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CO-OPERATIVE APARTMENTS IN ILLINOIS

Chester C. McCullough, Jr.*

In the present day housing shortage,¹ a renewed interest has been shown in co-operative apartments. The “To Rent—Apartments” column of the want advertisement section in any metropolitan daily newspaper reveals an increasing number of apartments listed as “co-op” the “ownership” of which is for sale. This concept of “owning” an apartment is rather vague in the minds of most laymen, and there has been very little published on its incidents from the lawyer’s viewpoint.²

A co-operative housing project may be organized under the 100-per cent. plan, in which case all the apartments or units of living space are occupied by members of the organization, the so-called “tenant-owners,” or it may be organized under a semi-co-operative or group ownership plan, wherein only a portion of the project is occupied by tenant-owners, the remainder being leased to non-members for income to the organization in order to reduce the maintenance expense of members of the group. Ordinarily, neither of these is primarily a profit-making venture. However, it is also necessary to keep in mind two other concepts:

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co-operative housing of the "fashionable" or luxury type, and low-cost co-operative housing produced to meet necessitous circumstances or to provide living quarters for the less affluent. Both types exist today and are receiving impetus from the current housing situation.

I. History of Co-operative Housing

The history of low-cost co-operative housing is as old as the idea of co-operation in ownership and attempts have been made to trace it to ancient Rome and even before. It can be more definitely traced in its historical aspects to Rennes, in France, where a great fire had produced a desperate housing situation in the year 1720. A co-operative project there produced an apartment building in which each head of a family paid for his own apartment. In the next century, co-operative projects of the apartment-building type appeared in England, and in 1880 and 1881, respectively, apartment projects owned co-operatively appeared in this country. Since then, such projects have appeared in many countries of Europe, including Denmark, Germany, Switzerland, Finland, Holland, Spain, Italy, and quite extensively in Sweden. In this country, in the twentieth century, such low-cost housing projects have been instituted by labor unions, consumers' co-operative groups, and agencies of the federal government. Low-cost housing projects on a co-opera-

3 Proceedings of the Co-operative Apartment Section of the Nat'l Ass'n of Real Estate Boards, p. 39 (1924).
6 Ibid.
8 "Co-operative Housing," a pamphlet published by the Co-operative League of America, 1920.
9 Proceedings of the Co-operative Apartment Section of the Nat'l Ass'n of Real Estate Boards, p. 40 (1924).
tive basis are currently receiving encouragement from the United
States Department of Labor. 12

The other type, the fashionable or luxury type of co-operative
apartment, is largely an American development and first appeared
in New York City. 13 The first two co-operative apartment build-
ing s appearing in Illinois were developed in Chicago in 1920;
one under the corporate and one under the trust form of organiza-
tion, 14 and during the national housing boom of the following
decade the co-operative apartment building concept spread rap-
idly. 15 In 1924, there were eight co-operative apartment buildings
operating successfully in Chicago. 16 By 1925, co-operative apart-
ments had been erected in sixteen cities in the United States. 17

By the next year, Chicago had thirty-three co-operative buildings
valued at about fifty-six million dollars while in New York City
approximately two hundred million dollars had been so invested. 18
Before the end of the decade, over one hundred such buildings had
been erected in Chicago representing a cost of about eighty million
dollars. The depression years which followed saw a marked cur-
tailment of all building 19 and brought the expansion of the
coop erative apartment building movement almost to a stand-
still. Many existing buildings were sold under foreclosure, 20

12 U. S. Dept. of Labor, Organization and Management of Cooperative and Mutual
13 As early as 1906, according to Sommers, “Co-operative Homes,” in Skylines,
Nov. 8, 1926. The first corporate ownership of such property in New York, however,
ocurred in 1914 according to 8 Annals of Real Estate Practice, p. 90 (1925).
14 See Section II hereof, post.
15 Hoyt, One Hundred Years of Land Values in Chicago (The University of Chi-
cago Press, Chicago, 1933), p. 238, notes that the growth thereof in Chicago was
promoted by the doubling of apartment rents from 1919 to 1924.
16 Chicago Evening Post, July 23, 1924.
18 Sommers, “Co-operative Homes,” in Skylines, Nov. 8, 1926.
19 Hoyt, op. cit., p. 266.
20 Litigation over co-operative buildings may be noted in New York Life Ins. Co.
v. 1325 Astor St. Bldg. Corp., 325 Ill. App. 536, 60 N. E. (2d) 257 (1945); Green-
baum Sons Bank & Trust Co. v. Kingsbury, 248 Ill. App. 321 (1929); Metropolitan
40-C-526; State Mutual Life Assurance Co. v. Campbell, Superior Court of Cook
County, case No. 39-S-13531; Chicago Title & Trust Co. v. 201 East Delaware Place,
Circuit Court of Cook County, case No. 36-C-5003; General Trust Co. of Ill. v.
Sheridan Grace Bldg. Corp., Circuit Court of Cook County, case No. B-192743;
Prudence Co. v. 160 West Seventy-Third St. Corp., 260 N. Y. 205, 183 N. E. 365
(1932); and Schaffer v. 8100 Jefferson Ave. East Corp., 267 Mich. 437, 255 N. W. 324
(1934).
and many disadvantages not theretofore considered were revealed.\textsuperscript{21}

At the present time, renewed interest in both the luxury and the low-cost type of co-operative apartment development has led to a consequent resurgence of both with an extension of both beyond a one-building concept to the planning of entire communities consisting of duplex houses as well as single-family dwellings. It is believed that as the co-operative housing concept grows in importance it becomes more and more important to review some of the forms of organization employed in the past and to note the advantages and disadvantages of each.

\section*{II. Forms of Organization}

From the point of view of those interested in living in a co-operative apartment building or co-operative housing project, two diverse objectives must be recognized, to-wit: retention of maximum democratic control, and minimization of the risk of personal liability of the members. The latter is a matter of primary concern when considering the question of ownership of the land chosen as the site for the project.\textsuperscript{22} Two forms of organization have been used most often and they may be referred to as the “trust” form and the “corporate” form, although each is subject to considerable variation.\textsuperscript{23}

\textsuperscript{21} See Section V hereof, post.
A. Trust Form of Organization

Under the trust form, an express trust is established and the title to the property is conveyed to the trustee.\(^2^4\) Most frequently a corporate trust company is employed for this purpose. A declaration of trust is drawn up, showing that the trustee holds the title and is to retain ultimate powers of control. The declaration usually provides that the primary purpose of the trust is the assignment of exclusive rights of occupancy to apartments, or units of living space, together with the use of common corridors, rooms and facilities, during the life of and subject to all the provisions of the trust. These provisions, which should be set out in great detail in the declaration, should include such things as (a) the obligation of the beneficiary to pay his share of the current operating expenses, usually called "assessments" or "maintenance charges," (b) requirements that the beneficiary observe all of the rules originally set forth and from time to time imposed, both as to the apartments and as to the facilities used in common with other occupants, (c) agreements not to use or permit to be used the occupant's part of the premises for any purpose prohibited by the declaration of trust or the laws and ordinances of the United States, the state, county, city, or other governing authority, (d) such restrictions as are considered necessary to assure compatible neighbors, (e) obligations of the beneficiary to surrender possession immediately upon termination of his rights of use and occupancy, in accordance with the terms of the declaration, and (f) provisions that any attempted transfer, conveyance, assignment, pledge or mortgage of all or any portion of the beneficiary's interest shall be ineffective unless done in compliance with the terms of the trust and with the knowledge of the trustee. There is usually a provision against subletting. It is often provided that, in event of default in the performance of these obligations which continues for a stipulated period, the

\(^2^4\text{This was the earliest form of organization for co-operative housing enterprises in the United States, but it has not been employed extensively within the last twenty years: Swayne, "Standard Forms," 8 Annals of Real Estate Practice, p. 89 (1925).}
trustee may sell the beneficiary's interest at public auction, the procedure for so doing being set forth fully in the declaration. It is also sometimes provided that the beneficial interest may be pledged or mortgaged, in a prescribed manner, with notice to the trustee.

In an attempt to retain democratic control without sacrificing limited liability, provision is usually made for the beneficial "owners" to elect an Executive Committee or Board of Governors, to act in an advisory capacity to the trustee in the operation and management of the building or project. This committee "recommends" an annual budget and periodic changes in the assessments or maintenance charges to the trustee, and apprises the trustee of continuing defaults of the beneficiary-occupants, or deficiencies in necessary services. Too great a degree of control in the hands of this committee, however, might result in a partnership liability of the beneficiaries.\(^{25}\)

The declaration further provides that, with the consent of an agreed percentage of the beneficiaries, the trustee may encumber the property and, by a similar vote, may provide that the trust may be terminated at any time,\(^{26}\) upon which the trustee must sell the property and distribute the proceeds proportionately, after deducting expenses, or convey to a corporation in which all the beneficiaries are stockholders, or else convey to the beneficiaries directly, as co-tenants.\(^{27}\)

After the declaration is drawn up, rights in the separate apartments or living units are provided for by a "beneficial certificate,"\(^{28}\) in units which may be based on number of rooms or amount of floor space, or by "assignments" of undivided


\(^{26}\) Castle, "Legal Phases of Cooperative Buildings," 2 So. Cal. L. Rev. 1 at 12 (1928).


\(^{28}\) MacChesney, op. cit., p. 370.
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beneficial interests, which will usually contain a summary of the obligations of the beneficiary as contained in the trust declaration, and will be keyed to a specific apartment. This may constitute the contract between the beneficiaries and the trustee, but is more frequently coupled with a "proprietary lease." If equal unit beneficial certificates are issued, the holder of a certain number of these receives a proprietary lease which designates the living space to be occupied, and contains the essential elements of the contract of the parties.

B. The Corporate Form

The corporate form of organization has been by far the most popular in the co-operative housing movement, both for realtors and builders interested in the luxury type of project and for the organizers of low-cost housing units. Incorporation may be under a limited dividend housing act, an urban redevelopment law, a special co-operative statute, a non-profit corporation statute, or a general incorporation act.

While all states now permit a corporation to be organized, under one or another type of statute, to acquire and hold real estate, such was not always the case and, in fact, the idea is a twentieth-century development. In Illinois, for example, soon after the enactment of the 1872 act concerning corporations, the doctrine was laid down that a corporation could not be organ-

29 A sample form of such an assignment may be found in Castle, "Legal Phases of Cooperative Buildings," 2 So. Cal. L. Rev. 1 at 10 (1928).
30 See Section III hereof, post.
33 Such a statute has been enacted for the District of Columbia: Pub. Act No. 642, 76th Cong., 3d Sess., Ch. 397.
34 In re Estate of Pitts, 218 Cal. 184, 22 P. (2d) 694 (1933).
35 For a discussion of the characteristics of incorporation under various forms of statutes in different states, see Yourman, "Some Legal Aspects of Cooperative Housing," 12 Law and Cont. Prob. 126 beginning at 129 (1947).
36 Laws 1871-2, p. 296.
ized for the purpose of holding or dealing in real estate,\(^{37}\) and this was adhered to for many years as the established policy of the state.\(^{38}\) New York was the first to break away from such general prohibitions\(^{39}\) and, in 1915, Section 1 of the Illinois statute\(^{40}\) was amended to state that "corporations for acquiring, owning, erecting, leasing or operating only one building and the site therefor of not more than 80,000 square feet of land, hereinafter called building corporations, may be organized and operated" under the provisions of the act.\(^{41}\) It was further provided that the description of the site had to be given at the time a certificate of incorporation was applied for, and that site had to be improved with a building within five years or sold.\(^{42}\) The section was also subsequently amended, in 1917, to permit corporations to be formed for carrying on the "real estate agency business."\(^{43}\)

In 1919, a new law was enacted to replace certain sections of the 1872 statute dealing with this subject,\(^{44}\) but Section 3 of the law then enacted\(^{45}\) contained the same provisions as had appeared in Section 1 of the first statute,\(^{46}\) together with the amendments made in 1915\(^{47}\) and in 1917.\(^{48}\) At the next session of the legislature, held two years later,\(^{49}\) Section 3 was again


\(^{38}\) People v. Shedd, 241 Ill. 155, 89 N. E. 332 (1909), affirmed in 217 U. S. 597, 30 S. Ct. 696, 54 L. Ed. 896 (1910); Imperial Building Co. v. Chicago Open Board of Trade, 238 Ill. 100, 87 N. E. 167 (1909). A further discussion of the Illinois policy in this regard may be found in In re Hool Realty Co., 2 F. (2d) 334 (1924).

\(^{39}\) 8 Annals of Real Estate Practice, p. 90 (1925).

\(^{40}\) Laws 1871-2, p. 296.

\(^{41}\) Laws 1915, p. 331.

\(^{42}\) Ibid.

\(^{43}\) Laws 1917, p. 311.

\(^{44}\) The decisions in Tennant v. Joerns, 329 Ill. 34, 160 N. E. 160 (1928), and in Roberts & Schaefer Co. v. Emmerson, 313 Ill. 137, 144 N. E. 818 (1924), affirmed in 271 U. S. 50, 46 S. Ct. 375, 70 L. Ed. 827 (1926), indicate that the legislative purpose was to replace and not merely to amend the prior statute.

\(^{45}\) Laws 1919, p. 316.

\(^{46}\) Laws 1871-2, p. 296.

\(^{47}\) Laws 1915, p. 331.

\(^{48}\) Laws 1917, p. 311.

\(^{49}\) Laws 1921, p. 382.
amended to eliminate the limitation of the area of the site to "not more than 80,000 square feet of land." Practically all of the co-operative apartment corporations organized during the period of the last building boom were incorporated under the 1919 statute, as amended, because it was believed that the law governing the formation of non-profit corporations was inapplicable. The entire 1919 act was itself repealed when the present Business Corporation Act of 1933 was enacted to take its place.

From 1872 to 1944, the Illinois statute governing corporations not for pecuniary profit was to be found in Sections 29 to 34 of the 1872 act, but these sections were repealed by a 1943 enactment and were replaced by a general Not for Profit Corporation Act which became effective on January 1, 1944. In the meantime, however, Section 29 of the 1872 statute had been amended to permit the formation of non-profit corporations having the power to include "ownership of residential property on a co-operative basis" among the corporate functions and this provision was carried over to become Section 4 of the present statute on the subject.

It can be seen, therefore, that it would now seem possible to incorporate the co-operative housing project under either the Business Corporation Act or the general Not for Profit Corporation Act, but it must be remembered that a corporation organ-
ized under the latter statute may not issue shares of stock nor distribute income in the form of dividends. It is also possible, in the low-cost housing field, to incorporate under the state Housing Act and to acquire property from a housing authority for a non-profit private housing group.

As previously mentioned, practically all of the co-operative apartment corporations organized in the period between 1920 and 1930, during the period of greatest growth, were organized under the general Corporation Act of 1919. However, the approach to the problem of incorporation under the present Business Corporation Act, and the provisions thereof peculiar to the co-operative housing arrangement, have not changed greatly. The forms necessary to commence incorporation proceedings are obtainable from the Secretary of State. The first steps, after the advance planning stage, would call for the filing of an application for the reservation of a name and the preparation and execution of the pre-organization stock subscription agreement. A meeting of the subscribers must then be called to select incorporators who should see to it that the articles of incorporation are drawn up in proper form and duly filed. It is necessary to be meticulous in stating the object for which the corporation is being formed.
and when the certificate of incorporation is issued by the Secretary of State the same must be recorded in the appropriate office within fifteen days.

After incorporation, by-laws should be prepared for the new corporation. These, in addition to the usual provisions, should delineate the purposes of the incorporators in such a way as to maintain the project on a co-operative, non-speculative basis, and to assure such restrictions on transfer of membership as will uphold the objective of appropriate housing for those intended to be benefited. The lease to which the holder of a certain number of shares of stock shall be entitled must be related to the stock. Hence, there must be a provision in the by-laws with regard to the requisite number of shares which will permit the directors to issue the proprietary lease. If the project is to be a 100-per cent. co-operative, a provision should be inserted that only stockholders may receive leases. If not, there should be some statement as to the manner by which disposition is to be made of that part of the premises which is to be held for income purposes.

