Survey of Illinois Law for the Year 1937-1938;Survey

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SURVEY OF ILLINOIS LAW FOR THE YEAR 1937-1938

PERSONS

MUNICIPAL CORPORATIONS

The Illinois law of municipal corporations has enjoyed its usual activity during the year. The oil "boom" within the state, the pressing needs of air traffic, and the continued availability of "easy" Federal money for public works have elicited legislative response. The courts, too, have produced their customarily abundant crop of decisions, many of which are merely cumulative with respect to matters well settled, but some few of which may be regarded as significant.

1 The present survey is not intended in any sense as a complete commentary upon or annotation of the cases decided by the Illinois courts during the past year but is published rather for the purpose merely of calling attention to cases and developments believed significant and interesting. The period covered is that of the judicial year, i.e., October to October, embracing from 366 Ill. 552 to 369 Ill. 231; from 291 Ill. App. 508 to 296 Ill. App. 540; and from 92 F. (2d) 1 to 98 F. (2d) 832.

2 The powers of cities and villages were enlarged by the addition of a new section of the Cities and Villages Act (Ill. Rev. Stat. 1938 supp., Ch. 24, § 65.62a, H.B. No. 69, §1), which authorizes the city council in cities and the village board in villages to grant permits authorizing the mining of oil and gas within the municipal limits.

3 An amendment to an existing section of the Cities and Villages Act (Ill. Rev. Stat. 1938 supp., Ch. 24, § 65.99 1/2, S.B. No. 4, §1) enlarges the powers of municipalities with reference to the establishment and maintenance of airports by granting specifically the power to acquire land and rights of way, by purchase, condemnation, agreement, lease, or otherwise, and to enter into contracts for the removal of obstructions interfering with the improvement of such airports. The impasse which had confronted the city of Chicago in this respect was rather obviously within the legislative contemplation.

4 The bonding powers of cities having a population under 500,000 was increased from 2 1/2 to 5 per cent in the case of bonds issued for the purpose of acquiring or constructing a city hall or municipal building (Ill. Rev. Stat. 1938 supp., Ch. 24, § 662.15, H. B. No. 59, §1). A similar increase was provided for in the event of indebtedness incurred for the purpose of constructing, altering, improving, or repairing of streets, sidewalks, or alleys (Ch. 113, § 44.12, H.B. No. 13, §1); for the purpose of acquiring rights-of-way and borrow pits for the construction of levees (Ch. 113, § 44.13, H.B. No. 16, § 1); and for the purpose of constructing, purchasing or acquiring city halls, police or fire department buildings (Ch. 113, § 44.14, H.B. No. 54, §1). These provisions were doubtless prompted by the fact that many cities had reached the limit of their debt-incruring power, and were therefore prevented from undertaking the construction of useful and needed works and from securing grants, or loans and grants, from the Federal Emergency Administration of Public Works.

5 Two cases dealing with tort liability of municipalities are noted below under the heading "Torts."
Zoning

In two decisions the Supreme Court has charted further the zoning law of the state. In *Speroni v. Board of Appeals,* the court approved a zoning ordinance dividing a city into industrial, commercial, and residential districts, and excluding apartment houses from the residential district. In an earlier case the court upheld an ordinance excluding apartment houses from a strip of lake front property zoned for residential use. In that case, however, it did not appear that apartment houses were excluded from all other residential districts as well. In the instant case, apartment houses could only be constructed in industrial or commercial districts. The court emphasized the fact, however, that there were substantial residential areas in the commercial and industrial districts, and that apartment houses could not be restricted to districts "unfit for human habitation." In the other case, that of *Decatur Park District v. Becker,* the court, without citing any authority, decided that a city could not exclude parks from class A residential districts. No such power of exclusion was given by the legislature, the court said, and the recognition of such a power would result in a holding that parks could only be established in commercial and industrial zones.

**Board Meetings**

In the case of *People v. New York, Chicago and St. Louis Railroad Company,* the Supreme Court considered, apparently for the first time, the legality of a meeting of a county board of supervisors not called in accordance with statutory requirements. The board had adjourned from the regular meeting in September, "subject to the call of the chairman." On November 26, the chairman called a special meeting, a notice of which was published and also mailed to each member of the board. The court held that the adjournment in September was in effect *sine die,* and that the meeting of November 26 was not an adjourned regular meeting nor a legal special meeting. The court ruled,

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6 368 Ill. 568, 15 N.E. (2d) 302 (1938).
7 Minkus v. Pond, 326 Ill. 467, 158 N.E. 121 (1927).
8 368 Ill. 442, 14 N.E. (2d) 490 (1938).
9 368 Ill. 536, 15 N.E. (2d) 397 (1938).
10 Ill. Rev. Stat. 1937, Ch. 34, § 51: "Special meetings of the board of supervisors shall be held only when requested by at least one-third of the members of the board, which request shall be in writing, addressed to the clerk of the board, and
accordingly, that tax levies made at this attempted meeting were void. The practice which prevails of adjourning from time to time regular county board meetings to avoid the expense and time involved in calling special meetings, may lead to the disastrous result reached here unless the meetings are adjourned to a fixed date to be reconvened automatically.

Estoppel

Two cases in the Appellate Court concerning the doctrine of estoppel of municipal corporations are perhaps worthy of mention. In Cook v. City of Staunton,\(^{11}\) the court held that the rule distinguishing between municipal contracts which are *ultra vires* in the strict sense and contracts which are within the power of the corporation but irregularly or illegally made, and allowing a recovery in the latter class of cases, was applicable to special assessment bonds to which the following three defenses were interposed: (1) that the bonds did not mature during the year for which the respective installments became due and payable as required by statute, (2) that some of the bonds were issued against the first installment when they should only be issued against the second and succeeding installments, and (3) that the aggregate amount of the bonds was in excess of the assessment as confirmed. Following the general rule of estoppel as laid down in McGovern v. City of Chicago,\(^{12}\) the court held the city liable. To be contrasted with this decision is the case of Folkers v. Butzer,\(^{13}\) in which the court, reaffirming a rule established in earlier cases,\(^{14}\) held that a statutory requirement calling for competitive bids in the letting of road construction contracts was mandatory, and that a failure to follow the prescribed procedure was not a mere irregularity which the town, having received the benefits, was estopped to rely upon as a defense, but an omission which rendered the entire contract illegal and void.

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specifying the time and place of such meeting, upon reception of which the clerk shall immediately transmit notice, in writing, of such meeting, to each of the members of the board. The clerk shall also cause notice of such meeting to be published in some newspaper printed in the county, if any there be."

\(^{11}\) 295 Ill. App. 111, 14 N.E. (2d) 696 (1918).
\(^{12}\) 281 Ill. 264, 118 N.E. 3 (1917).
\(^{13}\) 294 Ill. App. 1, 13 N.E. (2d) 624 (1933).
Control of Property

A lease by a county board of supervisors of space in a courthouse to a private abstracter was held to be unauthorized in *Yakley v. Johnson*. The court ruled that the statutory power of the board to sell, convey, or lease real estate and to rent space not needed for county purposes to any "city, village, town, sanitary district, or other municipal corporation" did not authorize a lease for a private purpose. In an early case, the court held that the county could recover possession by forcible entry and detainer of space granted by a county recorder to a private abstracting firm. In that case, however, the action was ordered brought by the board of supervisors itself, so that the problem of the instant case was not involved. Another case dealing in a sense with the use and control of municipal property is that of *People v. Village of Lakewood*, in which the Supreme Court considered the extent to which a village may exercise control over the territory included within a township park. The court ruled that such township parks may exist within a village and are subject to the police control of the village for the maintenance of order, but that in other matters, including the granting of licenses for concessions, the jurisdiction of the board of park commissioners is exclusive. No cases were cited and the case is believed to be one of first impression.

Eminent Domain

In *People v. City of Chicago*, a mandamus action to compel the city to pay a condemnation judgment, the Supreme Court held that the city could not offset against the claim for interest the value of the beneficial use of the property by the judgment creditor who was allowed to remain in possession, inasmuch as this would, in effect, amount to enforcing a tenancy on the creditor with rental equivalent to interest accruing on the judgment. The court pointed out that the tenant's possession was subject to termination by the city at any time and its action in permitting the creditor to remain on the property was purely voluntary.

