Survey of Illinois Law for the Year 1939-1940

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SURVEY OF ILLINOIS LAW FOR THE YEAR 1939-1940

PERSONS

MUNICIPAL CORPORATIONS

Zoning

IN the period covered by this survey two zoning cases of some importance were decided by the Illinois Supreme Court. Both cases emphasize the fact that the courts, while paying lip service to the doctrine that the validity of zoning legislation is not to be determined by the effect such legislation may have on particular pieces of property, are nevertheless willing to listen to arguments designed to question the constitutionality of such legislation because of allegedly excessive burdens cast upon specific property. In one of these cases, Taylor v. Village of Glencoe, the court held invalid a zoning ordinance insofar as it restricted the complainant’s property to residential uses when it appeared that the property was practically surrounded by commercial uses which had existed prior to the enactment of the zoning ordinance and which had been permitted to continue thereafter. This case apparently means that if the character of a neighborhood is already determined by the types of establishments existing at the time a zoning law goes into effect, this character cannot be arrested or changed by a

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 of merely calling attention to cases and developments believed significant and interesting. The period covered is that of the judicial year, embracing from 372 Ill. 1 to 373 Ill. 639; from 301 Ill. App. 217 to 305 Ill. App. 626; and from 106 F. (2d) 1 to 111 F. (2d) 912.

prohibition upon the extension of the character-determining uses. If this interpretation of the significance of the case is correct, municipalities are apparently powerless to arrest by zoning legislation the development and extension of commercial uses in semi-built-up areas which ought to be limited to residential uses for the welfare of the inhabitants.

In the second case, Harmon v. City of Peoria, an ordinance placing the plaintiff's property in a one-family residential district was held unreasonable and void in view of the fact that a majority of the houses in the block in which the plaintiff's property was situated were used for income purposes, that is, the accommodation of roomers, boarders, and renters. The court pointed out that the plaintiff could, under the ordinance, rent and serve meals to four persons, but could not rent a portion of the premises as a housekeeping unit to a family even though the family should consist of only two persons. In the final analysis, the classifications in the ordinance rested, the court held, on the effect of double kitchen facilities, since the kitchen alone would distinguish the position of families from that of boarder-roomers in many cases. This decision appears to be very sound and brings into question the wisdom as well as the validity of many fine distinctions embodied in zoning laws, particularly in the setting up of one-family dwelling districts.

Torts

The principles affecting the question of municipal liability for damages arising out of blasting and soil subsidence in connection with the construction of the Chicago subway, discussed in a recent number of this review, were analyzed by the Appellate Court in Baker v. Healy Company. The court remanded the case with directions to overrule defendant's motion to dismiss, pointing out that under the decision in Macer v. O'Brien, a municipality may be liable for damage resulting from the performance of intrinsically dangerous work upon its streets even though negligence is not shown and the work is performed by an independent contractor.

3 373 Ill. 594, 27 N.E. (2d) 525 (1940).
5 302 Ill. App. 634, 24 N.E. (2d) 228 (1939).
6 356 Ill. 486, 190 N.E. 904 (1934).
The anomolous distinction between governmental and proprietary functions of a city for the purpose of determining the question of tort liability was continued by the Supreme Court in Taylor v. City of Berwyn, holding that injuries arising out of the negligence of city police officers engaged in the pursuit of a suspect through a neighboring village could not be made the basis for a claim against the city. The persistence of claimants and their lawyers in bringing suits against municipalities for damages arising out of the actions of police officers, in spite of the repeated and positive declarations of the courts that police officers are agents of the state and not of the municipality employing them and that the latter is not liable for their acts, is evidence either of ignorance of the law in this respect or of the hope that the courts will some day weaken in their defense of an irrational principle.

In Storen v. City of Chicago, the Supreme Court has again emphasized that while cities and villages may be liable for injuries arising out of their negligence in maintaining streets and sidewalks they are only required to exercise reasonable care and diligence and are not insurers against accidents. Permitting the depression of a curb for an entrance to a private driveway was not negligence, the court held, although as a result of this break in the curb a car was forced by a collision onto the parkway, striking a child playing thereon. Curbs are established primarily for drainage and cleaning purposes and not for protection, the court found. The factual situation presented in this case is new but the decision is in accord with previous holdings.

Indebtedness

In four cases dealing with the constitutional and statutory limitations upon municipal indebtedness, the Supreme Court held that such indebtedness is not reduced by the amount of cash on hand subject to general disbursement but is reduced

7 372 Ill. 124, 22 N.E. (2d) 930 (1939).
8 Craig v. City of Charleston, 180 Ill. 154, 54 N.E. 184 (1899); Evans v. City of Kankakee, 231 Ill. 223, 83 Ill. 223 (1907).
9 373 Ill. 530, 27 N.E. (2d) 53 (1940).
10 Wheeler v. City of Le Roy, 296 Ill. 579, 130 N.E. 330 (1921); Boender v. City of Harvey, 251 Ill. 228, 95 N.E. 1084 (1911).
by the amount of cash or bonds on hand in a sinking fund established for the sole purpose of discharging debts;\textsuperscript{11} that, after the extension of credit to a municipality and the entry of a confirmation judgment for public benefits in local improvement proceedings and in the absence of a showing that the municipality is ready to raise the amount by taxation, such benefits are debts within the meaning of the constitution;\textsuperscript{12} that bonds issued to fund a tort judgment against a village do not increase the indebtedness of the municipality since they merely evidence an existing debt;\textsuperscript{13} that neither the revenue bonds issued by a municipality to defray the cost of constructing a waterworks system (and payable solely out of the income from the system) nor the agreement of the municipality to pay a fixed rental per month for each hydrant used, constituted debts of the municipality, since "no physical property presently owned by the municipality could be called upon to pay for the new facilities" and since the city did not obligate itself to pay the bonds or pay for any fixed number of hydrants for any specified time.\textsuperscript{14} The last case is particularly significant because the obligations of the municipality were contained in ordinances of a standard type used in the construction of waterworks projects through the co-operation and aid of the Public Works Administration of the Federal Works Agency. Hence the legality of other municipal waterworks systems financed by federal government grants and revenue bonds is assured insofar as questions of municipal debt limitations are concerned.

Contracts

The statutory provision authorizing the employment of teachers, principals, and superintendents in the public schools for periods up to three years\textsuperscript{15} was held valid in the case of Sloan v. School Directors.\textsuperscript{16} Prior to the adoption of this statute the court had held that a board of school directors had no authority to employ a teacher for a term to commence after the next succeeding election of board mem-

\textsuperscript{11} People v. Hamilton, 373 Ill. 124, 25 N.E. (2d) 517 (1940).
\textsuperscript{12} People v. Crane, 372 Ill. 228, 23 N.E. (2d) 337 (1939).
\textsuperscript{13} Elmhurst Bank v. Village of Bellwood, 372 Ill. 204, 23 N.E. (2d) 41 (1939).
\textsuperscript{14} Simpson v. City of Highwood, 372 Ill. 212, 23 N.E. (2d) 62 (1939).
\textsuperscript{15} Ill. Rev. Stat. 1939, Ch. 122, § 136b.
\textsuperscript{16} 373 Ill. 511, 26 N.E. (2d) 846 (1940).
The rule in these earlier cases was formulated in an effort to prevent a school board from tying the hands of its successors and perhaps thwarting the will of the voters by entering into contracts to be carried out wholly in the future. Apparently, however, the commencement and duration of municipal employment contracts is subject to legislative control.

**Police Power**

In *Village of South Holland v. Stein* an ordinance making it unlawful for any person to go into a private residence for the purpose of soliciting orders for goods, merchandise, or services of any description without a permit to be issued by the village board upon application and a finding that the applicant is a person of good moral character and engaged in a legitimate enterprise, was held to violate the state and federal constitutional guarantees of freedom of speech and press as applied to one arrested and fined for selling publications of an organization known as "Jehovah's Witnesses." The court was apparently influenced in reaching this conclusion by a decision of the United States Supreme Court which reversed the conviction of a member of that sect, under a similar ordinance. In an earlier decision the Illinois Supreme Court had held invalid an ordinance making it "unlawful for any person . . . to distribute . . . upon any street . . . sidewalk . . . or other public place . . . any circular . . . handbill . . . etc." on the ground that the city had no authority, express or implied, to pass such an ordinance and that it was an unreasonable exercise of the police power. However, in the *City of Chicago v. Rhine,* the court sustained an ordinance which prohibited the sale of any article (including magazines) on any street in the Loop district. This decision stressed the power of municipalities over streets and the need for measures to avoid congestion in the area to which the ordinance applied. These cases indicate that subtle distinctions may determine the scope of the protection

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17 Stevenson v. School Directors, 87 Ill. 255 (1877); Davis v. School Directors, 92 Ill. 293 (1879).
18 373 Ill. 472, 26 N.E. (2d) 868 (1940).
21 363 Ill. 519, 2 N.E. (2d) 905 (1936).
afforded by the constitutional guaranties of freedom of speech and press. This fact is, of course, well known to lawyers but is bewildering to laymen who are apt to find difficulty in recognizing the distinction between selling pamphlets in the Loop, outside the Loop, or in private residential districts.

**Judgments**

In *Moore v. Town of Browning*,22 a case of first impression in Illinois, the court held that mandamus would lie to compel a town to pay a judgment rendered more than seven years prior to the filing of the petition although no execution had been issued on the judgment and it had not been revived by scire facias. The court held that “a writ of mandamus performs the same office as a scire facias, and . . . the judgment could have no greater force if it was revived by scire facias.”

Judgment creditors of municipal corporations were also given encouragement in another decision, *People v. Village of Glencoe*,23 which held that mandamus would lie to compel a village to pay a condemnation judgment out of surplus money in the garbage fund. Although it was held in *People v. City of Cairo*24 that the holder of a judgment against a city for work in grading and filling streets was entitled to a writ of mandamus to compel the city to pay the judgment out of surplus money in the general fund, improvement fund, and the fund for retirement of bonds, it has never been entirely clear that surpluses in funds set up for specific purposes, particularly in funds derived from special taxes, could be diverted to other funds or used for other purposes. In the light of the instant decision such surpluses apparently are to be deemed “free” money available for disbursement against any legitimate obligations of the municipality.

**Publication and Posting of Ordinances**

The Supreme Court held in *Simpson v. City of Highwood*25 that a city, constructing a waterworks system under a statute which provided that the authorizing ordinance should be “published once in a newspaper published in such

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municipality" or posted in three public places if there was no "newspaper so published," was required to post rather than publish such ordinance where the only newspaper published in the city was printed elsewhere and circulated free. The court conceded that a newspaper is published in the community where it is first circulated and that the place of printing is immaterial but held that a newspaper printed in another city and distributed free in a municipality "p+artakes more of the nature of a handbill or circular for the benefit of its advertisers than a newspaper." Posting, rather than publication in such a "newspaper," was required under the statute, the court decided. There was no question raised as to the "newspaper" being a secular paper of general circulation within the requirements of Chapter 100, Section 5, Illinois Revised Statutes, 1939. Hence the factor which prevented the paper from being a "newspaper" within the meaning of the statute was apparently its free distribution. It is therefore essential that ordinances and notices, required by law to be published, should be published in a newspaper which is (1) secular, (2) published, (i.e., first circulated) in the community, (3) of general circulation in the community and (4) distributed to paying subscribers. Publication in a "newspaper" not meeting these tests is of no effect.

Officers

Municipal officers are generally held to be exempt from personal liability for unlawful acts committed in their official legislative capacity, provided such acts were committed in good faith. However, a deliberate attempt on the part of park district officers to evade a statute requiring bonds to be sold at par, by accepting a bid which on its face was a par bid but which was accompanied by a charge of $71,000 for services to be rendered by an agent of the bidder in appearing before the legislature for the purpose of securing the passage of a validating act, was held, in Chicago Park District v. Herczel & Co., to be such a gross breach of duty as to subject the officers and the sureties on their bonds to liability to the district. The payment

26 Ricketts v. Village of Hyde Park, 85 Ill. 110 (1877).
27 373 Ill. 326, 26 N.E. (2d) 119 (1940).
of the $71,000 was illegal, the court declared, not only because it resulted in the sale of bonds below par, but also because the object of the expenditure, lobbying for the passage of legislation, was against public policy and was not a corporate purpose. In the only other case found on the personal liability of municipal officers for a sale of bonds below par, the court indicated by way of dictum that "the officers were probably personally liable." The expenditure of municipal funds for lobbying, however, has never been condemned in this state heretofore where the purpose of the lobbying has been to present the interests of the municipality to the legislature in a direct and honest manner and not secretly to importune individual legislators through appeals to their personal interests. The Supreme Court, in the instant case, made no effort to analyze the nature of the services rendered by the lobbyist in securing the enactment of legislation validating the park district's bond issue. It is not safe to assume, however, that there has been any substantial change in the doctrines laid down in the earlier cases on this subject.

CORPORATIONS

The vexing problem as to constitutional liability for the debts of a defunct bank has broken out in another direction—this time to compel the shareholders of a holding corporation owning bank stock to stand responsible therefor. While liability has not yet been established, it has been held in Flanagan v. Madison Square State Bank that a complaint designed to test this question was not subject to a motion to strike, as the powers of a court of equity are sufficiently broad to permit an investigation to determine who the "real" owners of such bank stock may be. If judgment against such shareholders be ultimately sustained, the corporate entity theory is well on the way to dismemberment.

Rights against a dissolved corporation and its property were concerned in Markus v. Chicago Title & Trust Com-

28 Sherlock v. Village of Winnetka, 68 Ill. 530 (1873).
pany,31 in which the mortgagee of corporate property was allowed to foreclose his lien despite the fact that the corporation had been dissolved more than two years prior to the institution of the foreclosure suit. The then owner of the mortgaged premises contended that they were free of the lien, because since no action would be permitted against the corporation at such late date,32 the essential debt to support the mortgage was lacking.33 Comparing the dissolution of a corporation to the death of a human mortgagor, the court found that the lien might continue though the personal remedy be gone and that hence the statute relied on had no application.

MASTER AND SERVANT

Agency

Three decisions of the Appellate Court falling within the broad field of agency and treating subjects not elsewhere discussed in this survey may be noted here. The so-called "opinion of the court" in Kaspar American State Bank v. Oul Homestead Association34 is illustrative of the reluctance of some judges to yield to statutory abandonment of the incongruous formalism of descriptio personae in even so practical a field of laymen's law as negotiable instruments.

Section 20 of the negotiable instruments law35 provides in part:

Where the instrument contains, or a person adds to his signature, words indicating that he signs for or on behalf of the principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized.

The note in litigation was on the usual printed form and contained the customary confession of judgment clause. It

31 373 Ill. 557, 27 N.E. (2d) 463 (1940).
32 Ill. Rev. Stat. 1939, Ch. 32 § 157.94 provides: "The dissolution of a corporation... shall not take away or impair any remedy given against such corporation... if suit thereon is brought and service of process had within two years after the date of such dissolution."
33 For support of this familiar principle see Burgett v. Osborne, 172 Ill. 227, 50 N.E. 206 (1898).
purported to bind the “undersigned jointly and severally,” and was signed:

Oul Homestead Association
Albert Hornick, Pres.
James L. Preisler, Sec’y
James Bican, Treas.

The justice who wrote the “opinion of the court,” while recognizing the general operation of Section 20 in eliminating the doctrine of descriptio personae from the field of negotiable instruments, nevertheless took the unrealistic position that the joint language of the note indicated an intention that the officers should be bound personally. Although contained in the “opinion of the court,” this position represents the view of only one of the three justices. One wrote a vigorous opinion dissenting from the view taken, and the other concurred in the judgment on the sole ground apparently that the affidavit filed for the purpose of opening up the judgment obtained by confession was insufficient, a view concurred in by all.

In Armstrong v. Zounis, the court reviews the authorities and clarifies the distinction between the general or retaining lien of an attorney and his special or charging lien. The client had given the complainants two master's deeds with the understanding that they should keep them until certain legal fees had been paid. Upon the client's failure to make payment, the plaintiffs filed suit to foreclose their lien, and the lower court so decreed. Holding the lien to be merely a retaining lien, the Appellate Court reversed the judgment.

The agency problem involved in Trust Company of Chicago v. Jackson Park Building Corporation is that of the fiduciary and the extra profit. A trustee under a bond issue had bought in the property at foreclosure. In its decree, the court had specifically retained jurisdiction “until the bondholders receive their pro-rata share in cash or other security to be approved by this court.” A three man bondholders' protective committee “was organized”—precisely how does not appear—one member of whom was a licensed real estate broker. This broker opposed the approval of a sale arranged

36 304 Ill. App. 537, 26 N.E. (2d) 670 (1940).
by the trustee and subsequently himself obtained a purchaser at a higher figure. The question is whether or not his fiduciary relationship precludes him from receiving the customary commission for his services as a broker. The Appellate Court resolved this question in favor of the broker with the following terse comment:

However, the court, in deciding that Henriksen was entitled to the commission, knew of his position as a member of the Bondholders' Protective Committee. There was no concealment of that fact. He was a licensed real estate broker, and if there was a full disclosure and an understanding that despite his position as a member of the committee, he would be allowed a commission if he were successful in procuring a purchaser whose bid was acceptable to the court, it would be proper to allow him a commission for his services.

Upon the face of it this seems fair enough. With whom, however, was the "understanding" and "full disclosure"? Certainly not with the trustee, who apparently opposed the brokers activity consistently from the beginning. Certainly not with the bondholders, who appeared only through the committee of whom the broker was a representative and through the trustee. If with anyone, it was with the court itself. At the outset, in view of the limitation placed by the Supreme Court in the Bryn Mawr case on the power of the chancellor to approve a plan of reorganization, i.e., seemingly solely for the purpose of determining the adequacy of the bid at the master's sale, in the instant case consummated long before, it is somewhat startling to find the chancellor retaining supervision and control of the whole proceeding and finally holding the sale himself. Conceding that in the present case the opportunity of earning a sizable commission would not influence the fiduciary judgment of the broker, and that in opposing the approval of the previous sale he was considering solely the interests of the bondholders and not the possibility that he personally might profit should he be fortunate enough to find a purchaser, and conceding further that after obtaining his own purchasers he would not use his position as a member of the committee to discourage the interest of prospective purchasers represented by other brokers, and

overlooking the fact that one of the broker-fiduciary’s purchasers was an attorney who was active in the proceeding and was incidentally allowed a $1,500 fee for services, one is still reminded of the resolute language of the late Justice Cardozo:

Many forms of conduct permissible in a workaday world for those acting at arm’s length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the “disintegrating erosion” of particular exceptions. . . . Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.  

Labor Law

After having twice denied certiorari, the Supreme Court of the United States, on June, 3, 1940, reversed its position and granted certiorari in Milk Wagon Drivers’ Union of Chicago v. Meadowmoor Dairies, Inc. It also reversed an earlier ruling and granted certiorari in the Swing case. This raises the interesting constitutional question of whether enjoining picketing with printed banners constitutes a violation of the right to freedom of speech where the persons enjoined are not employees of the petitioner and no labor dispute exists. Meanwhile the doctrine of the Swing and Meadowmoor cases has been followed in numerous Appellate Court decisions.

40 60 S. Ct. 128 (1940); 60 S. Ct. 295 (1940).
41 60 S. Ct. 1092 (1940).
42 60 S. Ct. 514 (1939).
An injunction against peaceful picketing was denied in *Ritholz v. Andert*, where a labor dispute was found to exist. Two points of particular interest appeared in the case. First was the effect of an attempt by the employer to avoid the Anti-Injunction Act through a sale of his factory. This the court regarded as a sham. Second was the effect of the change of affiliation from A.F. of L. to C.I.O. of the men having a union contract with the employer which apparently was in effect. The court said that the change “was not a matter that concerned the parties.” The novelty of this second point raises many speculations.

An order of the trial court issuing a temporary injunction against union activities was properly reversed by the Appellate Court in *Brandt v. Milk Wagon Drivers’ Union of Chicago*, where the trial court had based its order on evidence introduced by the plaintiff in an ex parte proceeding without giving the defendants an opportunity to deny the charges made.

**Workmen’s Compensation**

The constitutionality of Section 25 of the Workmen’s Occupational Disease Act was attacked in *Liberty Foundries Company v. Industrial Commission*, and collaterally or secondarily, the sufficiency of the evidence to establish liability was questioned. Objections were made to Section 25, which provides that an employee shall be deemed conclusively to have been exposed to the hazards of an occupational disease when for any length of time, however short, he is employed in an occupation or process in which the hazards of

ence in relief, depending upon whether a state or federal forum is selected still exists in labor cases in spite of the decisions in *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487 (1938) and *Ruhlin v. New York Life Insurance Co.*, 304 U. S. 202, 58 S. Ct. 860, 82 L. Ed. 1290 (1938).

