Survey of Illinois Law for the Year 1940-1941

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SURVEY OF ILLINOIS LAW FOR THE YEAR 1940-1941

PERSONS

MUNICIPAL CORPORATIONS

In People v. Village of Wilmette, the Supreme Court blocked upon technical grounds an attempt upon the part of the Village of Wilmette to incorporate within its arid confines the tiny oasis of "No Man's Land." This unincorporated triangular tract of some twenty-two acres is wedged in between Wilmette and Kenilworth on the shore of Lake Michigan. In 1939, the General Assembly passed a "general" statute, actually describing the tract in question by every means short of metes and bounds, authorizing annexation by any contiguous municipality. The court invalidated the statute upon the sole ground that the subject matter was not included in the title. One cannot but wonder whether, if the statute had not been invalid for this reason, it would not...

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 calling attention merely to cases and developments believed significant and interesting. The period covered is that of the judicial year, embracing from 374 Ill. 1 to 376 Ill. 485; from 305 Ill. App. 627 to 310 Ill. App. 485; and from 111 F. (2d) 913 to 119 F. (2d) 784.
2 375 Ill. 420, 31 N.E. (2d) 774 (1941).
3 Ill. Rev. Stat. 1939, Ch. 24, § 408b: "Whenever, any contiguous unincorporated territory, containing thirty (30) acres or less is bounded on one side by any navigable body of water and otherwise is wholly bounded by two or more cities, villages or incorporated towns, and there were not more than 200 qualified voters residing therein on June 1, 1939, such territory may be annexed by any one of such cities, villages or incorporated towns by the passage of an ordinance to that effect." [Punctuation sic].
4 The act was entitled: "An Act to provide for the annexation of unincorporated territory which is entirely surrounded by incorporated territory." The tract in question here, of course, was bounded on one side by water.
have been invalidated as "special legislation," particularly in view of the inability under the general statute of a municipality to incorporate territory without the consent of a majority of the owners.

Upon the facts of the instant provision a very interesting dilemma might arise. Not only might territory incorporated thereunder subsequently divorce itself from the municipality under the Disconnection Act of 1935, allowing disconnection under certain circumstances of an area of twenty acres or more, but certain territory granted disconnection under the latter act might thereafter be reincorporated under the special statute. This process of incorporation and disconnection might conceivably go on ad infinitum. It should be noted in this connection that the application of the Disconnection Act of 1935 has been broadened and clarified during the year by the Supreme Court in Illinois Central R. Co. v. Village of South Pekin, by permitting to be included within the definition of area several "tracts" owned by different parties, and without regard to their use.

The ill-fated Chicago Board of Education tax anticipation warrants of 1929 came before the Illinois Supreme Court once more, and probably for the last time, in Leviton v. Board of Education of City of Chicago. No orderly method of liquidation having been prescribed in either the statute or ordinance authorizing the issuance of the warrants, the Board of Education paid off warrants in full as presented as rapidly as it received its 1929 taxes. The taxes so collected fell some $10,000,000 short of retiring all of the warrants. A statute authorizing the issuance of bonds to raise the difference was invalidated by the Supreme Court in 1935 as not being for a corporate purpose, inasmuch as the warrants were a lien only upon the 1929 taxes and not a general obligation of the Board of Education. Subsequently many unappealed judgments were taken against the Board by the holders of the unpaid warrants, and finally in 1937, the legisla-

5 Ill. Rev. Stat. 1941, Ch. 24, §§ 7-1 et seq.
6 Ill. Rev. Stat. 1941, Ch. 24, §§ 7-40 to 7-43.
7 374 Ill. 431, 29 N.E. (2d) 590 (1940).
8 374 Ill. 594, 30 N.E. (2d) 497 (1940); note, 36 Ill. L. Rev. 216.
tured again authorized the issuance of bonds,\textsuperscript{11} doubtless feeling that such bonds might be valid because the judgments would constitute general obligations of the Board. These bonds were invalidated in the present decision. The Court reiterated its position in the Berman case, and avoided the effect of the judgments by holding them to be "presumptively fraudulent," since permitted upon a theory already disapproved by the Supreme Court. Assuming that the position of the court is correct in rejecting theories based upon tort, upon the ground that the school boards are "quasi-municipal" corporations, and as such not liable in tort, there would still seem at least two well-supported theories upon which a just result might have been reached. A quasi-contractual theory might have been employed, inasmuch as the Board of Education has had the use of the money, and unjust enrichment has resulted. An even simpler and more logical theory would seem to be that uniformly applied in Illinois to similar cases involving special assessment bonds, i.e., that the Board of Education received the 1929 taxes as a trustee, obligated to distribute the same ratably among the holders of the warrants.\textsuperscript{12} This was the theory applied by the Circuit Court of Appeals with respect to these same warrants. The holders of some of these warrants were given relief by that court in \textit{Board of Education of City of Chicago v. Norfolk & Western Ry. Co.},\textsuperscript{13} and an accounting by the Board is still in progress in that litigation. The fear of the Illinois Supreme Court seemed to be that the method here employed might be used as a device for avoiding statutory debt limitations — a fear which tends to dwindle when one remembers that legislative authority is a prerequisite to the issuance of bonds such as those in issue. One wonders if even greater danger may not lurk in the cavalier brushing aside of judgments as "presumptively fraudulent." Since there would seem to be little difference between expenditure of money for other than a public purpose and the granting of unconstitutional tax immunity, this latest decision might seem an ominous rever-