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15 295 Ill. App. 77, 14 N.E. (2d) 692 (1938).
17 Hardin v. County of Sangamon, 71 Ill. App. 103 (1896).
18 The court there held that the care and custody of the court house were vested in the board of supervisors and the sheriff, and that the recorder's possession was only coextensive with his official duties.
19 368 Ill. 209, 13 N.E. (2d) 275 (1938).
20 368 Ill. 421, 14 N.E. (2d) 473 (1938).
The decisions relied upon to support the decision were drawn from other jurisdictions.

**Licenses**

The city of Chicago suffered another adverse decision in the Supreme Court in *Bullman v. City of Chicago*,21 in which it was determined that dealers in used cars and accessories are not subject to the licensing power of the city. The provision of the Cities and Villages Act22 authorizing cities to “tax, license, regulate . . . dealers in junk, rags and any second-hand article whatsoever. . . .” was construed to authorize the regulation and licensing of only such businesses as were similar to junk shops, the more general term “any second-hand article whatsoever” being limited by the particular words preceding. In several earlier decisions the court had held that the licensing and regulatory powers of cities under this and similar provisions did not extend to wholesale dealers in scrap iron and steel,23 dealers in second-hand bottles,24 dealers in second-hand books,25 or to wholesale dealers in rags.26

**CORPORATIONS**

The opinion of the Appellate Court in *Neiman v. Templeton, Kenly & Company, Ltd.*27 explores rather thoroughly and clarifies expressions concerning the statutory qualifications and limitations on the right of a stockholder to examine the books of a corporation. Section 45 of the Business Corporation Act28 was ruled to be reasonable and constitutional and applicable to the plaintiff who had filed a petition for mandamus allegedly based upon the section. The petitioner contended that the qualifications therein prescribed29 were applicable only where the penalty was sought for failure to allow examination and that the concluding paragraph30 of the section preserved the common law right of mandam-

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21 367 Ill. 217, 10 N.E. (2d) 961 (1938).
22 Ill. Rev. Stat. 1937, Ch. 24, § 65.94.
25 Eastman v. City of Chicago, 79 Ill. 178 (1875); City of Chicago v. Moore, 351 Ill. 510, 184 N.E. 621 (1933).
29 "... a shareholder of record for at least six months immediately preceding his demand or who shall be the holder of record of at least five per cent of all the outstanding shares of a corporation. . . ."
30 "Nothing herein contained shall impair the power of any court of competent jurisdiction, upon proof by a shareholder of proper purpose, to compel by manda-
mus to any stockholder who could show a proper purpose. The court said that this paragraph has reference only to the purpose for which the examination is sought and to the remedy, and not to the qualifications of the shareholder. Another case of interest is that of Spivey v. Spivey Building Corporation, holding that a building corporation incorporated in Delaware for the sole purpose of acquiring, owning, and operating a building in Illinois, had a valid existence in Illinois and could acquire title to property in the latter state. Thus had been consummated a radical change in the policy of the state toward corporate ownership of land.

FAMILY

In Dwyer v. Dwyer, a case of first impression, the Illinois Supreme Court held that adoption does not relieve the natural parents of the duty to support a child. In that case the child had been adopted by third persons and subsequently readopted by its mother, who was the divorced wife of the defendant parent. Another case, apparently of first impression, involving the family, is that of Thoresen v. Thoresen, in which attorneys for a divorced wife sought to enforce against defendant divorced husband an attorney's lien on money payable under a decree in the form of alimony. The Appellate Court held the statute relating to attorney's lien inapplicable to a divorce proceeding, saying:

The inherent nature of a divorce proceeding wherein a wife, if she prevails, may be awarded as an incident to her decree of divorce not damages but an allowance for her support and wherein the only allowance for attorney's fees provided for or contemplated by the Divorce Act is to the wife, precludes the applicability of the Attorney's Lien Act to such proceeding.

PROPERTY

WILLS

In Swirski v. Darlington, apparently the first decision construing the amendment of 1925 adding "forgery" to Section 2 of the

31 367 Ill. 25, 10 N.E. (2d) 385 (1937). Note, 16 CHICAGO-KENT REVIEW 55.
32 See Carroll v. City of East St. Louis, 67 Ill. 568 (1873), holding a foreign corporation incapable of holding title to Illinois realty.
36 P. 175
37 369 Ill. 188, 15 N.E. (2d) 856 (1938).
Wills Act, the court held that proof of forgery of a will offered for probate may be made by witnesses other than those who attested the instrument.

In Barber v. Barber, the court declined to hold conditional a will reciting that the testatrix was going on a journey and providing: "... if anything should happen to me I request that everything I own both personal and real be given to my sister." The court cited with approval Justice Holmes's decision in Eaton v. Brown.

The year has seen two interesting revocation cases. In one, Fleming v. Fleming, the Supreme Court reaffirmed and perhaps even extended the doctrine of Casey v. Hogan, denying partial revocation of a will by obliterating, tearing, or cutting with intent to revoke such portion and held that such acts should be disregarded and the will admitted to probate as originally executed. In the other case, Gartin v. Gartin, the Appellate Court settled a question of greater difficulty in holding that the granting of a decree of divorce to a wife with provision for alimony constitutes such a change of circumstances as to effect implied revocation of the husband's will leaving everything to the wife.

In the case of In re Judd's Estate, the court held that the amendment of 1927 to the Dower Act had accomplished its purpose—to obviate the doctrine of Clark v. Hanson—and that the surviving spouse is entitled to take the statutory share of personality notwithstanding the fact that there is no realty, and hence technically no dower.

In Northern Trust Company v. Porter, the question was pre-
presented for the first time: In determining whether exercise of a 
general power of appointment by will violates the rule against 
perpetuities, must the period of the rule be computed from the 
time of creation of the power or from the time of exercise by the 
donee? The court held that the period must be computed from 
the creation of the power. It also ruled that damages for the 
breach of a contract to exercise such a general testamentary 
power in a particular manner are not recoverable, since to per-
mit such recovery would be to defeat the intention of the donor 
and convert the power, in effect, into one to appoint either by 
deed or will.

MORTGAGES

Two cases involving foreclosure of mortgages have been de-
cided, which, while in accord with well settled principles, are be-
lieved to be the first Illinois cases involving squarely the points 
therein decided. In *Chicago Title and Trust Company v. Chief 
Wash Company*, 49 a foreclosure suit was instituted by the succes-
sor trustee under a trust deed which provided that the trustee 
"was not required to foreclose unless 25 per cent of the bondhold-
ers demanded such action." It appeared that 80 per cent of the 
bondholders had consented to an extension, as the trustee well 
knew, yet it persisted in the foreclosure proceeding. Upon peti-
tion to remove the successor trustee, the Supreme Court held 
that its action was proper, inasmuch as it represented both the 
depositing and nondepositing bondholders, and was required to 
exercise sound discretion in protecting the rights of both groups. 
In the second case, *Notroma Corporation v. Miller*, 50 a foreclo-
sure and sale had been had and a deficiency judgment had been 
rendered against Miller, although he had not been personally 
served, as he was a nonresident. Thereafter the unpaid balance 
on the note was assigned to plaintiff, who brought attachment 
proceedings. Miller defended on the ground that the note had 
merged into the decree of foreclosure and deficiency, in response 
to which defense the Appellate Court ruled that since the defi-
ciency judgment was void for lack of jurisdiction, no merger had 
taken place, and that the plaintiff might enforce payment of the 
balance of the note in any legal fashion, including attachment.

49 368 Ill. 146, 13 N.E. (2d) 153 (1938). Note, 16 CHICAGO-KENT REVIEW 289.
Perhaps the most important decision of the Illinois Supreme Court in the field of trusts during the past year was that of *Love v. Engelke*. In that case a will devised unproductive real estate with other property to trustees giving them discretionary powers to sell it, the proceeds to be held for the purposes of the trust. The income from the trust was payable to designated persons for life and there were remainders to other persons. Years after the death of the testatrix, the trustees sold the vacant real estate for sums many times greater than its value at her death. The expenses of carrying the property had always been paid out of gross income. Upon application by the life beneficiaries for a share in the proceeds the court held that the entire amount belonged to the corpus of the estate and that the carrying charges were properly paid out of income. The court apparently placed its decision upon the ground that since the power to sell was discretionary in the absolute sense, the life beneficiaries had no right to share in the proceeds. In this way the court distinguished the decision in *Edwards v. Edwards*, which is probably the best known case directing an apportionment under circumstances like these. The court also refused to allow the expenses of carrying the property to be charged against the proceeds. This ruling would have been entirely proper had the court allowed an apportionment. But in view of the decision upon the first point discussed, the result appears to be that the life beneficiaries have borne the cost of the retention of property which was entirely for the benefit of the remaindersmen. The effect of this case should be to require the draftsmen of trusts to take care to provide for situations like the present one, especially if the trust is to be administered in Illinois.