*303 Ill. App. 61, 24 N.E. (2d) 588 (1940).*

*Ill. Rev. Stat. 1939, Ch. 48, § 2a.*

*Compare Dubinsky v. Blue Dale Dress Co., 292 N. Y. S. 898 (1936), dealing with the “runaway shop” problem.*

*304 Ill. App. 578, 26 N.E. (2d) 643 (1940).*

*For the effect of indiscriminate issuance of injunctions without fair hearings, see Frankfurter and Greene, *The Labor Injunction*, passim.*

*373 Ill. 146, 25 N.E. (2d) 790 (1940).*
the disease exist. Further provisions placed liability on the employer in whose service the employee was last exposed, except that as to silicosis and asbestosis the only employer liable is the last employer, and exposure must have occurred during sixty days or more after the effective date of the act. The court held that Section 25 must be construed with Section 6, and that exposure to the hazards does not establish the disease, nor its necessary connection with the employment, nor does it establish liability, and that therefore the provision is not in violation of Article 2 of the Constitution. Moreover, when employer and employee elect to come under the act, the sections of the act become a part of the contract of employment, and rights guaranteed by the due process clause are waived by electing to come within the compensation provisions of the law.52

An interesting case was carried through the Appellate to the Supreme Court of this state in Kijowski v. Times Publishing Corporation.53 The driver of a newspaper delivery truck hired a minor to assist him in counting, binding and delivering papers on a route. The minor helper was paid by the driver, who was not reimbursed by the corporate defendant. The minor was injured by the negligence of the driver, and a common-law action was started, in which it was claimed that the helper was not bound by the provisions of the Workmen's Compensation Act. This position was sustained by the Supreme Court, where it was held that through the driver as agent, the principal could be reached for the imposition of common law liability, although the principal could not be heard to say that thorough knowledge of the driver's practice, and acquiescence therein the minor had become its employee and subject to the act. Similar cases in other jurisdictions, differently decided, were distinguished, but not without some difficulty.54

Agar Packing & Provision Company v. Becker,55 a case of novelty and of importance, was decided in the Appellate

52 Citing Casparis Stone Co. v. Industrial Board, 278 Ill. 77, 115 N.E. 822 (1917), and Booth Fisheries v. Industrial Commission, 271 U.S. 208, 46 S.Ct. 491, 70 L.Ed. 908 (1926).
53 298 Ill. App. 236, 18 N.E. (2d) 754 (1939), noted in 17 CHICAGO KENT LAW REVIEW 295; 372 Ill. 311, 23 N.E. (2d) 703 (1939), noted in 28 Ill. B.J. 300.
Court. An employee amenable to the Compensation Act was killed while driving in his automobile, through the negligence of a farmer, a member of a class expressly excluded from the act. Compensation was voluntarily paid to the sole dependent by the employer, who then filed suit in his own name against the farmer claiming subrogation under Section 29. The trial court dismissed the suit on motion of the defendant, and the Appellate Court sustained the dismissal. The opinion stated that the statute which gives the employer the right to maintain the suit against such “third party” limits the “third party” defendants to those mentioned in Section 29, and, since the defendant farmer is expressly exempted from the operation of the statute, the suit will not lie. The Wrongful Death Act was said to bar any action by anyone other than those mentioned in its own provisions. Since the action could not be predicated on the Wrongful Death Act, nor on the provisions of the Compensation Act, no remedy is available to the employer. It is still an open question as to whether the Supreme Court will sustain this view if and when such a case reaches it.\footnote{See note, 18 Chicago-Kent Law Review 117.}

\textbf{FAMILY}

The validity of a marriage contracted in Indiana, by residents of Illinois, in an effort to avoid the provisions of the so-called Saltiel Act,\footnote{Ill. Rev. Stat. 1939, Ch. 89, § 6a.} requiring proof of freedom from venereal disease, was considered in \textit{Boysen v. Boysen},\footnote{301 Ill. App. 573, 23 N.E. (2d) 231 (1939). Notes, 18 Chicago-Kent Law Review 206, 34 Ill. L. Rev. 872.} where the plaintiff sought an annulment on the ground that such marriage, being in violation of the provisions of the Uniform Marriage Evasion Act,\footnote{Ill. Rev. Stat. 1939, Ch. 89, § 19.} was void. The court properly pointed out that since the only penalty for violation of the act in question was one imposed on the clerk who issued the license, such marriage, even if it had occurred in Illinois, would have been valid; therefore annulment could not be granted, and the intent of the parties in going to Indiana was of no consequence.

The constitutionality of an act passed in 1933 terminating
alimony payments upon remarriage of the recipient thereof was challenged in Adler v. Adler, but upheld. In that case the parties were divorced in 1922. The decree approved an alimony settlement by which a trust was created to provide monthly payments for the plaintiff for the remainder of her lifetime, further provided that remarriage of the plaintiff should not operate as a release, and ordered the defendant to comply with such settlement. In 1936 the defendant applied for modification thereof on the basis of the plaintiff's subsequent remarriage. Such relief was granted, the court finding (1) that the settlement was not an alimony settlement in gross and so was subject to modification, and (2) that the legislature was free to regulate the payment of periodic alimony, although, of course, only so far as installments which had not yet accrued were concerned. The agreement of the parties to pay despite remarriage was held a nullity on the ground that it would oust the court of its power to amend its own decrees if enforced.

An unusual complaint by a wife seeking to have a Nevada decree of divorce secured by her husband declared null and void, was filed in the Circuit Court of Champaign County. The trial court dismissed the suit for want of equity. On appeal, the cause was reversed and remanded with direction to enter a decree in favor of the complainant for the relief prayed for, the Appellate Court finding as a fact that defendant was not a bona fide resident of Nevada at the time of the alleged divorce and that he had procured it by fraud and deception. No doubt the court was right in its finding as to the facts, but the nature of the proceeding arouses interest. The validity of the alleged earlier divorce is usually tested in either a suit to secure separate maintenance, or for an absolute divorce, or for an annulment of a subsequently contracted marriage, at which time such decree is offered as a defense. In the instant case the

61 373 Ill. 361, 26 N.E. (2d) 504 (1940).
62 Herrick v. Herrick, 319 Ill. 146, 149 N.E. 820 (1925). If the agreement had not become incorporated in the decree, modification would have been improper. Smith v. Johnson, 321 Ill. 134, 151 N.E. 550 (1926).
64 As to separate maintenance, see Janssen v. Janssen, 269 Ill. App. 233 (1933);
question was apparently presented by asking for a declaratory judgment as to the effect of the Nevada decree—an unusual action in Illinois, which neither court nor counsel appears to have questioned.65

Notice was previously taken herein of an order of an Illinois court in habeas corpus proceedings providing for the division of custody of a child between the parent and grandparents.66 The Supreme Court, by reversing such order,67 has removed all doubt that the parental right to the care and custody of his child is exclusive, unless the parent has forfeited such right. The status of children was also considered in Brainard v. Brainard,68 in which certain illegitimate children claimed they had become legitimated by virtue of the Illinois Revised Statutes of 1939, Chapter 89, Section 17a. It was admitted that the father had acknowledged them as his children and had held their mother out as his wife, but the court disbelieved the evidence tending to prove an intermarriage between the parents. Lacking such proof, the court held the children had not become legitimate inasmuch as the statute in question had not been complied with in its most vital aspect. The court refused to enter into a discussion of the constitutionality of the statute, which was treated as being beside the point on the facts before it.69

for absolute divorce, see Dunham v. Dunham, 162 Ill. 589, 44 N.E. 841 (1896); as to annulment, see Jardine v. Jardine, 291 Ill. App. 152, 9 N.E. (2d) 645 (1937).

65 In the absence of statutes authorizing the courts to pronounce declaratory judgments, the general rule appears to be that courts should act only to grant corrective relief: Willing v. Chicago Auditorium Association, 277 U. S. 274, 48 S. Ct. 507, 72 L. Ed. 880 (1928); Prather v. Lewis, 287 Ill. 304, 122 N.E. 470 (1919). See also 87 A.L.R. 1205; 16 Am. Jur. 273.


68 373 Ill. 459, 26 N.E. (2d) 856 (1940).

69 From an examination of the briefs it appears that appellee had contended the act in question was unconstitutional because it purported to amend the Marriage Act, Ill. Rev. Stats. 1939, Ch. 89, whereas the purpose of the statute was to endow such children, otherwise illegitimate, with the ability to inherit from the father and should, therefore, be amendatory of the Descent Act, Ill. Rev. Stats. 1939, Ch. 39. Appellant relied on Prescott v. Ayers, 276 Ill. 242, 114 N.E. 557 (1916), which held constitutional Ill. Rev. Stat. 1939, Ch. 89, § 18, relating to slave marriages and the legitimacy of offspring therefrom. The court appears to have followed the appellee's contention in its initial opinion and held the act unconstitutional. See petition for rehearing, answer thereto, and reply to such answer. On rehearing, the decision passed on the grounds above noted, the initial opinion apparently having been withdrawn.
One other case, that of *Usalatz v. Estate of John Pleshe*,\(^7\) is of consequence. There the claimant, a woman, sought to recover from the estate of the decedent as on an implied contract for the value of the services she rendered deceased during his lifetime while living with him as his wife "under the mistaken belief that she was his wife, he knowing that she was not, and voluntarily accepting such services." There was no showing that any purported ceremony had been performed, nor had decedent been guilty of any fraud in inducing the relationship. It was held that no implied contract to pay the value of such services could be predicated on such illicit relationship; hence, the claim was dismissed.

**PROPERTY**

**TRUSTS**

A wide range of problems of trust law from creation to termination of trusts came before the Illinois reviewing courts during the past year. Most of the decisions presented merely routine applications of well-settled principles. One or two cases which present novel questions in Illinois and several cases which reinforce the doctrines of older decisions deserve to be mentioned.

The legal effects of a provision in a will directing a trustee to expend funds to erect a cemetery monument were passed upon in *Kingsley v. Montrose Cemetery Company*,\(^7\) apparently for the first time in this state. The will in question directed that certain funds be paid to the cemetery company in trust to use the income for the perpetual care of a burial lot and the monument to be erected upon it. The testatrix then provided that the remainder of her estate be paid to a designated corporate trustee to be used in the construction of the monument, with provision for the payment of any residue to a relative of the testatrix. The named trustee declined the trust and the ultimate residuary legatee filed a complaint for the construction of the will contending that the bequest of funds to the cemetery company for the care of the lot and monument was invalidated by reason of a perpetual care

\(^7\) 302 Ill. App. 392, 23 N.E. (2d) 939 (1939).

\(^7\) 304 Ill. App. 273, 26 N.E. (2d) 613 (1940).
agreement entered into between the testatrix and the company some time before her death. The cemetery company filed an answer and a counterclaim in which it presented the novel contention that it was a beneficiary of the trust for the construction of the monument and praying for the appointment of a trustee to carry the trust into effect. The court ruled that the interest of the company was not that of a beneficiary, as the advantages it would derive were merely incidental to the main objectives of the trust.\(^7\) It was further held that a valid trust was not created since there was no definite beneficiary capable of enforcing the trust. Seemingly, this decision rejects the doctrine of the so-called "honorary trust,"\(^7\) although the point is not discussed in detail in the opinion. The court decided, however, that such a provision for a monument might be valid as a direction to the personal representative to pay funeral expenses, but that this was a question for the probate court. The cemetery company and the plaintiff were allowed attorney's fees under the rule that, where the testator expresses his intent so ambiguously as to create a difficulty which makes it necessary to go into a court of chancery for a construction of the will, the costs of the litigation must be borne by the estate.

Two other cases involving problems of the creation of trusts should be mentioned. One of these presents a situation of a type frequently occurring in the reports, wherein the absence of legal advice has proved costly to laymen who are not familiar with the essentials of the trust device. In 1927 a business transaction was closed by a woman with the assistance of her friend, a real estate man. The large sum of money which was paid to her she allowed to remain in the hands of the real estate man, who paid her interest semi-annually on the balances in his hands. In 1930, after several withdrawals, a balance of $13,000 remained and receipt was given by the friend reciting that the funds were in his hands for the purchase of "first mortgage on property in Chicago."\(^7\) The court held that a valid trust was not created since there was no definite beneficiary capable of enforcing the trust. Seemingly, this decision rejects the doctrine of the so-called "honorary trust," although the point is not discussed in detail in the opinion. The court decided, however, that such a provision for a monument might be valid as a direction to the personal representative to pay funeral expenses, but that this was a question for the probate court. The cemetery company and the plaintiff were allowed attorney's fees under the rule that, where the testator expresses his intent so ambiguously as to create a difficulty which makes it necessary to go into a court of chancery for a construction of the will, the costs of the litigation must be borne by the estate.

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\(^7\) Restatement of Trusts, § 126.
\(^7\) See Restatement of Trusts, § 124, comments c and d.
\(^7\) "Chicago, Ill., Mar. 18, 1930.

"Received of Margaret Schaack Thirteen Thousand Dollars for purchase of First Mortgage on property in Chicago, Ill., Chicago, Cook County, Illinois."
March 27, 1936. After his death, a fifth class claim was asserted against his estate on the theory that the money was held in trust. The estate was insolvent. The probate court allowed the claim as a fifth class claim and was reversed by the Appellate Court. The Supreme Court divided, the majority holding that the money was not held in trust and that the facts presented merely a sixth class claim. In the opinion of Mr. Justice Murphy chief reliance was placed upon the absence of any evidence of intention to create a true trust. It was said that the original transaction amounted to no more than a loan and that nothing was done subsequently to change the nature of the transaction. The dissenting opinion by Mr. Justice Gunn, concurred in by Mr. Justice Jones and Mr. Justice Farthing, took the position that the receipt contained all the necessary elements of a valid trust. The decision in the case seems clearly right. Strangely, neither opinion discusses the fact that the deceased paid interest on the balance in his hands regularly until 1936. Apparently, the deceased was expected to pay interest from his own funds at a fixed rate and not merely such interest as the funds might earn. Payment of interest imports a loan, not a trust. If the original transaction was therefore stamped with the character of a loan, the position of the dissenting judges is not tenable since the facts do not indicate any material change in the character of the relationship down to the time of deceased’s death. Such transactions are frequently met with and it often appears that the claimant enters into such an arrangement through lack of understanding of the technical difference between a true trust of money and a loan to someone in whom the claimant reposes a broad confidence.

*Albers v. Tau Kappa Epsilon Fraternity* presented a situation in which the fraternity treasurer deposited funds

This receipt must be surrendered when said papers are delivered. $13,000.00. (signed) Joseph J. Reiter."

A similar receipt for a larger amount was surrendered when this receipt was given.

77 304 Ill. App. 238, 26 N.E. (2d) 156 (1940).
from the sale of securities in the bank in which he was employed, taking certificates of deposit in the usual form. These were paid in full when the bank failed to open after the moratorium, on the theory that the funds were held in trust. The Appellate Court decided that this was an unlawful preference in view of the lack of sufficient evidence to establish any agreement on the part of the bank to segregate the funds.

The Supreme Court handed down one decision during the year which is of importance as indicating the position of the court on the question of whether it is proper in the absence of any provision in the trust instrument for a trustee to purchase trust investments from a company or organization with which the trustee is affiliated. In *Kinney v. Lindgren*78 two individual trustees bought bonds from the corporation of which they were the principal officers. The court, citing Section 170 of the Restatement of Trusts, held that a trustee, in the absence of any provision in the trust instrument, cannot purchase investments for the trust from a company in which he has a substantial interest or is a principal officer. Good faith and the consideration paid were said to be immaterial. This seems to be the first direct ruling on this question in this state.

Litigation over trust investments as an aftermath of the economic depression is still active. The recent Appellate Court case of *In re Sanders' Estate*79 again presents the difficult problem of considering in retrospect the conduct of a trustee in making investments and of endeavoring to reconstruct the background against which his conduct must be viewed. In this case the trust instrument contained a rather unusual investment clause: "To invest the same as to the said trustee shall seem proper, in Government bonds, first farm mortgages or other equally good securities. . . ." It was provided that the trustee should make a report to the court at least once every two years. The income from the trust res was to be used for the support of the minor daughter of the settlor with discretion to use the principal. At the time of the creation of the trust, the res consisted of a small amount of cash and a $16,000 note secured by a first mort-

78 373 Ill. 415, 26 N.E. (2d) 471 (1940).
gage on farm property. This note was paid when due, and the trustee bought six per cent first mortgage bonds on Chicago real estate, on which real estate a hotel building was in process of construction. The bonds were purchased on the advice of an officer of the bank wherein the trustee was employed and the agent of the securities firm from whom the bonds were purchased. The trustee charged the trust estate with the price of the bonds at par, but the evidence indicated that the actual price which he paid for them was 96. In 1930 one bond was paid and the trustee bought another real estate bond on Chicago property. From 1931 to 1938 the trustee made no report. In the latter year, when the trust was ready for termination, he filed a report showing $47.31 on hand plus certificates issued in reorganization proceedings of the two properties securing the bonds which he had purchased. The court sustained objections by the beneficiary and surcharged the trustee with the principal and interest at the rate of 5 per cent. The Appellate Court affirmed the surcharge but reduced the interest rate to 3 per cent, as more nearly approximating the normal rate of return. The opinion found that the trustee was remiss in not following the directions of the settlor to invest in securities equal in grade to government bonds or first mortgages on farm properties. The trustee did not make the proper personal investigation at the time the investments were made, nor did he exert the vigilance which his duty required. The opinion indicates also that the trustee should have diversified the investments, instead of investing almost the entire trust fund in one issue of real estate bonds. In view of these facts and the additional evidence that the trustee made a secret profit on the first purchase of bonds, the decision is clearly right. However, the opinion suggests that the trustee violated his instructions in investing in real estate bonds because these were not a proper type of investment under the language of the investment clause. This conclusion does not appear to be sound in view of the position of the Supreme Court of Illinois in regard to the propriety of a trustee's investing in participating interests in real estate mortgages.\(^8\) Some real estate

\(^8\) In the Matter of Estates of Lalla, 362 Ill. 621, 1 N.E. (2d) 50 (1936); In re Guardianship of Lutz, 362 Ill. 631, 1 N.E. (2d) 55 (1936).
bonds might reasonably have been considered quite as good investments as farm mortgages in 1927.

The insulation provided for trust funds by Section 49 of the Chancery Act against attack by creditors of the beneficiary was alluded to in the case of Hurst v. American State Bank. It was held that a vested remainder in the principal of a trust fund could be reached by creditor's bill, although the interest of a beneficiary was immune. Even though the interest of the remainderman could be sold before the termination of the trust this could not affect the trust res. The confused situation as to the rights of creditors of the beneficiary requires extensive re-examination of statutory and equitable remedies.

Two cases dealt with the problems involved in the termination of trusts. In Sutliff v. Aydelott, the court applied to an unusual situation the rule that where all parties are capable of acting they can compel the termination of the trust although its objects are not accomplished. In this case certain real estate was transferred to trustees to apply all net income to the use and benefit of the grantors "share and share alike, and the heirs of each of them. . . ." Certain personal property was likewise transferred to the trustees to hold during the lives of the grantors and the life of the survivor of them and when within a reasonable time after the death of the survivor to convey to the heirs at law. It was said that the word "heirs" was a term of limitation in the case of the real property. Therefore, all the grantors being sui juris, they could terminate the trust. It was pointed out that the trust was "executory" as to the personalty since the trustees were required to convey after the death of the survivor. Therefore, children of the grantors acquired interests in the trust res. Moreover, the rule in Shelley's Case could not be applied to personalty.

In Friese v. Friese, specific directions of the settlor as to the termination of the trust were considered mandatory, as against a contention that they were merely directory. The court relied upon Section 334 of the Restatement of Trusts.

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83 373 Ill. 633, 27 N.E. (2d) 529 (1940).
84 Burton v. Boren, 308 Ill. 440, 139 N.E. 868 (1923).
85 373 Ill. 216, 25 N.E. (2d) 788 (1940).
Finally the courts passed upon some problems of the law of charitable trusts in three cases which deserve mention. In two of these cases the problem of the proper application of the *cy pres* doctrine was examined. In one case the testator made a bequest to the Chicago Daily News Fresh Air Fund which declined to accept, since it had decided to discontinue its operations. In proceedings to determine the proper disposition of the bequest, the Attorney General contended that the fund should be applied to some other charity of similar purposes. The court was unable to find a "general charitable intent" from the fact that property was disposed of to a charitable organization designated by name and correctly held the *cy pres* doctrine inapplicable. Reliance was placed upon the well-known case of *Quimby v. Quimby*. The Supreme Court held proper a decree ordering a sale of certain lots deeded to a city for school purposes "for the use of the inhabitants of School District No. Two," where the funds were to be used for school purposes in the area formerly included in the school district specified. In an interesting opinion the court held charitable a trust to provide for "practical scientific research work in horticulture and agriculture" through the establishment of an outdoor museum where trees and plants could be examined and studied.