\textsuperscript{11} Ill. Rev. Stat. 1939, Ch. 122, §§ 327.62-327.67.


\textsuperscript{13} 88 F. (2d) 462 (1937).
sal of the attitude of the Court toward *res judicata* taken in *Brown v. Jacobs.* 14

An excellent statement of the trust theory above referred to will be found in *Friedman v. City of Chicago,* 15 finally released by the Supreme Court just six days before the decision in the Leviton case:

Under the Local Improvement Act in this State the proceeds of special assessments are trust funds for the payment of the bonds issued for the cost of an improvement and a bondholder whose bonds are past due is entitled, in equity, to have his pro rata share of the installment that has been collected paid to him with interest.

The issue litigated in that case, however, was not the trust fund theory, which passed unquestioned, but the problem of whether or not retrospective effect would be given the amendment to the Local Improvement Act permitting the payment of special assessments with bonds even where the amounts of bonds exceed the amounts of assessments and interest. The court held that the amendment was inapplicable to bonds issued prior to the effective date of the amendment.

Several cases involving elections, and election officials and their tenures may be worthy of notice. In *Stockholm v. Daly,* 16 the Supreme Court held that the statute 17 requiring ballots to be preserved for six months and then destroyed, provided that if any election contest is then pending the ballots shall not be destroyed until the contest is finally decided, does not make mandatory the destruction of the ballots at the end of the six months' period where a number of prosecutions for violations of the election laws are pending, even though no election contests have been filed. The attitude of the court was that the destruction of the ballots under such circumstances might seriously hinder, if not prevent, the proper prosecution of the contempt charges. Two justices dissented, emphasizing the importance of averting all threats to the secrecy of the ballot, and expressing the opinion that the writ of mandamus should issue to permit the destruction of the ballots not actually involved in the pending cases.

14 367 Ill. 545, 12 N.E. (2d) 10 (1937); note, 17 CHICAGO-KENT LAW REVIEW 64.
15 374 Ill. 545, 30 N.E. (2d) 36 (1940).
16 374 Ill. 441, 29 N.E. (2d) 1010 (1940).
17 Ill. Rev. Stat. 1941, Ch. 46, §§ 59 and 316.
In quo warranto proceedings brought by a defeated candidate, the Appellate Court, in *People v. Quilici,*\(^{18}\) refused to hold invalid an election to fill a vacancy on the Municipal Court of Chicago. The Municipal Court Act requires such vacancies to be filled at the next regular election.\(^{19}\) Inasmuch as the only positions to be filled at the election were six judgeships on the Superior Court and the vacancy in question, and there was no contest in the Superior Court election, the Board of Election Commissioners, twenty-five days before the election, reduced the number of polling places from 3,648 to 648. The court rejected the contention that this was not the next regular "election" because an election requires a contest; sustained the propriety of the reduction in the number of polling places; held that the constitutional right to vote of anyone residing within the precinct for thirty days next preceding the election had not been abridged; and indicated that at all events a candidate cannot stand by and take his chances at the polls and then attack the election if he is unsuccessful.

In *People v. Lipsky,*\(^{20}\) the Appellate Court was called upon to determine whether or not the City Civil Service Act\(^{21}\) impliedly repeals the provisions of the City Election Act\(^{22}\) empowering city boards of election commissioners to appoint their employees with county court's consent and approval. The court decided in the negative, i.e., that election employees are not subject to civil service, indicating that there was no necessary repugnancy between the two statutes, and stressing the fact that repeal by implication is not favored.

