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## Property - Survey of Illinois Law for the Year 1955-56

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turning to Illinois, filed her petition in the original divorce action alleging that her ex-husband was in default in an amount equal to the difference between the payments provided for in the Illinois order and those incorporated in the California award. The Appellate Court for the Second District held that, inasmuch as the California order did not purport by its terms to affect the Illinois decree, it did not supersede it and, furthermore, the mere acceptance of payments did not evidence the fact that the wife had abandoned the provisions made for her by the Illinois court.

## VI. PROPERTY

### REAL AND PERSONAL PROPERTY

Although there are no cases of significance involving interests in personal property, there are several decisions of consequence concerning proprietary interests in real estate. In the case of *Bradley v. Fox*,<sup>1</sup> the Illinois Supreme Court found it necessary to reconsider the rights of a surviving joint tenant who had murdered his co-tenant. This problem had initially been presented to the court some four years earlier in the case of *Welsh v. James*<sup>2</sup> where it was decided that, inasmuch as the survivor took the whole interest by virtue of the original contract, constitutional proscription prevented a denial of his right of survivorship.<sup>3</sup> Though confronted with this precedent, the court nevertheless concluded that one of the implied conditions of a joint tenancy is that neither party will acquire the interest of the other by murder. Hence, it was able to say that the survivor had destroyed the joint tenancy as well as the right of survivorship incident thereto and retained only an undivided one-half interest in the property as a tenant in common with the heir at law of the deceased.

<sup>1</sup> 7 Ill. (2d) 106, 129 N. E. (2d) 699 (1955), noted in 34 CHICAGO-KENT LAW REVIEW 318 5 DePaul L. R. 316, 44 Ill. B. J. 353, 31 N. Y. U. L. R. 963, 9 Vanderbilt L. R. 892, and 58 W. Va. L. R. 422.

<sup>2</sup> 408 Ill. 18, 95 N. E. (2d) 872 (1951), noted in 29 CHICAGO-KENT LAW REVIEW 260.

<sup>3</sup> Forfeiture of property as a penalty for the commission of crimes is prohibited by Ill. Const. 1870, Art. II, § 11.

With respect to the constitutional problem hereinabove indicated, the court pointed out that, since the survivor was at no time prior to the murder the sole legal owner of the entire estate, he is being deprived of nothing enjoyed by him prior to his crime, and thus there is no forfeiture involved.

Inasmuch as cases involving easements typically present questions of fact rather than questions of law, there is seldom any occasion to mention them in this survey. However, an exception to this general statement is the dogmatic dictum contained in the case of *Allendorf v. Daily*.<sup>4</sup> The Supreme Court there stated that partition commissioners had the power to burden one portion of the partitioned estate with an easement in favor of another portion if such action is necessary to provide a fair and impartial partition. However, since the partition decree was under collateral attack by parties to the original proceeding, it may be assumed that the actual decision rested on principles of *res adjudicata*.

In the realm of future interests, only one case, that of *Trustees of Schools of Township No. 1 v. Batdorf*,<sup>5</sup> appears to possess any lasting significance in the law of Illinois. Therein, the constitutional validity of the so-called Reverter Act,<sup>6</sup> as applied to existing interests, was questioned. Generally, the effect of this statute is to limit the duration of possibilities of reverter and rights of re-entry to fifty years, and places a limitation of one year from the effective date of the statute on suits predicated on grants made more than fifty years earlier. Despite the contention that this statute violated the due process clauses of both the state and federal constitutions,<sup>7</sup> the Supreme Court was able to hold the statute valid on the theory that the affected interests were mere expectancies and, therefore, there was no deprivation of property. It is disturbing to note that the court

<sup>4</sup> 6 Ill. (2d) 577, 129 N. E. (2d) 673 (1955).

<sup>5</sup> 6 Ill. (2d) 486, 130 N. E. (2d) 111 (1955), noted in 34 CHICAGO-KENT LAW REVIEW 250, 5 DePaul L. R. 325, 1956 Ill. L. Forum 298, and 54 Mich. L. R. 863.