Two other cases dealing with trusts should be mentioned in this survey. In *Booth v. Krug*, the settlor directed his trustees to invest the trust property and pay the income to the settlor’s sister “for her upkeep, maintenance and enjoyment” for life. Thereafter the income was to be paid in equal portions to the settlor’s two half-sisters. The will contained provisions authorizing the trustees to use any or all of the corpus of the estate in the event the income was insufficient “to meet the needs” of his sister or

51 368 Ill. 342, 14 N.E. (2d) 228 (1938). Note, 6 U. of Chi. L. Rev. 129.
53 368 Ill. 487, 14, N.E. (2d) 645 (1938).
half-sisters. After the death of the half-sisters the trustees were directed to pay the residue of the estate to a Board of Education for educational purposes. It was argued that since the trustees had discretion to devote all of the trust property to private purposes, the bequest to charity was void for uncertainty. The Supreme Court upheld the trust.

It is well established that where trustees are given absolute discretion to devote all or any part of the trust property to private or charitable purposes as they see fit, the charitable trust is void for uncertainty as to the trust res. In the instant case, however, Mr. Chief Justice Farthing in a well-reasoned opinion held that the direction of the trustees was not absolute and unlimited. It was pointed out that the possible exhaustion of the trust res through its application to prior demands does not render it uncertain. It is only where the application of property to the purposes of the trust depends upon the absolute uncontrolled discretion of the person having possession of it that fatal uncertainty exists. Under the terms of this trust the trustees could use the principal for the benefit of the sister or half-sisters only in case the income was inadequate for their needs. It was held that a court of equity could supervise the acts of the trustees in this regard. Thus, there was no uncertainty as to the trust res available for the charitable purposes set forth in the will.

An unusual factual situation and an unusual problem was presented to the Appellate Court in the case of Haw v. Haw. The settlor conveyed property to a trustee to pay the net income therefrom to the settlor for life and upon the death of the settlor to divide the corpus equally among the settlor's surviving children. The settlor and life beneficiary persuaded the trustee to pay to her from time to time sums in excess of the income, pleading necessity. These sums were expended in part at least for the support of the life beneficiary and her children. The question arose as to whether the trustee should be allowed credit for such sums in his account. The Appellate Court held that, although the children were minors and could not consent to such application of the trust funds, it would be inequitable to hold the trustee accountable under the circumstances. The decision appears to rest upon the special circumstances of the case rather

than upon any application of principles of estoppel. The general question of whether a court of equity will approve a deviation from instructions by a trustee where it would have authorized such deviation if applied to at the time is not discussed. Whether there was a power of revocation does not appear.

MISCELLANEOUS

In Foote v. City of Chicago, the Supreme Court held that a cotenant's acquisition of the entire premises through foreclosure is sufficient notice of adverse claim and is sufficiently hostile to start the running of the statute of limitations, and renders it unnecessary that a prescriptive claimant give actual notice that he is holding adversely to his former cotenant.

The Supreme Court has seemingly retreated from the rather extreme position taken in the Wells-Jackson case, in the White Way Sign Company v. Chicago Title and Trust Company. The action was in replevin to recover from the owner of the freehold a theater sign sold on conditional sales contract to a lessee who was under a lease requiring the improvement in question to be made, and provided that it should belong to the freehold. The court denied recovery and held against the conditional vendor, indicating that any change in the law of secret liens effected by the Uniform Sales Act applied only to personalty and not to reality, and that there was no reason to apply it to fixtures. It reiterated the public policy of the state to protect the stability of titles to real estate against unrecorded claims of third persons. The court sought to distinguish the Wells-Jackson case on the ground that in that case the sprinkler system (bolted into the freehold) could be removed without substantial injury to the freehold, whereas in the instant case it could not—a questionable distinction in view of the facts.

CONTRACTS
SALES

In addition to the White Way Sign case, above discussed, the Appellate Court handed down several interesting decisions deal-

56 368 Ill. 397, 13 N.E. (2d) 965 (1938).
ing with conditional sales. In *Meisel Tire Company v. Edwards Finance Corporation*, the court held that the vendor of automobile accessories, such as tires, tubes, and storage batteries sold under a conditional sales contract and attached by the vendee to an automobile which had also been purchased under a conditional sales contract with another vendor, could be repossessed for default in payments, since such detachable accessories did not become merged into, and an integral part of, the automobile. This settles, seemingly for the first time, a troublesome question of frequent occurrence. Another case was that of *Ford Motor Company v. National Bond and Investment Company*, in which an automobile manufacturer who delivered automobiles to a dealer under a sales agreement, which recited that the cars were purchased for resale, that any check should not constitute payment, and that title should remain in the manufacturer until the cars were actually paid for by the dealer, was held entitled to recover in a suit for conversion against a finance company which financed the purchases on a trust receipt transaction and took possession of the cars upon the dealer’s default, where the dealer’s check to the manufacturer was dishonored by insufficient funds. The court described the agreement as a conditional sale, and construed it as permitting “resale” only *after* payment to the manufacturer.

What seems to be the first treatment in Illinois of a “sale by sample,” is contained in *People v. West Picture Frame Company*. The court there held that where a lot of furniture which is the subject matter of a sale is in existence and presently available for inspection, but only part of the lot is examined by the buyer, there is not a sale by sample unless the parties expressly so agree.

**NEGOTIABLE INSTRUMENTS**

Two decisions of interest with respect to negotiable instruments have been handed down. In *McKee v. Gaulrapp*, the Supreme Court has extended the rule of several earlier cases so as to permit one maker of a judgment note containing the recital, “all makers to this note are principals,” to prove by parol

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60 295 Ill. App. 243, 14 N.E. (2d) 870 (1938).
62 368 Ill. 336, 13 N.E. (2d) 958 (1938).
evidence that he was, in fact, a surety, and after having paid the judgment and taken an assignment, to enforce the judgment against the other signer. In the other case, *Houghton Mifflin Company v. Continental Illinois National Bank & Trust Company*, the Appellate Court has had occasion for the first time to give effect to the amendment of 1931 of Section 9, subsection 3 of the negotiable instruments law, extending the principle of the fictitious payee to the situation where the person named as payee of a negotiable instrument was "not intended to have any interest in it, and such fact was . . . known to" an "employee or other agent who supplies the name of such payee."

**INSURANCE**

Two rather novel decisions concerning the construction of insurance contracts have been handed down, one in the state, and the other in a Federal court. In *Ginsburg v. Prudential Insurance Company*, the Illinois Appellate Court construed the words "permanent or total disability," used in a "rider" attached to a life policy providing disability benefits, which policy entitled the insurer to demand proof not oftener than once a year of insured's continued disability, holding that insured was not required in the first instance to prove that forever after he was to be totally and permanently disabled. The court allowed recovery of disability benefits upon the showing that for a time such disability was believed permanent, notwithstanding the fact that at the time of trial the disability had ended. In the other case, *Warbende v. Prudential Insurance Company*, the Circuit Court of Appeals for the seventh circuit held that the characteristic scarlet blotches on the skin of the insured, caused by carbon monoxide poisoning from exhaust fumes of an automobile, satisfied the requirement of an accidental death policy containing the customary language, "a visible contusion or wound on the exterior of the body."

In a third case, *People v. Acme Plate Glass Mutual Insurance Company*, the Appellate Court upheld the Insurance Director of Illinois in the exercise of his statutory power and discretion. The Director was engaged in the liquidation of the defendant com-

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pany under a court order issued pursuant to the provisions of the statute. He had appointed a receiver, who qualified and proceeded with the litigation. Considerably more than thirty days after the order of liquidation, the defendant company petitioned the court to discharge the receiver and restore the defendant to its property because it had meanwhile become solvent. The petition was allowed and the Appellate Court reversed the decree, stating that the order of liquidation was final and that the court had lost jurisdiction after thirty days except for purposes of enforcement. In the same order purporting to discharge the receiver, the chancellor had ordered the Director of Insurance to issue a new license to the defendant. The court invalidated this order also on the ground that the issuance of the license was vested in the discretion of the Director in the first instance, and could not be compelled by the court until and unless the Director abused his discretion in refusing to issue such license.