In *People v. City of Chicago,*\(^{23}\) the Supreme Court had occasion to pass upon a novel problem of municipal tenure. Petitioners in mandamus were appointed July 10, 1931, as members of the board of examiners of stationary engineers for the City of Chicago. The appropriation ordinances of 1932 and 1933 reduced the compensation of such members below that appropriated in 1931. The present suit brought for the

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\(^{18}\) 309 Ill. App. 466, 33 N.E. (2d) 492 (1941).
\(^{19}\) Ill. Rev. Stat. 1941, Ch. 37, § 364.
\(^{21}\) Ill. Rev. Stat. 1941, Ch. 24½, §§ 39 et seq.
\(^{22}\) Ill. Rev. Stat. 1941, Ch. 46, §§ 159 et seq.
\(^{23}\) 374 Ill. 157, 28 N.E. (2d) 93 (1940).
purpose of compelling the City to pay the difference, was based upon the constitutional prohibition against diminution during such term of a municipal officer who is elected or appointed for a definite term of office. By general ordinance, the City had fixed at two years the terms of officers not otherwise determined. The portion of the Cities and Villages Act providing for the creation of such offices also authorized their discontinuance by the council at the end of any fiscal year. The act also provided:

The compensation of all officers shall be by salary, as fixed in the annual appropriation bill, by the City Council, and the compensation of no officer shall be altered during the same fiscal year.

The Supreme Court reversed the order of the Superior Court granting mandamus and held that

excepting officers whose terms of office and salaries are fixed by statute, the legislature intended by the sections quoted above, to stabilize the salaries of officers of cities and villages for only the fiscal year.

The last session of the General Assembly passed the Revised Cities and Villages Act, to go into effect January 1, 1942. No analysis of the new act will be attempted here. It may be stated, however, that this body of statutory material has been substantially reduced in volume and the whole rationally classified into eighty-seven separate “articles.” Apparently, duplicatory and overlapping provisions, as well as innumerable corrective acts and special acts cast in general form, have been eliminated. These physical gains will be sufficiently appreciated by anyone who has been compelled to work with this confused body of materials. Improvements of a less mechanical type will doubtless be disclosed for appreciation by use of the new revision and, it is hoped, by a study and analysis beyond the scope of this survey.

24 Ill. Const. 1870, Art. IX, § 11: “The fees, salary or compensation of no municipal officer who is elected or appointed for a definite term of office, shall be increased or diminished during such term.”
29 In addition, a number of miscellaneous amendments and changes of a minor character have been made in the old cities and villages statutes. Laws 1941, Vol. 1, p. 319 et seq.
The validity of Section 52 of the Business Corporations Act, permitting a corporation to amend the articles of incorporation, was involved in Kreicker v. Naylor Pipe Company, particularly insofar as the provision affects the right of a corporation organized under an earlier statute to create new classes of stock having rights and preferences prior and superior to classes of stock already outstanding. The conditional nature of the corporate contract, not only as between the corporation and the state, but also as between the corporation and the shareholder, was recognized, and, in view thereof, it was held that an amendment properly adopted pursuant to said Section 52 did not interfere with the "vested rights" of a holder of preferred stock, and hence that the statute was not unconstitutional.

An interesting problem respecting the right to vote corporate shares of stock held by co-trustees was involved in People ex rel. Courtney v. Botts, in which case the shares belonging to the decedent had been devised in trust to a corporate and a personal trustee. The shares had been duly transferred on the corporation's books into the names of such persons jointly. It was held that, at least so far as quo warranto proceedings were concerned, the voting of such stock required the joint action of both trustees, and any attempt by one of them to vote all or any part of the shares

31 374 Ill. 364, 29 N.E. (2d) 502 (1940). The corporation, organized in 1919, originally possessed a capital structure consisting of cumulative preferred stock and common stock. In 1936, apparently in order to remove unpaid accumulations on the preferred, the corporation amended the articles to create a new class of prior preferred stock and offered the same, by way of exchange, for cancellation of the old preferred stock and accumulations. Plaintiff, a preferred stockholder, sued to have such amendment declared null and void and to enjoin proceedings thereunder. Held: Complaint dismissed for want of equity. Note, 8 U. of Chi. L. Rev. 134.
32 376 Ill. 476, 34 N.E. (2d) 403 (1941). The action incidentally involved the problem whether quo warranto proceedings to determine the right of a corporate director to hold office could become moot by reason of the expiration of the term of such office pending appeal. The rule as applied in mandamus proceedings, illustrated by People ex rel. Lawrence v. Village of Oak Park, 356 Ill. 154, 190 N.E. 286 (1934), and in certiorari proceedings, National Jockey Club v. Illinois Racing Commission, 364 Ill. 630, 5 N.E. (2d) 224 (1935), was rejected as not applicable to quo warranto, whether affecting public or so-called private rights; hence the proceedings were not moot.
was a nullity. The unusual feature of the case, however, concerned the effect to be given to a provision in the will which gave the corporate trustee the power "to vote so much, and so much only, of the stock . . . as may be sufficient to elect one director. . . ." The court refused to consider the effect of such provision in the quo warranto proceedings, holding the corporate records were controlling on the legal right to vote. In the light of the current practice of corporation stock transfer officials to insist upon having certified or authenticated copies of all documents showing the right of the fiduciary to hold shares in such capacity, it is not readily apparent how the fact of issuance of shares in the name of the trustee could override the effect of provisions in the trust instrument or will, if otherwise valid, limiting or affecting the power of such fiduciary to vote such shares.

