancy deed ought to give way to the rule of equity which protects a party beneficially interested and which gives rise to a

<sup>40</sup> 397 Ill. 112, 73 N. E. (2d) 321 (1947), noted in 36 Ill. B. J. 58.

<sup>41</sup> 387 Ill. 186, 56 N. E. (2d) 367 (1944), noted in 24 CHICAGO-KENT LAW REVIEW 35. See also *Partridge v. Berliner*, 325 Ill. 253, 156 N. E. 352 (1927).

resulting trust, the instant legal title is transferred, in favor of the one furnishing the consideration.

In two cases published in the same volume, the Supreme Court distinguished on the facts but reiterated the power of a court of chancery to decree a deviation from the terms of a trust when required by necessity. In *Dyer v. Paddock*,<sup>42</sup> the court held the facts sufficient but in *Stough v. Brach*<sup>43</sup> they were not enough to permit deviation. In the former, the property was in danger of loss through physical deterioration as well as by reason of a great change in the use and value of adjoining premises. In the latter, the trust property could have been lost through the failure of the beneficiary to pay taxes, but there was no showing of an inability to do so. Section 50 of the Chancery Act,<sup>44</sup> which restates the historical basis for deviation, was apt and contributed to the decision in the *Dyer* case.<sup>45</sup>

Legislation has been added enlarging the powers of trustees under express trusts or testamentary trusts, thereafter created, so as to permit such persons to grant options, sell at public or private sale, or execute proxies to vote corporate shares held by the trust.<sup>46</sup> The statute also permits a surviving trustee to exercise all rights, titles and powers during a period of vacancy in the trusteeship and confers similar powers on successor trustees. A series of bills has also been enacted to regulate perpetual care funds paid to cemeteries, the principal bill being the Cemetery Care Act<sup>47</sup> designed to place such funds under the supervision of the State Auditor.<sup>48</sup>

<sup>42</sup> 395 Ill. 288, 70 N. E. (2d) 49 (1946), noted in 35 Ill. B. J. 417.

<sup>43</sup> 395 Ill. 544, 70 N. E. (2d) 585 (1947).

<sup>44</sup> Ill. Rev. Stat. 1947, Ch. 22, § 50.

<sup>45</sup> See comment thereon in 35 Ill. B. J. 417.

<sup>46</sup> Laws 1947, p. 1747, H. B. 47; Ill. Rev. Stat. 1947, Ch. 148, § 35.

<sup>47</sup> Laws 1947, p. 338, S. B. 584; Ill. Rev. Stat. 1947, Ch. 21, § 64.1 et seq.

<sup>48</sup> See also Laws 1947, p. 658, S. B. 656; Ill. Rev. Stat. 1947, Ch. 30, § 153, dealing with the accumulation of income in trust. Any trust created for the care of burial places is now exempted from the provision against accumulations whereas heretofore that exemption was granted only to trusts for the "perpetual" care thereof.

## WILLS AND ADMINISTRATION

Revision and reorganization of any substantial portion of the statutory law may call up for redetermination questions previously regarded as well-settled. Thus, in *Sternberg v. St. Louis Union Trust Company*,<sup>49</sup> the court had before it the effect, if any, of Sections 85 and 89 of the still relatively new Probate Act<sup>50</sup> upon the established rule that the validity of a will devising real estate is to be tested by the law of the state where the real estate is situated. The will of the testator there involved, he being a resident of Missouri, was valid in that state but since he had married subsequent to the execution thereof the will, tested by Illinois law, would be deemed revoked.<sup>51</sup> In a will contest suit, filed after the will had been admitted to probate in this state as provided in Section 87 of the Probate Act,<sup>52</sup> the court held that the will was ineffective to pass title to real estate situated in Illinois and that there was nothing in the statute to vary the established rule that all questions of execution, validity, and revocation of a will devising real estate are to be resolved on the basis of the *lex rei sitae*. Thus an order admitting a foreign will to probate has no greater effect than would a similar order pertaining to a domestic will and, upon a will contest, the validity of the will is to be determined *de novo*.