**MISCELLANEOUS**

In *Chesnutt v. Schwartz,* the Appellate Court held that an agreement by attorneys for a trustee in bankruptcy employing accountants in the proceeding and promising to file and have allowed a claim for their services was not illegal by reason of the failure of the attorneys to secure a court order of approval in accordance with the General Orders in Bankruptcy. The court allowed a recovery against the attorneys for breach of contract, i.e., failure to cause the claim to be allowed.

In *Tuzik v. Lukes,* the Appellate Court liberalized the rule allowing a reasonable restraint of trade, and extended it beyond the situation where the restraint is ancillary to a sale of a business by the party excluded from competition. In the instant case the covenantor had previously sold a bakery business, including the property in which it was conducted. Several years later he sold an adjoining piece of vacant property to the vendee of the business, to which sale the covenant not to compete was ancillary. The covenant was sustained.

71 Ill. Bar. Stat. 1935, Ch. 73, § 105(4).
73 No. XLV: "No auctioneer or accountant shall be employed by a receiver or a trustee except upon an order of the court expressly fixing the amount of the compensation or the rate or measure thereof."
Seemingly the Illinois Appellate Court has joined the general trend of decisions toward increasing the tort liability of municipalities. In *Costello v. City of Aurora*, the court held the city liable to a minor, who injured his hand by reason of a cannon ball falling on it from a pyramid constructed of concrete into which this cannon ball, together with others, was imbedded, the pyramid being maintained by the city in a public park and playground. Heretofore, Illinois, along with the majority of other states, has regarded the maintenance of public parks as a governmental rather than a proprietary function. Another decision increasing substantially the tort liability of municipalities is that of *Strappelli v. City of Chicago*, involving a suit to recover for personal injuries sustained by the plaintiff as a result of a fall on the icy pavement of a safety island. The court, emphasizing the generality of the icy condition, held the city liable. It appeared that the city had sufficient notice of the condition and that the ice had been permitted to accumulate in uneven ridges. Heretofore the duty of a city to keep its streets and sidewalks in a reasonably safe condition has not been construed to require it to prevent mere slipperiness due to natural accumulations of ice and snow.

Among the tort cases for the year are a few others in the Appellate Court which may be worthy of mention, if only for the interest of the factual problems presented. In *Campion v. Chicago Landscape Company*, the owner of a golf course was held not liable to one struck by a poorly played ball from an adjoining fairway, even though the course may have been laid out negligently, since such negligence would constitute at most the conditioning and not the efficient cause of the injury. Further, the court declined to limit the doctrine of assumption of the risk to the situation of master and servant, or other contractual relationship. In *Crowley v. Bugg*, on the other hand, the court held a theater owner liable to a patron who tripped and fell over a child

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77 295 Ill. App. 469, 14 N.E. (2d) 986 (1938).
78 295 Ill. App. 225, 14 N.E. (2d) 879 (1933).
79 292 Ill. App. 210, 10 N.E. (2d) 678 (1937).
sitting in the aisle, on the ground that the child was not a sufficient intervening agency to constitute a superseding cause. Another owner and patron case where liability was sustained was *Pabst v. Hillman's,* in which the fall was caused by a stringbean rather than a child. Here the court seemingly relieved the plaintiff of the burden of proving freedom from contributory negligence and distinguished the Kroger case on the ground that here the defendant knew of the existence and location of the bean in the aisle, since its employee had filled a hamper to such an extent that the beans were falling out of it. It is believed that this decision contains the first judicial definition of the term "string bean."

Another Appellate Court case of considerable interest is that of *Wolever v. Curtiss Candy Company,* where the court held that the plaintiff had proved a prima facie case in establishing that her husband was killed while performing his duties as an employee of defendant company operating under workmen's compensation; that the company, its insurer, and others had concealed the fact that he was killed in an accident and represented that he had died from heart failure; that subsequently, in order to recover workmen's compensation, she was put to expense in having her husband's body disinterred, in having a post mortem performed, and in having the body reinterred; and that she had suffered extreme and aggravated mental anguish, etc. The trial court had directed a verdict for defendants at the conclusion of the plaintiff's case.

**CRIMINAL LAW AND PROCEDURE**

Several interesting cases of first impression have been decided in the field of criminal law and procedure. In *People v. Menagas,* the court held, for the first time in Illinois, that electric current or energy is property within the meaning of the larceny statute. In *People v. Allen,* the court solved a more difficult problem than either of these—whether or not a person who has

81 293 Ill. App. 547, 13 N.E. (2d) 77 (1938).
83 293 Ill. App. 586, 13 N.E. (2d) 197 (1938).
84 Two statutory innovations, at least quasi criminal in character, are the provisions for the licensing of drivers of motor vehicles, Ill. Rev. Stat. 1938 supp., Ch. 95½, §§ 32b-36h, S.B. No. 14, § 1; and for the commitment of "Criminal sexual psychopathic persons," Ch. 38, §§ 820-825, H.B. No. 36, §§ 1-6.
87 368 Ill. 368, 14 N.E. (2d) 397 (1938). Note, 16 CHICAGO-KENT REVIEW 386.
been tried for the death of one of two persons killed by the defendant in the same automobile accident will be subjected to double jeopardy if subsequently tried for the death of the other. The court answered the question in the negative, holding that the killing of the two persons constituted two separate crimes.

In *People v. Tobin*, the court assimilated the doctrine of the necessity of a motion for a new trial as a condition of appeal in criminal cases to the practice prevailing in civil suits. In that case the trial was had before the court without a jury, and the court held that such motion was not necessary, but would have been necessary had the case been tried before a jury.

In *People v. Mack*, the court has again had occasion to consider the effect of violations of the statute in the mode of selecting grand jurors. Eight of the jurors had been "selected by the sheriff of Cook County from the body of the county," rather than being drawn by lot from the jury commissioners' list as provided by statute. The court ordered the indictment quashed, and distinguished the Lieber case on the ground that in that case there had been substantial compliance and certainly an attempt to comply with the law, whereas in the instant case there was neither.

**REMEDIES**

**EQUITY**

The relation between law and equity and the present application of some old formulations of equitable principles were before the Illinois courts in three recent cases. The results appear to contribute somewhat to an understanding of the administration of equity in Illinois since the passage of the Civil Practice Act.

In the case of *Darst v. Lang*, the Supreme Court held that a warranty deed might be reformed by inserting in it a provision reserving a life estate to the grantors where there had been an agreement by the grantee not to record the deed until the grantors were through with the property. Although the mistake was one of law, it was said that relief was not barred, since the

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88 369 Ill. 73, 15 N.E. (2d) 687 (1938).
89 367 Ill. 481, 11 N.E. (2d) 965 (1937).
90 Ill. Rev. Stat. 1937, Ch. 78, § 32.
91 People v. Lieber, 357 Ill. 423, 192 N.E. 331 (1934).
92 The question of the extent to which the Civil Practice Act has accomplished a merger of law and equity is far from clear under the provisions of that act. See for example the comment on the effect of the Act in Scott and Simpson, Cases and Other Materials on Judicial Remedies, p. 1158 (1938).
93 367 Ill. 119, 10 N.E. (2d) 659 (1937). A practice question involved in this case is discussed in 16 Chicago-Kent Review 164.
mistake was as to the legal interests of the parties rather than as to "a general rule of law prescribing conduct." This distinction was recognized in the case of Peter v. Peter, from which the court quoted with approval. By employing this technique the court gives evidence of a tendency to restrict the application of the mistake of law dogma to situations where no great hardship will result. Courts have reached the same result by treating such mistakes as mistakes of fact.

Evidence that the distinction between law and equity retains most of its ancient vitality can be gathered from the language of the Appellate Court in Printers Corporation v. Hamilton Investment Company. In this case the plaintiff corporations borrowed money from the defendant, each giving its secured note for an amount larger than that borrowed, payable in installments. The notes contained clauses providing for confession of judgment "at any time hereafter." It appears that installments on both notes were regularly paid when due. Notwithstanding this fact the defendant demanded the balance due on the notes in advance of the maturity of the remaining installments and caused judgments to be confessed for the face of the notes less the amount


95 See note "Some Aspects of the Law of Mistake in Illinois," 5 U. of Chi. L. Rev. 446, 452. See also discussion of mistake of law in Restatement of Restitution, p. 179 et seq. and p. 35 et seq., Reporters' Notes.

Close scrutiny of the facts in Darst v. Lang raises a doubt as to whether there was in reality any mistake. The defendant was a daughter of the grantors and lived with them. The deed in question was made in 1926 and was intended to convey the premises to the daughter as a gift. The defendant agreed orally at the time of the execution of the deed that she would not record it, yet filed it for record less than a year later. Apparently, no disagreement arose at that time. Several years after the premises described in the deed had ceased to be occupied by the grantors and the grantee, the grantee asserted a right to the rents.