To enable the members to determine the qualifications of their co-tenants, it is frequently provided that the corporation shall have an opportunity to purchase the stock before it is offered to a stranger upon the same terms. A universal requirement

75 Ibid., § 157.144.
76 See Section III hereof, post.
is that no shares shall be transferred until all claims of the corporation against the owner of such shares have been paid.\textsuperscript{78} The usual statement is that the corporation shall have a first and prior lien on all shares registered in the name of each stockholder for debts due the corporation from him and that, after a prescribed notice of default for a certain period, the stock may be sold at public or private sale.\textsuperscript{79} It is almost always provided that the shares shall be transferred only as an entirety, except where the board of directors or a majority of the stockholders shall have given written approval for a division.\textsuperscript{80} Obviously, a stockholder’s right to his lease, and therefore the occupancy of his apartment, must terminate upon a transfer of his stock, and a provision to this effect should be inserted in the by-laws.

Limitations on the right to sub-lease must be set forth.\textsuperscript{81} The consent of the board of directors is usually required, and consequently a suitable notice to them of the intention to sub-lease should be provided for.\textsuperscript{82} A right to appeal to the stockholders is sometimes reserved to the members desiring to sub-let in the event there should be a denial of consent by the directors. A specific provision that the sub-lessor is to retain his financial liability, in case of a sub-letting, is generally inserted.

The duties of the lessee-stockholder to maintain and repair that part of the premises in his control will be outlined in the by-laws, as well as in the proprietary lease, and there will usually be a provision to the effect that the stockholders’ leases shall be subject to any mortgage indebtedness.\textsuperscript{83}

It is required in the by-laws that the board of directors are

\textsuperscript{79} Fletcher, Private Corporations, Perm. Ed., Vol. 8, § 4207, and Vol. 11, § 5265. See also U. S. & Canada Land Co. v. Sullivan, 113 Minn. 27, 128 N. W. 1112 (1910).
\textsuperscript{80} Castle, “Legal Phases of Cooperative Buildings,” 2 So. Cal. L. Rev. 1 at 4 (1928) ; MacChesney, op. cit., Ch. 8, p. 377.
\textsuperscript{81} In the absence of such a restriction, the lessee may sublet: Edelman v. F. W. Woolworth Co., 252 Ill. App. 142 (1929).
\textsuperscript{82} See sample by-laws, Art. 12, § 7, in Standard Forms and Methods of Operation for 100 Per Cent Cooperative Apartment Projects (Chicago Real Estate Board, Chicago, 1928), p. 38.
\textsuperscript{83} Such a provision was evident in Greenebaum Sons Bank & Trust Co. v. Kingsbury, 248 Ill. App. 321 (1928).
to prepare an annual budget estimating the operating costs of
the property, including interest and payments on principal of any
mortgage indebtedness and other corporate expense such as taxes,
insurance, and cost of general upkeep. The stockholders are
then assessed on each share of stock an amount proportionate
to the total estimated cost divided by the number of shares
outstanding, each assessment normally being payable in monthly
installments. Provision is made for additional assessments dur-
ing the year up to a stated maximum which can be exceeded
only after a ratification by two-thirds of the stockholders at a
special meeting called for that purpose. Failure to pay these
amounts by a stated date, and continuing default for a pre-
determined period, may lead to an action such as forcible entry
and detainer proceedings, and the directors are specifically author-
ized, by the by-laws, to take such action.

By-laws along the lines mentioned should be formally adopted
at the first meeting of the board of directors. Thereafter, officers
should be chosen, the corporation should proceed to record the
certificate of incorporation,84 stock certificates should be issued
upon payment of the subscriptions,85 and arrangements should
be made for the taking of title to the property in the name of the
corporation.86

III. THE PROPRIETARY LEASE

The proprietary lease87 is the most important instrument in
the co-operative apartment organizational set-up. It is invariably
a part of the corporate plan and, in most cases, is included in
the trust plan. A stockholder is not the owner of the corporate

84 See notes 74 and 75, ante.
85 Such shares are typically Class "D" securities under Ill. Rev. Stat. 1947, Ch.
121½, § 103.
86 Kinney, "Titles of Purchasers Under Co-operative Apartment Plan in Their
87 Forms of proprietary leases may be found in Jones, Anno. Legal Forms, 8th Ed.,
Ch. 65, p. 2141; MacChesney, op. cit., Ch. 8, p. 397; Standard Forms and Methods of
Operation for 100 Per Cent Cooperative Apartment Projects (Chicago Real Estate
Board, Chicago, 1928), p. 49.
property,\textsuperscript{88} even if he owns all of the stock,\textsuperscript{89} hence he would not be entitled to use and occupy the premises merely by reason of his ownership of the shares.\textsuperscript{90} The beneficiary's right to possession of any specific portion of the trust property is likewise based on his contract. Thus the proprietary lease is the very foundation of the co-operative arrangement; the ownership of shares of stock in the corporation, or the holding of beneficial certificates under the trust, being important chiefly because they enable one to obtain a proprietary lease entitling the lessee to occupy a given amount of living space or a specific apartment. The lease defines the limits of the stockholder's or beneficiary's interest, and establishes the balance between the rights of the individual occupant and the authority of the group formed by the co-operators. It may, in a sense, be compared to a state or federal constitution.\textsuperscript{91}

The term used in the lease may vary greatly. Some have been drawn to run from year to year,\textsuperscript{92} others for two or three years,\textsuperscript{93} for eight years,\textsuperscript{94} for twenty-one years,\textsuperscript{95} for ninety-nine years,\textsuperscript{96} or for the life of the corporation.\textsuperscript{97} The primary advantage of the shorter term lease is that an undesirable tenant may be the more easily removed.\textsuperscript{98} A longer term lease has, however, generally been preferred\textsuperscript{99} as being more consistent with the sense

\textsuperscript{88} Sterling Midland Coal Co. v. Chicago-Williams Coal Co., 336 Ill. 586, 168 N. E. 655 (1929).
\textsuperscript{89} Brodsky v. Frank, 342 Ill. 110, 173 N. E. 775 (1930).
\textsuperscript{90} People v. Dennett, 276 Ill. 43, 114 N. E. 493 (1916); Coal Belt Electric Railroad Co. v. Peabody Coal Co., 230 Ill. 164, 82 N. E. 627 (1907).
\textsuperscript{91} MacChesney, op. cit., Ch. 8, p. 380.
\textsuperscript{92} Ibid., p. 381.
\textsuperscript{94} Woodrow Court v. Ambrookian, 113 Misc. 509, 185 N. Y. S. 756 (1920).
\textsuperscript{97} Standard Forms and Methods of Operation for 100 Per Cent Cooperative Apartment Projects (Chicago Real Estate Board, Chicago, 1928), p. 49.
\textsuperscript{98} MacChesney, op. cit., p. 381.
\textsuperscript{99} Ibid.
of security and permanency of interest which are most frequently urged as the advantages underlying this form of arrangement.¹

In form, the lease is usually quite similar to an ordinary long-term lease.² There will be recitals as to the purpose of the organization of the lessor, whether this be incorporation or the establishment of a trust; that the lessor is the owner of certain described land improved for residence purposes; and that the lessee is qualified to have the lease under the provisions of the by-laws, if a corporation, or in accordance with the terms of the declaration, if a trust. There will then be operative words of leasing and a description of the demised apartment, usually keyed to an attached diagram, the customary habendum clause,³ the reservation of the rent, the agreement as to the duration of the term, and the several covenants of the lessor and of the lessee. The lease will usually provide that the board or trustee may adopt uniform "house" rules, which the lessee will covenant to obey, and a provision will be inserted to the effect that the lessee's rights under the lease may be terminated, in a prescribed manner, for his violation of such covenants.

Pertinent provisions contained in the declaration of trust or the by-laws of the corporation, as discussed above, will also be set forth in the lease, such as the duties of the lessor and lessee, regulations in the event of default, limitations on assignment and subleasing, and provisions as to termination. This must be done with the realization that the subscription agreement, by-laws, and lease will be read together and construed as one contract.⁴

The reservation of the rent may be in general terms, such as "an annual assessment" proportionate to the number of shares or certificates held, estimated in advance by the board of direc-

³ Standard Forms and Methods of Operation for 100 Per Cent Cooperative Apartment Projects (Chicago Real Estate Board, Chicago, 1928), p. 49.
tors or executive committee, plus such further and additional charges as the board or committee may find it necessary to levy.\textsuperscript{5} It may be stated in the form of a fixed charge, established at a figure to include interest and payments on indebtedness, amortization of the depreciation of the property, taxes, insurance and operating expenses,\textsuperscript{6} subject to being increased or decreased from time to time by the board of directors.\textsuperscript{7} If this plan is used, it is necessary to budget an amount in excess of anticipated expenses and provide for the handling of the surplus. Or it may be provided that rent will be payable under a three-fold plan to cover all contingencies, to-wit: (1) a nominal sum, such as one dollar per rent period, stated as definitely due, plus (2) "further rent" to include the lessee's pro-rata share of all expenses of operation and payment of fixed charges, and (3) "additional rent" to cover emergency expenditures, as determined by the board or the trustee on recommendation of the committee. The lease will also usually provide that settlement of breached covenants upon which a money valuation can be placed shall be payable as "additional rent."\textsuperscript{8}

It must be kept in mind that, in the absence of ambiguity, such a lease will be enforced according to its plain language regardless of the construction put upon it by the parties.\textsuperscript{9} Therefore, the lease must be very carefully drawn to provide for possible contingencies.\textsuperscript{10} Special care must be taken in regard to the provisions limiting the transferability of the lease, relating

\textsuperscript{5} Standard Forms and Methods of Operation for 100 Per Cent Cooperative Apartment Projects (Chicago Real Estate Board, Chicago, 1928), p. 52.

\textsuperscript{6} Operating expenses, of course, would include janitor's wages, administrative cost, fuel, utilities, and repairs.


\textsuperscript{8} MacChesney, op. cit., Ch. 8, pp. 385-6.


\textsuperscript{10} In the case of 1165 Fifth Ave. Corp. v. Alger, 288 N. Y. 67, 41 N. E. (2d) 461 (1942), where the lease provided against assignment without the lessor's consent except to a person in a specified relationship to the lessee, or to a trustee for the benefit of such a person, the court held the lessor's consent was not essential to an effective assignment of the lease and stock to a trustee for the benefit of a person within the class named, even though the trustee executed the assumption agreement as trustee only and not personally, and there was no other property in the trust to insure payment of the rent.
it to the shares of stock owned by the tenant, if under the corporate form, and outlining the factors which will serve to terminate the lease. Mention should always be made of the circumstance of the tenant’s death. It will usually be provided that his widow, or members of his family, living with him at the time of his death, may remain in occupancy for a stated period provided they continue to pay the assessments or maintenance charges, and the conditions will be outlined whereby the heirs or devisees may become entitled to assume the lease, thereby releasing the estate of the tenant from liability. It may be seen, then, that the success of the leasing arrangement under the co-operative apartment plan is dependent upon meticulous care in planning and executing the instruments which set forth the contractual relationship of the parties involved.

IV. Financing and Taxation Problems

The funds for the purchase or erection of a co-operative apartment project must come from two sources, to-wit: mortgage financing, if borrowing is necessary, and the initial contributions of stockholders or beneficiaries. Funds needed over and above the amount of the mortgage must be raised by the sale of stock or beneficial interests. Ultimately, of course, the stockholder, or beneficiary, tenants must repay the indebtedness. A high original outlay by the members, in the form of a high initial price for the stock or beneficial interests, will reduce that portion of the carrying charges which must go to pay interest and the reduction of principal indebtedness; a low original outlay necessarily means higher interest and amortization charges. The

13 See In re Donchian’s Estate, 128 Misc. 51, 217 N. Y. S. 318 (1926), where the “rent” of testator’s apartment in a co-operative apartment building was held to be a debt of the estate, payable by the executors.
14 The trustee, under the trust form, should be given the power, in the declaration, to encumber the property. If it is already subject to a building loan mortgage, this fact should be included in the initial plan.
borrowed fund may be provided by the promoter-contractor, or financing may be by means of a single long-term mortgage, a small mortgage amortized over a short period, or a combination of first and second mortgages. The precise method employed will vary with the circumstances of the initiators of the project, business conditions at the time the organization is instituted, and the objectives of the group that is undertaking the enterprise. Detailed studies of the practical aspects of the various financing methods are available in current publications and will not be repeated here.

The issuance of shares, if the objective of incorporation has been properly stated so as to bring the corporation under the non-profit corporation grouping of the federal law, will result in an exemption from the capital stock tax, but strict compliance with the Illinois Securities Law will of course be necessary. The federal income tax problem is an involved one and will not be discussed at length. It may be stated in general, however, that if the corporate by-laws require that unexpended earnings be promptly disbursed as rent refunds, rather than as dividends to stockholders, the same are not to be treated as income, but conversely if held as reserves or paid out as dividends then tax

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19 Stafford Owners, Inc. v. United States, 39 F. (2d) 743 (1930).
21 Ill. Rev. Stat. 1947, Ch. 121 1/2, § 96 et seq.
22 For dangers inherent in failure to heed this admonition, see Marks, "Coercive Aspects of Housing Cooperatives," 42 Ill. L. Rev. 728 at 731 (1948).
There is still an open question as to the nature of an increase in net worth arising from funds applicable to the decrease of the principal of any mortgage, but since 1942, a "tenant-stockholder" may take as a deduction from gross income, on his federal income tax return, an amount representing his proportionate share of the real estate taxes, paid or accrued within the taxable year, on the land and building, or the interest incurred by the corporation on its indebtedness contracted in connection with the acquisition, construction, or maintenance of the co-operative apartment building.

V. DANGERS AND LIMITATIONS

The advertisements confronting a prospective member of a co-operative apartment project offer to "sell" him an apartment. He is told he may "buy" one for a stated price and become the "owner" thereof. This concept of ownership would give the individual an initial impression that he will own his apartment as he would a house and lot. The forms of co-operative organization that exist today, however, especially in the apartment field, do not give a fee title to the buyer, and probably will not until the practice of subdividing the air becomes more widespread than it is today.

The payment of the "purchase price," and even the payment of the agreed nominal rent in advance, will not necessarily prevent the tenant from being charged for use and occupancy in the event of foreclosure. In Greenebaum Sons Bank & Trust Company v. Kingsbury, for example, the defendant occupied an apartment in a co-operative building under a ninety-nine year lease at a nominal rental of one dollar per year and had paid much more than the amount due in advance. Nevertheless, the
court ordered the defendant to pay the receiver the sum of $110 per month as the fair cash or commercial value of the apartment pending the sale of the property and a final determination of the distribution of the assets.\textsuperscript{31}

The only "ownership" that exists in the conventional sense is the ownership of a certain number of shares or stock or beneficial certificates. These may entitle the shareholder or beneficiary to occupancy or to a lease that controls occupancy, but the result is that he is still a "tenant" paying "rent," though the charges be called by another name and be payable otherwise than in the ordinary form. This view has been reiterated by the courts, in decision after decision,\textsuperscript{32} until the repetition has become almost tiresome.

There is nothing essentially wrong in the facts of this tenancy, provided its nature is understood, but the incidents of a rental relationship are considerably different from the situation of an owner in fee. The "renter" has less absolute control over his use of the property; he can be evicted; his right and ability to "sell" what he has purchased are limited by the rules of the organization, so as to restrict its marketability; and he is dependent upon the economic condition of his neighbors for the retention of his "property" which, in this case, is a right of occupancy. The economic interdependence of the members of a co-operative project was amply illustrated during the depression of the last decade. Mortgage foreclosures took their toll of many of the most carefully organized projects of the fashionable type promoted among the more affluent,\textsuperscript{33} while unemployment, job fluctuations, and consequent shifts of groups of workers led to the collapse of a number of the low-cost developments.\textsuperscript{34}


\textsuperscript{33} See Section 1 hereof, particularly note 20, ante.