The exclusive control over corporate dissolution proceedings vested in the Attorney General by Section 82 of the Business Corporations Act, which includes the power to stipulate to vacate orders entered therein, was vindicated by People ex rel. Cassidy v. James Karban & Company, Inc. In that case, after decree of dissolution had been entered, the corporation, through the chairman of the board of directors, moved to vacate such decree on the ground of lack of personal service, which motion was granted, apparently without objection of the Attorney General. Thereupon a stockholder in the corporation, upon intervening petition, charged that the corporation director who had so moved was without authority to act in that fashion, was in fact acting in opposition to the stockholders who had determined on liqui-

34 376 Ill. 476 (at p. 482), 34 N.E. (2d) 403 (at p. 405).
35 It was indicated that such problem should be left for a court having competent jurisdiction—presumably in a suit to construe the will, or on application of the trustee for directions. 376 Ill. 476 (at p. 484), 34 N.E. (2d) 403 (at p. 406).
36 Ill. Rev. Stat. 1941, Ch. 32, § 157.30, requires transfer to the trustee in order to allow the fiduciary to vote.
37 That such provisions may render the corporation liable for an unauthorized transfer of shares, see Wooten v. Wilmington & W. R. Co., 128 N.C. 119, 38 S.E. 298, 56 L.R.A. 615 (1901).
38 Ill. Rev. Stat. 1941, Ch. 32, § 157.82.
40 In an answer to the intervening petition, the Attorney General indicated that a part payment of the unpaid franchise taxes, the cause assigned for dissolution, had been made and that the balance would be forthcoming if the order vacating the decree was permitted to stand. 307 Ill. App. 310 (at p. 318), 30 N.E. (2d) 149 (at p. 152).
The stockholder sought to reinstate the original decree of dissolution. The challenge of the Attorney General to such intervening petition, on the ground aforesaid, was upheld, and the intervenor was directed to seek appropriate relief elsewhere.41

The right of a creditor of a closed bank to enforce the superadded liability of a stockholder therein still presents problems, as was seen in Burnett v. West Madison State Bank,42 in which, some six years after closing of a consolidated bank,43 an attempt to collect such liability was met by the defense of the statute of limitations.44 While recognizing that the enforcement of such liability may be defeated by too long a delay, the court pointed out that the cause of action against the stockholder, though resting upon a separate constitutional foundation,45 is, nevertheless, so connected with the transaction which creates the relationship of creditor against the bank itself, as to be enforceable against the stockholder just as long as the same could be regarded as actionable against the corporation and no longer. Where different provisions for limitation might exist as to the several creditors,46 the responsibility is on the stockholder sued to show, by affirmative defense,47 which of the several provisions applies. The effect of the decision, insofar as it provides a guide to future litigation, has been considerably altered by a new limitation statute,48 enacted in 1941, which pur-

41 It is difficult to see how a minority stockholder, such as the intervenor appears to be, could secure relief, inasmuch as voluntary dissolution proceedings under Ill. Rev. Stat. 1941, Ch. 32, § 157.75, may be undertaken only upon consent of all the stockholders, or, under Ill. Rev. Stat. 1941, Ch. 32, § 157.76, only upon resolution first adopted by the board of directors with subsequent approval thereof by the vote of at least two-thirds of the outstanding shares.

42 375 Ill. 402, 31 N.E. (2d) 776 (1941), reversing 305 Ill. App. 113, 26 N.E. (2d) 881 (1940).

43 The creditor's claim was against a bank which had ceased to accept deposits on November 12, 1929, having then transferred its assets and liabilities to another institution which did not close until June 11, 1931. Neither acceptance of dividends in liquidation of the latter, nor long delay was regarded as sufficient to show a novation releasing the stockholders of the former institution.