**WILLS AND ADMINISTRATION**

While an executor under a prior will may be a proper party to contest a later will and may either resort to an appeal from admission to probate or may file a bill in the circuit court to contest the later will, he may not use these remedies cumulatively when the decision in the first case results from a finding that the executor is not in fact an interested person, and no appeal is taken from such decision. So held the Appellate Court in *In re Estate of Hills*. In the previous cases where an executor under a prior will has been treated

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87 175 Ill. App. 367 (1912).
89 People v. Morton, 373 Ill. 72, 25 N.E. (2d) 504 (1940).
91 305 Ill. App. 193, 27 N.E. (2d) 324 (1940).
as a proper person to contest a later will, the prior will would have been extant but for the later will. In the case at hand the circuit court had found on proceedings to contest the later will that the first will had been destroyed by the testator with intent to revoke and therefore that the executor named therein was not an interested person. Although it was averred later to have been found and filed, the executor thereunder did not thereby acquire a right to appeal from the admission to probate of the later will as long as the decision in the contest case, finding the earlier will to have been revoked, still stood unchallenged.

The Appellate Court held that an attorney for an executor who has applied to the probate court to fix a reasonable attorney’s fee and to have the same allowed out of the estate will be precluded by the order of the probate court which fixes the fee and finds that it has been paid in full from thereafter claiming in a suit against the executor individually that the amount fixed by the probate court was not reasonable and that he is entitled to a further sum.\textsuperscript{92} The court said,

where an attorney intends to hold an executor or administrator personally responsible for his fee, good faith toward the client would seem to dictate that the attorney should so inform the client at the time the latter seeks his services.

The last statement is somewhat broader than was necessary to the decision, which considered not merely the conduct of the attorney at the time he was employed but also the attorney’s conduct after the services were rendered, indicating an intent to look to the estate for payment. But broad statements are sometimes perpetuated in the form of decision. Should this happen here, we may find that because it is customary for an attorney to look to the estate for payment, it will be presumed that he enters into the contract on that understanding unless he exhibits to his client a contrary intention.

The case of Allen v. Beemer\textsuperscript{93} presents some unusual angles regarding revocation of wills and appears to be the first decision in Illinois concerning the peculiar points in-

\textsuperscript{93} 372 Ill. 295, 23 N.E. (2d) 724 (1939). Note, 28 Ill. B.J. 245.
volved. Benjamin F. Beemer lived in Iowa and owned a farm in Illinois. May 22, 1928, he made a will in Illinois and limited the effect of the instrument to property within this state. A month later, at his home in Iowa, he executed another will which disposed of his personal estate and his Iowa realty. The second will purported to revoke "any and all former wills." In a long and well-reasoned opinion, Justice Shaw held that it was not the intention of the testator to revoke the Illinois will, inasmuch as the Iowa will did not purport to affect the Illinois farm. The court also called attention to the fact that the two instruments when read together showed a plan to give the Illinois farm to the testator's son and his son's children and to give the Iowa farm to his daughter and her children. In the words of Justice Shaw:

The two wills not only fail to overlap in any respect, but actually come together and join in a perfectly harmonious whole, and when so joined present a completely harmonious, just and reasonable distribution of his estate among the natural objects of his bounty. Taken together they provide fully for his wife, equally for his children, and reasonably per stirpes for his grand-children. The Iowa will, alone, produces no such result.

The provisions of the statutes regarding revocation of wills is mandatory, and neither a signed written instruction of the testatrix to her attorney, who had the will in his custody, to destroy the will, nor his subsequent act of destroying it could operate to revoke the will, according to In re Estate of Mitchell.\(^94\) The written instruction could not serve to revoke the will because it was not itself executed with the formality of a will, and the destruction was not in the presence of the testatrix as required by the statute.

A presumption of undue influence may arise from the fact that one who benefits largely by the provisions of a will gave a lawyer the directions for drafting the will, especially where others of equal degree of relationship, who were not present when the will was executed, did not receive equal benefits, in spite of the fact that the principal beneficiary himself was not present at the time of the execution of the will. This would seem to be the gist of the ruling in Sulzberger v. Sulzberger\(^95\) in so far as it dealt with undue influ-

\(^94\) 305 Ill. App. 289, 27 N.E. (2d) 606 (1940).

\(^95\) 372 Ill. 240, 23 N.E. (2d) 46 (1939).
ence. The principal beneficiary in the case was a brother, Bertram, who received one-third in fee and the remainder after the expiration of life estates which another brother and a sister took equally in the other two-thirds. Bertram had lived with the decedent up to the time when the former was married, and then had lived on adjoining property, exchanging work with the decedent. His sons had also worked for the decedent. No special confidential relation was shown to have existed. It is not impossible for the jury to have found undue influence as a fact; however, to say that a presumption existed is to modify the requirements heretofore believed to have been necessary to raise such a presumption. And if the decision had depended alone on the finding of undue influence, it might well have proved startling; but the will was attacked also on the ground of mental incapacity, and there was sufficient evidence from which the jury could have found such incapacity. It might have been more proper to say that the facts from which the court presumed undue influence, namely, a mind weakened by suffering and physical debilitation, an unequal provision for the natural objects of the testator's bounty, a will, the terms of which were dictated by the principal beneficiary according to alleged instructions from a testator who appeared physically and mentally incapable of giving instructions, would rather be such as would strengthen the belief of mental incapacity rather than raise a presumption of undue influence.

A clear case on the subject of partial revocation is found in Board of National Missions of the Presbyterian Church v. Sherry, where interlineations and deletions were held not to effect a cancellation, although the envelope containing the will bore the notation: "August 1st, 1938. The enclosed will not to be executed Kate Bennett.

MORTGAGES

A number of interesting mortgage cases came up for hearing in the Supreme and Appellate Courts this year. Most of the following were decided in accord with well established principles, but there was presented in many of

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96 See 23 Ill. B.J. 218 and citations there given.
97 372 Ill. 272, 23 N.E. (2d) 730 (1939).
them some new fact or theory which makes them well worth noting.

Adverse claims to the rents collected by the receiver appointed in the foreclosure proceedings occur frequently. Ordinarily the mortgagee secures his right to rents during the redemption period by obtaining a deficiency decree and continuing the receiver in possession. In *Liss v. Harris*, however, the mortgagee had secured the appointment of a receiver but had failed to obtain a deficiency decree, although a deficiency had been found due in the master’s report. The mortgage in this case had pledged the rent, but the petitioners, assignees of the equity of redemption, claimed that this pledge was only a right to a lien which required the entry of a deficiency decree to mature it. The court, in line with previous decisions, stated that the pledge constituted an existing lien to the extent of the deficiency and was not dependent upon a decree. The rents in the hands of the receiver were, therefore, delivered to the mortgagee. The court stated further that it is not necessary that a deficiency decree be entered at any special time and that one may be entered even after the expiration of the period of redemption.

After expiration of the redemption period the holder of the master’s certificate frequently fails to apply for his deed and, although under the statute and decisions he has a period of five years to secure one, he does not, meanwhile, have a title to the premises. In *Clark v. Hall*, the mortgagee had bid at the sale, secured a deficiency decree, continued the receiver in possession, and then had held his certificate to almost the last day of its validity. In the meantime the receiver had collected rents, and at the time the master’s

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98 304 Ill. App. 173, 26 N.E. (2d) 133 (1940).
100 Ill. Rev. Stat. 1939, Ch. 77, § 31: “When the premises mentioned in any such certificate shall not be redeemed in pursuance of law, the legal holder of such certificate shall be entitled to a deed therefor at any time within five years from the expiration of the time of redemption. . . . When such deed is not taken within the time limited by this Act, the certificate of purchase shall be null and void. . . .”
101 See also Strauss v. Tuckhorn, 200 Ill. 75, 65 N.E. 683 (1902); Hack v. Snow, 338 Ill. 28, 169 N.E. 819 (1930); Klein v. Mangan, 369 Ill. 645, 17 N.E. (2d) 958 (1938).
102 303 Ill. App. 1, 24 N.E. (2d) 394 (1939).
deed was issued had a balance on hand. The lower court ordered the entire balance to be applied against the deficiency decree. On appeal it was held that the right to rents ceased at the expiration of the redemption period, and that the rights of the mortgagee for the unpaid balance on the deficiency decree were only those of a common creditor.

*Harper v. Sallee* involves pertinent questions concerning both rent and redemption. In this case the second mortgagee had answered the complaint to foreclose a first mortgage and had proven up his second mortgage. After sale, the second mortgagee redeemed on the last day of the twelve-month period but did not proceed to sale under his junior decree, claiming instead the right to title under the redemption. The second mortgage had not pledged the rents but the mortgagee went into possession. The court pointed out that since this was a redemption within the twelve-month period and therefore only extinguished the first lien, it did not offer the means of transferring title. Therefore, no title interest accrued to the second mortgagee until he had proceeded to sale and perfected it pursuant to statute, and the unpledged rents belonged to the owner of the equity of redemption.

Redemption by a judgment creditor resulted in an interesting decision in the case of *Hruby v. Steinman*, wherein the bondholders' committee had made the mistake of bidding in the property at an unusually low price. The judgment creditor sought to redeem under two judgments, one against each of the co-owners of the premises, and one of which judgments was invalid. The bondholders' committee sought to enjoin the redemption and to litigate the whole redemption procedure. They claimed among other things that the creditor could not redeem the whole of the premises under his one judgment against an undivided interest of one co-owner. The court in this case pointed out that the real interest of the purchaser at the foreclosure sale is to secure the amount due him under his bid, and, if he wishes to protect himself, he must do so not by attacking the redeem-

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102 305 Ill. App. 85, 26 N.E. (2d) 987 (1940).
103 Ill. Rev. Stat. 1939, Ch. 77, § 18: ", . . . whereupon such sale and certificate shall be null and void."
104 302 Ill. App. 480, 24 N.E. (2d) 175 (1939).
tioner but by the amount of his bid. The court stated that the fact that the purchaser at the execution sale may or may not receive a good title is no concern of the bidder at the foreclosure sale. The judgment against the one co-owner was held sufficient under the statute to redeem the whole of the premises, the only requirement being that it be an actual judgment recovered by the creditor within the prescribed period.\footnote{Ill. Rev. Stat. 1939, Ch. 77, §§ 25 and 26.}

Although the Illinois courts recognize the right of a mortgagee to pursue both his remedy at law and in equity against the debtor or debtors until paid in full, a limitation on this rule is indicated in \textit{Skolnik v. Petella}.\footnote{304 Ill. App. 331, 26 N.E. (2d) 646 (1940).} In the foreclosure proceedings the mortgagee had failed to allege facts under which he could have held liable the grantee who had assumed the indebtedness, but the grantee had entered her appearance and could have been made subject to a deficiency decree by proper amendment. The mortgagee had taken a deficiency decree against the mortgagor and thereafter had filed suit at law against the grantee. The court refused to allow the subsequent suit at law, stating that the doctrine of res judicata was applicable here and finding that the election to make either one of the debtors liable in the foreclosure proceedings was a choice that included the duty of seeking the same remedy against all of the debtors before the court. Therefore the mortgagee did not have the right to harass the court and the defendant with another suit.

A similar question arose in \textit{First National Bank v. Marks},\footnote{304 Ill. App. 438, 26 N.E. (2d) 731 (1940).} except that in this case the defendants, who were sued at law, were guarantors who had been previously made defendants in the foreclosure proceeding. The foreclosure suit had been instituted before the Civil Practice Act became effective, and the mortgagee could not join third parties in an action of foreclosure for the purpose of obtaining a deficiency against them.\footnote{Walsh v. Van Horn, 22 Ill. App. 170 (1887); Christensen v. Niedert, 259 Ill. App. 96 (1930); Shiel v. Chicago Title & Trust Co., 262 Ill. App. 410 (1931).} Hence, it was held that the election to make the mortgagor liable in the foreclosure pro-
ceedings could not affect the position of the guarantors, nor could such proceedings be *res judicata* as to them.

Where mortgaged property is conveyed and the grantee assumes and agrees to pay the mortgage indebtedness he has entered into a contractual relationship involving both the grantor and the mortgagee. The duty to perform must of necessity arise from the promise, and if no promise has in fact been made, either expressly or impliedly, the courts have on a number of occasions refused to hold the grantee liable merely because a covenant in the deed provided that the grantee assumed and agreed to pay. This is always a question of fact. In *Zamis v. Hanson*, the determination of this question of fact took an interesting turn when the court held that, although the grantee had no knowledge of either the deed or the assumption clause in the deed, she became liable by ratification upon making a later conveyance. Title in this case was taken in the name of the grantee by her husband, who was president of an investment company and dealt frequently in real estate transactions. Later the husband, together with another member of the firm, and the grantee conveyed various properties, including the one in question, to a trustee, who in turn issued beneficial certificates of 200 shares to the husband, 110 shares to the other member of the firm, and 90 to the defendant grantee. This conveyance by the grantee to the trustee was held to have constituted a ratification of the act of the husband in procuring the original conveyance and to have estopped the grantee from denying knowledge of the said assumption covenant. At the trial the grantee stated that she had no knowledge of either of these transactions. If this were actually so, the rule enunciated would seem somewhat harsh.

Cases dealing with the amendment of decrees after term time are always of interest to the practicing attorney. In *Dillinburg v. Hellgren*, through error, the decree in the


111 It appeared from the opinion that although the defendant disclaimed knowledge, her statements were contradictory and did not follow the pleading which had admitted knowledge.

See also Sutter v. Rose, 64 Ill. App. 263 (1896), aff'd in 169 Ill. 66, 48 N.E. 411 (1897).

foreclosure proceeding was entered on December 20, 1933, in conformity with the Judgment and Decrees Act of 1921 rather than with that of 1917, which it should have followed. Pursuant to that decree the master sold the premises and, after the expiration of fifteen months, issued a deed. In October, 1936, the holder of the master’s deed, upon petitioning for a writ of assistance, discovered the error and filed a petition to amend, requesting a sale in accordance with the act of 1917. It was held that this amendment was not revisory or appellate and did not alter the substantive rights of the parties, and it could therefore be made.

Whenever an action at law is followed by a foreclosure the question of merger in the deficiency decree may be important. In *McDonald v. Culhane* the mortgagee discovered to his sorrow that his original judgment lien gave way to a subsequent one because of just such a merger. In this case the mortgagee held a note secured by collateral notes, the payment of which latter were secured by mortgage. Judgment was confessed on the first note, and execution issued; thereafter the collateral notes were foreclosed, and a deficiency decree was entered which included the amount due under the first judgment. Execution was duly had on this decree. Between the date of the original judgment and the deficiency decree, another creditor recovered a judgment against the debtor, and it therefore became important in a partition suit to discover which lien was paramount. The court, after pointing out that the authorities are divided on this question, adopted the view that the first judgment became wholly merged in the decree, and, therefore, lost its character as a lien. This decision was aided by the fact that the mortgagee himself had so treated his former judgment.

Section 1 of the Mechanics’ Lien Law came up for discussion in the case of *Erickson v. Ginocchio*, wherein the mortgagor had entered into a contract for painting and


114 Ill. Rev. Stat. 1939, Ch. 82, § 1: “This lien shall extend to an estate in fee, for life, for years, or any other estate on any right of redemption, or other interest which such owner may have in the lot or tract of land at the time of making such contract. . . .”

115 303 Ill. App. 159, 24 N.E. (2d) 884 (1940).
decorating the premises after foreclosure and sale had been had. It was contended that under Illinois law the mortgagor, as owner of the equity of redemption, had the same estate in the premises before and after sale and that such an estate was subject to the lien under Section 1.116 The court held, however, that the interest of the mortgagor in the equity of redemption before sale was distinct from the statutory right to redeem and that the Mechanics' Lien Law referred to the equity of redemption. The statutory right to redeem is, therefore, not a sufficient interest to support a mechanic's lien.

Under Illinois law a mortgage is incident to the debt, and where the debt is barred by the statute of limitation, the mortgage is no longer a lien on the premises.117 On the other hand, where a mortgagor dies, and the mortgagee fails to present his claim in the probate court, the fact that his claim becomes barred against the estate does not prevent a suit to foreclose against the heir or devisee.118 Under the Corporation Act,119 where a corporation has been dissolved, suits must be brought against the corporation within two years or they are barred. In *Markus v. Chicago Title & Trust Company*120 the court held that although a corporation had been dissolved for more than two years the mortgagee could proceed in his action in rem to foreclose. Dissolution thus was likened to the death of an individual and did not dissolve the indebtedness for which the mortgage was security.

The relation of a judgment, rendered at law pursuant to a counterclaim filed in the mortgage proceedings, to the mortgage indebtedness sought to be foreclosed was discussed in the case of *State Bank of St. Charles v. Burr*.121 In this case the defendant had filed his counterclaim and had re-

117 Reeves, Illinois Law of Mortgages and Foreclosures, § 10; Lightcap v. Bradley, 186 Ill. 510, 58 N.E. 221 (1900).
118 Reeves, op. cit., § 10, Waughop v. Bartlett, 165 Ill. 124, 46 N.E. 197 (1897).
119 Ill. Rev. Stat. 1939, Ch. 32, § 157.94: "The dissolution of a corporation . . . shall not take away or impair any remedy given against such corporation, its directors, or shareholders, for any liability incurred prior to such dissolution if suit thereon is brought and service of process had within two years after date of such dissolution."
120 373 Ill. 557, 27 N.E. (2d) 463 (1940).
ceived a judgment on the law side prior to the decree of foreclosure. He thereafter contended that this judgment could not be set off against the mortgage indebtedness prior to sale, for the reason that such a set-off would constitute the rendition of a personal judgment in violation of Section 17 of the Mortgage Act. The court, however, pointed out that the chancellor had the power to adjust the equities of the parties in the foreclosure proceeding and to find the net amount of the lien. Thus, the application of the judgment in reduction of the mortgage indebtedness was held not to constitute the rendition of a personal judgment but merely to fix the net amount of the lien. The mortgage indebtedness can be set off against the judgment on the counter-claim and vice versa, and up to the point where the judgment on the counter-claim is equal to, or more than, the mortgage indebtedness, a foreclosure decree can be entered.

In *Bank of America v. Jorjorian* a dismissal with prejudice entered in a suit against a grantee who had assumed and agreed to pay the indebtedness was held to be as conclusive of the rights of the parties as if suit had been prosecuted to final adjudication adverse to the plaintiff. Thus, the defendant-grantors in the case, who stood as sureties to the grantee, were released from liability upon the entry of the said order in the former proceedings.

In two cases entitled *Tudor v. Firebaugh*, the Appellate Court divided over several problems involved in foreclosure and reorganization. The premises had been foreclosed and bid in at the sale by the trustee, who did not pay any cash. He thereupon proceeded to manage the premises until a successor trustee was appointed. The latter, after receiving instructions as to the management of the premises, presented a plan of reorganization which set up trustees, provided for distribution of rents and profits, provided

122 Ill. Rev. Stat. 1939, Ch. 95, § 17: "In all decrees hereafter to be made in suits of equity directing foreclosure of mortgages, a decree may be rendered for any balance of money that may be found due to the complainant, over and above the proceeds of the sale or sales, and execution may issue for the collection of such [payment of money]. . . . And such decree may be rendered conditionally, at the time of decreeing the foreclosure, or it may be rendered after the sale and the ascertainment of the balance due. . . ."


for sale and termination after fifteen years, and which ordered the interest of the bondholders to be personalty. Both depositing and nondepositing bondholders were treated alike under the decree. In reversing the lower court, the Appellate Court held, among other things, and this by way of somewhat desultory comment, that it was error to allow fees to counsel and the master in chancery based on evidence which did not set forth any statement as to time consumed by claimants in performing the work for which they sought to be paid; that the court had no power to change the bondholders' interest in real estate under their trust deed into personalty; that after sale the court did not retain jurisdiction for purpose of passing upon a plan of reorganization, nor could it liquidate the premises without knowledge of the bondholders and authority in the trust deed; and that the trustee could not borrow on the property and charge non-depositing bondholders.

titles

Whether or not a widow's dower interest may be divested without her written consent seems to depend upon whether her husband died prior to the effective date of the new Probate Act. The case of Gradler v. Johnson\textsuperscript{125} held that, under the prior statutes,\textsuperscript{126} the dower interest could not be taken without a consent, but the act of 1939 changes this rule.\textsuperscript{127} The only question of interest which remains is whether a dower interest which was consummate before the effective date of the new provision is subject thereto. And it is submitted that this question is answered in the negative by Section 346,\textsuperscript{128} which states that the express repeal of all inconsistent acts by Section 345\textsuperscript{129} does not "affect . . . a claim, right, power, or remedy accrued under any law in force prior to the effective date. . . ."\textsuperscript{130}

\textsuperscript{125} 372 Ill. 137, 22 N.E. (2d) 947 (1939). Note, 34 Ill. L. Rev. 878.
\textsuperscript{126} See Ill. Rev. Stat. 1939, Ch. 41, § 39 and Ch. 106, § 32.
\textsuperscript{127} "On application by the person entitled to dower or by any person having an estate of inheritance in the real estate, the court shall order that the real estate be sold at public sale free of the dower interest and that a sum of money equal to the gross value of the dower interest as assessed by the court be paid as dower from the proceeds of the sale to the person entitled to dower." Ill. Rev. Stat. 1939, Ch. 3, § 185 (c).
\textsuperscript{128} Ill. Rev. Stat. 1939, Ch. 3, § 501.
\textsuperscript{129} Ill. Rev. Stat. 1939, Ch. 3, § 500.
\textsuperscript{130} See note 128 supra.
The rule that the Statute of Limitations will not run against the title of the sovereign was avoided in *Trustees of Schools v. Lilly*, where the court indulged in the presumption of a patent by the State of Illinois from the evidence of exclusive possession under claim of ownership for eighty years, the fencing, cultivation and use of the land, the prevailing reputation as to title in the neighborhood, together with the assessment and payment of taxes for seventy-eight years. . . .