A sound financial plan for the organization in the first instance requires considerable business acumen, and many projects have failed for lack of foresight as to changing conditions. The stability of the group participating must be judged in advance for the form of plan to be properly calculated. If all members are employed in one industry, or are dependent on the same or similar lines of business endeavor for their livelihood, layoffs, recessions, or population shifts may defeat the project in its infancy. The age of the members of the group must also be considered in planning the amortization period of the mortgage. Over-financing, or too many luxury features, are dangers which promoters are not prone to admit. In some forms of organization, it has been suggested that a reserve may be built up to carry the group through a period of depression, when some members will be unable to meet their payments, but it must be remembered that this reserve will increase the net worth of the co-operative and may thus become a form of taxable income.\footnote{35 See Section 4 hereof, ante.}

It has already been stressed that the planning and execution of the actual plan of organization requires meticulous care and legal analysis of every step.\footnote{36 Several projects described in U. S. Dept. of Labor, Nonprofit Housing Projects in the United States (Bur. of Labor Statistics, Bull. No. 896, 1947), failed because of poor planning.} In the trust form, the trustee must be vested with ample powers,\footnote{37 Scott, Law of Trusts, Vol. 2, § 186, p. 982.} and the contractual obligations of the beneficiary-occupants must be stated fully.\footnote{38 Castle, "Legal Phases of Cooperative Buildings," 2 So. Cal. L. Rev. 1 at 10 (1928).} In the corporate form, the law under which the corporation is organized enters into and forms a part of its charter,\footnote{39 Metropolitan El. Ry. Co. v. Chicago, 261 Ill. 624, 104 N. E. 165 (1914).} and the various instruments executed will be read and considered together as one contract.\footnote{40 Tompkins v. Hale, 284 N. Y. 675, 30 N. E. (2d) 721 (1940).} But even if soundly financed and soundly organized, there is the possibility of hidden danger generated by the vesting of too much control in the hands of a few.
Many so-called co-operatives lack the features of co-operation which make the plan feasible. Common objectives on the part of the co-operators are essential for successful operation. In *Hess v. Aquitania Apartments Company*, for example, any inclination to co-operate disappeared when the minority stockholders charged fraudulent conduct of corporate affairs on the part of the directors and officers and sought an injunction to prevent the imposition of an unnecessary encumbrance on the property of the corporation. Such disputes are not the only evidence of lack of co-operation. Misrepresentations made when selling apartments, pressure exerted on occupants of a building to join a co-operative, non-compliance with registration requirements, overvaluation of the property by unscrupulous promoters, and speculation in the stock or apartments are all symptomatic of the loss of the co-operative feature. When speculation enters such a project, it is usually the precursor of failure.

Still another species of danger is illustrated by the case of *Schaffer v. 8100 Jefferson Avenue East Corporation*. The tenant-stockholders there alleged acts on the part of the managing company and others willfully to induce a fraudulent foreclosure, by deliberately failing to make certain payments, in order to eliminate the interests of the tenant-stockholders and to permit a misappropriation of funds. Moreover, there have been enough other allegations of avoidance of contract, constructive evic-
tion,\textsuperscript{51} and outright fraud,\textsuperscript{52} to make it apparent that the maxim of \textit{caveat emptor} must be fully heeded in this sphere.\textsuperscript{53}

Another danger may be classified as one representative of difficulties not easily foreseen, yet still a significant problem in the field. It is exemplified by the difficulty which may arise in connection with the various rent control regulations.\textsuperscript{54} Co-operative apartment corporations were given special recognition in the rent control act adopted by New York after the First World War.\textsuperscript{55} A summary procedure to obtain possession was there authorized in favor of a bona fide co-operative apartment corporation, the entire stock of which was held by shareholders in proportion to the number of rooms to be occupied,\textsuperscript{56} and a newly-formed co-operative corporation was permitted to gain possession under an interpretation given to that act.\textsuperscript{57}

Under the nation-wide rent control acts of the present decade, however, the emphasis has changed. An OPA amendment adopted in 1945\textsuperscript{58} sought to prevent the use of a co-operative organization to promote evictions and to evade rent ceilings. Under that regulation, a non-resident purchaser of stock in a co-operatively owned building could not evict a resident tenant in order to secure occupancy of the apartment unless the property had been operated as an active co-operative on February 17, 1945, or eighty-five per cent. of the apartments were occupied by stockholders.\textsuperscript{59} Under the Housing and Rent Act of 1947,\textsuperscript{60} it would

\textsuperscript{54} This problem was considered at some length in Marks, "Coercive Aspects of Housing Cooperatives," 42 Ill. L. Rev. 728 at 736 (1948).
\textsuperscript{56} Mont Cenia Apartments v. Alexander, 120 Misc. 542, 199 N. Y. S. 69 (1923); Ravitz v. Simetz, 115 Misc. 406, 188 N. Y. S. 402 (1921).
\textsuperscript{57} Woodrow Court v. Ambrookian, 113 Misc. 500, 185 N. Y. S. 756 (1920).
\textsuperscript{59} 1945 Ann. Surv. of Am. Law 529.
\textsuperscript{60} Pub. Law 129, Ch. 163, 80th Cong., 1st sess., 1947; 50 U. S. C. A. App. § 1881.
appear that, in any event, the new purchaser of a right of occu-
pancy in a co-operative apartment project could not evict the
resident tenant.61 Three nisi prius decisions rendered by lower
courts in Chicago would seem to reaffirm this, for they hold that
the lessee under a proprietary lease is not a landlord within the
meaning of the 1947 statute, hence would not be entitled to evict
the present tenant.62

The Housing and Rent Act of 1948 makes practically no
change in the applicable provisions,63 except there is a proviso
thereto dealing with the right of the co-operative corporation or
association to recover possession.64 That proviso, however, does
not aid the individual purchaser of stock or beneficial certificates,
so it would still seem as if such purchaser, even though he be en-
titled by the terms of his contract to a proprietary lease, may still
have his possession delayed.65 Under the trust plan, moreover,
the holder of beneficial certificates may not maintain a forcible
detainer action for his own possession because the interest of the
beneficiary is deemed to be personal property and will not support
the action.66

61 Ibid., § 209(a).
62 Seligman v. Greenleaf Apartment Bldg. Corp., Circuit Court of Cook County,
  case No. 47-C-11676; West, Trustee v. Martinez, Municipal Court of Chicago,
  case No. 47-M-62538; Kenny v. Thompson, Municipal Court of Chicago,
  case No. 47-M-62570. See also Braislin v. Sawdon, 68 N. Y. S. (2d) 774 (1946).
63 Pub. Law —, Ch. 161, 80th Cong., 2nd sess., 1948; 50 U. S. C. A. App. § 1894
  et seq.
64 That proviso amends § 209(a)(2) of the statute referred to in note 60, ante,
  and declares that “in the case of housing accommodations in a structure or premises
  owned or leased by a co-operative corporation or association, no action or proceeding
  under this paragraph or paragraph (3) to recover possession of any such housing
  accommodations shall be maintained unless stock in the co-operative corporation or
  association has been purchased by persons who are then stockholder tenants in
  occupancy of at least 65 per centum of the dwelling units in the structure or
  premises and are entitled by reason of stock ownership to proprietary leases of
  dwelling units in the structure or premises; but this proviso shall not apply where
  such corporation or association acquires or leases such structure or premises after
  the effective date of the Housing and Rent Act of 1948 pursuant to a contract
  entered into prior to such date.”
65 In Illinois, in the absence of an express covenant to deliver possession, the
  lessor is not bound to put his tenant in possession: Gazzolo v. Chambers, 73 Ill. 75
  (1874); Palmer v. Young, 108 Ill. App. 252 (1903). See also Hannan v. Dusch, 154
66 Handler v. Alpert, 331 Ill. App. 405, 73 N. E. (2d) 171 (1947); Barnett v. Levy,
  Kosterlitz, 329 Ill. App. 244, 67 N. E. (2d) 876 (1946), noted in 25 CHICAGO-KENT
  LAW REVIEW 176. See also Duncanson v. Lill, 322 Ill. 528, 153 N. E. 618 (1926).
In addition, co-operative apartment projects may have difficulty, under the Housing and Rent Act of 1947,67 as amended in 1948,68 with regard to overceiling rent provisions. The statute defines rent as being the "consideration demanded or received in connection with the use or occupancy or the transfer of a lease of any housing accommodations." 69 The initial purchase price of shares or beneficial certificates may be considered as part of the rent under this provision, just as the monthly assessments or maintenance charges are rent,70 in which case a new entrant into the organization may be paying well over the maximum laid down by law. The theory has recently been expressed 71 that the necessity of buying shares of stock or beneficial certificates in a co-operative arrangement produces a violation of the statute as a "tie-in" sale.72 Inasmuch as the nature of the co-operative apartment was recognized quite early under the OPA, however,73 and in the light of the tacit recognition of the arrangement as revealed by the most recent statute on the subject,74 it is doubtful whether this is more than a theoretical difficulty at most.

VI. CONCLUSION

After this brief review of the history, the organization, and some of the dangers involved in that complex relationship which is implied when one speaks of a "co-operative" apartment, it would seem apparent that this type of arrangement is becoming a well-established part of our economy, hence the legal concepts involved become increasingly significant. The co-operative ar-

67 See note 60, ante.
68 See note 63, ante.
69 Ibid., § 202(e).
70 See Section V hereof, particularly note 32, ante.
71 Marks, "Coercive Aspects of Housing Cooperatives," 42 Ill. L. Rev. 728 at 739-40 (1948).
72 In particular, see Controlled Housing Rent Regulation, 12 Fed. Reg. 4331, July 1, 1947. Section 9(b) thereof specifies that "no person shall require a tenant or prospective tenant to purchase or agree to purchase . . . any other property as a condition of renting housing accommodations."
73 See notes 58 and 59, ante.
74 Footnote 64, ante.
rangement, either in corporate or trust form, would appear to be a practical method of organizing either low-cost or luxury type housing, provided the plan is understood in its true light and suitable care is taken in advance to anticipate the dangers confronting it. The participant in such a project should understand that all he actually owns is a share in a co-operative venture, and that co-operation implies interdependence. So long as these limitations are remembered, the co-operative apartment arrangement is, like all other legal vehicles, an appropriate means of achieving a desired objective.
DISCUSSION OF RECENT DECISIONS

ACTION—Actions for Declarations of Rights Without Other Relief—Right of Lessee, Obligated by Lease to Pay Taxes, to Obtain Declaratory Judgment as to Validity of Tax Imposed Upon the Demised Premises—The recent Kansas case of Boeing Airplane Company v. Board of County Commissioners of Sedgwick County1 was one calling for a declaratory judgment as to the validity of certain taxes assessed against leased premises. Plaintiff was the lessee of, and held an option

1 164 Kan. 149, 188 P. (2d) 429 (1947). Although Burch, J., wrote the opinion for the majority, he also wrote a dissenting opinion, concurred in by Wedell and Hoch, JJ.
to buy, the real property in question which was owned by the Reconstruction Finance Company as successor to the Defense Plant Corporation. By the terms of the lease, plaintiff was obligated to pay any taxes which were lawfully assessed against the demised premises. The defendants had entered the property in question upon their tax books for the years 1944 to 1946 as the property of the plaintiff, notwithstanding the fact that the legal title was in the Reconstruction Finance Company, apparently acting on the assumption that taxes were to be levied and collected in the same manner as on privately owned property. The lessee’s protest against the assessment was denied both by the defendant and the state commission of revenue and taxation, despite the claim that the tax levy was invalid.² Plaintiff then sought a declaratory judgment as to the validity of the tax levy, impleading the Reconstruction Finance Company as a defendant.³ The principal defendants demurred, claiming that the court had no jurisdiction on the ground that the petition did not disclose any controversy within the purview of the local declaratory judgment act⁴ and also because there was no privity of interest between the lessee and the taxing authorities over the taxation of property belonging to another. The district court sustained jurisdiction but upheld the demurrer on the second ground. On appeal to the Supreme Court of Kansas, that court, with three judges dissenting, declared that the lower court was without jurisdiction to entertain a declaratory judgment proceeding of that character and ordered the appeal dismissed.

The instant case presents, for the first time in the United States, an inquiry as to whether a lessee, under an obligation to pay lawful taxes, could secure declaratory relief as to the validity of taxes assessed against real estate not owned by the lessee. The decision of the Kansas court to the effect that such a lessee may not, is unfortunate in two respects. It is contrary to the progressive attitude of declaratory judgment acts in general and to the Kansas statute in particular, as well as contrary to views expressed in ordinary law actions involving the same subject wherein a much more rigid attitude toward the problem could have been rationalized on a sounder basis.

In the first place, it is a well established legal principle that a lessee

² The claim of invalidity was based on the argument that U. S. C. A., Tit. 15, § 610, permitting taxation of property belonging to the Reconstruction Finance Company, was in conflict with the act admitting Kansas into the Union, 12 Stat. 127, § 3, para. 6; with the joint resolution of the Kansas legislature accepting statehood, Kan. Laws 1862, Ch. 6; and also with Kan. Gen. Stat. 1837, § 79-201(5), exempting property owned, used by, and belonging exclusively to the United States government.

³ The Reconstruction Finance Company filed an answer which did no more than admit all the facts alleged in plaintiff’s petition.

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who agrees to pay all taxes levied on the demised premises thereby assumes only to pay such taxes as may be legal and valid. The leading case on that point is Clark v. Coolidge\(^5\) which, ironically enough, was also decided in Kansas. Conversely, taxing bodies have, at times, availed themselves of such a contract between lessor and lessee to justify a levy of taxes directly against the lessee. In New York Guaranty and Indemnity Company v. Tacoma Railway & Motor Company,\(^6\) for example, the court said: "We are of the opinion that the motor company's exclusive possession and enjoyment for the period of 25 years of the leased portion of the power plant site, with a covenant binding it to pay the taxes thereon 'fulfills the condition of being owner' for the purposes of taxation."\(^7\) The conclusion is irresistible that if the lessee who assumes the payment of taxes is bound to pay only such taxes as are valid, and if he may be directly coerced into paying such taxes, he should, as a matter of natural justice, be permitted to enter a direct contest to determine the validity thereof.

This general proposition has, as a matter of fact, been subscribed to by the courts. In Pursell v. Mayor, etc., of the City of New York,\(^8\) the lessee had paid an assessment for local improvements by reason of a covenant in his lease binding him to pay all such assessments. On application by his landlord, pending at the time payment was made, the assessment was set aside. It was held proper for the lessee to have the benefit of that decision and to recover the amount of the taxes so paid. There is considerable significance in the remark there made to the effect that "... the plaintiff was not the party assessed, nor was he the petitioner in the proceeding to vacate the assessment; but he had a valuable leasehold interest in the property, upon which the assessment was an apparent lien, and he was also bound by the covenants in his lease to pay all the assessments. He was, therefore, the real party in interest in the proceedings instituted by his landlord to vacate the assessment. He might have instituted them himself ..."\(^9\)

The case of In re Burke\(^10\) possesses much the same effect for there the court said: "Nor, if a lessee is bound by his lease to pay an assess-


\(^6\) 93 F. 51 (1899).

\(^7\) 93 F. 51 at 57.

\(^8\) 85 N. Y. 330 (1881).

\(^9\) 85 N. Y. 330 at 333.

\(^10\) 62 N. Y. 224 (1875).
ment laid, can I perceive a difference between him and an owner, in his right to take this proceeding . . . Either the owner whose title may be clouded by an illegal assessment, or a lessee who is under covenant to pay an assessment, is aggrieved when an invalid assessment is made . . . The provision of law for this special proceeding to vacate was meant to afford an early, speedy and cheap mode of testing the legality. It is open to any one, owner or lessee, who is likely to be put to litigation and expense by reason of it."11 The reactionary attitude of the majority of the court in the instant case is pointed up, and its incongruity heightened, by the sharp contrast with such liberal language expressed over seventy years ago.