<sup>6</sup> Ill. Rev. Stat. 1955, Vol. 1, Ch. 30, § 37b et seq.

<sup>7</sup> U. S. Const., Amend. XIV, and Ill. Const. 1870, Art. II, § 2.

apparently would not draw any distinction where the specified conditions had occurred and the "expectancies" had already ripened into present interests when the act became effective. Particularly with respect to determinable fees, it would seem that the former owner would be no more than an adverse possessor and should not enjoy rights greater than adverse possessors generally.

#### LANDLORD AND TENANT

The law governing the relationship between landlord and tenant witnessed four cases during the past year which may be said to have affected or reshaped that relationship. Although three of them are concerned with the construction of leases, their impact is reflected in the frequency with which the problems may arise. In the first, that of *Fox v. Fox Valley Trotting Club*,<sup>8</sup> the lease in question reserved rent in the amount of a fixed sum plus a percentage of the revenues received by the lessee, and further provided that the premises were to be used only for the staging of harness races and like activities. Although there was no express undertaking that any races would be held, the Supreme Court nevertheless concluded that such a promise was to be implied from the other terms of the lease. The lessee was therefore held liable for his failure to hold races on the leased premises during the year in question.

A clause in a lease permitting alterations and changes was, in the case of *Rosenblum v. Neisner Bros., Inc.*,<sup>9</sup> held sufficient to allow lessees of Illinois realty to construct a third floor addition to a two-story building. Since the lease did not explicitly permit additions, the United States Court of Appeals for the Seventh Circuit appears to have taken the position that this construction was only an alteration. In so doing, it distinguished contrary cases on the ground that the additions therein had been lateral or horizontal rather than vertical. In the case of *Cerny-*

<sup>8</sup> 8 Ill. (2d) 571, 134 N. E. (2d) 806 (1956).

<sup>9</sup> 231 F. (2d) 322 (1956). Appeal pending.

*Pickas & Company v. C. R. Jahn Company*,<sup>10</sup> the particular terms of a lease were held to exonerate the lessee from liability for the loss of the leased premises by fire even though the fire was caused by the negligence of the lessee. The lessee had there covenanted to return the premises "in good condition and repair (loss by fire and ordinary wear excepted)". The Supreme Court took the position that the parties were free to contract to shift the risk of loss, and had here done so inasmuch as the lessor was required to pay for fire insurance on the leased building.

The question of a landlord's responsibility to guests of his tenant was presented to the Appellate Court for the First District in the unusual case of *Shiroma v. Itano*.<sup>11</sup> Therein, the tenant's guest, present for the purpose of participating in a poker game, was injured in a fall down an unlighted stairway. Though the general statement of liability would be that the landlord's duty runs only to persons lawfully on the premises, the court nevertheless held the landlord liable since it felt that the condition "lawfully" referred only to the injured person's relation to the tenant and not to the motive for his presence. The court was also impressed by the fact that the injury was not connected with the unlawful activity and that such an accidental circumstance should not be sufficient to relieve the landlord from his duty.

#### SECURITY TRANSACTIONS

It is fundamental law that there can be no occasion for any form of security transaction unless there is a debt of some sort to be secured, for the real estate mortgage or other security device is no more than an incident and the existence of a debt is the matter of prime concern.<sup>12</sup> This does not mean, however, that it is essential that the debtor must be personally liable for the payment of the debt, although personal liability is the usual and customary consequence. It was possible, therefore, for the

<sup>10</sup> 7 Ill. (2d) 393, 131 N. E. (2d) 100 (1956), noted in 34 CHICAGO-KENT LAW REVIEW 259, 5 DePaul L. R. 305, 44 Ill. B. J. 576, and 1956 Ill. L. Forum 301.

<sup>11</sup> 10 Ill. App. (2d) 428, 135 N. E. (2d) 123 (1956).