This presumption of a patent was not rebutted by the trustees of schools, plaintiffs in ejectment, and the decision was for the defendant. The court declined to confuse the issue and refrained from "bolstering" the result with a holding that the Statute of Limitations does run against one who holds "for a very limited portion of the public." The decision is sound, but a note of warning might well be sounded. The evidentiary doctrine of "ancient grants" when applied to disputes between private individuals has been crystallized into a rule of substantive law, and the courts have refused to permit a rebuttal of the presumption. If this process should occur in cases involving a sovereign, there will be a violation of the policy underlying the rule denying the effect of the Statute of Limitations to bar the title of the state.

In *Saunders v. Saunders*, the Supreme Court reversed the Appellate Court and decided that there may be a reservation in a deed in favor of one not an owner, provided that the person in whose favor the reservation is made is the grantor's spouse who joins in the deed with the grantor for the purpose of waiving inchoate dower. The land in question was owned by Mrs. Saunders, and her husband joined with her in a deed purporting to reserve unto the grantors the use of the farm for and during their natural lives. Mrs. Saunders predeceased her husband, and the Supreme Court in deciding that the surviving husband had a life estate followed its dictum in certain earlier cases, although it based its decision primarily on what it considered the obvious intention of the parties to the deed, namely that the grantee

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131 373 Ill. 431, 26 N.E. (2d) 489 (1940).
132 For a discussion of this problem see note, 29 Harv. L. Rev. 88.
133 373 Ill. 302, 26 N.E. (2d) 126 (1940).
as well as the grantors understood and intended that the husband should have a life estate in the event he should survive his wife. The court in reaching its decision did not overturn the doctrine that there cannot be a reservation in favor of a stranger.

In *Texas Company v. Wall* the Seventh Circuit Court of Appeals held sufficient an exception in a deed purporting to convey a twenty-acre tract of land "except about (25/100) acres on the Westerly side [of the tract] to be deeded to the Centralia Water Works Company," since the quoted words were descriptive of the excepted parcel and afforded a means of determining the excepted part by their reference to an existing contract with the Water Works Company. The court referred to and recognized the general rule that an exception in a deed of conveyance must contain an identifying description of the land excepted, but held that such requirement is satisfied if the language of the exception provides information which, when supplemented by competent extrinsic evidence, satisfactorily identifies the excepted parcel. The court also held that if the extrinsic evidence is competent, it is not material that it consists of official records or parol evidence of agreements or written contracts.

**OIL AND GAS**

In *Predestinarian Baptist Church v. Parker* the Supreme Court of Illinois held that a church, to whom land had been conveyed "as long as the same was used . . . as a place of meeting," could execute an oil and gas lease without terminating the qualified fee of the church. After the execution of the lease, the church used the premises regularly once a month as a place of meeting. It was held that the limitations upon the use of the land did not, under the circumstances, prevent the leasing of the land for oil and gas purposes, since this use was not a speculative venture but was a necessary move to obtain from the property its real value. Five wells had been drilled on adjacent land within 150 feet of the well on the church property, and two had been drilled within 250 feet of the church premises. All seven of

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136 373 Ill. 607, 27 N.E. (2d) 522 (1940).
the wells were in operation at the time of the leasing by the church. If a well had not been drilled on the church premises, all the underlying oil and gas might have been drained to adjoining wells and lost to the holders of the title to the church premises.

*Mode v. Whitley*\(^{137}\) is a case wherein the U.S. District Court of Illinois held that a contract, partly oral and partly written, for an oil lease of 169 acres of ground for "ten years or as long as oil should be produced," was a contract to occupy leased premises for an indefinite period and was therefore an agreement to confer a freehold estate upon the lessee. The only writing in evidence was a receipt signed by George F. Whitely which recited payment to him of $10 on account of an oil and gas lease on land "containing approximately 169 acres in Sections 15 and 17, Township 13 North, Range 7 East of the Third Principal Meridian, Coles County, Illinois." The court held that the contract was within the Illinois Statute of Frauds\(^{138}\) and that the memorandum of contract was insufficient because the land was not sufficiently described. It was also held that the deposit in escrow of an oil lease which was to be delivered to the lessee upon payment of the sum stated in the memorandum as balance due did not overcome the defects in the memorandum. In reaching this decision, the court cited and followed decisions by the Illinois Supreme Court relative to the deposit of deeds in escrow. The established doctrine requires a valid contract between the parties, and if the memorandum is insufficient as such, it cannot be aided by the delivery in escrow of a deed containing none of the essential agreements of the parties.\(^{139}\)

In *Triger v. Carter Oil Company*,\(^{140}\) the Supreme Court held that a freehold corporeal interest in the land itself passed to the grantee in a mineral deed purporting only to convey the oil and gas under a certain tract described in the deed. In reaching this decision the court was following the well established rule in Illinois that title to oil and gas in place can not pass to a grantee because they are fugacious

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139 Johnson v. Wallden, 342 Ill. 201, 173 N.E. 790 (1930); Main v. Pratt, 276 Ill. 218, 114 N.E. 576 (1916).
and incapable of ownership, and they belong to the owner of the land only so long as they remain underneath the land, and for this reason the title to the oil and gas alone can not pass to the grantee in the deed.\textsuperscript{141} It was held that the mineral deed conveyed not only the right to take oil and gas but granted also the right to the grantee to enter upon the land for the purpose of prospecting and operating wells. The deed, being for a period of indefinite duration and being a conveyance of an interest in the land itself, created a freehold estate.\textsuperscript{142}

In \textit{Gray v. Schoonmaker},\textsuperscript{143} the United States District Court of Illinois decreed specific performance in favor of lessees where a lessor, after executing an oil lease, orally agreed that if the lessees would drill on land adjoining the leased land and that if oil were not discovered thereon, the lessor would relieve the lessees of obligation to drill on the leased land and would execute a lease covering other land. The lessees accepted the oral proposition and drilled on the adjoining land and, no oil having been discovered thereon, sought specific performance of the oral agreement for a lease on the other land. The lessor contested the lessees' right to specific performance and sought to defeat it on the theory that the performance relied upon by lessees was not on the same lands as that concerning which specific performance was sought. The court held that the partial performance need only have reference to the contract relied upon, and not to the land concerning which specific performance is sought.

\textbf{MISCELLANEOUS}

In \textit{Famous Permanent Wave Shop, Inc. v. Smith},\textsuperscript{144} the lessee sought to have the lessor enjoined from declaring a forfeiture of the leasehold estate in accordance with the express provisions of the instrument and from taking any ac-

\textsuperscript{141} Watford Oil and Gas Co. v. Shipman, 233 Ill. 9, 84 N.E. 53, 122 Am. St. Rep. 144 (1908); Ohio Oil Co. v. Daughetee, 240 Ill. 361, 88 N.E. 818, 36 L.R.A. (N.S.) 1108 (1909).

\textsuperscript{142} Watford Oil and Gas Co. v. Shipman, 233 Ill. 9, 84 N.E. 53, 122 Am. St. Rep. 144 (1908); Transcontinental Oil Co. v. Emmerson, 298 Ill. 394, 131 N.E. 645, 15 A.L.R. 507 (1921).

\textsuperscript{143} 30 F. Supp. 1019 (1940).

\textsuperscript{144} 302 Ill. App. 178, 23 N.E. (2d) 767 (1939). Note, 18 CHICAGO-KENT LAW REVIEW 315.
tion to recover possession of the demised premises, notwithstanding the fact that the lease expressly provided that the lessor should have the right to declare a forfeiture and take possession upon lessee's failure to perform certain covenants which the lessee had breached. The Appellate Court held that subsequent events had not nullified the right of the lessor to declare a forfeiture for failure to pay rent promptly in advance as provided in the lease, notwithstanding the lessee had frequently been several days late in payment, without any protest being made by lessor. The lease was explicit in its provisions that the acceptance of rent either in a single instance or repeatedly should not be construed as a waiver by lessor of his right to declare a forfeiture, and the decision in favor of the lessor is sound, although the case was in equity and there is a recognized tendency by courts of equity to extend the doctrine of relief against forfeiture.

In Haskell v. Art Institute, the Appellate Court of Illinois held that the owner of chattels may dispose absolutely of his interest in such property during his or her lifetime even though it is the donor's intention by making such gift to deprive his or her spouse of dower rights in the event that such spouse should survive the donor and renounce the provisions of the donor's will. It was held that a gift of paintings was complete and effective as a gift inter vivos upon the execution of a donation agreement providing that the donor should retain possession for a year, and acknowledgment of that agreement in a letter by the donee accepting the gift under the terms of the agreement. The transaction was not testamentary in character, although the donor's will confirmed the transfer and provided that, if the transfer failed, the paintings were bequeathed to the donee. The court, in discussing the agreement and the letter of acceptance, held that actual delivery was unnecessary to effect a gift and said: "In each of these, the language is clear and specific and shows that . . . [decedent] intended and did make a gift of the paintings . . . which was accepted." The court also held that the validity of the transfer was not affected by the statute against fraudulent conveyances, since no right of

145 304 Ill. App. 393, 26 N.E. (2d) 736 (1940).
the donor's wife had been invaded, and that the transfer was not merely colorable since there was a sufficient delivery of the paintings to the defendant Art Institute.

CONTRACTS

INSURANCE

Of slight importance, but as a case of first impression in Illinois, the Appellate Court determined that a wife's "inchoate right of dower" is a mere intangible and contingent expectancy, and, its value being unascertainable, it cannot provide an insurable interest in a dwelling house the legal title of which is in her husband's bankruptcy trustee. In a few other jurisdictions, where dower has been offered as the basis of an insurable interest, the courts have arrived at the same conclusion even though the value of an inchoate right of dower has been recognized in condemnation proceedings, distribution of property in divorce proceedings, and enjoiner of waste.

Lack of insurable interest in the decedent's life defeated the plaintiff in the case of Foreman v. Great United Mutual Benefit Association. The company issued a policy to the plaintiff upon her cousin's life. It appears that the plaintiff asked the cousin if she might take out such a policy and was answered in the affirmative, but no affirmative authority or agency was shown and it appeared doubtful if the decedent ever knew that the policy had been issued.

The meaning of the word "permission" under the "omnibus clause" of automobile liability coverage received extended exploration in Byrne v. Continental Casualty Company. The plaintiff attempted to widen the scope of permissive use under the terms of the policy, and to make the chauffeur (on a spree of his own) an additional assured under the circumstances. The court was able to distinguish the instant case from Karton v. New Amsterdam Casualty Company, and Jefson v. London Guarantee & Accident Com-

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149 301 Ill. App. 447, 23 N.E. (2d) 175 (1939).
150 280 Ill. App. 201 (1935).
pany,\textsuperscript{151} as well as from \textit{Jackson v. Bankers Indemnity Insurance Company},\textsuperscript{152} these latter cases allowing recovery by the plaintiff but inapplicable to the Byrne case.

With no reference to the Insurance Code provisions, the rule that false representations, material to the risk, relied upon by the insurer, will avoid the policy even though made through mistake or in good faith was reannounced in \textit{Continental Assurance Company v. McCarty},\textsuperscript{153} and substantially so in \textit{Krajewski v. Prudential Insurance Company}.'\textsuperscript{154} However, \textit{Thompson v. State Mutual Life Assurance Company}\textsuperscript{155} was differentiated on the facts, and the plaintiff recovered.

The lively question of liability of the insurer of a host driver to the guest for "willful and wanton or intentional acts" of the host when "willful and wanton or intentional acts" is expressly excluded from coverage under the policy was decided in favor of the insurer in \textit{Hill v. Standard Mutual Casualty Company}.'\textsuperscript{156} The victim was left to seek redress from the insured himself. The court did not overlook the social theory that the insurance money may be the only fund available for the injured party, but refused to adopt a theory of ambiguity of the quoted words urged by the plaintiff, holding the policy exclusion to be clear and unambiguous and not against public policy. The case was determined on the pleadings and argument thereon.

Although Section 201 of the Insurance Code\textsuperscript{157} provides that

\begin{quote}
no order, judgment or decree, restraining or interfering with the prosecution of the business of any company . . . shall be made or granted otherwise than on the petition of the Director represented by the Attorney General,
\end{quote}

the state's attorney of Sangamon County filed a complaint in \textit{quo warranto} against several defendants alleging that they were transacting an insurance business without authority. The defendants resisted the suit on the ground, \textit{inter alia}, that Section 201 barred anyone but the Director of Insurance from

\textsuperscript{151} 293 Ill. App. 97, 11 N.E. (2d) 993 (1937).  \textsuperscript{152} 277 Ill. App. 140 (1934).
\textsuperscript{153} 302 Ill. App. 10, 23 N.E. (2d) 385 (1939).
\textsuperscript{154} 305 Ill. App. 64, 26 N.E. (2d) 892 (1940).
\textsuperscript{155} 305 Ill. App. 255, 27 N.E. (2d) 330 (1940).
\textsuperscript{156} 110 F. (2d) 1001 (1940).
\textsuperscript{157} Ill. Rev. Stat. 1939, Ch. 73, § 813.
maintaining the action. The court held the instant suit to be an interference with the Director's exclusive field of activity and dismissed the complaint.\(^{158}\)

That blood stains on a safe occasioned by the employee's being struck over the head with a gun and then forced to open the safe did not constitute "marks made by tools . . . or other chemicals" was held in *Bridge v. Massachusetts Bonding & Insurance Company*\(^{159}\) and coverage under the policy was denied. The argument of the plaintiff was novel but too far fetched to come within the protective blanket of ambiguities which could be construed against the company.

**QUASI-CONTRACTS**

In *Usalatz v. Estate of Pleshe*,\(^ {160}\) the Appellate Court, without the aid of Illinois precedents, decided in accordance with the weight of authority, and with what would seem to be the better view, that a woman could not recover on a contract implied in law for the reasonable value of her services as a housekeeper from the estate of a man with whom she had lived for a number of years as his wife when in fact there had been no marriage. This conclusion was based upon the assumption that there was no fraud or deception practiced upon the plaintiff, and was reached after an extended study of decisions from other jurisdictions. The court pointed out that the presumed relationship of husband and wife negatived any possible expectation of compensation and that the courts would not imply a promise to pay for services arising out of an illicit cohabitation.

A related problem was presented to the Appellate Court in the case of *In re Lyons' Estate*.\(^ {161}\) The sister-in-law of a decedent filed a claim in the Probate Court against his estate for services rendered as housekeeper and nurse. Upon a trial *de novo* in the Circuit Court a new trial was granted after a verdict of a jury allowing the plaintiff's claim for $2,500. There was evidence to show that both parties understood that the services were not to be rendered gratuitously.

\(^{158}\) People v. Hargreaves, 303 Ill. App. 387, 25 N.E. (2d) 416 (1940), noted, post, Discussion of Recent Decisions.


\(^{161}\) 303 Ill. App. 642, 25 N.E. (2d) 555 (1940).
The will of the decedent bequeathed one-fifth of the income from the estate to the plaintiff for life. As the assets of the estate amounted to less than $6,000, this annuity would scarcely exceed $50 per year. The court overruled the order granting a new trial and ordered judgment on the verdict.

The decision was undoubtedly correct in holding that there was sufficient evidence to overcome the presumption, arising from the relationship of the parties, that the services were gratuitous, but ignores a further problem presented by these facts. Although it may have been the intention of both parties that compensation should be forthcoming, it is not clear whether the court regarded the bequest of income to have been intended as compensation or as having no relation to the claim for services. The court apparently takes the view that there was an implied contract between these parties but the opinion leaves in doubt the question of whether the court meant an actual contract existing upon the facts or whether it meant merely an obligation to make restitution arose quasi-contractually. In either event it would seem necessary to decide whether, in making provision for the plaintiff in his will, the decedent intended to discharge his obligation or to make the plaintiff an additional gift. The question is important, since, if the decedent intended to discharge his obligation but made inadequate provision, the judgment should be in lieu of the bequest or the jury should have been instructed to take the bequest into consideration in determining the amount the plaintiff was entitled to as the fair value of her services. The difficult problem in cases of this kind is the ascertainment of the actual and exact intention of the parties.\footnote{162}

**MISCELLANEOUS**

The tendency is to think of the seal as an anachronism which is gradually disappearing in favor of the more up-to-date doctrine of consideration. That it has not gasped its last breath is made plain by the case of *Whyte v. Rogers*.\footnote{163} True, there is a statute in Illinois permitting the defense of

\footnote{162} See note, 28 Mich. L. Rev. 87.

\footnote{163} 303 Ill. App. 115, 24 N.E. (2d) 745 (1940), where the court held to be irrevocable an exclusive agency for a definite time given by a sealed writing. Note, 28 Ill. B. J. 239.
want or failure of consideration in actions on sealed instruments, but this statute has been construed to apply only to negotiable instruments. As to other contracts, then, the seal still carries its ancient attributes. However, we seldom see nowadays a written contract, even though it be under seal, that does not recite or disclose some form of consideration. And, with the forms of action eliminated so that the contract may be sought to be enforced on the theory of assumpsit or covenant, courts of appeal seldom find it necessary to notice the seal or its effect. Yet it may be suggested that we are not yet prepared to discard it altogether. There is a growing feeling that, when a person intentionally executes a writing with the object of creating a legal obligation, the technical requirement of consideration, which Holmes said was as much a form as a seal, should not prevent legal effect from being given to the intent. This feeling must even be shared by the courts, who sometimes require a consummate skill at gymnastics in order to find the presence of a consideration which does not exist. Until we solve the problem by adoption of the Uniform Written Obligations Act it may be suggested that lawyers may be more certain and courts more honest by use and recognition of the seal.

In Cherry v. Aetna Casualty & Surety Company, the Supreme Court of Illinois disposed of a controversy as to rights of subrogation and conflicting claims between certain holders of bonds which were issued to finance a building project and a surety company which had assumed liability on the bond of the general contractor which had agreed to erect the hotel building in question and had defaulted, leaving a number of subcontractors unpaid. The obligee in the bond, a hotel company, was adjudged a bankrupt while still owing the general contractor a portion of the agreed compensation. The subcontractors meanwhile had filed mechan-

164 III. Rev. Stat. 1939, Ch. 98, § 10.
167 As in In re Estate of Wheeler, 284 Ill. App. 132, 1 N.E. (2d) 425 (1936).
ics' liens on the building. In order that the hotel might continue in operation, a receiver was appointed in the bankruptcy proceedings, who brought suit in the Circuit Court of Vermilion County against the surety company and recovered a judgment. The hotel property was put up for sale by the bankruptcy court and certain of the bondholders desiring to bid were permitted to do so only after making a deposit sufficient in amount to cover the claims of the subcontractors, and their deposits were applied to the satisfaction of such claims. Having supplied the money to pay the subcontractors, the paying bondholders claimed subrogation to the right of the latter against the surety company on the bond of the general contractor and that they had acquired rights superior to those of the surety company notwithstanding the fact that the bond of the general contractor made express provision for subrogation of the surety company in the event of default by the general contractor. The court held that subrogation is not simply a matter of contract but is one of equitable right and that the bondholder's right of subrogation was superior to that of the surety company.

In the field of Sales, the Supreme Court affirmed the decision of the Appellate Court which denied a conditional vendor a right to priority over the vendee's attaching creditor in the proceeds of the resale of the chattel sold under a conditional sale contract, although the contract expressly provided that the proceeds of the resale would be held in trust for the conditional vendor.169

The Motor Vehicle Law and the Uniform Motor Vehicle Anti-Theft Act are not recording statutes, the Appellate Court held.170 Hence, a buyer of a second-hand automobile who does not receive the seller's certificate of title is not charged with notice of a defect in the seller's title.

TORTS

The rule laid down in McDavitt v. Boyer,171 as to privileged communications, wherein the court said:


170 L. B. Motors, Inc. v. Prichard, 303 Ill. App. 318, 25 N.E. (2d) 129 (1940), noted, post, Discussion of Recent Decisions.

171 169 Ill. 475, 483, 48 N.E. 317 (1897).
Whatever is said or written in a legal proceeding, pertinent and material to the matter in controversy, is privileged; and no action can be maintained upon it, appears to have been extended to remarks made by counsel in negotiations for settlement before legal proceedings are instituted. In Dean v. Kirkland,\textsuperscript{172} it was alleged that, during such negotiations, remarks were made by one of the attorneys which were defamatory of the client of the opposing attorney. Although the court disposed of the case on other grounds, it said as to this matter:

Discussions between attorneys representing opposing parties should not be discouraged. Such discussions have a tendency to limit the issues or to settle the litigation, thereby saving the time of the court. . . . It would be contrary to public policy to penalize attorneys by making them respond in damages under the circumstances disclosed by the complaint.