44 Ill. Rev. Stat. 1941, Ch. 83, § 16, which fixes a five-year period on all civil actions not otherwise provided for.


47 A motion to strike the complaint and to dismiss the suit filed under Section 48 of the Civil Practice Act, Ill. Rev. Stat. 1941, Ch. 110, § 172, was regarded as insufficient in the instant case in the absence of an affirmative showing on the face of the complaint that such cause was in fact barred and no supporting affidavit, introducing such matter, was presented.

48 Laws 1941, Vol 1, p. 272; Ill. Rev. Stat. 1941, Ch. 16 1/2, §§ 6a-6h.
ports to establish a one-year limitation on actions to recover the superadded liability, whether based on claims already in existence or which may mature in the future. If constitutional, the new act apparently relieves former stockholders, whose shares are transferred more than one year prior to closing of the defunct bank, from the shadow of liability which has hung over them hitherto.\(^49\) Even in the absence of such limitations, the provisions of the Administration Act regarding claims against deceased stockholders’ estates,\(^50\) together with the discharge of such administrator or executor after due administration, will serve as an effective bar to the enforcement of such superadded liability against the estate under the decision in *Lewis v. West Side Trust & Savings Bank*.\(^51\)

Two other decisions may be worthy of brief mention. In *Highway Mutual Casualty Company v. Stern*,\(^52\) an opportunity was presented to apply Section 8 of the Business Corporations Act\(^53\) dealing with the defense of ultra vires, but the court relied on an earlier decision\(^54\) and, reaching the same result as the statute, rejected such defense where the transaction was not intrinsically illegal and had been fully performed by the person suing. In so holding, however, the court permitted recovery by an assignee for premiums under a contract of insurance issued by a business corporation which had not been organized under, nor had complied with, the provisions of the Insurance Code.\(^55\) While the latter statute was inapplicable in the instant case, since the contract had been issued prior to 1937, the decision should be analyzed carefully to prevent it from becoming a precedent for future recoveries in similar, but more recent, situations. In *Frank-

\(^{49}\) The act does not purport to affect the existing limitation statutes as between the creditor and the banking institution. Laws 1941, p. 274; Ill. Rev. Stat. 1941, Ch. 16\(\frac{1}{2}\), §6d.

\(^{50}\) Ill. Rev. Stat. 1941, Ch. 3, § 356.

\(^{51}\) 376 Ill. 23 (at p. 45), 32 N.E. (2d) 907 (at p. 918) (1941). Certain of the defendants were sued in their capacities as executors, though they had theretofore duly administered the estates of their decedents and had been formally discharged. The decree, assessing the liability and requiring payment thereof in due course of administration, was reversed on the ground that, upon such discharge, the executor is “funtus officio” and cannot be sued in the absence of fraud, accident or mistake.

\(^{52}\) 306 Ill. App. 506, 29 N.E. (2d) 281 (1940); note, 29 Ill. B.J. 263.


\(^{54}\) Prudential Insurance Co. v. Richmond, 364 Ill. 234, 4 N.E. (2d) 76 (1936).

\(^{55}\) Ill. Rev. Stat. 1941, Ch. 73, § 733.
lin Process Company v. Western Franklin Process Company, the question arose of the right of the parent corporation to share as a creditor in the assets of the subsidiary undergoing liquidation on an equal footing with other creditors. It was contended that the claim of the parent corporation should be subordinated on the ground the subsidiary was a mere instrumentality of the former, but the court refused to apply such rule in the absence of a showing that the other creditors had suffered some special injury by reason of the acts of the parent corporation, and held that the latter was entitled to participate on a parity with the other creditors.

While the general structure of the Business Corporations Act has been left undisturbed, the recent General Assembly has made some minor amendments thereto. Thus Section 6 now empowers the corporation to acquire its own shares, if redeemable, by either redemption or by purchase at not to exceed the redemption price, provided such purchase does not reduce the remaining assets below the amount required by Section 58. When shares are so acquired, they shall not be voted at any meeting, nor counted in determining the total number of outstanding shares, though, if held by the corporation in a fiduciary capacity, such limitation is inapplicable. The requirement that notice of stockholders meetings be mailed in a sealed envelope has been deleted, probably in order to permit the use of second-class mailing privileges. The method of determining the closing of transfer books and fixing the record date has been redrafted, although the terms are substantially as heretofore. Failure to compile a list of stockholders prior to any meeting, as required by Section 32, shall not invalidate any action taken thereat, though the officer at fault remains liable to any stockholder damaged thereby. The criminal liability of a director who votes for the improper declaration of any divi-

56 308 Ill. App. 302, 31 N.E. (2d) 364 (1941); note, 36 Ill. L. Rev. 229.
dend or distribution is now removed if he acts in good faith upon certain statements furnished to him by the corporate officers or agents.\textsuperscript{64} To clarify any doubt, the stockholder's right to have resort to mandamus proceedings to compel an inspection of the corporate books and records is expressly made unconditional in-so-far as duration or extent of ownership is concerned, although the statutory right of examination remains as heretofore.\textsuperscript{65}