<sup>12</sup> *Evans v. Holman*, 244 Ill. 596, 91 N. E. 723 (1910).

Appellate Court for the Fourth District to decide for the first time in Illinois, through the medium of the case of *Bedian v. Cohn*,<sup>13</sup> that if the parties to a real estate mortgage transaction should stipulate against personal liability on the secured debt the creditor would be limited to the security as a source for satisfaction and would be precluded from obtaining a deficiency judgment.<sup>14</sup> The situation there presented was considered comparable to a pawnbroking transaction, under which the pledgor would stand to lose the pawned article if he did not pay but the creditor would have nothing beyond the security of the property for his protection.<sup>15</sup>

If the attempt to provide security does not rise to the height of the creation of a legal lien, it might still be possible for the creditor to demonstrate the existence of an equitable lien and, in a proper case, use a proceeding for specific performance to translate his equitable right into a legal one. In order to do this, however, the creditor must be able to demonstrate that the agreement to give a legal lien is as full and certain as would be required for the enforcement of an agreement for a sale of the premises.<sup>16</sup> It became necessary, therefore, for the Appellate Court for the First District to say, in the case of *Baker v. Baker*,<sup>17</sup> that it would be improper for a court to decree specific performance of an agreement to give a note and trust deed as security for a loan in the event the parties had not agreed upon a precise rate of interest.<sup>18</sup> Nevertheless, the creditor therein was allowed to assert an equitable lien over the property, and to enforce the same by foreclosure if the debt was not repaid within a reasonable

13 10 Ill. App. (2d) 116, 134 N. E. (2d) 532 (1956).

14 A claim that the note and mortgage differed from the original agreement for the sale of the premises, because drawn under mistake or by reason of fraud, was rejected on the ground there was neither pleading nor proof to sustain the same.

15 See Robbins, "The Pledge as an Illinois Security Device," 31 CHICAGO-KENT LAW REVIEW 99 (1953), particularly pp. 100-2.

16 *Whitelaw v. Brady*, 3 Ill. (2d) 383, 121 N. E. (2d) 480 (1954), illustrates what would be required before specific performance of a sale contract could be had.

17 6 Ill. App. (2d) 557, 128 N. E. (2d) 616 (1955).

18 If no discussion of the point had been had, the court might have settled upon a provision for interest at the legal rate, pursuant to Ill. Rev. Stat. 1955, Vol. 1, Ch. 74, § 2. It appeared, however, that the parties had discussed, but had not settled upon, interest at a rate around 2½ to 3%.

time, because the evidence clearly disclosed an agreement to give a mortgage of some sort. In the case of *Pope v. Speiser*,<sup>19</sup> relief by way of an equitable lien was also accorded where the court was unable to find a clear agreement for a sale of the premises but did find that the alleged purchaser had made substantial improvements on the premises in reliance upon the belief the same would inure to his benefit as a purchaser.

Security is, at times, provided by the use of an absolute conveyance to the creditor but the law is clear that instruments of this nature, if intended as security for the payment of debts, are no more than veiled mortgages and must be dealt with as such<sup>20</sup> with the right of redemption continuing until it is barred in one of the modes recognized by law.<sup>21</sup> In the event the land becomes more valuable, as it did in the case of *Warner v. Gosnell*,<sup>22</sup> the grantor would be prone to seek relief against the absolute conveyance and to exercise the privilege of redeeming the property from the debt created at the time of the loan. The court there concerned, however, noted that it would be legally possible for the grantor, at a time subsequent to the conveyance, to abandon the right of redemption by parol acts and agreements, so as thereby to give full effect to the instrument used, and on the facts before it held, in one of the rare instances to be found in this state, that the grantor had so waived the right of redemption. A decree dismissing a complaint for relief by way of redemption from an absolute conveyance was there affirmed.