Further application and extension of the doctrine of Rylands v. Fletcher,\textsuperscript{173} imposing absolute liability, irrespective of negligence, for damage caused by use of explosives, appears in Baker v. Healy Company.\textsuperscript{174} In this case, the Healy Company, operating under their contract with Chicago Sanitary District, which contract was authorized by an ordinance of the city of Chicago, in constructing an intercepting sewer, was using dynamite for blasting. The Appellate Court, in reversing the lower court, held the City, the Sanitary District and the Contractor all liable, citing and following Fitz Simmons & Connell Company v. Braun & Fitts,\textsuperscript{175} City of Chicago v. Murdock,\textsuperscript{176} and Macer v. O'Brien.\textsuperscript{177}

In Hyba v. C. A. Horneman, Inc.,\textsuperscript{178} the Illinois Supreme Court decided that an action for wrongful death under the Injuries Act is entirely different from and independent of an action under the Dram Shop Act for the same wrongful death, and that the outcome of either action is not \textit{res judicata}-

\textsuperscript{173} L. R. 3 H. L. 330 (1868).
\textsuperscript{174} 302 Ill. App. 634, 24 N.E. (2d) 228 (1939).
\textsuperscript{175} 94 Ill. App. 533 (1901), aff., 199 Ill. 390, 65 N.E. 249 (1902).
\textsuperscript{176} 212 Ill. 9, 72 N.E. 46, 103 Am. St. Rep. 221 (1904).
\textsuperscript{177} 356 Ill. 330, 190 N.E. 904 (1934).
ta of, and has no bearing upon, the other. Mary Hyba died as the result of an accident alleged to have been caused by the intoxication of one Lowery, with whom she had been riding as his guest. Her father, as administrator of her estate, brought an action against Lowery under the Injuries Act, which action was terminated by a settlement in the nature of a covenant not to sue. Subsequently, the action now under discussion was brought by the parents and a brother and sister of the decedent against C. A. Horneman, Inc., under the Dram Shop Act. The trial court dismissed the complaint on the ground that the settlement of the first suit was a bar to any subsequent action to recover for the same death, but the decision of the court below was reversed by the Appellate Court, thereby settling a question which appears theretofore to have been in considerable doubt.

In *Consolidated Biscuit Company v. Illinois Iowa Power Company*\(^ {179}\) it was decided that, where a city contracts with a private corporation to operate waterworks for the purpose of furnishing water to a city and its citizens, a property owner cannot hold the city or water company liable for loss by fire occasioned by the failure of the water company to furnish an adequate supply of water for fire protection. The court held that the plaintiff could not recover, either *ex contractu* or *ex delicto*. Recovery in tort was denied on the basis that the failure to furnish an adequate supply of water was, at most, the denial of a benefit, and not the commission of a wrong. The court distinguished the case of *Clark v. Public Service Company*,\(^ {180}\) relied on by the plaintiff, on the ground that, in the Clark case the act of the defendant in arbitrarily cutting off the supply of electric current going to the premises of the plaintiff was an affirmative tortious act. As to the action *ex contractu* the court denied recovery on the ground that there was no privity of contract between the water company and the plaintiff which would support the action, stating that this question had been before the highest judicial tribunals of a large number of states, and in all of them, except Kentucky, North Carolina, and Florida, this rule had been adhered to. As Illinois authorities the court cited *Rostad v.*

\(^ {179}\) 303 Ill. App. 80, 24 N.E. (2d) 582 (1940). Note, 28 Ill. B. J. 296.

\(^ {180}\) 278 Ill. App. 426 (1935).

The case of Nice v. Illinois Central Railroad Company184 may constitute the final demise, in Illinois at least, of the mistaken term "negligence per se." The plaintiff's intestate, while driving a truck across the defendant's tracks in the Village of Chestnut, an unincorporated village of about 300 people, was struck and killed by a fast passenger train of the defendant, which was traveling at a speed of about 90 miles per hour. The court said:

It is hard for this court to see in this day and age, and under the circumstances proven in this case, how it can determine that it is negligence per se to operate a train at the rate of 90 miles per hour through the village. . . .

Although there was much evidence of contributory negligence in this case, the decision may appear inconsistent with Lake Shore and Michigan Southern Railway Company v. Bodemer,185 in which a speed of 40 miles per hour in the city of Chicago, on the railroad tracks adjacent to Thirty-fourth Street was held to be such wanton and wilful misconduct as to permit recovery, even by a trespasser upon the railroad property. An attempt to raise this point was made in the Appellate Court, in the instant case, but the court held that the allegations of the complaint did not charge wilful and wanton misconduct; the case was tried and the jury instructed on the theory of general negligence, and the Appellate Court deemed it too late for the appellee to raise the question in that court. It would appear, therefore, that, in Illinois at least, instead of endeavoring to prove existence of the doubtful or nonexistent element of "negligence per se," plaintiffs' attorneys in such cases will increase the probability of a favorable outcome by inserting in the complaint, in each case where facts and circumstances are similar to the instant case, a "wanton and wilful" count.

Stine v. Union Electric Company186 deals with the viola-

185 139 Ill. 596, 29 N.E. 692 (1892). 186 305 Ill. App. 37, 26 N.E. (2d) 433 (1940).
tion of a statute prohibiting parking of a vehicle within 20 feet of a cross-walk or intersection\textsuperscript{187} as evidence of negligence and as the proximate cause of the injury to one struck by another vehicle while crossing the street. The defendant's truck was parked in violation of the statute, with its front at the cross-walk intersection, thereby materially interfering with and obstructing the view of drivers of vehicles approaching the cross-walk on the east side of the street, and of pedestrians approaching the east side of the street on the cross-walk. The plaintiff, a five-year-old child, started across the street at the cross-walk, ran in front of the truck and into an automobile which was then passing the truck, proceeding toward the cross-walk and street intersection. The court found no case in Illinois similar on the facts, but cited, reviewed, and followed a line of cases from other jurisdictions,\textsuperscript{188} holding that the statute violated was intended not merely to keep open the crossings at intersecting streets for pedestrians but to add to the safety of pedestrians in the use of such cross-walks. It further held that violation of a statute prescribing a duty for the protection and safety of persons and property is evidence of negligence if such violation caused or contributed to causing the injury; that, to constitute proximate cause, the negligent act or omission must be one of the essential causes producing the injury but need not be the sole cause nor the last or nearest cause; that it is sufficient if it concurs with some other cause, acting at the same time, which in combination with it causes the injury.

A case which, in some respects, appears to extend the doctrine of \textit{respondeat superior} is \textit{Metzler v. Layton}\.\textsuperscript{189} Layton was office manager of a loan corporation with offices in Chicago, which corporation was also made a party defendant to the action. He also did extra work, from time to time for one Adelman. Metzler, the plaintiff, was employed as a messenger boy for Adelman, and was well known to Layton. One morning when Layton was alone in the office shortly after it

\textsuperscript{187} Ill. Rev. Stat. 1939, Ch. 95 1\textfrac{1}{2}, §§ 98, 109, 111 and 187.
\textsuperscript{189} 373 Ill. 88, 25 N.E. (2d) 60 (1939).
was opened, three strangers entered. They covered Layton with guns and one of them ordered him to face the wall, which he did. They robbed Layton, then ordered him to tell where the money was and to open the safe. The safe was opened and the robbers began a search of the office. At this point Metzler came into the office on an errand. Layton warned Metzler not to come in, but he entered, and the robbers locked him and Layton in a clothes closet. A minute or so elapsed and the robbers left. Layton was aware of this by the sound of the automatic door closer; so he and Metzler freed themselves from the closet. Layton procured a pistol from his desk and ran out of the door of the office and down the corridor of the building with the pistol in his hand. Metzler followed shortly. At the intersection of two corridors, Layton looked toward the elevators. There was nobody in sight. He turned and looked in the other direction down the hall, and saw someone running toward him yelling, as he claimed, "Stick 'em up," although this was denied on trial. Layton fired at the approaching figure. The man, who was Metzler, fell, and Layton shot him again. His injuries were serious. No property of the corporation was taken by the robbers, but only money belonging to Layton. In holding the corporation, Layton's employer, liable, the only Illinois authority cited by the court is *Baum v. Industrial Commission*,190 where an employer was held liable for the death of an employee killed by strikers who rushed into the shop while the employee was trying to defend his fellow-employees and the employer's property. The employee was not in charge of the premises and was not a person in authority, as was Layton in the instant case. The court then states that the duty of an office manager, by the very character of his position, is more comprehensive than is the duty of a mere employee or special servant, and cites *Central Motor Company v. Gallo*191 as authority for holding that his employer is responsible for his acts done in safeguarding its property, even though the manager acts unwisely. The court held that the fact of Layton's private, personal motive for the chase did not exclude the interest of the corporation, since the pursuit was the continu-

190 288 Ill. 516, 123 N.E. 625 (1919).
ation of one transaction, and Layton, under the circumstances, could not know whether any of the corporation's property had been taken, nor did he pause to investigate when free. The court further held untenable the contention of the corporation that it was not liable because the act was done beyond its premises.

CRIMINAL LAW AND PROCEDURE

Little change has occurred in the substantive law of crimes; but three decisions are worthy of notice. In one, *People v. Robinson*,\(^{192}\) the defendant, who had been charged with conspiracy to administer drugs to race-horses in violation of Chapter 8, Section 37h1 of the Illinois Revised Statutes, contended such statute was unconstitutional because it was ambiguous and failed to define a criminal offense. It was held that, although the act was not skilfully drawn, it stood the tests of constitutionality. In another, *People v. Purcell*,\(^{193}\) a more striking problem arose. There two defendants were indicted for conspiracy to violate the gambling laws by agreeing to play for money at a game of cards. The prosecution was evidently predicated on the conspiracy statute,\(^{194}\) though the act of gambling, if engaged in, would have fallen under a different provision.\(^{195}\) The defendants moved to quash the indictment on the ground that since the principal crime, gambling with cards, would require the conduct of two persons at least, there could be no such thing as a conspiracy so to do, since neither, alone, could have perpetrated the completed offense by himself. The court upheld this contention, despite the lack of local precedent, adopting the so-called Wharton's Rule,\(^{196}\) though being careful to recognize the distinction that if the conspiracy had been between others than the actual gamblers, or between the gamblers and still other persons, or had been a conspiracy to commit an offense which was capable of commission by either conspirator when acting alone, then the result would have been different.

\(^{192}\) 372 Ill. 503, 24 N.E. (2d) 376 (1939).
\(^{193}\) 304 Ill. App. 215, 26 N.E. (2d) 153 (1940).
\(^{194}\) Ill. Rev. Stat. 1939, Ch. 38, § 139.
\(^{195}\) Ill. Rev. Stat. 1939, Ch. 38, § 324.
\(^{196}\) Wharton, Criminal Law (12th ed. by Ruppenthal), II, 1862, § 1604.
The defendant in the third case, *People v. Martin*, on several occasions obtained goods from the prosecuting witness by falsely stating that the goods were being secured for the defendant's employer. Each such purchase was paid for at the time of the succeeding transaction. When the defendant made the final purchase he promised to return in a day or so to pay for the last two purchases, but he neither returned nor made payment. He was convicted of obtaining goods by means of a confidence game, but on writ of error his conviction was reversed on the ground that his conduct had amounted to obtaining property by false pretense; the essential element of the confidence and trust reposed by the victim was deemed lacking, and proof of another and distinct crime was, of course, insufficient to sustain the conviction. The generality of the wording of the two statutes involved prevents the drawing of any clear distinction between the two offenses, but the court seems to intimate that a mere misrepresentation, or even a series thereof, will not suffice to secure the essential "confidence and trust" of the victim.

Significant decisions affecting the field of criminal procedure are more in evidence. The ambiguity as to jurisdiction over criminal offenses in Cook County as between the criminal court and the county court thereof was discussed in *People v. Dickelman*, wherein it was decided that the two courts possessed concurrent jurisdiction in cases where the punishment is not imprisonment in the penitentiary or death. The Supreme Court, in *People v. Crabb*, again called attention to, and again condemned, the illegal practice of public officials in detaining arrested persons incommunicado for long periods of time without returning them before a proper magistrate for preliminary examination as is re-

198 Ill. Rev. Stat. 1939, Ch. 38 § 256.
200 Ill. Rev. Stat. 1939, Ch. 38, § 701 provides: "The Criminal Court of Cook County shall have exclusive original jurisdiction of all criminal offenses . . . ."
201 Ill. Rev. Stat. 1939, Ch. 37, § 177 provides: "The County Courts shall have concurrent jurisdiction . . . in all criminal offenses and misdemeanors where the punishment is not imprisonment in the penitentiary or death."
202 304 Ill. App. 482, 26 N.E. (2d) 704 (1940). See also Discussion of Recent Decisions, post.
quired by law. Such condemnation was made effective by requiring the submission of such fact to the trial jury as having a bearing on the validity of a confession secured during such period of illegal detention.

Lengthy detention after preliminary examination and before trial, however, did not operate favorably to the defendant in People v. Stillwagon, who relied thereon to secure his discharge for want of prosecution. The defendant had engaged in an armed robbery in Lake County on August 18, 1936, and thereafter drove the stolen truck to Cook County where he was apprehended on August 20th and charged with larceny. He was held there, in default of bail, until November 18th, when the charge was stricken with leave to reinstate. Defendant was removed to Lake County, indicted for armed robbery and again held, in default of bail, until his trial commenced on February 8, 1937, making a total imprisonment of five months and twenty days, though only two months and twenty days thereof had occurred in Lake County. It was held that his motion to discharge for want of prosecution was properly denied since the statute applied only to detention beyond the statutory period of four months by the county which had jurisdiction of the offense, viz., Lake County. While the decision appears obviously correct, it carries the implication that over-zealous officials, in prosecuting a larceny charge where the stolen property was carried through several counties, might detain the offender, in successive fashion, far beyond the time contemplated for prosecution.

The scope of appellate review in criminal cases was involved in People v. Finkelstein, in which, on defendant's motion, the indictment had been quashed, and such action had been affirmed by the Appellate Court on appeal by the State as permitted by statute. When the State sought

204 Ill. Rev. Stat. 1939, Ch. 38, § 664.
205 373 Ill. 211, 25 N.E. (2d) 795 (1940).
206 Ill. Rev. Stat. 1939, Ch. 38, § 748.
207 Ill. Rev. Stat. 1939, Ch. 38, § 707 gives jurisdiction over larceny to any county into or through which the stolen property may have passed. Venue on the robbery charge was necessarily confined to Lake County under Ill. Rev. Stat. 1939, Ch. 38, § 703.
208 372 Ill. 186, 23 N.E. (2d) 34 (1939).
further review before the Supreme Court, the defendant objected on the ground that the statute did not authorize such action, claiming that the State was not seeking the review of "an order or judgment quashing or setting aside an indictment or information" but rather was seeking to review the action of the Appellate Court in affirming the trial court's decision, which, so the defendant contended, was not within the language of the statute. His contention was rejected as "sticking in the bark," though the court was careful to distinguish the situation from that in People v. McArdle, where, after reversal of the trial court's action quashing the indictment, it was pointed out that there was no final order on which to predicate further review. In People v. Dobbs the defendant, after his conviction had been affirmed, filed a motion in the nature of a writ of error coram nobis and succeeded in securing appellate review of the trial court's ruling thereon despite the objection of the State that the conviction had already once been reviewed and affirmed. The Supreme Court held such motion was not a direct attack on the earlier affirmance but a collateral inquiry authorized by law, disregarding decisions in other jurisdictions to the contrary.

The burden of proof to establish an alibi in extradition proceedings was considered in People v. Bell, and was placed on the alleged fugitive to prove he was not present in the demanding state at the time of the alleged offense. The prima facie case made the extradition request and the accompanying affidavits were not overcome by merely raising a doubt as to the accuracy thereof, but required "clear and satisfactory proof" that the accused was not present in the demanding state.

213 372 Ill. 572, 25 N.E. (2d) 45 (1940).
214 Since the attack by habeas corpus on extradition proceedings is essentially a civil suit to protect the petitioner's civil rights, Ill. Rev. Stat. 1939, Ch. 60, § 2, it was deemed proper for the trial court to take into consideration the failure of the alleged fugitive to testify in his own behalf, the civil rule, illustrated by The Central Stock and Grain Exchange v. The Board of Trade of the City of Chicago, 196 Ill. 396, 63 N.E. 740 (1902), rather than the criminal rule, found in Ill. Rev. Stat. 1939, Ch. 38, § 734, and applied in People v. Corry, 349 Ill. 122, 181 N.E. 603 (1932), being applicable.
While the legislature has found no emergency requiring amendment of the various practice provisions, the courts have been busy interpreting, clarifying, and explaining the operation of the Civil Practice Act. Six years of reformed procedure have not yet developed all the significant problems, nor have scores of decisions removed all the complications from the path of the practitioner. The following cases are, therefore, worthy of note as illustrating the solutions found during the past year for some of these problems.

In *Baker v. S. A. Healy Company*,\(^{215}\) sixty-two separate plaintiffs, living within a radius of two blocks, but each owning separate parcels of land, joined together in a tort action to recover damages for separate personal injuries and property damage arising from the conduct of a sewer contractor in dynamiting a sewerage tunnel under an adjacent street. The municipal corporations, on whose behalf the work was undertaken, were joined as defendants. Each defendant moved to dismiss the complaint, or, in the alternative, to sever the separate causes, relying on an alleged misjoinder of plaintiffs. The trial court dismissed the complaint. On appeal it was held that the joinder fell within the provisions of Section 23 of the Civil Practice Act,\(^{216}\) since it involved the same transaction or series of transactions and that therefore the trial court had erred in dismissing the complaint.\(^{217}\)

The use of the counterclaim to settle all disputes between the litigants is well illustrated in *The State Bank of St. Charles v. Burr*,\(^{218}\) in which a mortgagee filed suit to foreclose and the mortgagor filed a counterclaim to recover damages for mismanagement and waste caused by the mortgagee while in possession. The equitable issue was tried by

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\(^{215}\) 302 Ill. App. 634, 24 N.E. (2d) 228 (1939).

\(^{216}\) Ill. Rev. Stat. 1939, Ch. 110, § 147.

\(^{217}\) In distinguishing the instant case from *Gombi v. Taylor Washing Machine Co.*, 290 Ill. App. 53, 7 N.E. (2d) 929 (1937), discussed in 15 CHICAGO-KENT REVIEW 303, the court indicated it regarded such case as not in accord with the spirit of the reformed procedure, though not in point as involving joinder of parties in an equity case.

\(^{218}\) 372 Ill. 114, 22 N.E. (2d) 941 (1939), noted in 18 CHICAGO-KENT LAW REVIEW 291. For earlier litigation involving the same parties see 295 Ill. App. 15, 14 N.E. (2d) 511 (1938) and 283 Ill. App. 337 (1936).
the chancellor, who determined the amount due on the mortgage. The issue on the counterclaim was tried separately before a jury resulting in a verdict and judgment in favor of the mortgagor, which amount the chancellor credited against the debt due, satisfying the judgment thereby, and ordered sale for the balance due the mortgagee. From this action the mortgagor appealed, claiming the trial court should not have so set one claim off against the other, but should have left each to stand as a separate judgment. It was held, however, that the manner of entering the decree was proper, inasmuch as the claims were mutual and self-cancelling.

The local counterclaim provision, however, differs from the one controlling procedure in the United States courts, as the litigants learned in Grodsky v. Sipe. That was a suit instituted against a trustee in bankruptcy to impress a lien, in favor of a remainderman, upon funds in his hands belonging to a bankrupt testamentary trustee, in order to compensate for losses sustained by reason of the latter's failure to dispose of certain assets promptly to pay charges thereon, resulting in substantial loss to the remainderman when the assets were finally sold. Earlier litigation had been brought in the state court by the legatee holding the charge to compel its payment. The present plaintiff was made a defendant thereto and could have, but did not, present a counterclaim against her codefendant, the testamentary trustee. The trustee in bankruptcy moved to dismiss the instant suit on the ground of res judicata, contending that the state court proceeding had settled all issues as between the parties which were, or might have been, presented, relying on the federal court rule as to counterclaims. The trial court properly considered the effect of the state, rather than the federal,

219 Presumably the mortgagor hoped the premises would sell for more than sufficient to pay the total debt due, leaving him the holder of an unsatisfied tort judgment against the mortgagee.

220 People v. Frick, 367 Ill. 446, 11 N.E. (2d) 955 (1937) distinguished. (Counterclaim proper, when sheriff sued for taxes collected, to secure judgment for monies advanced by him in caring for prisoners, but separate judgment required, because one was a personal demand, while claim for taxes constituted a trust fund; so, obligations not regarded as being mutual.)

221 30 F. Supp. 656 (1940).

rule,\textsuperscript{223} and decided that the Illinois provision was permissive and not mandatory, so that the plaintiff's failure to submit the issue by way of counterclaim in the earlier proceeding had not involved the loss thereof.\textsuperscript{224}

The content of the various pleadings, including the manner of allegation, seems fairly well settled, and reference to earlier practice will usually resolve most doubts. Thus the former requirement that a bill of review should set forth at length and verbatim the pleadings in the original case\textsuperscript{225} was still a requisite to proceedings brought under the present procedure, according to the court in \textit{Davis v. Oliver}.\textsuperscript{226} The necessity for setting forth affirmative defenses in the answer was considered in \textit{Parker v. Dameika},\textsuperscript{227} and it was there pointed out that such defenses are not available to defendant unless so pleaded, nor can one affirmative defense be shown upon pleading the existence of another and distinct affirmative defense. The desire for informative pleadings stressed by Section 43 (4) of the Civil Practice Act\textsuperscript{228} thus stands reinforced.