Voluntary dissolution of a corporation may have been delayed in the past by reason of the fact that the existence of pending suits would prevent the filing of the necessary articles.\textsuperscript{66} By amendment to Section 80,\textsuperscript{67} the articles of dissolution may now be executed and filed despite such fact, provided adequate provision is made to satisfy any judgment, order, or decree which may be entered in any such suit. Proceedings to bring about involuntary dissolution may now be instituted on three additional grounds: (a) failure to appoint or maintain a registered agent, (b) failure to file statement of change of registered office or registered agent, and (c) failure to report the issuance of authorized shares, provided such failure continue for a period of thirty days or more after the conduct has occurred or omission made.\textsuperscript{68} Such proceedings may be abated, if, after institution and prior to decree, the defaults are remedied by compliance with the Act.\textsuperscript{69} Section 94 of the Business Corporations Act,\textsuperscript{70} which formerly provided for the survival of remedies against the corporation after its dissolution, has also been amended to permit actions by the corporation upon rights or claims existing in its favor for a like period.\textsuperscript{71}

The act, as now amended, also permits the Secretary of State to make a slight increase in the charge for furnishing

\textsuperscript{66} Ill. Rev. Stat. 1939, Ch. 32, § 157.80(e).
\textsuperscript{70} Ill. Rev. Stat. 1941, Ch. 32, § 157.94.
\textsuperscript{71} Laws 1941, Vol. 1, p. 429; Ill. Rev. Stat. 1941, Ch. 32, § 157.94. Had such a provision been in existence at the time, the decision in Chicago Title & Trust Co. v. 4136 Wilcox Building Corp., 302 U.S. 120, 58 S. Ct. 125, 82 L. Ed. 147 (1937) might have been different.
certified copies.\textsuperscript{72} One other slight change may be noticed: a drug store or pharmacy may now be operated by a corporation provided "any two statutory officers . . . are each registered pharmacists in good standing in this State."\textsuperscript{73} Here-tofore, all the officers were required to be registered pharmacists.\textsuperscript{74}

\textbf{MASTER AND SERVANT}

\textit{Labor Law}

Law was made from an Illinois decision when on February 10, 1941, the Supreme Court of the United States over-ruled the Supreme Court of Illinois in \textit{American Federation of Labor v. Swing},\textsuperscript{75} to hold that the right to picket was constitutionally protected as an expression of free speech which could be voiced regardless of the existence of a so-called labor dispute. The state court had held that since no labor dispute existed within the meaning of the Illinois Anti-Injunction statute,\textsuperscript{76} the injunction could issue.\textsuperscript{77} At the same time, however, the same court upheld, in \textit{Milk Wagon Drivers' Union v. Meadowmoor Dairies, Inc.},\textsuperscript{78} the right of the Illinois courts to issue injunctions in labor disputes where

\textsuperscript{72} Laws 1941, Vol. 1, p. 431; Ill. Rev. Stat. 1941, Ch. 32, \textsection 157.141(a). The increase is from twenty-five to thirty-five cents per page.
\textsuperscript{73} Laws 1941, Vol. 1, p. 861; Ill. Rev. Stat. 1941, Ch. 91, \textsection 36.
\textsuperscript{74} Ill. Rev. Stat. 1939, Ch. 91, \textsection 36.
\textsuperscript{76} Ill. Rev. Stat. 1941, Ch. 48, \textsection 2a.
\textsuperscript{77} Swing v. American Federation of Labor, 372 Ill. 91, 22 N.E. (2d) 857 (1939); notes, 18 CHICAGO-KENT LAW REVIEW 18; 19 CHICAGO-KENT LAW REVIEW 290; 28 Ill. B.J. 145; 7 U. of Chi. L. Rev. 32. The Illinois Anti-Injunction Act provides that no injunction shall be issued "in any case involving or growing out of a dispute concerning terms or conditions of employment" restraining any person or persons "from peaceably and without threats or intimidation being upon any public street, or thoroughfare or highway for the purpose of . . . communicating information . . . ." The interpretation placed on the statute by the Illinois Supreme Court was, of course, binding in the Supreme Court of the United States, and its decision was rendered without reference to the statute. The effect of the decision is to render useless such statutes as that of Illinois. Statutes patterned after the Norris-La Guardia Act (29 U.S.C.A. \textsection 101-115) go further.
there is violence or a continuing threat thereof, even to the extent, if prior acts justified it, of enjoining all picketing.