Interesting on the facts, but enunciating no new rules or principles, was *Hedlund v. Miner*.<sup>53</sup> Testator's will, executed only twenty-two days prior to the birth of his child, made his wife sole beneficiary and made no mention of the child. The court held that the child was entitled, by virtue of Section 48 of the Probate Act,<sup>54</sup> to take its intestate share of the testator's property. The widow urged that testator's obvious knowledge of the imminence of the child's birth made it clear that he intended to disinherit the

<sup>49</sup> 394 Ill. 452, 68 N. E. (2d) 892 (1946), noted in 35 Ill. B. J. 220.

<sup>50</sup> Ill. Rev. Stat. 1947, Ch. 3, § 237 and § 241.

<sup>51</sup> *Ibid.*, § 197.

<sup>52</sup> *Ibid.*, § 239.

<sup>53</sup> 395 Ill. 217, 69 N. E. (2d) 862 (1946).

<sup>54</sup> Ill. Rev. Stat. 1947, Ch. 3, § 199.

child. The court, rejecting the argument, considered testator's failure to provide for or to mention the child as indicative of just the opposite in the light of the presumption that testator knew the statute would make provision for a child born after the will was made.

Worthy of mention is certain litigation which called into question the authority of a deputy clerk of the Probate Court of Cook County, also called an "assistant to the judge," to hear evidence on the admission of a will to probate. The heirs and next of kin, in *People ex rel. Kula v. O'Connell*,<sup>55</sup> sought a writ of mandamus to compel the probate judge to expunge from the records all entries regarding the hearing for admission to probate of decedent's will on the ground that the hearing of testimony by a deputy clerk was not authorized. It was held that the application for the writ was properly denied by the trial court since the certificate of the probate judge that testimony was taken before him was a sufficient showing that the applicable statute<sup>56</sup> had been complied with, hence relators had not shown that the proceedings in the probate court were void. The mandamus application was made subsequent to the commencement of a will contest in the same matter.<sup>57</sup> In that proceeding, an amendment to the complaint sought to attack the probate proceedings on the same ground of want of authority in the deputy clerk to hear testimony. This amendment was held properly stricken as being inconsistent with the purpose and prayer of the complaint, for there can be no will contest unless there has been a valid order admitting the will to probate. The operation of the present Probate Act is apparently, in this respect, the same as that of the former law.

The court had occasion to express its views on undue influence in *Challiner v. Smith*<sup>58</sup> and for the second time in the same litigation in *Tidholm v. Tidholm*.<sup>59</sup> It is apparent that the court intends

<sup>55</sup> 394 Ill. 409, 68 N. E. (2d) 758 (1946).

<sup>56</sup> Ill. Rev. Stat. 1947, Ch. 3, § 221 and § 227.

<sup>57</sup> *Kula v. Sitkowski*, 395 Ill. 167, 69 N. E. (2d) 688 (1946).

<sup>58</sup> 396 Ill. 106, 71 N. E. (2d) 324 (1947).

<sup>59</sup> 397 Ill. 363, 74 N. E. (2d) 514 (1947). See also *Tidholm v. Tidholm*, 391 Ill. 19, 62 N. E. (2d) 473 (1945).

to continue to require will contestants who allege undue influence to present clear and convincing evidence in order to prevail. The reaffirmance of the standard laid down in *Applehans v. Jurgenson*,<sup>60</sup> followed in numerous other cases,<sup>61</sup> indicates that, as in the past, a relatively small proportion of will contests predicated on this ground are likely to succeed.

The decision of the Appellate Court in *In re Abell's Estate*,<sup>62</sup> noted last year,<sup>63</sup> has been affirmed by the Supreme Court.<sup>64</sup> The case required construction of Section 96 of the Probate Act, dealing with preferential rights to administer an estate.<sup>65</sup> The court concluded that the statute is not mandatory in character, hence the probate court has the right to exercise a discretion when the person who would be entitled to administer is hostile to others interested or to the estate itself. The holding is in line with decisions in other states where the statutes are similar.<sup>66</sup>

No statute expressly authorizes another person to guide the hand of a feeble testator in the execution of a will but, according to *In re Estate of Kehl*,<sup>67</sup> such a "guided signature" does not invalidate the will. When it is considered that the statute does permit testator's signature to be affixed entirely and completely by some other person at the testator's request<sup>68</sup> the reasonableness of the decision can scarcely be open to question.