Ordinarily, mistake means a state of mind not in accord with the facts. In this sense, facts include rules of law. (Restatement of Restitution, sec. 6, comment a.) In cases like Darst v. Lang it would seem that the parties frequently entertain no erroneous belief whatever as to facts. The difficulty often arises from a belief that another will not act unconscionably in the future. A parent who conveys his home to his child by deed absolute is often under no delusion that his deed does not convey title nor that the child might not legally assert rights against him. But confidence reposed simply leads to the assumption that this will not be done. Relief should be granted in such cases wherever necessary to prevent unjust enrichment and violation of trust and confidence. Usually the cases employ either the mistake technique or that of fraud arising from abuse of a confidential relationship. The unjust enrichment element frequently remains inarticulate. Although the court in the present case gave no independent recognition to this element, it did quote with approval language from Reggio v. Warren, 207 Mass. 523, 93 N.E. 805 (1911), to the effect that mistake of law or fact which results in unjust enrichment should be relieved against.

96 295 Ill. App. 34, 14 N.E. (2d) 517 (1938).
actually paid. The plaintiffs filed motions and petitions to vacate the judgments which were denied. Thereafter the plaintiffs filed suits to enjoin the defendants from collecting that part of each judgment which was in excess of the money borrowed. The defendant contended that the remedy at law by motions to vacate the judgments was adequate and that the contract between the parties was controlling.

The court upheld the action of the trial court in granting injunctive relief. Section 44 of the Civil Practice Act was said not to have abolished the distinction between law and equity. In answer to the defendant's contention that the remedy at law was full, adequate, and complete and that the plaintiffs should have appealed from the decision of the court denying their motions to vacate the judgments the court said: "While it is true that in motions to vacate judgments entered by confession it is said that courts exercise equitable powers, yet we think it cannot be said that in such case the court exercises as broad equity powers as does a chancellor in a suit in equity."

Equity's supervision of the field of unfair competition resulted in a holding by the Illinois Appellate Court that violations of the criminal law may be restrained as unfair to a competitor who cannot "fight fire with fire" without himself becoming a violator of the law. In *Jones v. Smith Oil and Refining Company*, the defendant was restrained at the suit of a competitor from using an advertising scheme which amounted to a lottery. The defendant operated a chain of filling stations, one of which was located across the street from the station operated by the plaintiff. The scheme, known as the "Lucky License Pay-off Plan," involved the issuance of cards to persons visiting defendant's stations entitling the holders to participate in a drawing for cash prizes at the end of each month. The court cited with approval the well-known decision of the Texas Court of Civil Appeals in *Featherstone v. Independent Service Station Association*, and properly held that the injunction was not granted on the theory that it was to restrain the defendant from committing a crime, but to prevent serious interference with the business of the plaintiff. It is worth noting, however, that in this case and the Featherstone case the conduct of the defendant constituted an unfair competitive method only because it was in violation of the law; other-

wise the plaintiff might have resorted to the same type of activity to protect himself.

EVIDENCE

The year has seen at least two significant cases dealing with the propriety of acquainting the jury in personal injury cases with whether or not the defendant is insured. In Smithers v. Henriquez, the Supreme Court approved with certain limitations the interrogation of veniremen on voir dire with respect to their interest in any insurance company. In Smith v. Raup, the Appellate Court, while conceding the impropriety of showing that the defendant is insured, sustained the right of defendant to show that he was not insured. This fact was placed before the jury by permitting the defendant to testify to the reply given by him prior to suit to an inquiry made by the plaintiff relative to insurance. The court took cognizance of the fact "that the belief is prevalent and widespread" that in such cases "the defendant is really the nominal party in interest," and felt that defendant should have a right to rebut the inference.

In Sharp v. Bradshaw, a proceeding to impose a constructive trust upon the property of a devisee by reason of an oral contract made by the testator, the Supreme Court held that "where an asserted oral contract is out of harmony and inconsistent with a will made by the promisor subsequent to the time when it is alleged that he entered into the contract in question, the will is entitled to be taken into consideration as bearing upon the improbability of the contract having been made as alleged."

The case of People v. Black involves an interesting question of expert testimony, that is, whether or not a medical expert should be permitted to express an opinion with respect to the sanity of the defendant where such opinion was not based upon a hypothetical question, but (in addition to personal observation) "was formed, in part, upon the report of the social investigation made of the defendant, the psychiatric and medical examinations and psychological tests, all made by others than the witness." The majority of the court held the opinion inadmissible as invading the province of the jury. Mr. Justice Wilson dissented without opinion, and Mr. Justice Orr (concurring specially on other grounds) differed with the majority, saying: "The opinion of an

100 368 Ill. 588, 15 N.E. (2d) 499 (1938). Notes, 16 Chicago-Kent Review 371; 52 Harv. L. Rev. 166.
102 367 Ill. 526, 12 N.E. (2d) 1 (1937).
103 367 Ill. 209, 10 N.E. (2d) 801 (1937).
expert in insanity cases is peculiar and different from other expert testimony."

In Wuebbles v. Shea and Lamar, the Appellate Court had occasion to pass upon an entirely new situation involving the "dead man's rule." Two defendants were sued as joint tortfeasors for the wrongful death of the plaintiff's intestate. At the close of the plaintiff's case, Lamar moved for a directed verdict, but the motion was denied. Thereafter, the defendant Shea called Lamar as a witness, but the trial court ruled him incompetent as an interested party. The Appellate Court held that the motion of Lamar for a directed verdict should have been allowed and hence, that "he was incompetent only because of an erroneous ruling of the trial court." The court reversed as to Lamar, and reversed and remanded as to defendant Shea.

In Scally v. Flannery, a wrongful death action in which plaintiff proved freedom of decedent from contributory negligence by evidence of his careful habits, the Appellate Court held that the defendant could not offer himself as an eyewitness and thereby obtain the benefit of the rule prohibiting evidence of habits of care on the part of the deceased where there is an eyewitness.

CIVIL PRACTICE

Municipal Court of Chicago

Three significant decisions have been handed down dealing with the powers of the Municipal Court of Chicago. In the first of these, Danoff v. Larson, the Supreme Court had occasion to pass upon the rule making power of the Municipal Court. Because a bailiff was unable to serve a defendant in the usual fashion, the trial court directed that service be had by leaving a copy of the summons at his place of business and also mailing a copy

105 Ill. Rev. Stat., 1937, Ch. 51, § 2: "No party to any civil action, suit or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein of his own motion, or in his own behalf, by virtue of the foregoing section, when any adverse party sues or defends as the ... administrator ... of any deceased person ... unless ... ."
108 The Supreme Court at both the October, 1937, and April, 1938, terms adopted extensive changes in the rules relating to civil procedure in both trial and appellate courts. Convenient summaries of these changes have been prepared and published under the auspices of the Chicago Bar Association. See pamphlets dated December 1, 1937, and July 11, 1938, prepared by Albert E. Jenner, Jr.
109 368 Ill. 519, 15 N.E. (2d) 290 (1938). Note, 6 U. of Chi. L. Rev. 120.
to such place of business. This order was entered on the authority of Rule 10A of the Municipal Court. The defendant contended that the service was bad and that the rule was invalid, but that if the rule was within the act granting power to the Municipal Court to make rules, such act was unconstitutional. The Supreme Court sustained the act of the legislature and the rule-making power of the Municipal Court, but held that the act conferred no power to make this rule, nor any with respect to service of summons, because (1) such power would involve substantive questions of law and jurisdiction; (2) the making of such rule was not within the term “practice” over which the court had been given power to make rules; and (3) the particular rule here involved was not made by the court but only by a single judge.

In the second decision, *Fidelity and Deposit Company v. Stanford,* the Appellate Court held that the amendment of 1931 to Section 2 of the Municipal Court Act had enlarged the scope of the court’s jurisdiction to include actions on foreign judgments, since they were “contracts . . . implied in law.” Formerly the court was held to be without jurisdiction of such actions.

In the third case, *Huber v. Van Schaack-Mutual, Inc.*, the Supreme Court sustained Rule 167 of the Municipal Court, which provides in substance that where the plaintiff asks and pays for a six-man jury, the defendant must pay for the other six jurors if he desired a jury of twelve. The defendant had contended that the requirement that he pay for the additional jurors deprived him of his constitutional right to a common law jury.