An innovation in pleading was introduced by Rule 13 (3) of the Supreme Court,\textsuperscript{229} relieving the plaintiff from the necessity of making extended reference to the conditions precedent to the defendant's liability and to the manner in which such conditions were satisfied. This rule was involved in \textit{Bigelow v. Oglesby},\textsuperscript{230} in which the plaintiff filed suit on an underwriting agreement. The latter contained a provision that it should be a nullity unless a specified amount was subscribed within an allotted time. The complaint, without giving specification thereto, alleged that the plaintiff "in all things and in all respects duly performed all its obligations and undertakings and all conditions in the said contract con-

\textsuperscript{223} Section 38, Civil Practice Act; Ill. Rev. Stat. 1939, Ch. 110, § 162.
\textsuperscript{224} For earlier Illinois cases involving defendant's right to file counterclaim, rather than effect of failure to present one, see 15 \textit{CHICAGO-KENT LAW REVIEW} 338; 16 id. 279; 17 id. 60; and 18 id. 32, 43, and 57.
\textsuperscript{225} Cox v. Lynn, 138 Ill. 195, 29 N.E. 857 (1891).
\textsuperscript{227} 372 Ill. 235, 23 N.E. (2d) 52 (1939). Note, 18 \textit{CHICAGO-KENT LAW REVIEW} 294.
\textsuperscript{228} Ill. Rev. Stat. 1939, Ch. 110, § 167.
\textsuperscript{229} Ill. Rev. Stat. 1939, Ch. 110, § 259.13 (3).
\textsuperscript{230} 302 Ill. App. 27, 23 N.E. (2d) 378 (1939).
tained to be by it performed." The defendant contended the complaint was deficient for failure to allege that the prescribed amount was subscribed within the time set.\textsuperscript{231} For this, and other reasons, the complaint was dismissed. On appeal it was held that the method of pleading used by the plaintiff was expressly sanctioned by Rule 13 (3) of the Supreme Court,\textsuperscript{232} and that the plaintiff was not obliged to say more than he did.

Joinder of several claims in one proceeding, permitted under Section 44 of the Civil Practice Act,\textsuperscript{233} frequently involves the question as to which tribunal shall try the compound issues thus created. If the several claims are legal and equitable, or all equitable, but some of such nature as to require trial before a jury, the court is authorized to sever such claims by Section 51 of the act\textsuperscript{234} and to hold separate and appropriate hearings in order to preserve the rights of the parties to the proper type of hearing. Such right, however, may, according to \textit{Flynn v. Troesch},\textsuperscript{235} be expressly waived, in which case the court may, without a jury, hear all of the issues at one time.

Liberal use of the right to amend, in order that no man's claim might be lost through accidental error, is recognized by Section 46 (3) of the Civil Practice Act,\textsuperscript{236} but this right is qualified by \textit{Oetting v. Graham},\textsuperscript{237} which, following earlier practice, requires that such amendment shall not be permitted substantially to alter the case unless the defendant is given an opportunity to meet the new case by appropriate amended pleadings or unless he is afforded an opportunity to present additional testimony on the new issues thus created. The right to amend, likewise, may not be used as the basis for reviving claims barred by limitation, though the plaintiff in \textit{Nolan v. Sloan}\textsuperscript{238} urged that such should be the case. There the plaintiff confessed judgment upon two

\textsuperscript{231} The motion to dismiss made no mention of this ground, but it was, nevertheless, argued and passed upon by the trial court. Proper practice would require that the motion to dismiss enumerate the grounds relied on, Ill. Rev. Stat. 1939, Ch. 110, § 169.
\textsuperscript{232} Ill. Rev. Stat. 1939, Ch. 110, § 259.13 (3).
\textsuperscript{233} Ill. Rev. Stat. 1939, Ch. 110, § 168.
\textsuperscript{234} Ill. Rev. Stat. 1939, Ch. 110, § 175.
\textsuperscript{235} 373 Ill. 275, 26 N.E. (2d) 91 (1940).
\textsuperscript{236} Ill. Rev. Stat. 1939, Ch. 110, § 170 (3).
\textsuperscript{237} 373 Ill. 247, 25 N.E. (2d) 886 (1940).
\textsuperscript{238} 305 Ill. App. 71, 26 N.E. (2d) 990 (1940).
promissory notes against the makers thereof and also against several persons who had executed a guaranty upon the reverse side thereof. These guarantors subsequently successfully moved to vacate such judgment upon the ground that they had given no warrant of attorney to confess the same. Thereafter they moved to strike the complaint as failing to state a cause of action against them, the claim being based upon the note whereas their liability rested upon the annexed contract of guaranty. They were again successful. Thereafter the plaintiff filed an amended complaint setting forth the contract of guaranty, which was again attacked by motion to strike on the ground that the statute of limitations had run thereon. The trial court so found and dismissed the action as to the guarantors. On appeal, the plaintiff contended that since her original action had been instituted in apt time, the subsequent amendment was within the statute of limitations. It was held that the amended complaint did not merely amend an existing action begun in apt time, but in fact stated an entirely new cause, and hence, was properly barred.

The provisions regarding confession of judgment were involved in two cases. In the first, *Morris v. Levin*, the judgment was secured on a bond executed by the defendant. The latter, with full knowledge thereof, waited almost three months before moving for a permanent stay of execution on the ground that the obligation had, prior to judgment, been discharged in bankruptcy. His motion was granted over the plaintiff's objection that the defendant had been guilty of laches in failing to present his petition within the statutory period of thirty days. It was held that such statute did not apply, since, by the discharge in bankruptcy, the warrant to confess judgment had become *functus officio* and no valid judgment could be predicated thereon, hence, that prompt action to stay execution was unnecessary. In the other case the defendant, a resident of Whiteside County, exe-

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241 Ill. Rev. Stat. 1939, Ch. 77, §§ 82-83.

cuted certain judgment notes in that county. Thereafter the plaintiff took judgment by confession in the Superior Court of Cook County, which judgment the defendant, in apt time, moved to vacate, and also sought leave to plead to the merits and to file a counterclaim. Subsequently the defendant again moved to vacate the judgment on the ground that the court was without jurisdiction. Both motions were denied. On appeal the court recognized that the effect of Section 50 (5) of the Civil Practice Act\textsuperscript{243} was to deny the Cook County court power to render the judgment in the first instance, but held that the question of venue had been waived by the defendant’s initial motion which had operated as a general appearance.

The debate over the “fusion” between law and equity continues.\textsuperscript{244} Further ammunition was provided by the practical, though rather unorthodox, handling of the problem in \textit{Nikola v. Campus Towers Apartment Building Corporation},\textsuperscript{245} wherein the plaintiff had sued for personal injuries in the Circuit Court of Cook County on a complaint obviously stating a cause of action at law, hence properly triable before the law side thereof. The sheriff certified that service had been secured on the defendant by leaving a copy of the summons with an agent. Upon the defendant’s default, judgment was granted in the plaintiff’s favor. Execution was issued thereon more than thirty days after such judgment had been secured, and the defendant, on receipt thereof, petitioned the court to vacate such judgment and allow it to plead, contending the sheriff’s return was false. The plaintiff moved to dismiss such petition, thereby admitting the truth of such allegation, on the ground that since the application was not made within thirty days after judgment\textsuperscript{246} the defendant’s recourse should have been by motion in the nature of a writ of error \textit{coram nobis} authorized by Section 72 of the Civil Practice Act,\textsuperscript{247} resort to which would have been useless, inasmuch as at law the validity of the sheriff’s return is

\textsuperscript{243} Ill. Rev. Stat. 1939, Ch. 110, § 174 (5).
\textsuperscript{245} 303 Ill. App. 516, 25 N.E. (2d) 582 (1940).
\textsuperscript{246} Section 50 (7) Civil Practice Act, Ill. Rev. Stat. 1939, Ch. 110, § 174 (7).
\textsuperscript{247} Ill. Rev. Stat. 1939, Ch. 110, § 196.
conclusive after judgment, or else by a separate proceeding in equity to restrain the enforcement of the judgment. The trial court, nevertheless, vacated the judgment and gave the defendant leave to plead. On appeal from such order, it was held that the petition, admittedly ineffective under Section 72, could nevertheless operate as the equivalent of a complaint in equity, the court seeing no sound reason why the petition should be dismissed with direction to the defendant to file a complaint in equity and come back a few days later, when the relief would be granted, especially since the trial court was one possessing jurisdiction over causes at law and in equity.

The Supreme Court has placed its stamp of approval on Section 64 (3) of the Civil Practice Act by holding as had been the case in several earlier Appellate Court decisions, that the decree or judgment is presumed to be supported by evidence, and any one who attacks such a finding has the burden of preserving the evidence if he desires appellate review thereof. Of similar significance is Doellefield v. Travelers Insurance Company, in which the plaintiff appealed from an adverse judgment. The defendant contended that the errors of the trial court, if any, were not open to review, since the plaintiff had made no written motion for a new trial, as appears necessary by Section 68 of the Civil Practice Act. It was held that, since the section merely perpetuates the former practice, the language would be given the same effect as heretofore and be regarded as directory rather than mandatory. If a written motion is filed, however, the party is limited to the grounds therein assigned.

248 Owens v. Ranstead, 22 Ill. 161 (1859).
249 Defendant sought to dismiss the appeal on the ground that no final order was involved. The court, recognizing that if defendant had proceeded by complaint in equity and had secured a decree thereon such order would be a final order, came to the same conclusion on the instant petition.
250 Defendant expressly stated it had not sought and did not seek to invoke such section, 303 Ill. App. 516, 525, 25 N.E. (2d) 582, 587.
251 Ill. Rev. Stat. 1939, Ch. 110, § 188 (3).
252 Sauter v. Pickrum, 373 Ill. 541, 26 N.E. (2d) 844 (1940).
253 Note, 14 CHICAGO-KENT LAW REVIEW 367, listing the cases.
255 Ill. Rev. Stat. 1939, Ch. 110, § 192.
256 Ill. Rev. Stat. 1931, Ch. 110, § 77.
As was said before, the problem of securing appellate review still engages attention. For over one hundred years appellate courts in Illinois have reviewed errors of fact in civil cases, setting aside verdicts if necessary, though preserving the litigant's right to trial by jury by remanding the cause for further proceedings in a proper case. Legislation so providing, modified from time to time, and now cumulated in Section 92 of the Civil Practice Act, was recently challenged for the first time as being unconstitutional in Corcoran v. City of Chicago. The attack was unsuccessful, although the court recognized the necessity for remanding in order not to invade the right of trial by jury. The requirements for perfecting an appeal were clarified in Francke v. Eadie by making the filing of the notice of appeal in the trial court the principal jurisdictional factor, and holding that failure of the appellate record to disclose such fact could be cured by an additional transcript. A slight delay in filing the praecipe for record was also considered in Harris v. Sovereign Camp of Woodmen of the World, Inc., as being insufficient reason for dismissing the appeal. Of similar import was McDaniels v. Terminal Railroad Association, in which notice of appeal was filed eighteen days after rendition of judgment and a copy thereof was served three days later. The appellee sought to have the appeal dismissed for failure to serve notice within twenty days, claiming that since the appellant had acted under Section 82 of the Civil Practice Act, in such fashion as to make his

258 Ill. Rev. Stat. 1939, Ch. 110, § 216.
259 373 Ill. 567, 27 N.E. (2d) 451 (1940), cert. den. 61 S. Ct. 45 (1940), noted, post, Notes and Comments. Plaintiff therein, whose judgment was originally reversed and remanded, believing that a new trial would be of no service, requested the Appellate Court to strike the remanding portion of its order. His request was granted. Such action was necessary in order to secure review of the primary question, inasmuch as otherwise the decision of the Appellate Court would not have been a "final" one. Hartley v. Red Ball Transit Co., 344 Ill. 534, 176 N.E. 751 (1931).
261 302 Ill. App. 310, 23 N.E. (2d) 793 (1939). Note, 18 CHICAGO-KENT LAW REVIEW 290. Appellant filed its praecipe for record eleven days after filing its notice of appeal. Appellee moved to dismiss the appeal on the ground that such praecipe, under Rule 36 of the Supreme Court, Ill. Rev. Stat. 1939, Ch. 110, § 259.36, should have been filed within ten days and the consequent delay was fatal. The motion was denied.
263 Ill. Rev. Stat. 1939, Ch. 110, § 206.
notice of appeal operate as a supersedeas, he was obliged to complete the process and serve such notice within the twenty days allotted thereby. The court, in denying such motion, pointed out that the only provision relating to service of notice was to be found in Rule 34 of the Supreme Court, which required such service to occur within ten days after filing in the trial court and because this had been complied with the appeal could not be dismissed. Had the appellee contended that the notice had failed to operate as a supersedeas a different problem might have arisen.

Some other scattered decisions affecting procedure are interesting. In *McDougal v. Perry* a sole plaintiff instituted proceedings in forcible entry and detainer. During the pendency of the action, the plaintiff transferred her interest in the premises in question, and thereafter, before substitution of the assignees as plaintiffs, she died. When the assignees petitioned for leave to be substituted as plaintiffs, the defendant contended that the cause of action had been abated and could only be revived under the Abatement Act in favor of the heirs, which the assignees did not purport to be. The petitioners relied, however, on Section 54 of the Civil Practice Act and were granted leave to proceed. On appeal, it was held that the earlier provision of the Abatement Act was to be read in conjunction with the Civil Practice Act section, so that the action did not abate if either section warranted the substitution of a different plaintiff.

Pursuant to rule of the Municipal Court of Chicago the defendant in *Universal Credit Company v. Antonsen*, a replevin action, was ordered to reveal the whereabouts of the res, and, upon refusal so to do, he was punished for contempt of court. On appeal he contended that such rule was

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264 Ill. Rev. Stat. 1939, Ch. 110, § 259.34.
265 301 Ill. App. 272, 22 N.E. (2d) 727 (1939).
266 Ill. Rev. Stat. 1939, Ch. 57, § 11 provides that the Civil Practice Act shall apply to such proceedings.
268 Ill. Rev. Stat. 1939, Ch. 110, § 178 reads: “Where by reason of . . . assignment . . . after the commencement of a cause or proceeding . . . causing a change or transmission of interest . . . the action shall not abate . . . .”
an unlawful usurpation of legislative power by the Municipal Court in an effort to add to the remedies provided by the Replevin Act, but the Appellate Court held such provision was a regulation of practice and procedure, hence within the rule-making power of the court.

Shadows of a possible impending change in the law relating to remedies may have been forecast in *Susemiehl v. Red River Lumber Company*, from which it appeared that two suits had been instituted by the administrator against the same defendant, the first to recover for the wrongful death of his intestate, and the other to recover the damages to his estate by reason of the expenses incurred between the date of the accident and the date of the death which proximately resulted therefrom. The defendant moved to dismiss the second suit by reason of the pendency of the first case, contending that such first action provided plaintiff with his sole and exclusive remedy. The plaintiff appealed from an order sustaining the defendant's motion to dismiss. The Appellate Court felt obliged to sustain such order by reason of long established precedent, but gave the impression that had the question been a novel one the view found in other jurisdictions, that on such facts two distinct causes of action arise, might well have been adopted.

**EVIDENCE**

A controversy arose in the Municipal Court of Chicago over the use to be made of depositions taken by the plaintiff and not filed in court. Thereafter, the defendant obtained a rule upon the plaintiff to file them, but the plaintiff never used them. The depositions contained substantially the testimony which the two defendants personally testified to upon

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271 Subsequent to the period of this survey the decision was reversed by the Supreme Court, 374 Ill. 194, 29 N.E. (2d) 96 (1940), on the ground that such rule was unconstitutional, since it gave the plaintiff an additional remedy, hence altered the substantive rights of the parties and was not a mere rule of procedure. The court distinguished the situation from one in which defendant interfered with the property after official seizure thereof, which conduct, even without a rule, would be contempt of court.

272 305 Ill. App. 473, 27 N.E. (2d) 285 (1940), noted, post, Discussion of Recent Decisions.

273 Holton v. Daly, 106 Ill. 131 (1882).
the trial, and in spite of this fact, the defendant offered them, and they were received in evidence over the plaintiff’s objection. The Appellate Court held in *Home Life Insurance Company v. Franklin*\(^{274}\) that, under the circumstances, to read the depositions on the trial was error, for such use did not fall within the express authorization of Municipal Court Rule 149. Further, since the general rule is that depositions are taken *de bene esse*, subject to the contingency of the witness being unable to attend the trial, the spirit of the law was violated and, in effect, the testimony of the two defendants was given twice to the jury.

In *Weber v. Buck*,\(^{275}\) the rule (new in Illinois last year)\(^{276}\) that where a crime is charged in a civil suit, the proof to establish it need be only a preponderance of the evidence, was reiterated.

In *People v. Conzo*,\(^{277}\) the defendant, a woman, was interrogated by the grand jury, who were seeking information against two lawyers. She refused to answer questions and, when she again refused to answer before the court on the ground that her answers would tend to incriminate her, she was held in contempt. This case poses the old circular question of whether, since the witness need not explain how the answers would incriminate him, for such explanation might deprive him of his protection, it will not therefore be impossible for the commitment order to be so complete that when an appellate court examines it, it may determine whether the witness’s refusal was justified. The situation is not new, but no solution is offered to the judge in charge of the grand jury, whose commitment order is overridden.

In *Trustees of Schools v. Lilly*, an action in ejectment for alleged school lands,\(^{278}\) a presumption of fact based upon a sheriff’s deed, long-continued adverse possession, and payment of taxes, plus a presumption of fact that all school trustees, tax collectors, etc., know that section 16 is school

\(^{274}\) 303 Ill. App. 146, 24 N.E. (2d) 874 (1940).
\(^{275}\) 302 Ill. App. 218, 23 N.E. (2d) 759 (1939).
\(^{277}\) 301 Ill. App. 524, 23 N.E. (2d) 210 (1910).
\(^{278}\) 373 Ill. 431, 26 N.E. (2d) 489 (1940).
land unless sold, was more than the plaintiff trustees could overcome by relying upon the grant of section 16 of the State of Illinois as school lands, plus the absence of any evidence that a patent was ever issued to the premises in question.

Motion pictures as evidence[^279] received the approval of the Appellate Court again, and certain legal objections to technical treatment of the continuity of the film were happily disposed of in favor of the picture. A further objection that the motion picture operator had been an eyewitness of the scenes he had "shot" and could therefore testify as to what he saw (the pictures thereby becoming second-best evidence) was held invalid since the operator could not describe in detail just how the plaintiff was behaving as was done by the use of the camera. After all the trial lawyers have attended the "cinema" several times, it is to be expected that they will realize that even judges see moving pictures, and thus finally, the motion picture will grow up in the law of evidence.

**EQUITY**

Most of the important equity cases in the reviewing courts of Illinois during the year involved principally procedural questions. In the case of *Schuler v. Wolf*[^280] the question arose of the effect on a judgment for damages, awarded upon the dissolution of a temporary injunction, of a final decree granting the plaintiff's prayer for a permanent injunction. The plaintiff sued for temporary and permanent injunctions restraining the defendants from further performing certain contracts. A temporary injunction was granted and the Appellate Court reversed an order overruling a motion to dissolve. One defendant filed a suggestion of damages for the wrongful issuance of the injunction. The trial court thereafter awarded damages against the plaintiff in the amount of $1,065.96 and entered a decree sustaining a motion to dismiss the complaint. The plaintiff appealed from the order of dismissal directly to the Supreme Court, as a constitutional question was involved, and paid the award of damages pending the appeal. The Supreme Court decided

[^280]: 372 Ill. 386, 24 N.E. (2d) 162 (1939).
that the plaintiff was entitled to a permanent injunction.\textsuperscript{281} Thereupon the plaintiff petitioned the trial court to vacate the order assessing damages and sought to have the Supreme Court review the order dismissing the petition. The Supreme Court ruled that since no appeal was taken from the order assessing damages it had no jurisdiction to determine the issues presented.