After a will has been denied probate, it is customary to require that the same remain a part of the public records of the court even though it possesses no legal effect so far as the particular jurisdiction is concerned. It may happen, however, that such instrument could possess validity elsewhere, so a genuine prob-

<sup>60</sup> 336 Ill. 427, 168 N. E. 327 (1929).

<sup>61</sup> See, for example, *Frese v. Meyer*, 392 Ill. 59, 63 N. E. (2d) 768 (1945); *Quat-hamer v. Schoon*, 370 Ill. 606, 19 N. E. (2d) 750 (1939); *Johnson v. Lane*, 369 Ill. 135, 15 N. E. (2d) 710 (1938); *Morecraft v. Felgenhauer*, 346 Ill. 415, 178 N. E. 877 (1931).

<sup>62</sup> 329 Ill. App. 73, 67 N. E. (2d) 294 (1946).

<sup>63</sup> See 25 CHICAGO-KENT LAW REVIEW 65.

<sup>64</sup> 395 Ill. 337, 70 N. E. (2d) 252 (1946).

<sup>65</sup> Ill. Rev. Stat. 1947, Ch. 3, § 248.

<sup>66</sup> See note in 45 Mich. L. Rev. 203 and cases there cited.

<sup>67</sup> 397 Ill. 251, 73 N. E. (2d) 437 (1947).

<sup>68</sup> Ill. Rev. Stat. 1947, Ch. 3, § 194.

lem is likely to develop as to how it can be given operative effect in the other jurisdiction particularly since ancillary proceedings can hardly be based thereon. That problem was resolved, in *In re Barrie's Estate*,<sup>69</sup> by granting permission to the legatees to withdraw the original rejected instrument for the purpose of offering it for probate in a foreign state. The authority for such an order was said to rest upon the absence of any contradictory provision in the Probate Act<sup>70</sup> and the inherent power of every court to permit the removal of original files and exhibits.<sup>71</sup>

Two sections of the Probate Act were amended during the year. Section 38 now adds real estate sales in proceedings by a guardian or conservator under the act to the types of sales in which the owner may bring an action to acquire an outstanding inchoate dower interest.<sup>72</sup> Section 322 was also changed so that the conservator or guardian is no longer automatically entitled to administer the estate of his deceased ward but must secure new letters of administration.<sup>73</sup>

## VII. PUBLIC LAW

### ADMINISTRATIVE LAW

The decision of the Supreme Court in *Deutsch v. Department of Insurance*<sup>1</sup> furnishes an interesting commentary on the treatment to be accorded in a court of review upon informal administrative procedure. The applicants there concerned made due and proper application for a license to engage in the small loan business. The application was accompanied with an investigation fee, an annual license fee and a statutory bond, all in conformity with the statute.<sup>2</sup> The Department was then required to make an investi-

<sup>69</sup> 331 Ill. App. 443, 73 N. E. (2d) 654 (1947).

<sup>70</sup> Ill. Rev. Stat. 1947, Ch. 3, § 235, requires that all wills admitted to probate shall remain in the custody of the clerk of the court, but is silent as to the disposition to be made of a rejected will.

<sup>71</sup> *Lee v. Hicks*, 4 Ill. (3 Scam.) 169 (1841).

<sup>72</sup> Laws 1947, p. 1, S. B. 225; Ill. Rev. Stat. 1947, Ch. 3, § 189.

<sup>73</sup> Laws 1947, p. 1, S. B. 213; Ill. Rev. Stat. 1947, Ch. 3, § 476.

<sup>1</sup> 397 Ill. 218, 73 N. E. (2d) 304 (1947).

<sup>2</sup> Ill. Rev. Stat. 1947, Ch. 74, § 19 et seq.