The holding of the Illinois Supreme Court in the case of *Livingston v. Meyers*<sup>23</sup> insofar as it related to the meaning and purpose of Section 11b of the Limitations Act,<sup>24</sup> a statute dealing with the lien of recorded but ancient mortgages, must have come as a welcome note to persons seeking to clear title to land. In that case, a prospective purchaser refused to complete his pur-

<sup>19</sup> 7 Ill. (2d) 231, 130 N. E. (2d) 507 (1955).

<sup>20</sup> Ill. Rev. Stat. 1955, Vol. 2, Ch. 95, § 13.

<sup>21</sup> *Bearss v. Ford*, 108 Ill. 16 (1883).

<sup>22</sup> 8 Ill. (2d) 24, 132 N. E. (2d) 526 (1956).

<sup>23</sup> 6 Ill. (2d) 325, 129 N. E. (2d) 12 (1955), noted in 1956 Ill. L. Forum 143.

<sup>24</sup> Ill. Rev. Stat. 1955, Vol. 2, Ch. 83, § 11b.

chase on the ground he had been offered an unmerchantable title by reason of the existence, on record, of two unreleased trust deeds in the nature of mortgages of rather ancient vintage as to which no notice of the type required by the statute had been filed by the mortgagee in an effort to give warning that the debts evidenced thereby were still in full force and effect. Prior to the enactment of the statute in question, the purchaser would have been held to notice, from the original recording and the failure to release, that the mortgage liens might still be enforceable ones so long as the debts remained undischarged and in force,<sup>25</sup> for nothing in Section 11 of the statute would preclude suit in case the obligations had been kept alive by appropriate extensions.<sup>26</sup> The court, however, found it to be the legislative purpose in enacting Section 11b to remove clouds on title and to terminate the lien of recorded mortgages where notice as to the continued validity thereof had not been given, hence it reversed a decree denying specific performance.<sup>27</sup> It would now seem to be clear that a mortgagee, to protect his security interest, must not only arrange for a definite extension of the debt in the event it is not paid at maturity but must also periodically give notice of the fact of extension by recording an affidavit with respect thereto, otherwise his lien may have to yield before rights acquired by third persons.

Little has occurred in law with respect to security interests other than those created by way of real estate mortgage.<sup>28</sup> Mention might be made of the fact that, in the case of *Lewis v. Glen*

<sup>25</sup> *Kraft v. Holzmann*, 206 Ill. 548, 69 N. E. 574 (1904).

<sup>26</sup> Ill. Rev. Stat. 1955, Vol. 2, Ch. 83, § 11, in the form of a customary statute of limitation, merely directs that no person "shall commence an action" to foreclose a mortgage "unless within ten years after the right of action" has accrued. It should be read in conjunction with *ibid.*, § 17, dealing with the giving of a new promise in writing designed to extend the maturity of a promissory note.

<sup>27</sup> The result so attained might have been different had the mortgagee under the old mortgage been in possession of the premises: *Miller v. Frederick's Brewing Co.*, 405 Ill. 591, 92 N. E. (2d) 108 (1950). It should also be noted that, in *Zyks v. Bowen*, 351 Ill. App. 511, 115 N. E. (2d) 577 (1953), in which leave to appeal was denied, the court held that, as between the original parties, an action would not be barred, provided the debt remained otherwise enforceable, even though nothing had been done to record the several written extension agreements.

<sup>28</sup> See ante, Division II, Contracts, for cases dealing with aspects of the law of Suretyship.

*Motors, Inc.*,<sup>29</sup> the court held that a buyer of an automobile on an installment basis was not precluded from suing the seller because of fraud on the seller's part merely because the buyer had made his installment payments without protest to a finance company to whom his paper had been transferred, the latter taking without knowledge of the deceit which had been practiced on the buyer. It should be noted, however, that the installment contract did not appear to contain a fairly common provision to the effect that the buyer waives all claims and defenses arising out of the subject matter. The case of *Rovak v. Parkside Veterans' Home Project*<sup>30</sup> is also unique in that the court there held that a "stand by" agreement, entered into by certain creditors who had undertaken not to enforce their claims until one specified creditor had been paid in full, was of transferable character and could inure to the benefit of an assignee of the claim so preferred even though the agreement contained no provision on the point. The power to assign the benefit of the "stand by" agreement was said to be an inherent incident to an acknowledged ability to transfer the secured debt itself.