Cognizance should also be taken of an additional factor, to-wit: the plaintiff was not only lessee but in addition had an option to buy the demised property involved in the instant case. A similar interest was held sufficient to warrant a declaratory judgment in *Ken Realty Company v. Johnson*,12 wherein it was decided that an original complaint to enjoin the levying of an ad valorem tax against realty occupied by the plaintiff under a contract to purchase from the United States government contained a sufficient demand for judgment to include within its scope a declaration of right based upon such possessory interest. If it should be argued that such a right is only a contingent one, the argument must be countered with the assertion that in many instances "even if a right claimed is contingent upon the happening of some future event, its present determination may serve a very real practical need of the parties for guidance in their future conduct."13 The Connecticut case of *Sigal v. Wise*,14 says this very thing for it was there pointed out that a construction of declaratory judgment statutes which would "exclude from the field of their operation the determination of rights, powers, privileges and immunities which are contingent upon the happening or not happening of some future event would hamper their useful operation."15

The Kansas Declaratory Judgment Act, like similar statutes, is avowedly remedial and states that its purpose is "to afford relief from the uncertainty and insecurity attendant upon controversies over legal rights, without requiring one of the parties interested so to invade the rights asserted by the other as to entitle him to maintain an ordinary action therefor; and it is to be liberally interpreted and administered,

11 62 N. Y. 224 at 228.
14 114 Conn. 297, 158 A. 891 (1932), noted in 41 Yale L. J. 1090.
15 114 Conn. 297 at 302, 158 A. 891 at 893.
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with a view to making the courts more serviceable to the people." It is futile to have a legislature subscribing to progressive principles of legal administration of that character if the courts will not translate legislative intent into practical reality. The declaratory judgment is a lusty infant of the law. It is fitting that its growth and development should be zealously guarded so as to insure as nearly perfect a specimen as possible when it comes of age. But it is quite another thing to positively retard its growth and development by decisions that will circumscribe its natural scope and attenuate its potential force. The instant case stands as a refutation of the basic reasons which prompted the adoption of the declaratory judgment device. It is, therefore, not unreasonable to hope that the principles for which it stands will be rejected by subsequent decisions.

I. STEIN

CHARITIES—CREATION, EXISTENCE, AND VALIDITY—WHETHER OR NOT GIFT IN TRUST TO CLOISTERED CONVENT MEETS REQUIREMENT THAT TRUST FOR CHARITY MUST DISCLOSE PUBLIC BENEFIT TO BE VALID—The vexatious question of whether a gift in trust for the benefit of a cloistered convent amounts to a valid charitable gift was placed squarely before the Chancery Division of the High Court of Judicature in the English case of In re Coats' Trusts. In that case, a sum of money was held by trustees under a declaration of trust with direction to apply the income for the purposes of a Roman Catholic cloistered convent but if such purposes were not charitable then the trustees were directed to apply the trust fund to another religious community whose purposes were admittedly charitable. Upon request by the trustees for directions, the evidence showed that the convent consisted of a group of twenty strictly cloistered and contemplative nuns who devoted their lives to self-sanctification within their convent and who engaged in no exterior corporeal works of mercy.

17 Perhaps the most adequate expression of the purpose and efficacy of the declaratory judgment proceeding was made by Edson R. Sunderland, "A Modern Revolution in Remedial Rights—The Declaratory Judgment," 16 Mich. L. Rev. 69 at 76 (1917), where he states: "... if the courts could operate as diplomatic instead of belligerent agencies, less hesitation would be felt over recourse to them, and less strain would be put upon the friendly relations of the parties. To ask the courts merely to say whether you have certain contract rights against the defendant is a very different thing from demanding damages or an injunction against him. When you ask for a declaration of right only, you treat him as a gentleman. When you ask for coercive relief you treat him as a wrongdoer. That is the whole difference between diplomacy and war; the former assumes that both parties wish to do right, the latter is based on an accusation of wrong... It makes the law suit a cooperative proceeding in which the court merely assists the parties to settle their differences by stating the rules of law which govern them."

1 Sub nom. Coats v. Cilmour, [1948] Ch. 1.
The way of life of these nuns, however, was said to be a source of great edification to other Catholics and indeed, in innumerable cases, to non-Catholics, leading them to a higher estimation of spiritual things and to a greater striving after their own spiritual perfection as well as to inculcate in such persons a greater estimation of the value and importance of the things which were eternal than they would have had if they had not these examples before them.\(^2\) The court summed up the evidence as tending to indicate that the nuns in question, by means of their private worship, prayers, and meditations, caused the intervention of God to bring about "the spiritual improvement of the public (both Catholic and non-Catholic)" and also provided "an example of self-denial and concentration on the life of the spirit tending to the spiritual edification of . . . members of the public."\(^3\) Despite such evidence and contrary to the contention of counsel for the convent, that in determining whether a particular religious purpose was for the benefit of the public the court should assume the tenets of the particular religion to be true, it was held that the purposes of the convent in question were not charitable, the benefit to the public being too incidental and indirect, hence the trust over was called into operation.

Ever since Lord Macnaghten's decision in the case of *The Commissioners for Special Purposes of the Income Tax v. Pemsel*,\(^4\) legally recognized charities have been classified into four broad categories, to-wit: "trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads."\(^5\) Subsequent decisions have paid service to the proposition that for a gift in trust to be for a charity "there must be some public purpose—something tending to the benefit of the community."\(^6\) The gift in the instant case failed on this very issue for the court, in reaching its decision, relied upon dicta in the case of *Cocks v. Manners*\(^7\) to the effect that a gift to a cloistered convent could not be a charitable gift as it would be lacking in any aspect of public benefit.

The law relating to charities, however, has developed substantially during the past century and would hardly appear to support the decision

\(^2\) See affidavit by Cardinal Griffin, set out in [1948] Ch. 1 at p. 9.
\(^3\) [1948] Ch. 1 at p. 10.
\(^4\) [1891] App. Cas. 531.
\(^5\) Ibid., at p. 583.
\(^6\) See *In re Foveaux*, [1885] L. R. 2 Ch. 501 at p. 504. But for an interesting discussion of the proposition that a showing of public benefit should not be necessary as to gifts for the advancement of religion, see F. H. Newark, "Public Benefit and Religious Trusts," 69 Law Quart. Rev. 234 (1946).
\(^7\) [1871] L. R. 12 Eq. Cas. 573.
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in the instant case. It is true that the English courts at one time held that bequests for the saying of masses for the repose of the soul of the deceased testator were to be deemed illegal since the gift tended to propagate a religion other than the one recognized by the state. After the passage of the Roman Catholic Charities Act, such gifts were still held invalid, but on the ground of being superstitious uses. This last mentioned view was corrected in Bourne v. Keane, but it was not until the decision in the case of In re Caus that the court finally held that gifts of that character were charitable. The former decisions to the contrary were there declared to be based upon "insufficient and incorrect information with regard to the character of the rite," and upon the false assumption that, as the dominant purpose was to benefit the testator, the gift could not be charitable, egoism being the direct antithesis of charity. The court there received evidence as to the nature and purpose of the Mass, accepted the teachings of the Roman Catholic Church to be a true exposition, and arrived at the conclusion that as the gift was designed for the advancement of religion it bestowed a public benefit, hence was charitable in character. The courts of Ireland also, at one time, indicated that there was no public benefit which could be shown by legal evidence, but that view was likewise expressly overruled in the case of O'Hawlon v. Logue.

In this country, trusts for masses have generally been held to be charitable in character, and, since gifts to charity are looked upon with favor, every presumption consistent with the language used will be

9 2 and 3 Wm. IV, c. 115 (1832); Halsbury, Laws of England, Vol. IV, p. 132.
12 Sub. nom. Lindeboom v. Camille, [1934] Ch. 162.
13 Ibid., at p. 169.
14 The evidence indicated that every Mass, "on whatever occasion used, is offered to God in the name of the church, to propitiate His anger, to return thanks for His benefits, and to bring down His blessings upon the whole world." It was said to be impossible, according to the doctrine of the church, "that a Mass can be offered for the benefit of one or more individuals living or dead to the exclusion of the general objects included by the church." See In re Caus, [1934] Ch. 162 at p. 167.
15 On that score, the court said it would refuse "to entertain an inquiry as to the truth or soundness of any religious doctrine, provided it is not contrary to morals or contains nothing contrary to law." [1934] Ch. 162 at p. 168.
17 [1906] 1 Ir. R. 247.
18 Sedgwick v. National Savings & Trust Co., 130 F. (2d) 440 (1942); Hoeffer v. Clogan, 171 Ill. 462, 49 N. E. 527 (1898); Harrison v. Brophy, 59 Kan. 1, 51 P. 883 (1898); Coleman v. O'Leary, 114 Ky. 388, 70 S. W. 1068 (1902); Webster v. Sughrow, 69 N. H. 380, 45 A. 139 (1898); Holland v. Alcock, 108 N. Y. 312, 16 N. E. 305 (1889); Sherman v. Baker, 20 R. I. 446, 40 A. 11 (1898); In re Kavanaugh's Estate, 143 Wis. 90, 126 N. W. 672 (1910).
indulged in to sustain them.\textsuperscript{19} It being a political as well as a legal principle that there shall be no established religion, and government being forbidden to participate in the support of or dissemination of religion of any kind, all religious societies in the United States must depend upon the eleemosynary contributions of individuals for their support. Whenever the end of such gifts is truly religious, the law ought not stand in the donor’s way and should hold such donations as being really charitable.\textsuperscript{20} The decision in the case of \textit{In re Kavanaugh’s Estate}\textsuperscript{21} is typical, for it was stated therein, in reply to the contention that no public benefit was afforded by the saying of masses that according ‘to the doctrine of the Catholic Church as established by the proof in this case, the whole church profits by every mass . . . ’ The individuals who participate in the fruits of this mass are the person or persons for whom the mass is offered, all those who assist at the mass, the celebrant himself, and for all mankind, within or without the fold of the church.’ So it seems clear upon reason and authority . . . that a bequest for masses is a ‘charitable bequest,’ and valid as such, although the repose of the souls of particular persons be mentioned.\textsuperscript{22}

According to the teaching of the Roman Catholic Church, the benefit from a gift for masses is two-fold; spiritual, by the infusing of grace into the soul of man, and material, by the Divine bounty bestowed upon mankind. Another benefit may be found in that the mere knowledge there will be a rendition of the Mass edifies a large group of persons, Catholics and non-Catholics alike, leading them to ‘a higher estimation of spiritual things and to a greater striving after their own spiritual perfection.’\textsuperscript{23} If this is so, it seems inconsistent for a court to hold that a gift to a cloistered convent is not charitable in character for the same type of benefit is conferred by the prayers of the devote nuns as results from the saying of the Mass. The court would seem to misconstrue the whole object and purpose of nuns such as those in the instant case, in devoting their lives to self-sanctification in strict seclusion, when it holds that such purposes are for the benefit of the nuns alone and not for any appreciable portion of the public. This view ‘postulate[s] egoism as the note of the monastic life.’\textsuperscript{24} It is most unlikely that the prayers of such nuns are directed only to the procurement of blessing for themselves, but in any event their godly lives set an example and edification to the whole Church, if not to the entire public.

\textsuperscript{19} Carlstrom v. Frackelton, 263 Ill. App. 250 (1931).
\textsuperscript{21} 143 Wis. 90, 126 N. W. 672 (1910).
\textsuperscript{22} 143 Wis. 90 at 98, 126 N. W. 672 at 675.
\textsuperscript{23} See \textit{In re Coats’ Trusts}, [1948] Ch. 1 at p. 9.
\textsuperscript{24} Maguire v. Attorney-General, [1943] Ir. R. 238 at 247.
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J. A. SACCOME, JR.

JUDGES AND LAWYERS CANNOT BE EXPECTED TO BE THEOLOGIANS, NOR IS IT DESIRABLE, IN THIS AGE OF ACUTE DIFFERENCES AS TO RELIGIOUS BELIEFS, THAT THEY SHOULD BE. BUT IF THERE IS TO BE NO DISCRIMINATION OVER RELIGIONS, IT WOULD SEEM TO BE BETTER POLICY TO ADHERE TO VIEWS SUCH AS THOSE EXPRESSED IN THE CAUS AND KAVANAUGH CASES. UNDER THOSE VIEWS, AT LEAST, COURTS WILL NOT BE OPEN TO THE CHARGE THAT THEY FAVOR ONE RELIGION OVER ANOTHER.

CONTRACTS—REQUISITES AND VALIDITY—VALIDITY OF PROVISION IN ORIGINAL AGREEMENT WHEREBY CONTRACTING PARTY STIPULATES TO WAIVE BENEFIT OF STATUTE OF LIMITATION—In the recent Massachusetts case of National Bond & Investment Company v. Flaiger, the facts disclosed that the defendant purchased a car under a conditional sale contract in 1939 and at that time executed an installment promissory note to secure the unpaid balance. The note contained a provision to the effect that all “parties to this note . . . hereby severally waive . . . diligence in bringing suit against any party hereto,” and further authorized the holder to accelerate payment in case of default. The car was subsequently repossessed and sold because of default in payment of an installment on the note and the sale price was applied to reduce the indebtedness, leaving a deficiency thereon. Suit was brought on the note in 1946, to recover this balance, to which action the defendant pleaded the statute of limitation. The plaintiff replied that the statute could not be asserted as the defendant had waived the benefit of its terms, by the language above quoted, but the defendant contended that such waiver was against public policy and void. The trial court upheld the defendant’s contention, the appellate court dismissed an appeal therefrom, and the Supreme Judicial Court of Massachusetts, on further appeal, also affirmed the judgment, holding for the first time in that state that agreements in original obligations never to set up the statute of limitations violate the public policy underlying the statute.

While it is generally held that parties cannot, by agreement, modify a law, there is also unanimity of opinion on the point that they may forego the protection afforded by a particular law provided no principle of public policy is thereby violated. It is obvious, therefore, that the public policy permeating statutes of the kind in question must be clearly

1—Mass. —, 77 N. E. (2d) 772 (1948).
2 Mass. G. L. (Ter. Ed.), Ch. 260, § 2, limits actions to six years after the whole indebtedness becomes payable. It was applicable to the instant case, as the note in question had been declared due early in 1940 by acceleration when default occurred.
3 Wells Fargo v. Enright, 127 Cal. 669, 60 P. 439 (1900); Quick v. Corlies, 39 N. J. L. 11 (1876).
outlined before it is possible to pass on the validity of agreements such as the one involved in the instant case. Jurists generally consider such statutes as designed to serve both the needs of individuals and the courts; affording repose to individuals by preventing fraud and perjury against defendants handicapped by time-worn memories, paucity of witnesses, and loss of evidence which might once have existed, while protecting courts against the sudden descent of a mass of stale claims, thereby insuring a continuous flow of cases permitting of orderly, careful, and just determination. There is, however, another factor to be considered and that is the well-accepted fact that needy men are not essentially free men, hence will yield to pressure and assent to contractual terms, no matter how oppressive and unjust, in order that urgent needs may be satisfied. 4

Although the language used in many decisions would seemingly appear to present a great conflict, if the foregoing criteria are observed, the cases can be placed in definite categories. In the first group, adequately represented by the facts of the case under discussion, are cases where the waiver is attempted at the inception of the original obligation, i.e. at the time when the need of the debtor can best be exploited by the creditor. According to the prevailing view, such a waiver will be deemed contrary to public policy, 5 as is also the case where a renewal is granted only on condition that the maker forego the protection of the statute. 6

In contrast thereto, a second group of cases display a willingness to declare a waiver of the statute valid on the theory that as the parties may agree to a shorter period of limitation, less than that prescribed by statute, 7 they may fix a longer term so long as they deal at arms length


6 Steinfeld v. Marteny, 40 Ariz. 116, 10 P. (2d) 367 (1932). It would seem that the coercion is as great, at that moment, as it would be when the original loan was made.

7 Agreements shortening the period have been upheld in Burliew v. Fidelity & Casualty Co., 276 Ky. 132, 122 S. W. (2d) 990 (1938); Lewis v. Metropolitan Life Ins. Co., 190 Mass. 317, 62 N. E. 369 (1902); Stewart v. National Council of Knights
and the period fixed is not unreasonable. Especially is this the case if the waiver agreement is entered into subsequent to the execution of the original obligation, provided attention is given to the qualification that the agreement defers the defense for a definite or reasonable time. There are cases where the courts have decided that the defense of limitation is unavailable for so long as the parties may have agreed or, if the contract is indefinite as to time, then forever. Most courts, however, will place a time limit beyond which the waiver will not be effective, either on the theory that the statute runs against the contract not to plead the statute, or suspends the bar for a reasonable time which is measured by the statute, or else on the ground that the contract operates only as a waiver of time already past.

No Illinois reviewing court has, as yet, been called upon to decide the point raised in the case under discussion, nor has the question of the validity of a waiver subsequent to the original obligation been posed.