The Illinois Injunction Act appears to authorize the award of damages for the issuance of a temporary injunction before the final disposition of the case.\textsuperscript{282} Since the issues which arise out of an application for a temporary injunction are not necessarily the same as those which the court must decide in granting a permanent injunction, the award of a permanent injunction does not always determine the propriety of the temporary order. Yet in the instant case it appears that the reasons given by the Supreme Court for the granting of permanent relief would be equally decisive of the question of whether temporary relief was proper. Apparently, the court takes the view that a decision upon the issues involved in dissolving the temporary injunction is necessarily independent of the final outcome of the case. Such a result is not required by the Injunction Act and would seem to be undesirable in a case like the present one. The court might have considered the question of damages as incident to its determination of the merits of the cause.\textsuperscript{283}

Another case of passing interest involving temporary injunctions was the decision of the Appellate Court, following the usual phrasing, that a temporary injunction mandatory in character is ordinarily improper.\textsuperscript{284}

A novel situation involving the remedy of interpleader was presented in \textit{Hatzenbuhler v. Modern Woodmen of America}.\textsuperscript{285} In this case an injunction was improperly obtained in an interpleader action restraining the prosecution of a suit

\textsuperscript{281} Schuler v. Board of Education, 370 Ill. 107, 18 N.E. (2d) 174 (1938) discussed in 18 \textit{CHICAGO-KENT LAW REVIEW} 5.
\textsuperscript{282} Ill. Rev. Stat. 1939, Ch. 37, § 12; People v. Eisenberg, 288 Ill. 304, 123 N.E. 532 (1919).
\textsuperscript{283} See comment 7 U. of Chi. L. Rev. 184.
previously started by one of the claimants. Upon the dissolution of the injunction, the plaintiff in interpleader obtained the dismissal of the interpleader action over the objection of the other claimant, who appealed. Thereafter the interpleader plaintiff filed an answer and counterclaim for interpleader in the original suit brought against it and obtained an injunction which had the effect of preventing the appealing claimant from perfecting his appeal. It was held that the granting of the injunction was error. The purpose of interpleader is to prevent, not promote, multiplicity of suits. The result seems proper in view of the fact that the plaintiff could have obtained an injunction affording it ample protection in the first interpleader action had it followed the proper procedure. After having been brought into the interpleader action at the instance of the plaintiff, it was inequitable to require the claimant to appear and prosecute its claim in a second suit. The equities did not favor granting the plaintiff injunctive relief.

One of the most interesting decisions of the Supreme Court during the period covered by this survey was that handed down in the case of *Lee v. Hansberry.* The problem involved the application of the doctrine of *res judicata* to representative suits. An action was brought to enforce a "restrictive agreement" whereby the parties covenanted that none of the property covered by the agreement should be sold, leased to, or permitted to be occupied by colored persons. The agreement contained a provision that it should be of no force and effect unless signed by 95 per cent of the property owners within the area affected. The defendant's answer set up the invalidity of the agreement because it was not signed by the requisite number of owners. The plaintiff contended that this question was *res judicata* by virtue of the decision in *Burke v. Kleiman.* In the latter case the plaintiff, wife of one of the defendants in *Lee v. Hansberry,* brought suit on behalf of herself and all others similarly situated to enforce the same agreement. The case was determined upon an agreed set of facts including a stipulation that the requisite number of owners had signed the agreement. The court held in *Lee v. Hansberry,* two justices dis-

senting, that the validity of the agreement was conclusively determined in *Burke v. Kleiman*.

It is possible that the result may be justified in view of the relationship which existed between certain of the parties to both suits, but the basis upon which the decision is placed seems unfortunate. The trial court in *Lee v. Hansberry* found as a fact that not more than 54 per cent of the property owners had signed the agreement. In the first case the issue was confined to whether or not the agreement continued to be enforcible in the light of changed conditions in the area involved.

Apparently these are the first cases in Illinois applying the device of the representative suit to restrictive covenants of this kind. Many objections can be voiced to the view taken by the majority in *Lee v. Hansberry*. The decision purports to hold that all signers of the agreement are estopped to question its validity, although most were not actually parties to the determination of this issue. The representative suit can become an oppressive device unless care is taken to see that the interests of all members of the class are adequately and fairly represented. In the instant case the binding force of the agreement was expressly made dependent upon its being signed by the requisite number of owners. It seems clear that the interests of those who wished to resist the validity of the agreement on this ground were not fairly represented in a suit involving a different issue where the parties stipulated that the requisite number had signed. The majority view permits the actual parties to the litigation by their mere stipulation to bind all other signers regardless of their desires or interests. The court might have decided the case on ordinary equitable principles. Since considerably less property than the parties to the agreement deemed essential was subject to its restrictive force, the court could have ruled that a decree enforcing the agreement would be ineffective to carry out its purpose.

As this survey goes to press, the Supreme Court of the United States has handed down a decision reversing *Lee v. Hansberry* on the ground that the action of the Supreme Court of Illinois in applying the doctrine of *res judicata* to these facts denies to other signers, not actual parties to the
first suit, the adequate protection of their interests to which due process of law entitles them. The opinion, written by Mr. Justice Stone, takes the position that neither the plaintiffs nor the defendants in *Burke v. Kleiman* were in position adequately to represent the other signers.\(^{288}\)

Two other cases involving traditional equity points of view should be mentioned. The Supreme Court refused to sanction the reformation of a deed which contained a mis-description of the land intended to be conveyed and which was given in consideration of the "love and affection" of a father for a daughter.\(^{289}\) The reason given was that equity will not reform a voluntary conveyance. In response to the argument that there was a meritorious consideration, the court said, citing prior Illinois cases, that to constitute a meritorious consideration the existing moral obligations must at some antecedent time have been a legal one. The decision in *Kent v. City of Chicago*\(^{290}\) may be noted as indicating that equity courts today have less hesitancy on policy grounds in restraining criminal prosecutions and in determining the issues of criminality incident to such relief than they used to exhibit.

**CONFLICT OF LAWS**

Two cases discussed at some length in the Survey for 1938-1939 came before the Supreme Court for final decision late in 1939. The decision in the case of *Berlingieri v. Berlingieri*\(^{291}\) has already received extended treatment.\(^{292}\) Because the defendant was an "international itinerant" with merely a technical domicile in Italy, the court refused to find that the domicile of the plaintiff-wife had shifted from Illinois upon her marriage.

Passing notice\(^{293}\) was given to a decision of the Appellate Court\(^{294}\) which refused recognition and enforcement to

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\(^{288}\) Hansberry v. Lee, decided November 12, 1940. Mr. Justice McReynolds, Mr. Justice Roberts, and Mr. Justice Reed concurred in the result. The decision of the Supreme Court of Illinois is commented on in 7 U. of Chi. L. Rev. 563 and 35 Ill. L. Rev. 213. The latter comment discusses the constitutional question.

\(^{289}\) Marvin v. Kelsey, 373 Ill. 589, 27 N.E. (2d) 469 (1940).

\(^{290}\) 301 Ill. App. 312, 22 N.E. (2d) 799 (1939).

\(^{291}\) 372 Ill. 60, 22 N.E. (2d) 675 (1939).

\(^{292}\) 18 CHICAGO-KENT LAW REVIEW 15; and 18 CHICAGO-KENT LAW REVIEW 178.

\(^{293}\) 18 CHICAGO-KENT LAW REVIEW 65.

an Oklahoma judgment for an amount in excess of the amount claimed in the pleadings. This decision was reversed by the Supreme Court\textsuperscript{295} upon the ground that the excessive amount of the judgment did not destroy the jurisdiction of the Oklahoma court and no other question was open to a court in Illinois. The Appellate Court had placed its decision upon certain Oklahoma decisions dealing with the effect of judgments not responsive to the issues. The Supreme Court found these Oklahoma cases were not in point. This view, which confines the court in the second state in the ordinary case to the issue of jurisdiction, is to be preferred.

The reverberations of the decision of the Supreme Court of the United States in the now famous case of \textit{Erie Railroad Company v. Tompkins}\textsuperscript{296} continue to be heard everywhere. The doctrine of this case was tangled with questions of public policy in the recent decision of the Circuit Court of Appeals in \textit{Stephenson v. Grand Trunk Western Railroad Company}.\textsuperscript{297} Suits for wrongful deaths of the plaintiff's husband and son were brought in the United States District Court for the Northern District of Illinois. The injuries causing the deaths occurred in Michigan, and the defendant relied upon the Illinois statute, which, as interpreted by the Supreme Court of Illinois, forbids the bringing of wrongful death actions in Illinois for deaths occurring outside of the state.\textsuperscript{298} It was admitted that the Illinois legislature has no power to restrict the jurisdiction of the federal courts but it was argued that the statute defined the public policy of Illinois and that the federal court was bound to recognize such policy under the decision in the \textit{Erie} case.

The court correctly ruled that the public policy of a state could not constitutionally impose binding limitations upon the jurisdiction of the federal courts. This ruling does not necessarily dispose of the matter, however. Public policy in the conflict of laws is a devise whereby the forum may refuse to apply the foreign law indicated by the usual conflict of laws rules. The proper use of the device requires the forum to consider only the public policy of its own state or

\textsuperscript{296} 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1937).
\textsuperscript{297} 110 F. (2d) 401 (1940); cert. granted, 60 S. Ct. 1101 (1940).
\textsuperscript{298} Ill. Rev. Stat. 1939, Ch. 70, § 2.
country and to employ it only when the enforcement of a cause of action arising elsewhere or the application of foreign law would have undesirable effects in such state or country.\textsuperscript{299} In cases arising in state courts, difficulties occur only with respect to the task of interpreting public policy.

Federal and state courts possess independent jurisdiction over the same territory, and this fact creates an additional problem in employing the public policy device. As has been indicated above, the applicable public policy is ordinarily that of the state or country whose judicial power the forum exercises. If this point of view is carried into effect a federal court should consider only the national policy. Yet such a result is unsatisfactory in many cases, particularly where jurisdiction attaches on the ground of diversity of citizenship. With respect to many matters concerning which the different states have different policies, no national policy exists. Probably, it would not be desirable for the federal courts to initiate a practice of formulating such policies in hope of achieving national unity with respect to these matters.\textsuperscript{300}

The Erie case appears to postulate three generalizations bearing upon the problem in hand: First, the jurisdiction\textsuperscript{301} of federal courts is independent of the states in which such courts sit; second, the procedure in such courts is entirely a federal matter; third, the "rules of decision" are those provided by state law, where no federal question is involved. Public policy may be simply a question of whether or not the application of a rule or principle of the law of another state will cause harmful effects in the country of the forum, or it may be a question of whether a cause of action should be permitted in consideration of its possible effects. In either event, it is not a question of the existence of jurisdiction as the court in the instant case seemed to believe.

The Supreme Court of the United States in the Erie decision appears to have intended to place the federal courts, in diversity of citizenship cases, upon the same footing as the

\textsuperscript{299} For a valuable discussion of public policy see A. Nussbaum, "Public Policy and the Political Crisis in the Conflict of Laws," 49 Yale L. J. 1027 (1940).

\textsuperscript{300} The arguments concerning the place of public policy in the interstate field are discussed by Nussbaum in the article cited in note 299 at 1052, et seq.

\textsuperscript{301} In the "power" sense, of course.
courts of the states in which they sit with respect to the decision of cases involving no federal questions. Such courts necessarily, under this view, become interpreters of the policy of the states in which they sit and whose laws they apply. Public policy considerations may arise in connection with the application of almost any kind of legal rules or principles. In the great bulk of such matters, if the federal courts occupy essentially the same position as do the state courts, they must regard as authoritative the pronunciations of policy delivered by the highest courts of the states. But in view of the usual role of public policy in conflict of laws an argument exists for excluding state court decisions declaring state policy from the operation of the Erie case.

Indeed it may be said that even in cases in which jurisdiction attaches on the ground of diversity of citizenship there may be questions of federal policy as well as state policy. In such situations federal policy must control to the extent that it is in conflict with state policy. Rules designed to protect state courts against being imposed upon in certain ways may sensibly be regarded as procedural in character and disregarded under the Erie case.

Thus it will be seen that when the court in the case under consideration excluded the statute from having any effect upon the jurisdiction of the district court the solution of the problem was not complete. Since the statute deprived the state courts of jurisdiction in such actions there could be no authoritative rulings of such courts on the question of whether Illinois public policy dictated that such courts decline to exercise jurisdiction. Under the analysis suggested above, the Circuit Court of Appeals was required to answer this question for itself in the light of what it might think the effects would be in Illinois of allowing such actions. And the purpose of the statute would be important here. In addition,

302 Notice the attitude of the same Circuit Court of Appeals in the recent case of Schwager v. Schwager, 109 F. (2d) 754 (1940). In this case the court indicated that it would be bound by Wisconsin decisions on the question of whether or not provisions of a trust instrument intended to prevent participation by a divorced wife of the beneficiary under a spendthrift clause were against public policy. In the absence of any Wisconsin decisions on the question, the court followed what it believed to be the weight of authority. See comments on this case in 53 Harv. L. Rev. 1059 and 38 Mich. L. Rev. 1123.

the court was required to consider whether or not federal policy or statutes required the district court to exercise the jurisdiction which admittedly it possessed. The Erie case left unsettled many questions and has emphasized the importance of the use of the substance and procedure technique to avoid its doctrine.\textsuperscript{304} The role of public policy in conflict of laws cases arising in the federal courts because of diversity of citizenship is one of the important unsolved problems.

**CREDITORS' RIGHTS**

Several Illinois Supreme Court cases in this field should be noticed. In *Blaszynski v. Starczewski*\textsuperscript{305} three parcels of lots were levied upon and sold. Parcel No. 1 was a homestead. It would seem that No. 1 was first offered separately, then in combination with the other parcels, but no bid received. Finally all three parcels were sold en masse for $1,600. The court denied the purchaser the right to maintain ejectment on parcel No. 1, because homestead had not been extinguished in accordance with paragraph 9 of the Exemptions Act,\textsuperscript{306} which provides that no sale shall be made unless a greater sum than $1,000 is bid for a homestead. The court indicated that the value fixed on the homestead parcel by appraisal was immaterial and furnished no basis for presuming that at least $1,000 of the $1,600 was bid for the homestead parcel.

In the second case, *Ingalls v. Raklios*,\textsuperscript{307} the Supreme Court has nullified the unfortunate decision of the same name in the Appellate Court.\textsuperscript{308} The latter court had held that despite the amendment to Section 5 of Chapter 77, dealing with body executions,\textsuperscript{309} the pleadings might be searched to de-


\textsuperscript{305} 373 Ill. 140, 25 N.E. (2d) 884 (1940).

\textsuperscript{306} Ill. Rev. Stat. 1939, Ch. 52, § 9.

\textsuperscript{307} 373 Ill. 404, 26 N.E. (2d) 468 (1940).

\textsuperscript{308} 301 Ill. App. 1, 21 N.E. (2d) 856 (1939). Note, 18 CHICAGO-KENT LAW REVIEW 61.

\textsuperscript{309} Cahill's Ill. Rev. Stat. 1933, Ch. 77, § 5: “No execution shall issue against the body of the defendant, except when the judgment shall have been obtained for a tort committed by such defendant, or unless the defendant shall have been held to bail upon a writ of capias ad satisfaciendum [respondendum] as provided by law, or he shall refuse to deliver up his estate for the benefit of his creditors.”

Ill. Rev. Stat. 1939, Ch. 77, § 5: “No execution shall issue against the body of the defendant except when the judgment shall have been obtained for a tort
termine whether or not malice was the gist of the action. Mr. Justice Burke, dissenting, pointed out that the principal object of the amendment was to obviate this practice by requiring a specific finding that malice was the gist of the action. In reversing this decision, the Supreme Court stresses the fact that under the amendment the duties of the clerk in issuing the writ are purely ministerial and that he may not search the pleadings. The correctness of this decision seems obvious.

The Supreme Court handed down another decision, bearing obliquely upon Section 5 of the Judgments act, in Greene v. Noonan,\textsuperscript{310} in which it held that where the declaration consists of several counts, one or more of which state a cause of action the gist of which is malice, with others based upon negligence only, and the verdict is general, without specifying the count on which it is based, the presumption is that the verdict is based upon a cause of action of which malice is the gist.

All that it was necessary for the court to decide was that the refusal of the trial court to direct a verdict on the malice count for want of evidence constituted prejudicial error. Unfortunately, the court seems to have gone out of its way to revive certain phases of the objectionable doctrine of Jernberg v. Mix\textsuperscript{311} and In re Petition of Blacklidge,\textsuperscript{312} which the amendment was designed to correct.

In People v. West Town State Bank,\textsuperscript{313} the Supreme Court introduces its decision with a querying statement of the issue:

Where the receiver of a banking corporation timely disaffirms a lease to the bank, containing no provision for damages for breach of a covenant to pay rent, can the lessor maintain a claim for rent accruing after such disaffirmance or for anticipatory damages for breach of covenant?

The court then answered its own question in the negative committed by such defendant, and it shall appear from a special finding of the jury, or from a special finding by the court, if the case is tried by the court without a jury, that malice is the gist of the action, and except when the defendant shall refuse to deliver up his estate for the benefit of his creditors. [As amended by act approved July 11, 1935. L. 1935, p. 937."

\textsuperscript{310} 372 Ill. 286, 23 N.E. (2d) 720 (1939). Note, 28 Ill. B. J. 184.

\textsuperscript{311} 199 Ill. 254, 65 N.E. 242 (1902).

\textsuperscript{312} 359 Ill. 482, 195 N.E. 3 (1935).

\textsuperscript{313} 373 Ill. 106, 25 N.E. (2d) 509 (1940), noted, post, Discussion of Recent Decisions.
and reversed the Appellate Court which had held that the landlord was entitled to allowance of his claim for damages accrued prior to the hearing. The decision of the circuit court, allowing claims for repairs, for attorney’s fees incurred in the enforcement of the covenants, and for a commission paid to a real estate broker who rerented the property, was reinstated, but with one change. This modification was a generous proviso that the landlord would be secured against rent losses before any distribution to the stockholders of the lessee-bank, in the event that all the other claims were paid. The denial of the right to damages for loss of rent was placed on the ground that, owing to the absence of a liquidated damage clause, the claim was speculative at the time of the appointment of the receiver, but this line of reasoning is a little difficult to reconcile with the allowance of a brokerage commission for the rerental of the premises after the receiver’s disaffirmance of the lease. It is submitted that a more just result would have been attained by the evaluation and allowance of the claim with due regard to the fortuitous nature of the damages.

In Rowoldt v. Cook County Farmers Mutual Insurance Company the Appellate Court laid down the bald proposition, seemingly for the first time, that after a judgment debtor has waived his right to have realty taken first, the garnishee is not entitled to file the special defense of the existence of real estate.

Shades of Blakeslee’s Storage Warehouses, Inc. v. City of Chicago stalked the Appellate Court when that court held in Northwestern Yeast Company v. City of Chicago, that a property owner’s failure to protest against the payment of a condemnation judgment without including interest thereon, and acceptance of the amount of the judgment allegedly without knowledge of the right to interest did not preclude subsequent recovery of such interest. Two justices overruled the contention of the third that the acceptance of

315 305 Ill. App. 93, 26 N.E. (2d) 903 (1940).
the amount of the judgment without protest constituted some type of accord and satisfaction. They state that "the plaintiff could not have the intention to waive a right of which it had no knowledge." The Turk case,\(^3\)\(^1\)\(^8\) establishing the right to interest under such circumstances was not decided until after the payment in question.

A case of vital concern, to Chicago lawyers at least, is that of Trade Bond & Mortgage Company v. Schwartz.\(^3\)\(^1\)\(^9\) The Uniform Stock Transfer Act\(^3\)\(^2\)\(^0\) provides in part:

A creditor whose debtor is the owner of a certificate [of stock] shall be entitled to such aid from courts of appropriate jurisdiction, by injunction and otherwise, in attaching such certificate or in satisfying the claim by means thereof as is allowed at law or in equity, in regard to property which cannot readily be attached or levied upon by ordinary legal process.

The Appellate Court held that the Municipal Court of Chicago, in a case in which it had issued judgment and execution, was a "court of appropriate jurisdiction." The Appellate Court conceded that the Municipal Court was not a court of general chancery jurisdiction, but based its decision primarily upon the inherent power of a court of record to make its judgments "binding and operative."

An interesting but unsuccessful experiment in the realm of garnishment was attempted in Cohen v. North Avenue State Bank.\(^3\)\(^2\)\(^1\) After obtaining a decree against forty-eight stockholders of an insolvent bank, the judgment creditors instituted a single garnishment suit against twenty-seven different banks in the Chicago area; the affidavit therefore was made by an attorney for the creditors. After condemning the suit as a "fishing expedition" the court observed, We think it is so self-evident that even the court will take judicial notice of the fact that one practicing lawyer in Chicago did not have just reason to believe that the 27 banks were indebted to the 48 persons.

In a similar case, however, the creditors fared better. In Hillmer v. Chicago Bank of Commerce\(^3\)\(^2\)\(^2\) a single garnishment proceeding against four brokerage firms for the pur-

\(^3\)\(^1\) Turk v. City of Chicago, 352 Ill. 171, 185 N.E. 258 (1933).
\(^3\)\(^2\)\(^0\) Ill. Rev. Stat. 1939, Ch. 32, § 429.
\(^3\)\(^2\)\(^1\) 304 Ill. App. 413, 26 N.E. (2d) 691 (1940).
\(^3\)\(^2\)\(^2\) 304 Ill. App. 430, 26 N.E. (2d) 728 (1940).
pose of reaching debts due 154 judgment debtors was sus-
tained. The cases seem to indicate several collateral proposi-
tions pretty clearly: (1) that garnishment will lie as well
upon an equitable decree as upon a legal judgment, (2) that
the number of parties who may be joined in garnishment
would seem to be limited only to the field of plausibility of
the affidavit, and (3) that the mere circumstance that sepa-
rate executions have been returned is immaterial to such
multiple garnishment.