**Substituted Service on Nonresident Motorists**

The provisions of the Motor Vehicle Act for substituted service on nonresident motorists, by serving the Secretary of State, have been twice construed during the year on points arising in

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111 296 Ill. App. 1, 15 N.E. (2d) 616 (1938).
114 368 Ill. 142, 13 N.E. (2d) 179 (1938).
115 Ill. Rev. Stat. 1937, Ch. 95½, § 23: “The use and operation by a nonresident of a motor vehicle over the highways of the State of Illinois, shall be deemed an appointment by such nonresident of the Secretary of State, to be his true and lawful attorney upon whom may be served all legal process in any action or proceeding against him, growing out of such use or resulting in damage or loss to person or property, and said use or operation shall be a signification of his agreement that any such process against him which is so served, shall be of the same legal force and validity as though served upon him personally.”
Illinois for the first time. In *Jones v. Pebler*\(^{116}\) the automobile of the defendants, operated by their servant, was involved in a collision. Service on the defendants was had, in accordance with the statute, on the Secretary of State. The defendants moved to quash the service on the ground that they were not "operating" the vehicle, but that it was being operated by their servant. The Appellate Court sustained this contention, holding that, to permit substituted service, the defendant must *personally* operate the car. In the other case, *Nelson v. Richardson*,\(^{117}\) the court held that in view of the provision for substituted service on a nonresident, the absence of such nonresident from the state would not toll the statute of limitations,\(^{118}\) such special provision constituting an exception by implication to the statute of limitations.

**Appeals**

Four Supreme Court cases involving appeals are worthy of mention. In *People v. Kennedy*,\(^{119}\) a mandamus proceeding to compel a county superintendent of schools to annex certain territory to a high school district, the court was called upon to decide whether or not an owner of property in the territory sought to be annexed, who was not a party to the mandamus proceeding, could appeal. The court held that he might appeal, indicating that although prior to the Civil Practice Act the exclusive method of review available to such a person would have been a writ of error, Section 81 of the act\(^{120}\) allows such appeal to any party who would be affected by the judgment or decree irrespective of whether or not he was a party below.

The second case, that of *Grand Lodge Brotherhood of Railroad Trainmen v. McClary*,\(^{121}\) simply gives effect to the amendment of July 2, 1937, to Section 75\(^{122}\) changing the time within which appeals may be taken from the Appellate Court. In the third case, *Gyure v. Sloan Valve Company*,\(^{123}\) the court held that while assignment of errors in a brief is no longer jurisdictional,


\(^{117}\) 295 Ill. App. 504, 15 N.E. (2d) 17 (1938).

\(^{118}\) Ill. Rev. Stat. 1937, Ch. 83, § 19: "... if, after the cause of action accrues [against a person], he departs from and resides out of the state, the time of his absence is no part of the time limited for the commencement of the action."

\(^{119}\) 367 Ill. 236, 10 N.E. (2d) 806 (1937).

\(^{120}\) Ill. Rev. Stat. 1937, Ch. 110, § 205: "The right heretofore possessed by any person not a party to the record to review a judgment or decree by writ of error shall be preserved by notice of appeal."

\(^{121}\) 367 Ill. 414, 11 N.E. (2d) 924 (1937). Note, 16 CHICAGO-KENT REVIEW 163.

\(^{122}\) Ill. Rev. Stat. 1937, Ch. 110, § 199; Laws 1937, p. 994.

\(^{123}\) 387 Ill. 489, 11 N.E. (2d) 963 (1937).
as it was under the former practice, yet failure to comply with the rules of the court, here specifically Rule 39, requiring the brief to show the errors relied upon for reversal, will justify dismissing the appeal. In the last of the cases, *Bank of Republic v. Kaspar State Bank,* the court held that the omission of the prayer for relief required by Rule 33 is not jurisdictional but merely a matter of form, the omission of which will not be regarded as fatal.

Two Appellate Court cases dealing with appeals are perhaps worthy of inclusion in this survey. In *Gholston v. Terrell,* the court held that the filing of the appellee’s brief subsequent to his motion to dismiss the appeal for failure of the appellant to file a bond within the time prescribed, did not operate as a joinder in appeal and waiver of the motion to dismiss. *Gillis v. Jurzyna* was distinguished on the ground that in the instant case the brief indicated clearly that the appellee had no intention of waiving the motion to dismiss.

In the other Appellate Court case, that of *People v. Village of Wilmette,* the court was confronted with the problem of whether notice of appeal was required to be served on all parties or only on those who would be affected by the appeal. The court held that Rule 34 of the Supreme Court should not be construed to require service of notice on parties who defaulted in the trial court. There has been a conflict in several of the appellate courts with respect to this point, but the conflict has now been resolved by the Supreme Court amending its rule so as to bring it into conformity with the rule of the present case.

**Civil Practice Act**

In *Kronan Building and Loan Association v. Medeck,* the

126 369 Ill. 34, 15 N.E. (2d) 721, 116 A.L.R. 1464 (1938).
131 Ill. Rev. Stat. 1937, Ch. 110, § 259.34.
132 See notes, 16 CHICAGO-KENT REVIEW 52, 273.
133 "(1) A copy of the notice by which the appeal is perfected shall be served upon each party whether appellee or co-party who would be adversely affected by any reversal or modification of the order, judgment or decree, and upon any other person or officer entitled by law to a notice of appeal, within ten days after said notice of appeal is filed in the lower court."
Supreme Court construed Sections 38, 43, and 44 of the Civil Practice Act as allowing the joinder of issues of title with those arising on a bill of foreclosure, and thereby changed the former rule that issues of title were not germane to a foreclosure proceeding. This result would seem obviously correct, as would also that of the same court in Watt v. Cecil, where it held that failure to reply to an answer charging forgery in a foreclosure suit constituted an admission of the truth of such answer. The court was merely required to give literal effect to Sections 32 and 40 of the Civil Practice Act. In passing it is to be noted that in this case the court also approved a publication for "unknown owners" made five months after the filing of an amended bill for foreclosure as being within a reasonable time, notwithstanding the fact that at the time of such publication more than three years had elapsed since the filing of the original bill. Another case requiring merely such a literal interpretation of the Civil Practice Act, here of Section 60, was that of Hadley v. White, holding that the former practice has been changed by that section, which expressly provides that when an adverse party is called as a witness, the one so calling him "shall not be concluded thereby but may rebut the testimony thus given...." The suit was one by an attorney to recover fees, and it was he who called the adverse party as a witness.

In Metropolitan Trust Company v. Bowman Dairy Company, the court was called upon to construe a more difficult section of the Act, Section 46, relating to amendments after the statute of limitations has run. The Supreme Court took an even more liberal attitude than that of the Appellate Court in the Pevely Dairy case, holding:

Briefly summarized, Section 46 permits any amendment of a pleading, filed in apt time, after the time limited for commencing suit to set up a cause of action on any claim which was intended to be brought by the

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137 368 Ill. 510, 15 N.E. (2d) 292 (1938).
139 Ibid., § 184.
141 Chance v. Kinsella, 310 Ill. 515, 142 N.E. 194 (1924).
original pleading, provided, only, that it grew out of the same transaction or occurrence, and it is not necessary that the original pleading technically state a cause of action, or that a cause of action set out in the amendment be substantially the same as any cause of action stated in the original pleading.

In the present case the action was for wrongful death against Bowman Dairy Company and one Kunz. The company’s vehicle was a horse-drawn wagon; that of Kunz was a truck. It seems that Kunz drove onto the sidewalk and struck decedent in avoiding a collision with the wagon. The original complaint alleged that both vehicles struck decedent. The amended complaint stated that the negligence of both defendants caused the truck of Kunz to strike the decedent. The court affirmed a judgment against Bowman Dairy Company entered on the amended complaint.

Three cases in the Appellate Court dealing with miscellaneous practice questions should perhaps be mentioned briefly. In De Ronchi v. Northern Trust Company,\(^{145}\) the court held that the requirement of Supreme Court Rule 8, that a motion to strike be filed within twenty days,\(^{146}\) may be waived, by conduct, especially in view of the provision contained in the rule allowing the judge discretion to extend the time.\(^{147}\) In Boltz v. Crawford and North Avenues Theatre Company,\(^{148}\) the court held that a motion to strike cannot reach an incorrect allegation of damages unless that ground is specifically indicated in the motion. The analogy of general and special demurrers is obvious. In Farmer v. Alton Building and Loan Association,\(^{149}\) the court held that while Section 68 of the Civil Practice Act,\(^{150}\) as supplemented by Supreme Court Rule 22,\(^{151}\) “changes the rule under the former practice and permits either party to file a motion for judgment notwithstanding the verdict ... its only function is to raise the question as to whether the motion for a directed verdict should have been allowed,” and not to test the sufficiency of the pleadings.