11 First National Bank v. Mock, 70 Colo. 517, 203 P. 272 (1921); Bowman v. Palme, 64 Miss. 99, 8 So. 168 (1886); Maddux v. Jones, 51 Miss. 531 (1875); Bridges v. Stephens, 132 Mo. 524, 34 S. W. 555 (1896); Cecil v. Henderson, 121 N. C. 244, 28 S. E. 481 (1897); McIntosh v. Condron, 20 Pa. Super. 118 (1902).


13 Closest to the point is the case of Conerty v. Richsteg, 379 Ill. 360, 41 N. E. (2d) 476 (1942), reversing 308 Ill. App. 321, 31 N. E. (2d) 351 (1941). There the agreement to remain liable on the original debt, evidenced by a note, either accord-
There is language in the case of *Steen v. Modern Woodmen of America* which might foreshadow an eventual holding in this state as it pertains to a waiver contained in the original obligation. The court there, when deciding the validity of a waiver of a law other than the statute of limitations, indicated that there should be the utmost liberty of contracting so that, when such contracts have been entered into fairly and voluntarily, they should be sustained. It has also been held, in this state, that an agreement limiting the time within which suit may be brought is valid if the period fixed is not an unreasonable one. These decisions might indicate that an original waiver of the statute of limitations would be sound, on the theory that if its operation can be shortened by agreement it can also be extended. But sight should not be lost of the fact that waiver agreements are usually not truly voluntary ones, and this point may be seized upon as the determining factor should the problem ever arise in this state.

H. J. Jennings

**Criminal Law—Successive Offenses and Habitual Criminals—Whether or Not Burden of Proof Necessary to Establish Prior Conviction is Satisfied by Introduction of Authenticated Record Disclosing Similarity of Name—Surprisingly enough, the Illinois Supreme Court was never in a position to construe the degree of proof required by Section 2 of the Habitual Criminal Act until the recent case of *People v. Casey* afforded that opportunity. The defendant therein, one Patrick Leo Casey, was tried and convicted on an indictment which charged grand larceny and, in addition, two prior convictions for felony in Kansas and Missouri so as to bring the case within the Habitual Criminal Act. At the trial, over objection by the defendant, the state offered authenticated copies of the records of the prior convictions referring to persons named Patrick Leo Casey and Patrick L. Casey respecting to its terms or “according to any agreement extending time of payment,” was set forth in an accompanying real estate mortgage. Liability beyond the original period of limitation on the note was denied as the two documents were regarded as separate undertakings. Had the quoted language been found in the note, the instant problem would then have been squarely presented.

14 296 Ill. 104, 129 N. E. 546 (1920).
2 399 Ill. 374, 77 N. E. (2d) 812 (1948).
3 Ill. Rev. Stat. 1947, Ch. 38, § 602. No objection was made to the fact that the prior convictions arose out of the state, probably because of the decision in *People v. Poppe*, 394 Ill. 216, 68 N. E. (2d) 254 (1946). But see criticism thereof in 25 CHICAGO-KENT LAW REVIEW 157.
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In the absence of any contradictory testimony offered by defendant, the jury decided that Casey was a habitual criminal. On writ of error obtained by defendant, the Supreme Court reversed and remanded the case for a new trial on the ground that, in view of the imminence of an enhanced penalty such as is imposed on habitual criminals, it was not improper to require the state to establish the prior convictions by the same degree of proof demanded for the substantive offense, to-wit: proof beyond a reasonable doubt. It likewise held that the presumption of innocence runs as well to the allegation of prior conviction and is not overcome by authenticated records, even though declared to be prima facie proof by statute, without some additional evidence bearing on the question of identity.

At least twenty-three American jurisdictions have considered this problem under habitual criminal statutes containing provisions similar to Section 2 of the Illinois act. When the Illinois Supreme Court was confronted with the problem, therefore, it had a choice of two well-seasoned views. Thirteen of these states apply the rule adopted in the instant case, but there is a substantial minority where a verdict of guilty based only upon the prior record plus the presumption of identity arising from similarity of name will suffice. Judicial harmony on the point is disrupted not because of any disagreement as to the degree of proof


5 The fact that similarity of name may raise a presumption of identity of person in civil cases, Clifford v. Pioneer Fire-Proofing Co., 232 Ill. 150, 83 N. E. 448 (1908), and Flikins v. O'Sullivan, 79 Ill. 524 (1876), was declared insufficient to rebut the presumption of innocence in criminal cases: 399 Ill. 374 at 380, 77 N. E. (2d) 812 at 816.

6 Thompson v. State, 66 Fla. 206, 63 So. 423 (1913); Kelley v. State, 204 Ind. 612, 185 N. E. 453 (1933); State v. Lowe, 235 Iowa 274, 16 N. W. (2d) 226 (1944); State v. Dugas, 170 La. 209, 127 So. 345 (1930); State v. Beaudoin, 131 Me. 31, 158 A. 863, 85 A. L. R. 1101 (1932); State v. Livermore, 50 Mont. 362, 196 P. 977 (1921); Burnham v. State, 127 Neb. 370, 255 N. W. 48 (1934); State v. Adams, 64 N. H. 440, 13 A. 785 (1888); People v. Krumme, 161 Misc. 278, 292 N. Y. S. 657 (1936); Angus v. State, 136 Tex. Crim. App. 159, 124 S. W. (2d) 349 (1939); State v. Bruno, 69 Utah 444, 256 P. 109 (1927); State v. Harkness, 1 Wash. (2d) 530, 96 P. (2d) 460 (1939); Green Bay Fish Co. v. State, 186 Wis. 330, 202 N. W. 667 (1925). Note: only the most recent decision from each jurisdiction is given in this and the succeeding footnote to avoid unnecessary repetition.

required, but because the courts differ as to what constitutes proof beyond a reasonable doubt in such cases.

The language of the Iowa Supreme Court in the case of *State v. Smith* contains an excellent statement of one view, for the court there said: "The statute provides for the introduction of authenticated copies of the judgments alleged in proof prima facie thereof. But the state may not stop there. The identity of the defendant as the person who suffered such former convictions remains to be proven. We grant that the identity of names may be some evidence of identity of persons; but standing alone, it is not enough. Every fact essential to the infliction of legal punishment upon a human being must be proven beyond a reasonable doubt. And it would amount to a travesty to say that a *prima facie* case for an increased term of punishment could be made out . . . by showing the isolated fact that a man passing under that name had at sometime or other been convicted [elsewhere] . . . The matter for the jury to determine is the historical fact involved in the charge, and this they must determine as any other fact in the case." No such rhetoric is disclosed in cases expressing the opposite view, but an excerpt from the California case of *People v. Williams* may be regarded as typical. The court there noted that "the name of the defendant who was convicted in Yuba county is identical with that of the defendant in this action. It is a rule of law that identity of person may be presumed from identity of name . . . also that a presumption constitutes a species of evidence which, unless controverted, is sufficient proof of the existence of the fact to which it relates." The sharp contrast between the two views thus illustrated is irreconcilable.

Most courts following the reasoning illustrated by the Williams case impose on the defendant the burden of rebutting the presumption with evidence. Thus, the Oklahoma court in *Files v. State* summarily affirmed the conviction of a defendant who refused to assume that burden. A more conservative element of the minority, however, looks rather to the strength of the presumption created as measured in terms of the surrounding circumstances. In *State v. Bizer*, for example, the

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8 See annotation in 79 A. L. R. 1337, to the case of People v. Reese, 258 N. Y. 89, 179 N. E. 305 (1932), to the effect that it is universally regarded that the fact of the prior conviction is a substantive element of the offense charged and must be proved beyond a reasonable doubt just as is the case of any other element of the crime.

9 129 Iowa 709, 106 N. W. 187, 4 L. R. A. (N. S.) 539 (1906).

10 129 Iowa 709 at 714, 106 N. W. 187 at 189.


12 125 Cal. App. 387 at 388, 13 P. (2d) 841 at 842.


14 113 Kan. 731, 216 P. 303 (1923).
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Supreme Court of Kansas suggested that the certified copy of the record placed before the jury would inform them of such facts as the nature of the prior offense, the manner by which it was accomplished, and the time and place of commission. Where these compare substantially, the existing presumption of identity would be sufficiently strong to warrant the jury finding, beyond a reasonable doubt, that the accused was the person named in the record. Similarly, in Hefferman v. United States, the authenticated records showed that a person of the same name had been convicted several times for running a "speakeasy" in the same town and at the same address as that charged in the instant indictment. The Utah court, in State v. Aime, considered the presumption strong enough where the name was not a common one, and there was nothing to indicate that more than one person in the vicinity was known by the same name. But subsequent cases in the same jurisdictions would seem to reveal that this conservative view is difficult to apply and is apt to produce a swing in either direction.

To say the least, there is logic behind the majority view for, if it be conceded that the state has the burden of proving the prior conviction beyond a reasonable doubt, then it follows as a necessary consequence that the presumption of innocence which favors the accused should require more than a mere presumption to offset it. Certainly that burden would hardly be discharged by a presumption of fact which, on its face, is weaker than the legal presumption of innocence. But apart from logical consistency, the minority view is weak in the practical sense for, in a jurisdiction where the volume of criminal cases is substantial, a duplication of names is apt to occur frequently so that any identity of name becomes little more than a mere coincidence, but a coincidence which might weigh heavily against a defendant such as the one in the instant case.

This alone should be reason enough to put a well-defined burden on the prosecution, yet not serve to create an insuperable burden for, in most instances, proving the identity of a person is neither difficult nor expensive. It may be established by the testimony of witnesses who have

15 50 F. (2d) 554 (1931).
16 62 Utah 476, 220 P. 704 (1923).
17 See also Belcher v. Commonwealth, 216 Ky. 12, 287 S. W. 550 (1926).
18 In State v. Colopy, 120 Kan. 220, 242 P. 1016 (1926), for example, a conviction resting primarily on identity of name was affirmed. The later Utah case of State v. Bruno, 69 Utah 444, 266 P. 109 (1927), on the other hand, produced such a retreat from the rule in the Aime case, cited in note 16, ante, as to amount to a practical reversal thereof.
known the accused;\textsuperscript{20} by the sheriff who took him into custody after the prior conviction;\textsuperscript{21} by the accused's own admission;\textsuperscript{22} by the clerk of the court who read the prior sentence;\textsuperscript{23} by photographs;\textsuperscript{24} or by fingerprints.\textsuperscript{25} Such being the case, the Illinois Supreme Court is to be commended for achieving a rule which is eminently fair to all concerned.

D. V. O'Brien

\textbf{DIVORCE—ALIMONY, ALLOWANCES, AND DISPOSITION OF PROPERTY— WHETHER OF NOT INCREASE OF ALIMONY MAY BE JUSTIFIED ON GROUND DIVORCED HUSBAND HAS ACQUIRED ADDITIONAL WEALTH SUBSEQUENT TO DECREE—A problem of first impression, presented to the Appellate Court of the First District in the recent case of Arnold v. Arnold,\textsuperscript{1} required that court to decide whether or not a divorced wife was entitled to an increase in alimony upon a showing that her divorced husband had increased his wealth many times since the date of the original decree. The plaintiff therein had obtained an absolute divorce in 1931 together with an allowance of periodic alimony. Fourteen years later, she petitioned for an increase of the alimony alleging that while, at the time of the divorce, the defendant had been employed at a salary of seventy-five hundred dollars a year, he had since made over a million dollars and would probably receive an income of seventy thousand dollars for the following year. The master in chancery, after conducting hearings on the petition, recommended a substantial increase in the alimony allowance but the chancellor granted only a moderate increase on grounds other than those relating to defendant's newly-acquired affluence. Both parties appealed from the modification of the decree. The Appellate Court, however, affirmed the holding on the ground that as plaintiff had contributed nothing to defendant's acquisition of wealth, and had procured an absolute divorce, she was entitled to only such alimony as was sufficient to maintain her in the station of life to which she had become accustomed at the time of the divorce, with an increase therein sufficient to meet the present high cost of living\textsuperscript{2} and changes produced by the

\textsuperscript{20} State v. Howard, 30 Mont. 518, 77 P. 50 (1904); State v. Wilmot, 95 Wash. 326, 163 P. 742 (1917).

\textsuperscript{21} State v. Garrish, — Mo. —, 29 S. W. (2d) 71 (1930).

\textsuperscript{22} State v. Rusnak, 108 N. J. L. 84, 154 A. 754 (1931).

\textsuperscript{23} Klein v. United States, 14 F. (2d) 35 (1926).

\textsuperscript{24} State v. Smith, 128 Ore. 515, 273 P. 323 (1929).

\textsuperscript{25} People v. Reese, 258 N. Y. 89, 179 N. E. 305, 79 A. L. R. 1329 (1932).

\textsuperscript{1} 332 Ill. App. 586, 76 N. E. (2d) 335 (1947).

amendment of the federal income tax law redistributing the burden of taxation on alimony payments.³

While the Illinois legislature has seen fit to provide for modification of alimony allowances, at least as to those payable periodically, it has not specified what new facts will warrant an alteration of the original sum fixed by the court.⁴ By allowing the trial court to exercise broad discretionary powers the legislature has left judicial hands untied and capable of dealing equitably with the varied problems which may arise. There is indication that when so dealing the court should not act "in a niggardly manner"⁵ but that is far from saying there are no observable limits on the court's power.

The instant question whether or not to increase the alimony on the basis of the ex-husband's new wealth, is certainly novel, for Illinois courts have not previously had occasion to deal therewith directly, but from what has been said in other Illinois cases it is clear that a change of circumstance is required.⁶ The phrase "change in circumstance" has meaning for, unless it be shown, the court will not have jurisdiction to modify the decree.⁷ Two elements appear to be essential, to-wit: need on the part of the ex-wife, and ability on the part of the ex-husband to pay,⁸ although there is dictum to the effect that a change in either element may be enough.⁹ As applied to the instant case, only the second factor was shown to be present, in the form of a greatly enhanced ability to pay more alimony, thereby leading to the direct problem as to whether or not that was enough to justify a modification of the decree.

Not only was the court without Illinois precedents to guide it, but apparently the problem has been rarely raised elsewhere. There are

³ Jacobs v. Jacobs, 328 Ill. App. 133, 65 N. E. (2d) 588 (1946). But see Russell v. Russell, 142 F. (2d) 753 (1944), where an increase was denied on the ground that to grant the same would merely be readjusting the tax burden in a way not intended by Congress. The court did say, however, that an increase would be proper if the wife's station in life was lowered and the divorced husband was shown to be able to pay more.


⁸ Smith v. Smith, 334 Ill. 370, 166 N. E. 85 (1929); Cahill v. Cahill, 316 Ill. App. 324, 45 N. E. (2d) 69 (1943).

⁹ Herrick v. Herrick, 319 Ill. 146, 149 N. E. 820 (1925). See also Lay v. Lay, 204 Ill. App. 511 (1917), where the court expressed no uncertainty as to its power to grant an increase where the petitioner was the aggrieved party, but the petitioner there merely sought the additional sum to permit her to maintain the station in life she had occupied prior to the divorce.
some cases, however, which treat with the matter. In one case brought to the attention of the court, that of Humbird v. Humbird, there is language tending to support the position claimed for the plaintiff, for the court talked of maintaining the wife in the style and condition that her ex-husband's financial position would have "justified her in maintaining but for his wrongful conduct." But the basis for upholding the increase in alimony granted in that case was not that the ex-wife was entitled to share in her former spouse's subsequent good fortune so much as it was that the original allowance was set too low because based on the temporary condition of the ex-husband's income while in military service at the time rather than on his normal earning capacity as a civilian. Attention might have been directed, however, to the Minnesota case of Erickson v. Erickson wherein the court, after originally fixing a lump-sum allowance, granted an additional permanent allowance upon a showing that the ex-husband had become a beneficiary of a trust whereby his income would become appreciably augmented. While an Iowa court indicated that only the most unusual circumstances would ever cause it to order an increase, one sitting in New Jersey allowed a generous increase after a consideration of the husband's intelligence, education, refinement, and experience. In still another case, arising in New York, additional sums were allowed although the ex-husband was not employed in any gainful occupation and the value of his securities had fallen, but the rationale thereof proceeded on the theory that as a reduction may be granted because of inability to make the payments, then conversely a subsequent increase is in order if the financial situation warrants it. As none of these cases is strictly in point with the instant one, resort must be had to fundamental principles.