*Ellingsen v. Milk Wagon Drivers’ Union* 79 and *Lawrence Avenue Building Corporation v. Van Heck* 80 called for an application of these rules. In the former case, where numerous store owners sought to enjoin the Milk Wagon Drivers’ Union from picketing plaintiffs’ stores simply because plaintiffs bought their milk from vendors and drivers who belonged to another union, the Supreme Court sustained that part of the order of the trial court which enjoined “such conversation or action as would amount to threats, or attempts to intimidate,” but excluded “from its scope such peaceful picketing as the evidence and the findings of the master indicate the pickets were . . . by instruction of the appellant union, to carry on.” In the latter case, where the plaintiff, an owner and operator of an apartment building, sought to enjoin picketing of its building by a janitors’ union which was attempting to force an employee of plaintiff 81 into the union, the Supreme Court dissolved the restraining order issued by the lower court pursuant to the direction of the Appellate Court, 82 since it found insufficient violence or threats thereof to justify the order. 83 The uselessness of the Anti-Injunction Act is made apparent by these decisions.

The 1939 Prevailing Wage Act 84 requiring that not less than the per diem prevailing wage paid for work of a similar character in the locality in which the work is to be performed shall be paid to laborers on all contracts for the construction of public works when entered into by the State or a political subdivision thereof, was held unconstitutional by the Su-

79 377 Ill. 76, 35 N.E. (2d) 349 (1941), Justice Farthing specially concurring.
80 377 Ill. 37, 35 N.E. (2d) 373 (1941), Justice Farthing specially concurring.
81 The employee whom the defendant was trying to force into the union was not in fact the janitor for the building. His wife had been hired for that purpose. The court said: “Appellee’s evidence is that the wife . . . was employed to do all the janitor work while the husband sought other work outside, though he did odd jobs around the building such as painting, repairing and cleaning.”
82 Lawrence Avenue Bldg. Corp. v. Van Heck, 305 Ill. App. 486, 27 N.E. (2d) 478 (1940). The case had been heard by the Appellate Court at its October, 1938, term. The decision, reversing the trial court, was rendered May 20, 1940.
83 The court said: “We are of the opinion from the findings of the master and the evidence supporting it, that this is not a case which shows threats or violence, either to indicate a secondary boycott or to justify restraining peaceful picketing under the recent decisions of the Supreme Court of the United States hereinbefore referred to.”
84 Ill. Rev. Stat. 1939, Ch. 48, §§ 39n to 39s.
The Supreme Court in *Reid v. Smith.* The act contemplated that the "public body . . . shall ascertain the general prevailing rate of per diem wages in the locality," and defined the prevailing wage as "The rate determined upon as such rate by the public body awarding the contract." It further provided penalties for the failure of a contractor to abide by the prevailing rate, with power in the public body to hear complaints of violations of the act, from which appeals would lie to the courts. The court concluded that the administrative standards set up were too indefinite; that judicial powers were delegated to the public bodies; and that the law had "the effect of materially increasing costs, or limiting those who might be employed in the construction of public works."

In *Mayhew v. Nelson,* the 1931 Prevailing Wage Act had been held invalid on the ground that the act required prevailing wages based upon the skill of individual laborers and that no standard of skill had been set up in the act. This at least left room for an amendment. However, the third ground of the decision in the Reid case would seem to sound the death knell of all such legislation. None the less, an attempt was made by the legislature in its 1941 session to avoid the effects of the decision by the enactment of a new Prevailing Wage Act, which was directed to at least two of the court's objections in the Reid case.

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85 375 Ill. 147, 30 N.E. (2d) 908 (1940), Justices Farthing and Murphy dissenting; notes, 54 Harv. L. Rev. 497; 29 Ill. B. J. 308; 36 Ill. L. Rev. 233; 89 U. of Pa. L. Rev. 1095.


88 Ill. Rev. Stat. 1939, Ch. 48, § 39o.

89 It was admitted by the pleadings that in the instant case the minimum wage specified was from 30 to 75 cents per hour above that for which laborers could reasonably have been hired.