\(^{145}\) 292 Ill. App. 136, 10 N.E. (2d) 975 (1937).
\(^{146}\) Ill. Rev. Stat. 1937, Ch. 110, § 259.8: “(4) Unless otherwise provided, a motion attacking a pleading must be filed and served within 20 days after the last day allowed for the filing of the pleading attacked.”
\(^{147}\) Ibid.: “(5) The judge, for good cause shown on special motion after notice to the opposite party, may extend the time for putting in any pleading on the doing of any act which is required by the rules to be done, within a limited time, either before or after the expiration of the time.”
\(^{148}\) 294 Ill. App. 258, 13 N.E. (2d) 844 (1938).
\(^{149}\) 294 Ill. App. 206, 13 N.E. (2d) 652 (1938).
\(^{150}\) Ill. Rev. Stat. 1937, Ch. 110, § 192 (3) a.
Burket v. Reliance Bank and Trust Company\textsuperscript{152} deals with compositions of stockholders' liability in closed banks, under Section 11 of the banking act,\textsuperscript{153} which provides in part:

Said receiver shall have authority upon the order of the court appointing him to employ such auditors and assistants as may be necessary to establish and recover the liabilities of the stockholders, and may, with the approval of the court enter into compositions with insolvent stockholders, if any.

The Supreme Court held that such approval of the court may not be given until the creditors have had a hearing on the question of insolvency of the stockholders, resting the right to such hearing upon "due process of law."

In Campagna v. Automatic Electric Company,\textsuperscript{154} the Appellate Court held the defendant not liable in garnishment, notwithstanding the admission in its answer that it paid the debtor in advance even after service for the purpose of defeating garnishment proceedings—an instance of unusual frankness in pleading.

In Sneeden v. The Industrial Commission,\textsuperscript{155} a case of first impression in Illinois, the receiver of a national bank was held to be a proper respondent in a claim under the workmen's compensation act, made by an employee of the bank who was injured while engaged in tearing down a store building owned by the bank in receivership.

GOVERNMENT

TAXATION

In three significant cases the Supreme Court applied the Occupational Sales Tax Act.\textsuperscript{156} In the first, Bardon v. Nudelman,\textsuperscript{157} a case in which it would seem the court had little choice, it rejected the contention of the retail liquor dealers that the act would constitute double taxation as to them in view of the license fees that they are required to pay under Liquor Control Act.\textsuperscript{158}

The court pointed out that the fees paid under that act were for

\textsuperscript{151} Ibid., § 259.22: "The power of the Court to enter judgment notwithstanding the verdict may be exercised in all cases where, under the evidence in the case, it would have been the duty of the Court to direct a verdict without submitting the case to the jury."

\textsuperscript{152} 367 Ill. 196, 11 N.E. (2d) 6 (1937).
\textsuperscript{153} Ill. Rev. Stat. 1937, Ch. 16½, § 11.
\textsuperscript{154} 293 Ill. App. 437, 12 N.E. (2d) 695 (1938).
\textsuperscript{155} 366 Ill. 552, 10 N.E. (2d) 327, 113 A.L.R. 1447 (1937).
\textsuperscript{156} Ill. Rev. Stat. 1937, Ch. 120, §§ 440-453.
\textsuperscript{157} 369 Ill. 214, 15 N.E. (2d) 836 (1938). \textsuperscript{158} Ill. Rev. Stat. 1937, Ch. 43, §§ 94-195.
purposes of regulation, rather than of revenue, as in the case of the Sales Tax Act. In the second decision, that of Babcock v. Nudelman, the court sustained the contention of optometrists furnishing eyeglasses that the transfer of property by them was "merely incidental to the services rendered," and held that they were not subject to the tax. In the third case, Herlihy Mid-Continent Company v. Nudelman, the court overruled its previous decision in Blome Company v. Ames, and held that building contractors are not liable to pay sales tax except upon materials which retain their identity, i.e., fixtures.

The Supreme Court wrote the logical sequel to the Domestic Arts and Orrington cases in Ohio Street Hotel Corporation v. Lindheimer, in holding that any amount paid on taxes in excess of the 75 per cent required by Section 162 is money paid voluntarily and cannot be recovered.

In People v. Jastromb, the court decided the controversy between the assessor and the Board of Tax Appeals with respect to the power of the latter to revise assessments of real property in other than quadrennial assessment years in favor of the existence of such power. Another decision in favor of the board was that of People v. Board of Appeals, in which the court again demonstrated the futility of attempting to mandamus taxing authorities to compel the assessment of omitted property—here, capital stock tax of the Tribune Company for the years 1872 to 1934. The court said the averments were insufficient.

In People v. Metropolitan Trust Company, the Supreme Court has now construed the Inheritance Tax Act with respect to powers of appointment for the first time since the repeal in 1933 of the portion of subsection 4 of Section 1 dealing specifical-

159 367 Ill. 626, 12 N.E. (2d) 635 (1937). Note, 32 Ill. L. Rev. 685.
161 365 Ill. 458, 6 N.E. (2d) 841, 111 A.L.R. 940 (1937).
164 368 Ill. 294, 13 N.E. (2d) 970 (1938).
165 Ill. Rev. Stat. 1937, Ch. 120, § 375 et seq.
166 367 Ill. 348, 11 N.E. (2d) 368 (1937).
167 367 Ill. 559, 12 N.E. (2d) 666 (1938).
169 369 Ill. 84, 15 N.E. (2d) 729 (1938). Note, 16 CHICAGO-KENT REVIEW 404.
170 Ill. Rev. Stat. 1937, Ch. 120, §§ 375 et seq.
171 Laws 1933, p. 889.
ly with nonexercise thereof, and has held that a tax is presently assessable in the estate of the donor of such power but only on the assumption that the power will not be exercised and that the undisposed of remainder will go to the heirs-at-law, and that the tax cannot be assessed in the donor’s estate on the assumption that the donee will exercise the power in favor of a stranger, inasmuch as the unrepealed portion of subsection 4 of Section 1, providing for assessment of the tax in the donee’s estate in such case, is still in force.

The Appellate Court case of Harrison v. Deutsch seems to be the first case passing squarely upon the question of the priority of a claim in the probate court by the collector of internal revenue for an income tax deficiency assessment, filed after the expiration of the one year period for the filing of claims. The court held that such claim was entitled to priority as a class 2a claim.

In Brown v. Jacobs, the Supreme Court of Illinois placed its stamp of approval on a practical solution to the half-penalty tax dilemma which has confronted Illinois. The amendment to Section 177 of the Revenue Act, providing for the decreeing of half penalties where taxes have been contested in good faith, is of dubious constitutionality and remains untested. As a result the remaining half of the interest, practically speaking, clouds the title to land with respect to which the provision has been invoked. In the instant case, an action for specific performance for the sale of land brought by the vendor, the court held that the

172 “... and whenever any person, or corporation possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a transfer taxable under the provisions of this Act shall be deemed to take place to the extent of such omission or failure, in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure.”


175 367 Ill. 545, 12 N.E. (2d) 1210 (1937).

176 Ill. Rev. Stat. 1937, Ch. 120, § 165, Laws 1929, p. 635: “Provided, in the years 1929, 1930 and 1931, the court may, in entering judgment or decree in any action or proceeding wherein the validity of any tax shall have been in good faith contested, and the court shall so find by a finding to be entered of record, waive all or any part of such interest otherwise accruing thereon, not to exceed fifty (50) per cent of such interest, and may, in such judgment or decree, provide that not to exceed fifty (50) per cent of such interest otherwise accruing on such tax so in good faith contested, shall be waived during the pendency of any appeal or other proceeding diligently prosecuted for the review or vacation of such judgment or decree.”
"cloud" had been removed by decrees of a court of chancery, on suits instituted by the owner against the county treasurer and ex-officio county collector, and the county clerk of Cook County, and enjoining them from collecting 50 per cent of the interest. The Supreme Court, without passing upon the constitutionality of Section 177, pointed out that the decrees did not purport specifically to rest upon that section, that they may have been "entered in pursuance of the broad powers of a court of equity," and that the decrees, even if erroneous, were not subject to collateral attack. The court said:

The court passed on questions based on the statute, and whether it decided rightly or wrongly with respect to the validity of the taxes and the remission of penalties, would not affect the jurisdiction to render a judgment or decree. Assuming that it decided erroneously, its decree was not void.