#### TRUSTS

A thrust against the legality and validity of so-called spendthrift trusts was successfully parried in *Danning v. Lederer*,<sup>31</sup> wherein a trustee in bankruptcy claimed title to the bankrupt's interest in a number of trusts containing spendthrift clauses. The United States Court of Appeals for the Seventh Circuit declared that, in accordance with the applicable provisions of the Bankruptcy Act,<sup>32</sup> it would follow the decisions of the Illinois courts in determining whether the beneficiary's interest in a spendthrift trust was alienable. Since the Illinois courts have recognized the validity of spendthrift trusts and have held that a spendthrift clause may protect not only the income but also

<sup>29</sup> 7 Ill. App. (2d) 104, 129 N. E. (2d) 180 (1955).

<sup>30</sup> 8 Ill. App. (2d) 310, 132 N. E. (2d) 11 (1956).

<sup>31</sup> 232 F. (2d) 610 (1956).

<sup>32</sup> 11 U. S. C. A. § 110(a)(5).

the corpus of a trust, the bankrupt's interest in such an Illinois trust was held inalienable and, therefore, did not pass to the trustee in bankruptcy. It is also worth noting that an unexecuted command by the settlor to distribute a portion of the trust estate did not affect the outcome. For reasons herein unimportant, the court construed this order as being directory only and concluded that the spendthrift clause insulated the corpus until actual distribution had been accomplished.

Reference to two other cases might well be valuable to the practitioner. The case of *Pernod v. American National Bank & Trust Company of Chicago*<sup>33</sup> can serve as an illustration of the principle that only clear and convincing evidence will prompt a court to decree the revocation of a voluntary *inter vivos* trust upon the ground of mistake. And the case of *Art Institute of Chicago v. Castle*<sup>34</sup> may be mentioned as a tactful reminder to the bar that the enforcement of charitable trusts falls within the domain of public authorities; private individuals or organizations have no right to enforce such trusts, either by instituting proceedings themselves or intervening in a suit brought by some other party.

#### WILLS AND ADMINISTRATION

The most significant development in the laws relating to the devolution of property in the past year was the further dilution of the statute providing that marriage operates as a revocation of any existing will executed prior to the date of marriage.<sup>35</sup> The courts have long taken the position that this statute operated only as a presumption rather than as a rule of law and if the will was executed in contemplation of the marriage, the presumption was deemed to have been rebutted since it was felt that this was a positive indication that the testator did not intend a revocation. But this concept was limited in that the fact that the will was made in contemplation of marriage must

<sup>33</sup> 8 Ill. (2d) 16, 132 N. E. (2d) 540 (1956). Daily, J. filed a dissenting opinion.

<sup>34</sup> 9 Ill. App. (2d) 473, 133 N. E. (2d) 748 (1956).

<sup>35</sup> Ill. Rev. Stat. 1955, Vol. 1, Ch. 3, § 197.

appear on the face of the instrument;<sup>36</sup> evidence dehors the will was deemed insufficient to establish this fact.<sup>37</sup> However, in the case of *Estate of Day*,<sup>38</sup> decided during the current year, the Supreme Court specifically overruled the latter proposition and permitted proof that the will was made in contemplation of marriage to be made by extraneous evidence.