Alimony was originally developed in the ecclesiastical courts for the support of a woman after a divorce a mensa et thoro was granted, a situation presently akin to the separate maintenance allowance authorized

10 42 Ida. 29, 243 P. 827 (1926).
11 42 Ida. 29 at 38, 243 P. 827 at 829.
12 181 Minn. 421, 232 N. W. 793 (1930).
13 There is irony in the fact that the court had to subsequently reduce the alimony because of decreased returns from the trust fund during the depression: Erickson v. Erickson, 194 Minn. 634, 261 N. W. 397 (1935).
17 See Weiner v. Weiner, 242 App. Div. 847, 275 N. Y. S. 177 (1934). A court may balk against granting a reduction, however, if it feels the ex-husband, during his lush days, failed to be prudent and to provide against lean times: David v. David, 146 Misc. 444, 261 N. Y. S. 456 (1932).
18 1 Bl. Comm. 441.
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by statute when cause for living apart is found to exist. In all probability, at inception, the courts were generous in fixing or modifying the amount of that allowance because the wife had no choice other than a separation and few women were afforded economic opportunities to permit of self-support. After such a decree, of course, the parties still remained husband and wife, so it was not regarded as improper to permit her to benefit from any subsequent increase in her husband’s wealth through a suitable order increasing the alimony allowance.

In the modern period, however, absolute divorce is available to all who possess adequate grounds, and economic conditions have changed to the point where gainful occupation is open to all women except, perhaps, those burdened with the care of young children. As the basic reasons for alimony have substantially disappeared, a person who elects to secure an absolute divorce should generally be entitled only to nominal damages for breach of the marriage contract, except in cases where the age or condition of the health of the aggrieved party might call for more. The one applying for an absolute divorce desires to reacquire rights relinquished at the time of marriage. Such a person ought, in turn, surrender rights gained by that marriage. Alimony ought not be treated as a punishment, but as an attempt to meet an economic problem. If the one who seeks the divorce cannot become self-supporting, then the burden of supplying the necessities of life should rest on the guilty spouse rather than upon the whole of society. But alimony should not be awarded for the purpose of deterring the divorced spouse from seeking gainful emp-

20 DeBlaquiere v. DeBlaquiere, 3 Hag. Ecc. 322, 162 Eng. Rep. 1173 (1830) : Lewis v. Lewis, (1866) L. R. 1 P. D. 230; Magowan v. Magowan, (1921) 2 I. R. 314. Argument on behalf of the plaintiff in the instant case to the effect that, as her right to the increase would be unquestioned if she had received a decree for separate maintenance, she should not be denied the same right as it was the defendant’s misconduct which had forced her to seek an absolute divorce from him, was answered, inferentially, by the adage that she had made her choice and had to be content with it. The court said that the station in life to which the defendant had accustomed plaintiff at the time of the entry of the decree was “the station in life in which he is bound to maintain her now.” See 332 Ill. App. 586 at 598, 76 N. E. (2d) 335 at 340. Italics added.
22 The right of the ex-spouse to seek an increase in alimony to provide better opportunities in a more desirable environment for the child of the divorced parents is competently discussed in Foote v. Foote, 68 A. 467 (N. J. Eq., 1908), not officially reported.
24 In Wern v. Wern, 171 Mich. 82, 137 N. W. 71 (1912), the court took into consideration the fact that the wife was continuously sick and unable to work as the result of her husband’s abuse. See also Rood v. Rood, 280 Minn. 33, 273 N. W. 337 (1937), where the ex-wife’s tubercular condition necessitated her removal to Arizona.
ployment and becoming responsible for his or her own support. Faced in that light, increases in alimony should be granted on precisely the same ground as an original allowance, that is where the need is demonstrable. They certainly ought not be made to turn on subsequent increases in good fortune arising independently of the help or encouragement of the ex-spouse.

Miss C. L. Samuelson

**Landlord and Tenant—Terms for Years—Whether Demand or Service of Notice on Tenant for Termination of Tenancy Must be Made Pursuant to Particular Methods Prescribed by Statute—**The decision announced in the recent case of Ziff v. Sandra Frocks, Inc., lends further weight to the idea that statutory methods for the service of notice to terminate a tenancy for non-payment of rent are not necessarily exclusive. The plaintiff therein sent a statutory five-day notice to the defendant-tenant by registered mail informing it of the imminent termination of the lease because of non-payment of the rent. Defendant did not pay so, after due delay, the landlord began proceedings for possession. Although admitting receipt of the notice, defendant interposed the defense that plaintiff’s action lacked foundation because service of notice by registered mail did not amount to compliance with statutory requirements. The trial court granted plaintiff’s motion for summary judgment, and on appeal that judgment was affirmed. The operation of the decision is limited, however, by the fact that the defendant admitted receipt of the notice for a different result may well have been attained had there been a factual, rather than a legal, dispute over the question of service.

Technical common law requirements with respect to making a demand for rent have, fortunately, been changed by statute. Insistence thereon can no longer be used as a defense to hinder or delay the modern and

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1 331 Ill. App. 353, 73 N. E. (2d) 327 (1947).

2 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, or by leaving the same with some person above the age of ten years . . . and in case no one is in the actual possession . . . then by posting the same on the premises."

3 Ibid., Ch. 110, §§ 181, 259.15, and 259.16, permit the use of such motion in suits for possession of land. It may not be used where complicated disputed issues of title are concerned: Ward v. Sampson, 391 Ill. 585, 63 N. E. (2d) 751 (1945).

4 In that respect, see Barbee v. Evans, 220 Ill. App. 154 (1920).
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speedy summary proceeding for possession. But statutory specifications vary, so the reports indicate that the modern demand may have to range from strictest compliance with statutory requirements for personal service to the merest satisfaction of the need for communication of the pertinent information. In general, however, these statutes designate similar methods of service to those found in Illinois, to-wit: personal service, substituted personal service on some proper person, or constructive service by posting on the premises.

Where the enumeration of methods is prefixed by words such as "demand shall be made," or "shall be served," or where service of notice has been raised to the dignity of a summons, the provisions have been said to be mandatory and, therefore, have excluded other possible methods. Under such circumstances, the imparting of actual knowledge but by different means will not suffice for it is the proof that the notice was conveyed to the tenant by the prescribed method which governs. In fact, it has been said that to hold otherwise would nullify the intent of the legislature, as there would be no need to detail specific methods if any would do. Pursuant to this view, sending notice by registered mail is obviously insufficient. Other illustrations of the severity of statutes of this character may be observed, as where personal service of a true copy was held ineffective because the statute required a "duplicate" copy, or where substituted personal service on a member of the family was treated as being insufficient. Entry of appearance by the defendant does not cure defects of an unauthorized service, so other suits have been defeated where the notice was signed by improper parties or where proof of agency was lacking. It is the letter, rather than the spirit, of the law which is important in such situations.

9 213 W. Thirty-fifth Street v. Ruff, 152 Misc. 267, 273 N. Y. S. 233 (1934); Hinkhouse v. Wacker, 112 Wash. 253, 191 P. 881 (1920). In Barbee v. Evans, 220 Ill. App. 154 (1920), the court emphasized the fact that the statute required "delivery" of the notice to the tenant, but based its decision on the ground that there was no proof that the envelope in which the notice was mailed was received and opened within the time fixed by statute.
11 Doran v. Gillespie, 54 Ill. 366 (1870).
14 Mesaba Construction Co. v. 46th St. Service Station, 68 N. Y. S. (2d) 751 (1947).
Other statutes exist, however, where the permissive word "may" rather than the mandatory word "shall" is used or where no suggested methods of service are mentioned. Under such statutes, it is the fact of communication of notice which is important to accomplish the statutory object so any successful means to gain that end will be deemed sufficient. Under this theory, service by registered mail is clearly effective upon a showing that notice was received even though it was not an expressly authorized manner of service. In fact, one case has said that it furnishes a more desirable method than substituted service which, at best, provides only constructive notice.

Under statutes of this character, the principal dispute has been as to just how far a court may go in presuming that notice has been received. A requirement for written notice presupposes there will be a delivery of that notice even though the element of delivery is not spelled out, hence merely reading the notice is not enough. Absent a requirement for written demand, however, verbal notice has been held sufficient. The giving of notice to one of two tenants in common is regarded as notice to both, but if given by only one of the joint lessors the notice is ineffective. When addressed to a corporate tenant, service on an officer or one apparently in charge of the premises has been treated as tantamount to personal service because of a duty to forward.

Most statutes provide for some form of substituted personal service, as by leaving the notice with a person over a designated age or by posting, in the event personal service cannot be had. If the recipient is the wife,

19 Gash v. Dairymen's League Cooperative Assn., 10 N. J. Misc. 1228, 163 A. 147 (1932); Poindexter v. Call, 182 N. C. 366, 109 S. E. 26 (1921). Oral notice may likewise be sufficient if a provision in the lease requiring written notice may be said to have been waived: Citizens' Bank Bldg. v. Wertheimer, 126 Ark. 38, 189 S. W. 361 (1916).
20 Grundy v. Martin, 143 Mass. 279, 9 N. E. 647 (1887); Glenn v. Thompson, 75 Pa. 389 (1874).
21 McNally v. Leach, 205 S. W. 82 (Mo. App., 1918).
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father, son, or sister and the tenant admits receipt, he cannot be heard to complain. But service has been treated as defective when the notice was not received by the tenant from the wife, or from a handy-man around the premises but not residing therein, on whom service was had. The place of service is likewise generally unimportant for a tenant cannot complain because the notice was given on premises other than those demised, but where given at the business premises which were the subject of the demise, service has been declared insufficient under a statute which fixed service at the usual place of abode. Advertising the demised premises for rent does not satisfy, but putting the notice through a window in the tenant’s home, not on the leased premises, was sufficient when coupled with subsequent oral notification. Posting notice where no one was in actual possession at the time was treated as sufficient even though it referred merely to the ‘premises now occupied by you.’ It may be said, therefore, that courts will usually endeavor to seek for some indication that knowledge of the notice has been conveyed rather than act to defeat possessory actions because technical details have not been met.

On the specific point of mailing notice by registered mail, it should be remembered that the reports are full of cases concerning a presumption of receipt from the fact of stamping and mailing a letter. Like practically every other presumption, however, this one is also rebuttable and may give rise to a disputed fact to be determined by the jury. No such dispute was possible in the instant case as defendant admitted receipt of the registered letter, but even absent that acknowledgment it has been held that service on the wife of the tenant supports a belief that the husband received the notice, so it is likely that proof of delivery of registered mail to such a person may suffice. The fact of service should,

24 Farnam v. Hohman, 90 Ill. 312 (1878).
32 Hodgins v. Price, 137 Mass. 13 (1884). The fact of service was left to the jury, in Currier v. Grebe, 142 Pa. 45, 21 A. 755 (1891), because the tenant denied knowledge thereof.
33 Consolidated Coal Co. v. Schaefer, 135 Ill. 210, 25 N. E. 788 (1890).
34 Barbee v. Evans, 220 Ill. App. 154 (1920).
of course, be proved by legitimate testimony consonant with the rules of evidence. Admission of the original notice into evidence affords no support for the burden is on the plaintiff to prove both that there was adequate notice and that it was properly served. But the Illinois statute accepts the sworn return of the person serving the notice as at least sufficient to provide prima facie evidence of facts therein stated so, in the absence of contradiction, such a return showing service by registered mail should hereafter be enough.

While it may be safer to follow statutory suggestions, convenience will sometimes dictate the use of other methods for giving notice of termination of tenancy. Definite proof of the receipt thereof will insure a successful action, but except for those jurisdictions where statutory provisions possess mandatory effect, the use of other reasonable means should suffice particularly where communication of the notice is not denied.

L. C. Traeger

MARRIAGE—OPERATION AND EFFECT OF ANNULMENT—WHETHER OR NOT ANNULMENT OF VOIDABLE MARRIAGE SERVES TO AUTHORIZE SUIT FOR TORTS COMMITTED BY ONE SPOUSE ON THE OTHER DURING COVERTURE—The question of whether a former wife may bring an action against her former husband, after the marriage has been annulled for reason of his fraud, for a tort committed by him upon her during coverture was raised, for the first time, by the recent Massachusetts case of Callow v. Thomas. The parties in the case had been married in August, 1944. In November of that year, the wife was injured in an automobile accident, caused by the gross negligence of the husband, while she was riding as a passenger in his car. On the petition of the wife, the marriage was subsequently annulled because of the husband’s fraudulent representations, made at the time the marriage had been entered into, concerning the state of his health. Shortly thereafter, the former wife began the instant action to recover damages for the injuries sustained by her in the automobile accident, contending that, as the decree of nullity had effaced the marriage ab initio, her cause of action was maintainable against her former spouse. Despite the ingenuity behind this argument, the Supreme Judicial Court

37 Vennum v. Vennum, 56 Ill. 430 (1870); Ball v. Peck, 43 Ill. 482 (1867).
38 Lehman v. Whittington, 8 Ill. App. 374 (1880).
39 Tolman v. Heading, 11 App. Div. 264, 42 N. Y. S. 217 (1896). Failure to receive a mailed copy of a notice which had already been served by adequate substituted service will not viti ate the latter: Davis v. Jones, 15 Wash. (2d) 572, 131 P. (2d) 430 (1942).
1 — Mass. —, 78 N. E. (2d) 637 (1948).
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held that the plaintiff could not recover, basing its decision on the rule that, in cases of voidable marriages, things done and concluded during the period of the supposed marriage will not be undone and reopened after the decree of annulment. The opinion, however, carefully distinguished between cases of void marriages where, due to a fundamental disability, there is no marriage at the outset, and voidable marriages, which remain operative until challenged.

There is a dearth of American cases on the general subject, but what decisions there are appear, in the main, to buttress the proposition that an annulment does not completely eradicate the marriage for all purposes. Thus, when applying for a marriage license, a former spouse whose prior marriage has been annulled cannot claim that he has not previously been married, but must acknowledge the earlier marriage in the new license application. Where the rights of third parties have intervened, growing out of the voidable marriage, a subsequent annulment thereof cannot be set up to defeat them. An innocent wife who has used her spouse's funds for her support during coverture cannot be made to account for the use thereof at the time an annulment is being granted.

On the question of the legitimacy of issue born of an annulled marriage, however, there is a divergence of opinion. One well-known text writer states that children born under such circumstances are illegitimate and the New York case of In re Moncrief's Will has also reached the same conclusion, but there is authority for the contrary view and some states apparently settle the problem by statutes expressly designed to protect the rights of innocent children.

The question of the right to alimony, whether temporary or permanent, has also been considered in conjunction with annulment proceedings. The rule has been stated that alimony is not proper in such cases and recently a New York court refused to sanction the collection of arrearages in temporary alimony accruing under a separation order where, by subse-

2 As a general rule, torts committed during coverture are treated as being non-actionable even though divorce is subsequently obtained: Thompson v. Thompson, 218 U. S. 611, 31 S. Ct. 111, 54 L. Ed. 1180, 30 L. R. A. (N. S.) 1153 (1910).
3 The court, in the instant case, lists the English decisions having any bearing on the subject. They are not discussed, but they incline in the same direction as the instant holding.
4 Factor v. Factor, 184 Misc. 861, 55 N. Y. S. (2d) 183 (1945).
7 Bishop, Marriage and Divorce, § 690.
10 See, for example, Ill. Rev. Stat. 1947, Ch. 40, § 4, and Ch. 89, § 17a.
sequent decree, the marriage was declared null and void.\textsuperscript{12} Other courts, however, have held that the granting of temporary alimony is a matter calling for discretionary treatment,\textsuperscript{13} and in one case a husband who had agreed, as part of a divorce proceeding, to pay alimony until his ex-wife remarried, was ordered to recommence payments upon the annulment of the ex-wife's subsequent marriage.\textsuperscript{14} It is not possible, therefore, to be dogmatic on the point as to whether or not, upon annulment, the prior marital status is expunged for all purposes and to be treated as if it never existed.