The significance of the decision has been fully appreciated by the bar, and seized upon and made use of in a flood of suits instituted since its rendition.

CONSTITUTIONAL LAW

Government's power to regulate business provided the major constitutional problems dealt with by the Illinois Supreme Court during 1937 and 1938. The cases do not indicate any great change in the course of constitutional development but several are worthy of mention.

Reminiscent of the ruling of the United States Supreme Court in Ribnik v. McBride is the recent decision in the case of People v. Redfield. In this case the court held unconstitutional the provisions of the act of 1935 relating to employment agencies, which forbade any licensed employment agent to require any person for whom employment was obtained to sign a judgment note or execute a wage assignment. Violations were punishable by fine or imprisonment. Citing Ribnik v. McBride and City of Spokane v. Macho, the court said that there was nothing inherently evil in the business of employment agencies. Since judgment notes and wage assignments were in general use by many different kinds of business establishments, employment

178 366 Ill. 562, 10 N.E. (2d) 341 (1937). Notes, 16 CHICAGO-KENT REVIEW 178; 26 Ill. B. J. 329.
179 Ill. Rev. Stat. 1937, Ch. 48, § 197e.
180 Ill. Rev. Stat. 1937, Ch. 48, § 197l.
agencies could not be forbidden to use them unless there were peculiar circumstances relating to the business of such agencies. The court held the discrimination to be unreasonable. The opinion contains no discussion of the conditions which may have induced the legislature to pass the condemned provisions but merely takes the view that they bear no reasonable relation to the comfort, health, safety, or welfare of the people. The restrictions were declared to be violative of the due process clauses of the state and Federal constitutions.\textsuperscript{188}

On the other hand, in \textit{Stearns v. Chicago},\textsuperscript{184} a municipal ordinance imposing higher license fees on parking lots than on garages was upheld. The court pointed out that the business of parking lots was such as to require greater police protection against theft of cars and greater police regulation to prevent congestion of streets than that of garages. Thus, the classification was declared to be reasonable.

In two other cases the court upheld regulations applicable to businesses traditionally subject to unusual restrictions. In \textit{O'Connor v. Rathje}\textsuperscript{185} the court said that the right to deal in intoxicating liquors was not an inherent right and was not protected against governmental action by the Fourteenth Amendment unless such action did not have the protection of the community as its real object. Section 14 of the Dram Shop Act\textsuperscript{186} was attacked in this case but the court held that the constitutionality of the Dram Shop Act had been previously settled so that no substantial constitutional question was involved. In the other case, \textit{City of Chicago v. R. & X. Restaurant},\textsuperscript{187} the court sustained the power delegated to the city of Chicago to regulate the restaurant business.

The troublesome question of the definiteness with which a statute must describe a criminal offense was discussed in \textit{People v. Green}.\textsuperscript{188} The court considered and upheld as constitutional Section 48 of the Uniform Traffic Act.\textsuperscript{189} The court referred to decisions of the United States Supreme Court under the antitrust laws and disapproved some of the language in its own prior

\textsuperscript{188} Ill. Const. of 1870, Art. 2, § 2; Const. of U.S., 14th Amend., par. 1.
\textsuperscript{184} 368 Ill. 112, 13 N.E. (2d) 63, 114 A.L.R. 1507 (1938).
\textsuperscript{185} 368 Ill. 83, 12 N.E. (2d) 878 (1938).
\textsuperscript{186} Ill. Rev. Stat. 1937, Ch. 43, § 135.
\textsuperscript{187} 369 Ill. 65, 15 N.E. (2d) 725 (1938).
\textsuperscript{188} 369 Ill. 242, 13 N.E. (2d) 278 (1938). Note, 37 Mich. L. Rev. 484.
\textsuperscript{189} Ill. Rev. Stat. 1937, Ch. 95 ½, § 145: "Any person who drives any vehicle with a wilful or a wanton disregard for the safety of persons or property is guilty of reckless driving."
opinion in *People v. Beak*.\(^{190}\) The view of the court as to the definiteness required by "due process" was stated\(^ {191}\) in the following language:

We think the true rule is that if the legislature uses words having a common law meaning or a meaning made definite by statutory definition or previous judicial construction, it may strike directly at the evil intended to be curbed, leaving it to the pleader to state facts bringing the case within the statutory definition and to the judicial department of government to interpret the application of the act to the facts stated.

Mr. Justice Stone dissented from the court's conclusion that an information merely following the words of the statute was insufficient to inform the defendant of the nature of the charge against him as required by Article 2, Section 9 of the Constitution of 1870.

The court had occasion to discuss the problem of separation of powers as arising under the Old Age Assistance Act in the case of *Borreson v. Department of Public Welfare*.\(^ {192}\) It was there held that the provision of Section 10 of that act\(^ {193}\) for a trial de novo in the Circuit Court after a decision by the State Department upon the question of eligibility of an applicant for old age assistance was invalid as an attempt to authorize a branch of the judicial department to exercise functions of the executive department. The decision follows the interpretation of Article 3 of the Constitution of 1870 indicated in *Aurora v. Schoberlein*.\(^ {194}\) Mr. Justice Stone dissented, calling attention to the fact that mandamus would lie in a proper case to compel the granting of old age assistance under the act. He also expressed the opinion that since the legislature would not have enacted the act without providing an opportunity for appeal to the courts, the invalidity of the provision of Section 10 rendered the entire act invalid.

Mr. Justice Stone's view that mandamus will lie in a proper case to compel the granting of old age assistance was accepted by the court in *People v. Department of Public Welfare*.\(^ {195}\) The court was of the opinion, however, that the function of determining whether the executive department had acted arbitrarily was a judicial question. The opinion in this case was filed five days after that in the Borreson case discussed above. It was pointed out that while some of the provisions of the act involve the exercise of administrative discretion others are specific in their requirements. Apparently the court was of the opinion in both of

\(^{190}\) 291 Ill. 449, 126 N.E. 201 (1920).
\(^{191}\) 291 Ill. 449, 126 N.E. 201 (1920).
\(^{192}\) 368 Ill. 425, 14 N.E. (2d) 485 (1938).
\(^{193}\) 368 Ill. 425, 14 N.E. (2d) 485 (1938).
\(^{194}\) 230 Ill. 496, 82 N.E. 860 (1907).
\(^{195}\) 230 Ill. 496, 82 N.E. 860 (1907).
these cases that the trial de novo allowed by Section 10 required the Circuit Court to exercise administrative discretion. In *People v. Department of Public Welfare*, it was held that one who is an inmate of a private institution is not thereby ineligible to receive old age assistance from the state since there is no provision to this effect in the act.

Three cases dealing with other phases of constitutional law should receive brief mention. In *Martin v. Strubel*, the present statute empowering courts of equity to render deficiency decrees in foreclosure suits where there has been personal service of process was held not to interfere with the right to trial by jury.

Of lesser importance were the decisions in *People v. Palmer* and *Gillespie v. Barrett*. In the former case, Section 3 of the Insurance Act of 1879 (now repealed) requiring the Director of Insurance to revoke the license of any foreign insurance corporation which removed or attempted to remove any case to the Federal courts, was declared unconstitutional, following *Terral v. Burke Construction Company*. In this case the court expressly overruled *People v. Pavey* and noted that Sections 109 and 111 of the new insurance code do not contain provisions analogous to those condemned.

In the Gillespie case the court held that legislators could be members of legislative commissions without violating the provisions of Article 3, or of Article 4, Section 15 of the Constitution of 1870 where the acts creating the commissions provided that the members should receive no compensation.

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198 367 Ill. 21, 10 N.E. (2d) 325 (1937).
199 367 Ill. 513, 11 N.E. (2d) 931 (1937).
197 Ill. Rev. Stat. 1937, Ch. 95, § 17.
200 368 Ill. 612, 15 N.E. (2d) 513 (1938).
201 257 U.S. 529, 42 S. Ct. 188, 66 L. Ed. 352 (1921).
202 368 Ill. 612, 15 N.E. (2d) 513 (1938).
200 257 U.S. 529, 42 S. Ct. 188, 66 L. Ed. 352 (1921).
201 151 Ill. 101, 37 N.E. 691 (1894).
202 Ill. Rev. Stat. 1937, Ch. 73, §§ 722, 723. See also § 731.