Several other miscellaneous decisions affecting credit-
ors' rights should be mentioned briefly. In Bailey Meter
Company v. Owens-Illinois Glass Company,323 the Seventh
Circuit Court of Appeals held that a subcontractor who fur-
nishes material to a principal in Illinois but files no lien
therefor within sixty days, may not later, after the principal
has paid the contractor and upon finding that the material
furnished is defective, revive the period for filing claims by
repairing the defective material without cost. In Berry v.
Ackerman324 the Illinois Appellate Court held that a delay
of sixty-three days between the filing of the affidavit and
issuance of the writ on one hand and the making of the
statutory publication on the other, does not deprive the court
of jurisdiction. In Vandever v. Hill325 the Appellate Court
applied to judicial sales made under direction of the probate
court the chancery rule for holding liable defaulting pur-
chasers at judicial sales. The court states that rule to be as
follows:

It has long been the law of this State in chancery cases, that in order to
charge a purchaser under a judicial sale who refuses to complete his
purchases, with a deficiency arising on a resale, the first sale should be
reported to the court, the report confirmed, and an order served on the
purchaser to pay the purchase money within a given time or in default
the premises would be resold at his risk.

The sale of real estate in the probate court was one to pay
debts, and the plaintiff, who had not complied with the chan-
cery rule, unsuccessfully contended for a different rule for
a sale by a court not of general chancery jurisdiction.

323 108 F. (2d) 469 (1939).
324 305 Ill. App. 554, 27 N.E. (2d) 551 (1940), noted, post, Discussion of Recent
Decisions.
325 302 Ill. App. 18, 23 N.E. (2d) 68 (1939).
Two more sales tax cases may be added to the list of exclusions following the Revzan case. In *P. H. Mallen Company v. Department of Finance*, the Supreme Court held the Retailers' Occupational Tax Act not applicable to sales of medicines and pharmaceutical preparations to physicians, hospitals, and sanitariums. The court was unable to see any distinction between such sales and sales of optical supplies to optometrists. It had already held the latter exempt, upon the ground that the vendees did not "use and consume" the merchandise within the meaning of the act. Following the same line of reasoning, in *C. & E. Marshall Company v. Ames* the court excluded from the operation of the act sales of jeweler's supplies to persons and firms engaged in the business of assembling and repairing watches and clocks.

In keeping with the trend of interest from substantive principles of inclusion to procedural matters, the Supreme Court has passed upon several of the latter problems. Probably the most controversial point of sales tax procedure has been the time within which returns must be made by the Department of Finance, practically speaking, in order to serve as a basis for additional assessment. The modification "practically speaking" is employed advisedly. Ordinarily the only reliable evidence in such matters consists of the taxpayer's records. Obviously such evidence is not available after the taxpayer has destroyed those books. Under the act as originally enacted, the taxpayer was required to preserve his records "for at least two years." Inasmuch as returns corrected by the department are made prima facie correct by the statute, it follows that after the taxpayer has destroyed his books and stripped himself of the means of overcoming such presumption, the returns as corrected

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327 372 Ill. 598, 25 N.E. (2d) 43 (1940).
328 Ill. Rev. Stat. 1939, Ch. 120, § 440 et seq.
330 373 Ill. 381, 26 N.E. (2d) 483 (1940).
331 Ill. Rev. Stat. 1935, Ch. 120, § 446.
by the department are for all practical purposes conclusive. In *Hoffman & Morton Company v. Department of Finance*, the Supreme Court, with one justice dissenting, held that such corrections may not be made after the two years have passed and the taxpayer has destroyed his books. The position of the department and of the dissenting justice, and, one may suppose, of the circuit judge who was reversed, was that a statute of limitations does not run against the state. In refutation of this the majority calls attention to the exception which exists when the estate itself indicates that a particular limitation shall run against it, an exception conceded by the minority. The majority has no hesitancy about finding such an obvious intention here, observing that "the State does not enact laws for the entrapment of its citizens." Inasmuch as taxpayers are now required to preserve their records for three years and inasmuch as the making of assessments is limited to the same period (in the absence of fraud), the question is not likely to arise in connection with transactions subsequent to the new statutory arrangement. There are, however, numerous situations which will be controlled by the present decision, which, incidentally, seems obviously correct and just.

In *Novicki v. Department of Finance* the Supreme Court held that the Department of Finance could not sustain an assessment with hearsay evidence after the taxpayer had overcome the prima facie presumption of correctness of the assessment by introducing his own books. The taxpayer operated a tavern and the department introduced statements copied from books of beer vendors. In contending that this hearsay was admissible, the department, and presumably the nisi prius judge, relied upon the provision of the statute that the department should not be bound by technical rules of evidence. The Supreme Court construed this common provision in the customary manner, that is, as not including within the category of "technical rules of evidence" the hearsay rule. The department hoped to bring its proceedings

332 373 Ill. 116, 25 N.E. (2d) 513 (1940).
333 Ill. Rev. Stat. 1939, Ch. 120, § 446.
334 373 Ill. 342, 26 N.E. (2d) 130 (1940).
335 Ill. Rev. Stat. 1939, Ch. 120, § 447.
within an exception to the general rule recognized in a long line of tax cases, which in the instant case the court admits hold that

an officer who is empowered to review tax assessments is not bound by the evidence introduced by the taxpayer, but has a right to act upon his own knowledge and judgment and to use any available means of information; and that he may hear affidavits or unsworn testimony without giving an opportunity for cross-examination.

In the instant case the Supreme Court limits these decisions to proceedings involving the determination of the value of property for property tax purposes, and, of course, distinguished the proceedings of the department as involving the assessment of an excise tax laid upon the privilege of doing business.

The problem of notice and hearing was considered again in an entirely different type of tax case, and one of far greater significance, *Barnett v. Cook County*. With Mr. Justice Wilson alone dissenting, and that without opinion, the Supreme Court invalidated the second Pre-adjudication Tax Act upon the ground that it involved a denial of due process of law, in that it would have the effect of allowing in personam judgments to be entered against nonresidents without personal service or sufficient notice. It was upon the general ground of lack of due process for insufficiency of notice that the first act of 1937 was stricken down in *Griffin v. County of Cook*, a year ago. It had been generally supposed that this defect was remedied by adding to the publication of notice the giving of notice in the statute itself of the date for the confirmation proceeding. The advantages which would flow from testing the tax rate in advance of spreading the tax are well known and obvious. The legislation is much needed. Yet the language of the opinion is curiously disheartening. No feasible means of remedying the

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336 People v. Millard, 307 Ill. 556, 139 N.E. 113 (1923); People v. St. Louis Bridge Co., 291 Ill. 95, 125 N.E. 752 (1920); In re Maplewood Coal Co., 213 Ill. 283, 72 N.E. 786 (1904); Pratt v. Raymond, 188 Ill. 469, 59 N.E. 16 (1900); Earl & Wilson v. Raymond, 188 Ill. 15, 59 N.E. 19 (1900); Sterling Gas Co. v. Higby, 134 Ill. 557, 25 N.E. 660 (1890).
337 373 Ill. 516, 26 N.E. (2d) 862 (1940).
338 Ill. Rev. Stat. 1939, Ch. 120, § 812 et seq.
defect in the act is suggested, and the further defects raised in the special concurring opinion in the Griffin case are not even discussed. From reading the opinion in the Barnett case one receives rather definitely the impression that the court regards the legislation as incurable and the present decision as its death knell. Nevertheless, one cannot refrain from expressing the fond hope that discouragement will not prevent further attempts to save the legislation and secure its benefits.

A decision of perhaps equal interest and importance is that in *Hart v. Toman*,\(^{340}\) in which the Supreme Court seemingly lays down the bald and broad proposition that the stock of foreign corporations is not taxable in Illinois if such corporations have paid a tax within this state upon tangible personal property. The decision is contrary to the practice heretofore prevailing; hence, quite revolutionary. Although the court stressed the fact that 97.7901 per cent of all the tangible property of the corporation was located within the state of Illinois, seemingly the decision would be equally applicable to a situation where only 1 per cent of the property was located within the state. The decision is based upon the construction of the proviso in subdivision 4 of Section 3 of the Revenue Act then in force:

Provided, that in all cases where the tangible property or capital stock of any company or association is assessed under this Act, the shares of capital stock of such company or association shall not be assessed or taxed in this State.\(^{341}\)

The question of whether or not this proviso is limited to domestic corporations, to a provision concerning which it is apparently a positive, is answered in the negative. The court treats the "or" as disjunctive, and holds that since domestic corporations are, and foreign corporations are not, subject to our capital stock tax, the provision with respect to tangible property must have reference to foreign corporations. By implication the decision would seem to praise and damn the legislature in the same breath, to praise it by attributing to it an amazing perspicacity with respect to the probable ef-

\(^{340}\) 373 Ill. 462, 26 N.E. (2d) 501 (1940), noted, post, Discussion of Recent Decisions.

\(^{341}\) Ill. Rev. Stat. 1939, Ch. 120, § 502.
fect of its language, and to damn it by attributing to it an intention of creating a capricious taxing situation. If the stock of a ten million dollar foreign corporation is owned solely by residents of Illinois the entire ten million dollars worth of stock is taxable in Illinois if the corporation has no tangible property here assessable, but is not if the corporation has ten dollars worth of property assessable somewhere in the state. Inasmuch as the foreign corporation is not subject to capital stock tax either, it finds itself with a decided advantage over domestic corporations. The situation obviously demands legislative consideration and action.

Two other tax cases are worthy at least of passing notice. In *People v. Armiger*,42 a revocable trust had been created in 1923 for payment of income to a beneficiary for life with a remainder over, with provision that investment of funds or change of principal should be made only with consent of the settlor or of the beneficiary after the settlor's death. The Supreme Court held that the transfer was not one "intended to take effect in possession or enjoyment at or after such death," and so not taxable except as to property transferred into the trust subsequent to the amendment of 1933.43 Specific effect was given to the proviso of the amendment that it should not apply to transfers prior to July 1, 1933. In the other case, *People v. Morton*,44 the court held that the Morton Arboretum was not subject to taxation. The donors of the trust thus exempted as charitable had established a foundation to carry on practical scientific research in horticulture and arboriculture in an outdoor museum under natural conditions, and to record and preserve the results obtained.

**PUBLIC UTILITIES**

The Illinois Supreme Court has handed down what would seem to be its most important rate decision, at least in recent years, in *Peoples Gas Light & Coke Company v. Slattery*.45 The Illinois Commerce Commission had, in substance, by various orders, refused to permit an increase in

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42 372 Ill. 415, 24 N.E. (2d) 355 (1939).
43 Ill. Rev. Stat. 1939, Ch. 120, § 375 (3); Laws 1933, p. 889.
44 373 Ill. 72, 25 N.E. (2d) 504 (1940).
45 373 Ill. 31, 25 N.E. (2d) 482 (1940). "No substantial federal question" noted by the United States Supreme Court, 84 L. Ed. (Adv.) 649 (1940). Note, 18 CHICAGO-KENT LAW REVIEW 279.
Chicago gas rates. The gas company had successfully enjoined the orders of the commission in the Circuit Court of Cook County. That court had reviewed the evidence and, among other things, upon a basis of conflicting evidence, set a value on the company's property higher than that set by the commission. The Supreme Court reversed the lower court and sustained the commission. We may pass over the interesting treatment of the *Smyth v. Ames* problem, and note particularly the position of the Supreme Court on the question of judicial review. In dismissing the chancellor's valuation because based upon conflicting testimony the court says, "We cannot say the value fixed by the commission was shown to be unreasonably low." On the matter of depreciation allowance the court observes that the commission is presumed to be an expert body itself, and the fixing of the amount allowable for annual depreciation was entirely within its province, which we are not at liberty to disturb unless we find its action arbitrary or unreasonable.

Such language would seem to come very close to flying directly in the face of the *Ben Avon* and *St. Joseph's Stockyards* decisions and to place the court in the position of following precisely that course which caused the Pennsylvania Supreme Court to be overruled in the former case. Certainly it constitutes going beyond the strong presumption of the *St. Joseph's* case, even if it be assumed that on a chancery appeal the Appellate Court may substitute its discretion for that of the chancellor and itself make the "independent determination" of the issue of confiscation. It would seem here that the court has not only set aside the "independent determination" of the circuit court but felt itself not at liberty to make an independent determination of the facts underlying the issue of confiscation. Why the Supreme Court noted "no substantial federal question" and declined to review, one may only speculate. Perhaps it is because the complexion of that court has changed. Perhaps it is because it feels that the tenuousness of the line between the "inde-
pendent determination” and the “strong presumption” has been demonstrated in the curious situation of the St. Joseph’s case itself. Perhaps the court felt that no great injustice had been done and simply did not care to pass upon the perplexing question again at this time.

In *Village of West City v. Illinois Commercial Telephone Company*,[349] the Illinois Supreme Court invalidated a municipal ordinance which revoked the original franchise permitting the telephone company to use the public streets, in return for benefits to be derived by the inhabitants and free service for the village itself, and sought to impose an annual charge of a dollar a pole. The court rejected the contention that the original agreement was a mere license and further held immaterial the fact that the original grantee had dissolved subsequent to assigning its franchise to the present company.

In *Barry v. Commonwealth Edison Company*,[350] the Appellate Court has decided what would seem to be the only Illinois case on the problem of whether or not a decision of a utility commission operates by analogy to *res judicata* with respect to subsequent litigation. Seemingly the defendant had disconnected the plaintiff’s electric service on the ground that he was procuring unmetered current for his tavern by means of a “jumper” on his electric meter. Service was restored only upon the payment in part and agreement to pay the balance of $800 for such current. The plaintiff then filed a complaint before the Illinois Commerce Commission, attempting to recover the money paid and for other relief. Upon dismissal of the complaint, he filed a complaint in the Superior Court of Cook County in three counts: (1) to recover the sums paid, (2) for damage to his business, and (3) for slander. The Appellate Court sustained the dismissal of the complaint on the ground that the plaintiff was precluded by the Commission’s dismissal. While the court does not use the term *res judicata*, it does say:

The essential fact which plaintiff seeks to establish as a basis for a money judgment has finally and conclusively been determined to the contrary in the proceeding before the commission.

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Upon the general problem, however, the decision is greatly weakened by the specific provision in the statute that failure to appeal from the order of the commission shall be deemed a waiver of a right to have the matter heard by a court.\footnote{351}

*Rockwell Lime Company v. Illinois Commerce Commission*\footnote{352} involves another interesting problem of administrative procedure in connection with our utilities commission. The rather involved situation simmers down to a refusal on the part of that commission to take jurisdiction of a reparation proceeding based upon intrastate charges. The ground of refusal was that the Interstate Commerce Commission had assumed control of such rates to remove discrimination against interstate commerce. The Illinois Supreme Court affirmed the decision of the Circuit Court reversing the Illinois Commerce Commission and ordering it to award reparations. The gist of the decision seems to be that the order of the federal commission was not properly introduced into evidence, but merely referred to. The Supreme Court evidently regards the situation as identical with that in the Abilene case\footnote{353} and treats the federal order solely as fact to be treated as such. This is probably fair enough; yet, one cannot but wonder at the fact that the opinion does not even suggest the possibility that an order of the Interstate Commerce Commission may stand on a somewhat different basis from ordinary facts and that something analogous to judicial notice might be taken of it.\footnote{354}

**MISCELLANEOUS**

Several important questions regarding the exercise of the veto power of the Governor were passed upon by the Supreme Court during the past year. Under the Constitution of 1870 the Governor has ten days (Sundays excepted) within which to consider bills passed by the General Assembly and may sign such bills, allow them to become laws without his

\footnote{351} Ill. Rev. Stat. 1939, Ch. 111 1/2, §§ 38, 64, 68, 72 and 76.

signature, or return them to the legislature.\textsuperscript{355} It is further provided that where the General Assembly, by their adjournment, prevent the return of bills, such bills shall be filed, with the Governor's objections, in the office of the Secretary of State, within ten days after such adjournment, or become laws. The question arose as to whether the ten-day period began to run from the date bills were presented to the Governor or from the date of a \textit{sine die} adjournment of the General Assembly.\textsuperscript{356}

In a comprehensive opinion, the court held that the ten-day period begins to run from the date a bill is presented to the Governor.\textsuperscript{357} In arriving at this conclusion the court divided bills into four classes: first, bills presented more than ten days before adjournment; second, those presented on the day of adjournment; third, those presented less than ten days before adjournment; and fourth, those presented after adjournment. Bills falling in the third and fourth classes presented the problem of when the ten-day period began to run. The court reconciled the apparently conflicting language of the constitutional provisions and held that, in the case of bills falling in the third class, adjournment does not operate to increase the length of time allowed the Governor, and in the case of bills falling in the fourth class, adjournment does not operate to shorten the period.\textsuperscript{358} The last point required the court to hold, also, that bills may be presented to the Governor after a \textit{sine die} adjournment. The arguments of the court are the usual ones based upon the doctrine of separation of powers. In a later case involving the same question the court held that the Governor has no power to refuse to accept a bill presented after adjournment.\textsuperscript{359}

In an interesting opinion handed down late in 1939 the Supreme Court upheld the constitutionality of the statute making women eligible for jury service.\textsuperscript{360} Although the Constitution of 1870 guarantees the right to trial by jury as at

\textsuperscript{355} Ill. Const. 1870, Art. V, § 16.
\textsuperscript{356} Apparently prior governors had uniformly treated the day of presentment as the day on which the period began to run.
\textsuperscript{357} People v. Hughes, 372 Ill. 602, 25 N.E. (2d) 75 (1940).
\textsuperscript{358} 18 CHICAGO-KENT LAW REVIEW 320.
\textsuperscript{359} People v. Hughes, 373 Ill. 144, 25 N.E. (2d) 801 (1940).
\textsuperscript{360} People v. Traeger, 372 Ill. 11, 22 N.E. (2d) 679 (1939).
common law, the court took the view that qualifications of jurors were no part of the constitutional right. Thus the legislature had power to modify such qualifications. Such cases exhibit the technique of adapting the common-law tradition to modern ways of life.\(^6\)

Three other cases, treated more extensively elsewhere in the pages of the present issue of this journal, deserve passing mention here also. Village of South Holland v. Stein\(^3\) was one of the current crop of cases involving the organization known as "Jehovah's Witnesses." The Supreme Court, citing such recent decisions of the Supreme Court of the United States as Lovell v. City of Griffin,\(^3\) held a village ordinance unconstitutional as violating the guaranties of freedom of speech and of the press, if applied to require a license for the distribution of books or pamphlets.\(^6\)

In the important rate case of Peoples Gas Light & Coke Company v. Slattery\(^3\) the Supreme Court, among other matters, decided that the provisions of the Public Utility Act must be interpreted to permit independent injunctive action in equity even where a statutory appeal from a rate of the Commerce Commission is not taken. This court indicated that this interpretation (which renders the statutory provision completely inoperative) is necessitated in order to avoid depriving equity courts of their constitutional jurisdiction and to avoid an unconstitutional denial of the right of judicial review of orders of the Commerce Commission.\(^8\) The case of Corcoran v. City of Chicago\(^3\) upholding the constitutionality of the provision of the Civil Practice Act\(^8\) providing that the Appellate Courts may review "error of fact, in that the judgment, decree or order appealed from is not sustained by the evidence or is against the weight of the evidence," is fully discussed elsewhere in the present issue.\(^3\) The provision was assailed on the ground that it takes from the successful party in jury cases his right to a jury trial.

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\(^3\) See discussion, supra, under Municipal Corporations—Police Power.

\(^3\) See Notes and Comments, post.
Finally, one further case dealing with the preferred position of the state in litigation may be mentioned. In *People v. Bradford*\(^{770}\) it was decided, two justices dissenting, that the doctrine of estoppel is not applicable to the State acting in its sovereign capacity. Prior Illinois cases appeared to throw some doubt upon this position and the court went into the facts to decide whether there might here be an exception to the rule as stated. Bradford was Director of the Department of Conservation and had deposited funds to his official credit in a bank. The bank failed and only a partial recovery was secured in an action by the State for a preference. Bradford was not a party to this litigation. The estoppel was asserted in this subsequent action brought against him and his surety to collect the balance. State law required Bradford to pay funds received into the State Treasury and prescribed the form of currency for such funds. The State Treasurer refused to accept checks and drafts from him because of these provisions. At the direction of the Governor, Bradford procured a cashier’s check for the amount of his deposit and presented it to the State Treasurer. The check was not presented for payment until three days later, on which day the bank issuing the check closed. The court held that these facts did not require an exception to the general rule that the State, acting in its governmental capacity, cannot be estopped by the acts and conduct of its officers. Since estoppel and similar defenses are ordinarily not available against the State, the Bradford case is of interest as indicating a view that there may be situations where exceptions are justified.\(^{371}\)

\(^{770}\) 372 Ill. 63, 22 N.E. (2d) 691 (1939).

\(^{371}\) See 35 Ill. L. Rev. 113.