Courts do recognize a right of action in tort for fraud and deceit favoring the former spouse who has been induced to enter into a marital relationship by false representations. In one such case, that of \textit{Cohen v. Kahn},\textsuperscript{15} the court stated that, in the eyes of the law, "there never was any marriage contract between the parties. Under the circumstances I do not see how the plaintiff could be bound by the common law limitation against one spouse suing another for tort."\textsuperscript{16} But it is not clear, from the opinion therein, whether the tort on which the action was predicated was deemed to have been committed at the time the consent to marry was obtained, or whether it continued throughout the period of coverture. If the former, that view is not at war with the reasoning upon which the instant case was decided. But if the tort was considered as one occurring during the period of the supposed marriage, it is submitted that the principle there promulgated is too broad for general adaptation.\textsuperscript{17}

Relation back, in cases of annulment, is a fiction adopted in order to achieve justice. It should not be applied mechanically and blindly in every situation. Especially is this true with respect to voidable marriages. Such marriages will exist indefinitely unless challenged by an interested party. When so challenged, they may be obliterated as to the future but,\textsuperscript{12,13,14,15,16,17}

\textsuperscript{12} Saunders v. Saunders, 63 N. Y. S. (2d) 880 (1946).
\textsuperscript{14} Sleicher v. Sleicher, 251 N. Y. 366, 167 N. E. 501 (1929). The opinion indicated that the ex-husband was not liable for payments accruing during the existence of the marriage which was later annulled, deeming it inequitable that the wife should have two means of support at the same time, hence it would seem that rescission of a marriage is not without such bounds as may be prescribed by policy and justice. See also such related problems as the right to claim a pension after annulment, illustrated by People ex rel. Byrnes v. Retirement Board, 272 Ill. App. 59 (1933), and the same issue, with regard to workmen's compensation, discussed in Southern Ry. Co. v. Baskette, 175 Tenn. 253, 133 S. W. (2d) 498 (1939).
\textsuperscript{15} 177 Misc. 18, 28 N. Y. S. (2d) 847 (1941).
\textsuperscript{16} 177 Misc. 20, 28 N. Y. S. (2d) 847 at 848-9.
\textsuperscript{17} A tort committed prior to marriage is deemed discharged by the subsequent marriage of the parties before judgment has been pronounced: Gottliffe v. Edelston, [1830] 2 K. B. 378. See also note 2, ante.
as Chief Justice Cardozo observed in the case of American Surety Com-
pany v. Conner,\textsuperscript{18} decrees of annulment cannot "obliterate the past and
make events unreal."\textsuperscript{19} It would be manifestly fanciful for courts to ap-
ply legal principles rigidly, for blind espousal of bare principle is apt to
lead to bad law. The reasonableness of the approach manifested in the
instant case results, therefore, in an intelligent holding.

M. J. COLANGELO

\textbf{Nuisance—Private Nuisances—Whether or Not Business Pro-
prietor's Use of Sidewalk as Waiting Place for Customers Constitutes
an Enjoinable Private Nuisance—In the recent Florida case of Shamhart
v. Morrison Cafeteria Company,\textsuperscript{1} the plaintiff, a drugstore owner, brought
an action against the defendant, an incorporated cafeteria proprietor, to
enjoin a nuisance and to recover damages. The facts showed that at
the period of the noon and evening meals, customers of the cafeteria formed
lines on the sidewalk which frequently resulted in the virtual closing of
the entrance to the plaintiff's drugstore against his patrons for long
periods of time. The main defenses were that the defendant did not cause
the lines to form and, even if it did, it was the exclusive duty of the
police to regulate the use of the public streets. Upon consideration of a
master's report recommending relief as prayed, the chancellor dismissed
the bill declaring there was no basis for injunctive relief. When taking
jurisdiction on direct appeal, however, the Florida Supreme Court re-
versed the decision and ordered that relief be granted.

A business man whose premises abut upon a sidewalk or highway
may make such use thereof as the needs of his business require, but there
is a definite limitation upon this right, to-wit: the use must be reasonable
in regard to the needs of the public or to those of other individuals such
as adjoining owners.\textsuperscript{2} This commonly approved doctrine has been applied
in cases where a purely physical obstruction of the sidewalk exists\textsuperscript{3} and
there would seem to be a close analogy between the use of the sidewalk
as a storeroom for one's personal property and the use thereof as a wait-
ing room for one's customers. But in a situation where the queue con-
stitutes the obstruction, it is not as easy to see a causal connection between
the defendant and his customers. As the defendant, in this instance, does
not manually place each person in the queue, for the customers form lines
upon their own volition free from any direct physical control of the

\textsuperscript{18} 251 N. Y. 1, 166 N. E. 783, 65 A. L. R. 244 (1929).
\textsuperscript{19} 251 N. Y. 1 at 9, 166 N. E. 783 at 786.
\textsuperscript{1} — Fla. —, 32 So. (2d) 727 (1947).
\textsuperscript{2} Callanan v. Gilman, 167 N. Y. 360, 14 N. E. 264 (1887).
\textsuperscript{3} Johnson Chair Co. v. Agresto, 73 Ill. App. 384 (1897).
defendant, the problem is really one of determining to what extent the defendant may be said to indirectly control the formation of the injurious queues.

Some cases dealing with this problem have found a causal connection to exist when the defendant has been guilty of an unjustifiable commission in the operation of his business. The question has arisen, for example, because the defendant there concerned had maintained highly sensational window displays which attracted throngs of people to view the same. As these crowds served to obstruct the means of access to the premises of others, suits were brought to secure relief. In each instance, the court was called upon to determine whether or not the defendant was connected with the obstruction so as to make him liable for creating and maintaining a nuisance. The general holding was that if the natural and probable result of the defendant's sensational acts would be to cause a crowd to collect, he would be liable. But these decisions go no farther than to attach liability when the defendant has been guilty of unjustifiable or unnecessary positive conduct.

In the case of Barber v. Penley and that of Lyons & Sons v. Gulliver the foregoing method of determining causal connection was carried one step farther, so as to be made available in case of an unjustifiable omission. The defendant in each of those cases operated a theater and theater-goers queued up for an hour or so prior to the evening performance. It was declared that the queues were a nuisance which the defendants had brought about by wrongfully refusing to open their doors earlier so as to allow people to wait inside, a method which would have kept the sidewalks clear. In the first of these cases, the courts said: "As regards the defendant's suggestion that he could not help it, if in point of fact the nuisance exists which is caused by the defendant, not with an object to cause that nuisance, but by reason of the entertainment he carries on and to which he invites the public to come, it is a case in which he must either discontinue his performance, or the nuisance must be prevented." If the word "business" were substituted for the word "entertainment" in the broad rule there announced, that rule would apparently cover all possible situations, and would remove the limitation that some kind of improper conduct must be shown.


5 [1893] 2 Ch. 447.

6 [1914] 1 Ch. 631.

7 [1893] 2 Ch. 447 at 459.
But if there was ever any doubt that the English rule was based solely upon some form of wrongful conduct or omission, such doubt has been swept away by the case of Dwyer v. Mansfield. The facts therein show that the defendant, a merchant, had a license from the Ministry of Food to sell fruit and vegetables and, since an acute potato shortage existed, he was ordered to sell but one pound of potatoes to each customer. Neighboring shopkeepers brought an action to recover for damage caused by the daily line-up. The judge, denying recovery, there declared: "Even if a nuisance had been established, that would not suffice since the plaintiffs must prove that the nuisance was due to an act which was unlawful, or the doing of something which was unnecessary or unreasonable, therefore unjustifiable. I am satisfied that it was the short supply of potatoes that caused the queues to collect and the short supply was not a matter for which the defendant was liable." Even though the decision seems to have been forced upon the court by abnormal economic conditions, it is the law in England.

In the only other comparable case of this kind found in this country, that of Tushbant v. Greenfield's, Inc., the Supreme Court of Michigan was also confronted with a queue obstruction case wherein the defendant had been guilty of no unjustifiable positive conduct but lines extended from the defendant's cafeteria so as to block the entrance to, and view of, plaintiff's store. The court found it was necessary to draw an analogy from the physical obstruction cases and, by so doing, achieved the result that there had been an unreasonable use of the sidewalk. It evidently experienced no difficulty in establishing a connection between the defendant and its customers, so the court sustained a mandatory injunction which required the defendant to employ someone to supervise the lines in order to allow unobstructed entrance to the plaintiff's store. A dissenting justice therein, however, indicated that he could not see how it would be possible to ask the defendant to do more than to honestly seek police action, as a private person has no right to regulate other users of a public sidewalk.

The Supreme Court of Florida, when deciding the case under discussion, relied strongly upon this Michigan case and also considered the theater cases aforementioned, but the court did not limit in any way the general principle that if the natural and probable result of one's business is to attract lines of customers, thereby impairing another's right of ingress and egress, injunctive relief may be had. That it arrived at a fair and

9 Ibid., at p. 442.
11 The police argument was also advanced in the cases referred to in notes 4 to 8, ante, but has never received judicial affirmation and has only served as the basis for a dissenting opinion.
just decision seems evident for it would be an alarming decision indeed that would allow another's right of access to his property to be taken away under the cover of his neighbor's business ingenuity.

Where one maintains a profitable nuisance he should not complain when asked to take reasonable steps to prevent injury arising therefrom. The expense of abating the nuisance should properly fall upon him and he should not be allowed to pass it on to the taxpayers by insisting that only the police shall have the power to regulate his waiting customers. After all, the persons comprising the nuisance are not strangers to such a defendant, but are his own patrons whom he knowingly invites to come to his premises even if that may mean a long wait upon the sidewalk. Considered in this light, it is hardly conceivable how a closer connection between a defendant and a wrong could be shown. Although the law in England may allow an innocent business man, under unusual circumstances, to drive his neighbors into bankruptcy, it is comforting to know that this practice will not be passively commended in this country.

H. J. Jennings

RELEASE—CONSTRUCTION AND OPERATION—WHETHER OR NOT RELEASE, GIVEN TO ONE TORT FEASOR AS TO COMMON LAW LIABILITY, OPERATES TO RELEASE ANOTHER FROM CAUSE OF ACTION GROWING OUT OF VIOLATION OF "DRAM SHOP" STATUTE—The controversial question as to whether or not the Illinois Liquor Control Act1 creates a separate and distinct cause of action which would remain unimpaired, even though there has been a release of a common-law right of action for personal injuries growing out of the same situation, was considered in the recent case of Manthei v. Heimenderinger.2 The appellant therein filed his complaint against a tavern operator and the owner of the building in which the tavern was located, predicated on the statute, for injuries arising out of an automobile accident occurring when the car in which he was a passenger was struck by another driven by one Kerch. He alleged that the tavern operator had caused Kerch to become intoxicated, hence claimed that the defendants were liable under the statute. Appellees defended on the ground that appellant had executed and delivered a general release to Kerch and the insurer of Kerch's car covering the accident in question. The trial court sustained appellees' contention that such general release had operated to extinguish appellant's right of action under the statute and dismissed the suit. The Appellate Court for the Second District, on appeal, affirmed that ruling, holding

1 Ill. Rev. Stat. 1947, Ch. 43, § 94 et seq. Section 135 thereof provides for the maintenance of actions for damages caused by intoxicated persons.

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that whether or not the several wrongdoers were joint tort-feasors was relatively unimportant, it being enough that all were liable for the same indivisible injury arising out of a single accident, and the familiar rule that the release of one tort-feasor serves to release the other tort-feasors had to be applied.

There being no Illinois case squarely in point, the appellant found it necessary to rely on the Minnesota case of *Philips v. Aretz* to sustain his position. In that case, the plaintiff's father, having become intoxicated by liquor sold to him by the defendant, a dram shop keeper, was subsequently killed by an automobile. The administratrix of the deceased executed a release in favor of the operator of the car, and a portion of the proceeds of that settlement was set aside for the benefit of the minor plaintiff. In a subsequent action by the minor against the dram shop keeper to recover damages for the death so arising, the Minnesota Supreme Court held that the Wrongful Death Act and the Liquor Licensing Act were remedial enactments unknown to the common law, wholly unrelated in scope and purpose, and permitted separate recoveries. The court there stated, in part, "We think, and so hold that recovery here is allowed not for a tortious wrong but as a means of enforcing the penalty imposed on the dealer by statute. . . ." The court in the instant case rejected the principle underlying the Minnesota decision as being inapplicable because in the suit before it the supposedly several claims were not based on different statutes but rather consisted of a claim predicated on negligence at common law as well as under the Liquor Control Act, hence really amounted to a single indivisible cause of action. That result was achieved by regarding the statutory remedy as one designed to compensate the injured person for the damage sustained rather than as a means of enforcing a penalty imposed on the liquor dealer by statute, so that, once compensation had been received, all claim under the statute was gone.

Many factors militate against the decision so reached. It seems rea-

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3 *215 Minn. 325, 10 N. W. (2d) 226 (1943).* See also *Mayes v. Byer, 214 Minn. 54, 7 N. W. (2d) 403 (1943).*

4 *Minn. Stat. 1941, § 573.02.*

5 Ibid., § 340.12(4).

6 See syllabus 5, by the court, *215 Minn. 325, 10 N. W. (2d) 226 (1943).* The court further held that defendants could not escape liability on the theory that the liquor dealer, who furnished decedent with liquor contrary to law, and another who drove his car so as fatally to injure decedent were joint or concurrent tort-feasors.

7 It is clear that a release given to one tort-feasor will absolve others involved in the same wrong and subject to the same form of action, *Mooney v. City of Chicago, 239 Ill. 414, 88 N. E. 194 (1909).* on the assumption that the money paid was received as "full compensation" for the injury sustained and any attempt in the release to reserve a claim against the others would be void as there would then be nothing to reserve: *45 Am. Jur., Release,* § 39.
reasonably apparent from the original title of the act and its present broad scope that the primary purpose thereof was to control the traffic in alcoholic beverages. The legislation was enacted pursuant to the police power of the state, and created a separate and distinct right of action not previously known. The benefit thus conferred on those injured by the conduct of intoxicated persons was clearly an incident to the general scheme for such injured persons already had a right of action against the primary wrongdoer at common law, and to provide an additional right of action could serve no rational purpose unless it would be to punish the liquor dealer for his statutory breach. Actions brought under the remedial provisions of the act are not predicated on negligence, but upon the violation of the statutory duty. The two-year statute of limitations does not apply, as it would to actions for personal injuries sounding in tort, nor does the monetary limitation imposed on actions for wrongful death affect the amount of the possible recovery under this statute. Contributory negligence, generally, is not a defense, although where the injuries complained of were sustained by the intoxicated person, the reverse may be true. Clearly, then, the right of action under the statute is readily distinguishable from any remedy conferred by the common law.

If further emphasis of that fact is necessary, it is provided by the language of the Appellate Court for the Second District, in the case of Hyba v. Horneman, Inc., where the court declared that civil damage statutes with reference to keeping dram shops are "similar in purpose and therefore have a general similarity in their terms and provisions. Their evident object is to punish those who furnish means of intoxication by making them liable in damages caused thereby." The court further stated, "Therefore we find the two acts [the Dram Shop Act and the Injuries Act] to be separate and distinct, and that the rights created

8 The title to the first statute, R. S. 1874, p. 438, was "An Act to provide for the licensing of and against the evils arising from the sale of intoxicating liquors." The present statute, Ill. Rev. Stat. 1947, Ch. 43, § 94 et seq., is simply entitled "An Act relating to alcoholic liquors."
11 O'Leary v. Frisbey, 17 Ill. App. 563 (1885).
16 302 Ill. App. 143 at 145, 23 N. E. (2d) 564 at 566. Italics added.
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thereby do not rest on the same basis. . . . The right of recovery under each appears to be separate and distinct and in no way founded upon or governed by the rights of recovery under the other. . . . This permits of but one conclusion, that they are independent actions, and hence the one can not be considered as exclusive of the other.' 18 Three years later, the Appellate Court for the Third District, in the case of Meyers v. Young Mens Christian Association of Quincy Illinois, 19 also pointed out that there is "no connection between the common law right of action in tort and the specific statutory liability created under the Dram Shop Act. . . . Their purposes and remedies are different. In a proper case both causes of action may be pursued independently, and the satisfaction of one would not abate nor affect the right of action under the other." 20

It is difficult, in the face of this language, to reconcile the reasoning in the principal case, for it not only rejects the rationale of the Hyba case, decided in the same district, and the confirmatory ruling of the Third District in the Meyers case, but does so without commenting on either. 21 Instead, it looks to the wording of a decision by the Appellate Court of Indiana pronounced twenty-eight years ago to support the result here achieved. 22 By failing to reverse its own holding or to distinguish its own language, the court leaves the law of Illinois in a state of turmoil and indecision.