A further indication of the disposition of the Supreme Court to carry out the actual intention of the decedent may be found in the case of *Caracci v. Lillard*.<sup>39</sup> Therein, the testatrix, having made no specific disposition of her real estate, provided in the residuary clause only for the disposition of "All the rest and residue of the *personal* estate of which I may die seised, . . ."<sup>40</sup> The court, however, permitted the real estate owned by the testatrix to pass under the residuary clause after determining that the general intent of the testatrix was to dispose of her entire estate, and that this was sufficiently evident throughout the will. But of greater consequence is the fact that the bothersome phrase "personal estate" was devitalized by speculating that it might well be taken to mean property owned by the testatrix personally.

The interesting problem of whether a husband's estate is entitled to a surviving spouse's award where the husband and wife died as a result of a common accident was presented in the case of *In re Dillman's Estate*.<sup>41</sup> Inasmuch as the husband survived the wife by a few hours, a decree allowing a spouse's award of one thousand dollars was affirmed by the Appellate Court for the Fourth District when it took the position that the death of the surviving spouse does not defeat the statutory right

<sup>36</sup> See *Kuhn v. Bartels*, 374 Ill. 231, 29 N. E. (2d) 84 (1940) and *Ford v. Greenawalt*, 292 Ill. 121, 126 N. E. 555 (1920).

<sup>37</sup> See *Gillmann v. Dressler*, 300 Ill. 175, 133 N. E. 186 (1921) and *Wood v. Corbin*, 296 Ill. 129, 129 N. E. 553 (1921).

<sup>38</sup> 7 Ill. (2d) 348, 131 N. E. (2d) 50 (1956), noted in 34 CHICAGO-KENT LAW REVIEW 267.

<sup>39</sup> 7 Ill. (2d) 382, 130 N. E. (2d) 514 (1955).

<sup>40</sup> 7 Ill. (2d) 382 at 384, 130 N. E. (2d) 514 at 515. (*Italics supplied.*)

<sup>41</sup> 8 Ill. App. (2d) 239, 131 N. E. (2d) 634 (1956).

to such award.<sup>42</sup> Although forced to admit that the award, in the first instance, is based on the need for support during administration, the court pointed out that, under the statute, the minimum award was one thousand dollars and the personal representative of a surviving spouse is authorized to make the selection in case the spouse dies before payment.

## VII. PUBLIC LAW

### ADMINISTRATIVE LAW

Five decisions of the Appellate Court of Illinois for the First District, all involving the scope of judicial review in civil service cases,<sup>1</sup> incorporate the only interesting developments in this field for the past twelve months. The initial decision, typical of the entire group, is that of *Nolting v. Civil Service Commission of the City of Chicago*.<sup>2</sup> Therein, the Civil Service Commission discharged a police officer for abandoning his beat without permission as well as various other infractions. The order of dismissal, reviewed by the circuit court under the rules of the Administrative Review Act,<sup>3</sup> was reversed and the officer ordered reinstated by that court when it concluded that the commission's decision was excessively severe in relation to the charges against the officer. On appeal, however, the Appellate Court reversed the judgment, holding that the trial court had gone beyond the legitimate bounds of review. The so-called Civil Service Act authorizes a discharge for "cause" but, as it fails to define that term, it is deemed to be within the discretion of the commission to determine whether the charges alleged and proved are sufficient to warrant a dismissal. In reviewing decisions of this type prior to the passage of the present Administrative Review Act, the courts adhered to the principle that the findings of the commission as to the existence of "cause" would not be reversed

<sup>42</sup> Ill. Rev. Stat. 1955, Vol. 1, Ch. 3, §§ 330 and 333.

<sup>1</sup> Ill. Rev. Stat. 1955, Vol. 1, Ch. 24½, § 39 et seq.

<sup>2</sup> 7 Ill. App. (2d) 142, 129 N. E. (2d) 236 (1955).

<sup>3</sup> Ill. Rev. Stat. 1955, Vol. 1, Ch. 24½, § 77a provides that judicial review of final administrative decisions under the civil service laws shall be governed by the Administrative Review Act. Ill. Rev. Stat. 1955, Vol. 2, Ch. 110, § 264 et seq.