It is not anomalous to find a statute designed to force an industry to bear the expense of the injuries it fosters, irrespective of the negligence or lack thereof of its individual members. 23 If such a statute displaces a common-law remedy, it is not unreasonable to expect that the injured person should be limited to the statutory substitute, hence be restricted in the amount he can recover thereunder. But when such has been the case, there is evident language in the statute to show the existence of such a limitation, a provision compelling an election between the old and the new remedy, or else some compulsory form of subrogation in favor of the one who, by the statute, is forced to pay for the injury over against the

18 302 Ill. App. 143 at 146, 23 N. E. (2d) 564 at 567.
19 316 Ill. App. 177, 44 N. E. (2d) 755 (1942).
20 316 Ill. App. 177 at 189, 44 N. E. (2d) 755 at 760.
21 A possible explanation may lie in the fact that Justice Dove wrote the opinion in the instant case and it was concurred in by Justices Wolfe and Bristow, whereas the court, at the time the Hyba case was decided, consisted of Justices Pearce, Huffman and Hill.
23 See, for example, the Workmen's Compensation Act, Ill. Rev. Stat. 1947, Ch. 48, § 138 et seq., and the Occupational Diseases Act, ibid., § 172.1 et seq.
person really at fault. In such situations, the intent that the injured person may have but one recovery is obvious. By contrast, provisions of this character are absent in the Illinois Liquor Act, hence there is no foundation for any inference that the legislature designed the dram shop proceeding to be either an exclusive or a substitute remedy for the injured person. Legislative failure, in over three-quarters of a century, to act to revise or modify the statute to make that inference clear can only support the contrary inference that such was not the legislative desire. If it was not, then the courts should not attempt to make it so by wavering judicial interpretation.

C. J. Pratt

BOOK REVIEWS


Evaluation of the extent of the disability sustained by injured workmen lies at the bottom of all workmen’s compensation acts, for it forms the basis of the monetary awards made thereunder. The nature of an injury to the physical body is solely a medical problem, hence belongs wholly within the province of competent physicians and surgeons. The extent of that injury, as measured in terms of the disability it creates, is also likewise generally regarded to be within the province of physicians. There is ample room, however, in arriving at the amount of a particular award for the inclusion of other important factors such as the character of work formerly done by the injured employee, the possibility of future work which may be done despite the disability, the psychology of the injured worker, and other similar points rarely considered. Disability evaluation, therefore, while primarily a medical question, is also complicated by facts out on the periphery of, and some even well beyond, the physician’s field. If disability could be measured mechanically, there would be no difficulty in arriving at percentages. As its extent cannot be so determined, physicians who can measure disability with great objectivity are still, logically, the best witnesses to the percentage of disability sustained. Yet the physician, despite his medical competence and skill, can only approximate percentages when he considers disability evaluation.

It is at this point that this new edition of Doctor McBride’s well known work becomes of greatest value. His composite schedule of approximate evaluation for partial permanent disability constitutes a manual sustained by experience and thorough consideration as well as medical and surgical competence. These tables, printed on green paper so as to stand out boldly, become the reference point from which to establish factual findings or to check those already made. The chapters preceding these tables bear witness to their validity. Those which follow provide details and classifications of injuries which are apt to be considered gratuitous by physicians but will prove extremely helpful to lawyers and arbitrators engaged in compensation matters. The final chapter is forward-looking and industrially therapeutic in its dealing with the problem of the employability of persons already disabled.

D. CAMPBELL.

It is a rare case when the book-reviewer’s task has been done for him in language which cannot be improved upon. With due apologies, therefore, the following extract from a foreword to this publication, written by Randolph E. Paul, is reproduced as it tells, concretely and briefly, all that the reviewer need say, Mr. Paul writes:

"Its authors have put into readable language a mass of disparate tax material. They start, as they should, with the statute, and their plan of integrating the structure of the book with the Internal Revenue Code prevents them from forsaking the statute at convenient moments in the forgetful manner of some tax writers. But the authors do not end with the statute; they discuss, also the Regulations and all court decisions of wide significance. They avoid the thankless task of trying to discuss all court decisions.

"The book has balance; space is distributed among subjects with discrimination and due regard for relative values. Explanations are in broad terms with refreshing omission of modifications and exceptions of interest only to the specialist. The book is not a mere paraphrase of the Code and Regulations. It does not pretend to be a treatise, but it cannot be classed as a hornbook. Instead of saying a lot about a little in the manner of much specialized tax writing, the book gives the reader a little—but also needed—fundamental information about a lot of recurring tax problems. It achieves a high level of accuracy. It is completely objective and contains no special pleading, either for government or taxpayer. It is an explanation of income tax law as it is today, and not, like some books, a statement of what tax law would be tomorrow if the author’s suggestions should be adopted.

"If my judgment of the book is correct, it should be useful to many types of readers. Beginners in tax law—law students, associates in law offices, judges’ law clerks—should find the book indispensable . . . I should next mention the sorry plight of the general practitioner . . . in daily practice he must constantly tread areas where tax pitfalls beset his every step. The book should help him . . . I could name many more types of persons . . . accountants . . . corporate executives . . . economists . . . [even] employees of the Bureau of Internal Revenue who would not be harmed. . . . But I have saved for the end the most startling suggestion I have to make. It is that the book will be valuable to the tax expert."

The reviewer has only to add, after endorsing these remarks, that the introductory chapter also contains an excellent discussion of the several basic working tools available to the tax practitioner. Beyond that, there is no more that could be said.


The Constitution of the United States, unlike many of the state constitutions for which it has served as a guide, is a masterly condensed statement of fundamental political principles enfolded in a framework of governmental mechanisms. Some of that machinery is elaborately designed, but the provisions for the executive department are far from complete. Aside from the statement that the "executive power" shall be vested in a president, there are only a minor number of references in the original document to the powers and duties of the chief executive, much being left to be supplied by interpretation or by custom. Many of the details of that office have since been filled in by policy-making statutes, by judicial decisions, and by the acceptance of tradition-forming precedents. When Washington became the first president, however, he well understood that his every act might set a precedent for the future, hence his keen interest that his conduct should be guided by "true principles" as he wrote upon an almost blank slate.

The immediate work under consideration, prepared by a well-known political scientist and author of works on constitutional and administrative law, presents a study based on historical principles of the first eight months of initial steps during which the presidency began to take shape as, perhaps the most important office in the land. The materials used for this study are admittedly not new, but the arrangement thereof brings forth a new and significant product concerning the science of government and law. Herein will be found the facts, as they developed historically, relating to the president in his capacity as chief of state, in his relationship to Congress, particularly the Senate, and in his role as administrative head of the government. Little details such as the almost humorous punctilio over whether the president should receive a state governor or vice versa are not overlooked in treating on greater questions such as

1 Outside of the powers and duties enumerated in U. S. Const., Art. II, §§ 2-3, the only other reference to presidential functions is to be found in Art. I, § 7, dealing with approval or veto of bills.


3 Hart, op. cit., pp. 18-20.
whether the president should negotiate a treaty first and then submit it to the Senate or consult before negotiating. Here, also, is material taken from the records and debates, carefully analyzed and tabulated, tending to disclose that Chief Justice Taft's ideas concerning the president's power of removal, borrowed from Madison's own concepts on the subject, might not stand water.

To continue the catalog would be to deprive the reader of the pleasure of discovering for himself. Sufficient to say this is no book on constitutional law in the accepted sense of that term; yet it is an emphatic exposition of at least one phase of the law of the constitution as it is, rather than as it is written, a fact too often overlooked by those who would expound simply from the written text.


A person exposed to the welter of materials already written on the subject of administrative law is apt to retreat in horror from the task of trying to arrive at any orderly or comprehensive understanding to be gained, by his own efforts, from the contents of such an intricate maze. If he plunges in with nothing to serve as a guide, he may emerge with some kind of a grasp of the subject but it is apt to be analogous to the concepts formed by the blind men who set out to determine the characteristics of an elephant when aided only by their sense of feeling. There is now at hand a useful primer on the subject, prepared by a New York lawyer, which can serve to provide the necessary background so as to permit the more unlearned members of the profession, and the students in the law schools, to approach the task with less trepidation than has heretofore been displayed.

Not all of the author's statements will receive unqualified approval,

4 Ibid., pp. 78-111.
5 See Myers v. United States, 272 U. S. 52, 47 S. Ct. 21, 71 L. Ed. 160 (1926).

1 For example, the assertion is made at page 150 that if the Rule of Law, that term being used as a contrast to government by men, means that ultimate control over the administrative agency "must remain in the courts, then that kind of rule is futile." Traditional American concepts will hardly yield before such bald assertion even though they may have been whittled down in recent years.
but the book does provide, in broad strokes, a quick resume of the important topics usually included in the general scope of this subject. A dictionary of terms commonly used in administrative law, a disclosure of the major stumbling blocks as, for example, the rule against delegation of power, a pointing up of the limitations surrounding the use of administrative power, and a useful appendix containing model statutes and a bibliography, all go to make the first of these works a useful introduction to the subject.

The second publication referred to, in direct contrast, is the sort of book no one would care to approach without that intimate understanding of the subject which comes from long and familiar association. A single, although not unimportant, administrative statute was recently taken as the basis for discussion by a panel of experts, friendly and unfriendly. The discussion was sustained not only in the abstract but also with concrete relation to the impact of the statute on specific federal agencies. The several discussions, and the questions and answers evoked thereby, reduced to a formal record, have now been printed with suitable prefatory material to make up a substantial glossary upon a statutory text only twelve pages long.

Since the battle over administrative regulation has now, in the main, passed from the domain of constitutional law, the attack now presses from the standpoint of insistence upon procedural regularity. Whether such regularity will follow in the train of statutes such as the one here considered remains to be seen, but one can only emerge from reading a work such as this one impressed with the simple idea that there is more in the few words to be found in the statute than can be gathered from a quick glance. Most certainly, as Dean Vanderbilt suggests, many lawyers and judges will find it necessary to go to school again. Perhaps, aided by publications such as these, taken from the extremes, that schooling may not be too difficult.

W. F. Zacharias


The growing awareness of the law schools to the importance of a knowledge of statutory law on the part of the practicing attorney, most of whose time will be consumed by discovering, interpreting, and applying an enormous volume of legislation dealing with taxes, labor and trade
regulation, and other like and unlike subjects, has found its expression in the addition to the curriculum of courses dealing with the processes of law making through legislation and the interpretation of statutes. A new book by Professor Read of the University of Minnesota Law School and by Professor MacDonald of the Cornell Law School, designed to serve as a casebook as well as a text for such a course, has now been issued. It contains a wealth of material, carefully and assiduously selected by its authors, capable of acquainting the student and practitioner with that body of principles which has been referred to as the "legislative common law." The publication is a highly commendable one, containing as it does a considerable amount of periodical and other textual materials as well as many pertinent judicial decisions, but more space might have been allotted to the subject of statutory interpretation.

F. HERZOG


Comment upon the content or form of this particular publication should be superfluous for the attention of the readers of the CHICAGO-KENT LAW REVIEW has been drawn to the several annual editions of this survey, as they have appeared from time to time, ever since the series was initiated. One noteworthy feature, however, has been added and that is a cumulative topical index, over two hundred pages long, covering the first six volumes, thereby making it easy to follow the trend on any given subject as it may have developed over the years. It can only again be said that the current edition represents both a monumental and highly successful effort to provide a comprehensive and detailed picture of law in the course of its daily growth.

Perhaps more challenging to the bar, is the foreword by Dean Vanderbilt wherein he points to the general disdain for statutory materials prior to the time when the same have received construction and application by the courts. The discomfort of the legal profession with the statutes of any given jurisdiction becomes magnified before the lack of any suitable publication providing a comparative picture of legislation throughout the states. One who has been forced to grub through a whole series of separate

1 In a foreword to 1946 Annual Survey of Am. Law, p. v, appears the statement that, in 1945, "Congress and the legislatures of 43 states in regular session and of five states in special session enacted 39,620 pages of statutes . . . much of it inartistically drafted." That material primarily represents addition to, rather than deletion from, the hundreds of volumes of statutory law already in existence.


1 See 24 CHICAGO-KENT LAW REVIEW 296-8, dealing with the 1942, 1943, and 1944 editions, and 25 CHICAGO-KENT LAW REVIEW 266, commenting upon the 1945 edition.
state publications merely to find the text of a single substantially similar provision will agree that there is urgent need for some form of digest of the statutes capable of performing the same function as that rendered by the American Digest System with respect to case law. It is to be hoped that the challenge will not pass unnoticed.


When one hundred teachers, representative of the five major professions, meet in conference to discuss common problems, the event is worthy of notice. When they concentrate on the topic of whether or not their several educational disciplines are adequately preparing students to assume the duties not only of those several professions but also of citizenship, the occasion becomes one of major importance. When the joint product of that conference appears in print, then the resulting book, especially a work containing so much that is provocative of thought, cannot be overlooked, particularly by those currently engaged in making a monumental Survey of the Legal Profession.

Any attempt to establish the consensus of these collected papers would be well-nigh impossible, yet there is apparent agreement at some points. General education, at the collegiate level, is an admitted sine qua non to professional training, but should be the case only if it serves to aid the student to recognize problems, gather evidence, weight values, make judgments, and communicate those decisions convincingly to others. Work at that level, however, is apt to be worthless, or at least likely to be overshadowed by the student’s impatience to enter upon professional study, unless a conscious effort is made, at that time, to relate the general training to that which will follow. The emphasis, then, at that level, should clearly be on quality, not quantity.

Professional training, in any of the five fields considered, apparently can, to a great degree, be provided by the “case method,” whether those

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2 The mere tabulation of references would consume almost a printed page of small type. See, for example, 25 Chicago-Kent Law Review 199-200, which lists the statutory citations, for the several American jurisdictions, dealing with revocation and revival of wills.

1 Professor Smith, Provost of Carnegie Institute of Technology, closed the sessions with the pointed query as to whether undergraduate education for all professional students should not be “so related to professional education as to attain these values without allowing four college years to elapse before education takes on the vitality and usefulness that it could have from the start.” See Education for Professional Responsibility, p. 203.
cases take the form of actual appellate decisions, as in law, or of manufactured cases in the business courses, specific problems in science, practical field work for the divinity student, or clinical work in medicine. Through such cases, the student can gain not only (1) an insight into requisite knowledge, and (2) develop the skills necessary for professional competence, but (3) may also gather an understanding of the processes in which he will participate and the part he will be expected to play therein. Yet again, too close attention to "cases" may result only in developing the first two with a corresponding neglect of the third, hence the direction of emphasis in instruction needs constantly to be checked. By and large, any critical comment expressed at the conference was directed not so much at curriculum content as it was concerned with basic objectives; it opposed narrow professional specialization while favoring the fixing of fundamental insights and ways of thought by which the student might set his own program of self-education.

It was at the third session of the conference, however, that the discussions transcended professional boundaries and canvassed the responsibilities of the professional man as a citizen. Exhortation was not all along the line that he should become a leader of public opinion, a person asserting a degree of influence in political party management and one willing to assume the rigors of public office, but there was a certain naivete evident in Dean Katz's tacit suggestion that the student who understands human nature, as gleaned from psychiatric writings, will not only be a better lawyer but also a better citizen. It is more likely that the person so trained would function, as Doctor Romano expressed it, to the "maximum of his capacity as an intelligent, conscious, free human being." Whether the student's interest would then prompt him to assume a greater degree of concern with civic affairs is a matter which only he could, and should, decide. Precept and example may serve to show the way, but it does not follow that the human foot will necessarily tread therein.

W. F. Zacharias

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2 See the paper by Professor Fuller of Harvard University, entitled "What the Law Schools can Contribute to the Making of Lawyers," op. cit., at pp. 14-35, particularly pp. 18-23.

3 Dean Vanderbilt of New York University School of Law, who expressed that view, also commented on the "willingness of our most competent men to take public office when we are threatened with war" as compared with "their unwillingness to do so in times of peace." He asserted that a "little more peacetime patriotism would do much to prevent war." Op. cit., p. 153.


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