92 Ill. Rev. Stat. 1941, Ch. 48, §§ 39s-1 to 39s-12.

93 In the first place, the legislature defined prevailing wages as "the wages paid generally, in the locality in which the work is being performed, to employees engaged in work of a similar character," Ill. Rev. Stat. 1941, Ch. 48, § 39s-2 (see discussion supra) and set up administrative machinery for collecting data thereon, Ill. Rev. Stat. 1941, Ch. 48, § 39s-9. In the second place, it removed all penalties save the criminal one (which was in the prior Act as well—Ill. Rev. Stat. 1941, Ch. 48, § 39s-6; Ill. Rev. Stat. 1939, Ch. 48, § 39r), and gave any laborer who was paid less than the prevailing wage a right of action for the amount of his shortage, characterizing such action as a suit for wages and stating that "any and all judgments entered therein shall have the same force and effect as other judgments for wages." Ill. Rev. Stat. 1941, Ch. 48, § 39s-11.
In other cases, the constitutionality of the Firemen’s and Policemen’s Minimum Wage Acts of 1937 were upheld. The 1939 amendment of the Firemen’s Act, providing for an additional tax and the adoption of the act by a referendum was, however, declared unconstitutional. The same amendment to the Policemen’s Act was not drawn in question in the Littell case, but that amendment, together with the amendment to the Firemen’s Act was repealed by Senate Bill 10 in the 1941 General Assembly in its general amendment to the Cities and Villages Act.

The Appellate Court held in People v. Maggi that beauty shop operators were engaged in “trade and industry” within the meaning of the Illinois Minimum Fair Wage Standards Act for women and minors, against the contention that since the adoption of the beauty culture license act the educational requirements for beauty culturists made their occupation a profession.

WORKMEN’S COMPENSATION

The legislature amended sections 7 and 8 of the Workmen’s Compensation Act and sections 7 and 8 of the Workmen’s Occupational Diseases Act to provide that where death occurs to an employee as the result of an injury or an occupational disease sustained after July 1, 1941, the aggregate compensation payable to the injured employee shall be increased 10 per cent. Section 19 of the Workmen’s Compensation Act was amended to provide that judgments and orders of a City or Circuit Court under the Act may be reviewed only by the Supreme Court on a writ of error which the court may order to issue if applied for within 60 days.

94 People v. City of Peoria, 374 Ill. 313, 29 N.E. (2d) 539 (1940); Littell v. City of Peoria, 374 Ill. 344, 29 N.E. (2d) 533 (1940).
95 374 Ill. 313, 29 N.E. (2d) 539 (1940).
96 374 Ill. 344, 29 N.E. (2d) 533 (1940).
97 Ill. Rev. Stat. 1939, Ch. 24, §§ 860a, b, b-1, b-2, c, d, e, and f. See Ill. Rev. Stat. 1941, Ch. 24, §§ 111n-1, 111n-2, 12n-1 and 12n-2.
98 310 Ill. App. 101, 33 N.E. (2d) 925 (1941).
99 Ill. Rev. Stat. 1941, Ch. 48, §§ 198 et seq.
100 Ill. Rev. Stat. 1941, Ch. 1632, §§ 15 et seq.
instead of 30 days after the rendition of said judgment or order.

Several Supreme Court decisions during the year involved the question of whether or not the accident occurred "in the course of employment." Two murders,\textsuperscript{106} an accidental shooting resulting in death,\textsuperscript{107} and two deaths resulting from causes only to be inferred,\textsuperscript{108} were reviewed, but all decisions turned ultimately upon the facts, and involved no new questions of law.

A novel question of law was decided in \textit{Michelson v. Industrial Commission}.\textsuperscript{109} Has the Industrial Commission jurisdiction to set aside its former order approving a lump sum settlement on the ground of fraud? The Supreme Court of Illinois answered in the negative, stressing the fact that the commission is an administrative body, with prescribed and limited jurisdiction. The court referred to section 19 (h), which provides for continuing jurisdiction where on petition of either the employer or the employee it is shown that the disability has recurred, increased, or diminished, and concluded that such jurisdiction cannot be enlarged for purposes not specifically stated by the act.

It is well understood that proceedings under the act are statutory, but on several occasions the nature of the writ of certiorari, by which decisions of the Industrial Commission are reviewed the Circuit Court has required explanation by the Supreme Court. In \textit{Elles v. Industrial Commission},\textsuperscript{110} it was reiterated that section 19 regulates the procedure, and that the statutory writ is not that of common law certiorari. An additional and novel interpretation resulted when the court held further that jurisdiction is conferred on the Circuit Court if the return day designated in the writ complies with the aforesaid section, and that it need not coincide with the return day designated under the Civil Practice Act; and further that the failure of the clerk of the court to re-docket

\textsuperscript{106} Connor Co. v. Industrial Commission, 374 Ill. 105, 28 N.E. (2d) 270 (1940); Rosenfield v. Industrial Commission, 374 Ill. 176, 29 N.E. (2d) 102 (1940).
\textsuperscript{107} Scott v. Industrial Commission, 374 Ill. 225, 29 N.E. (2d) 93 (1940).
\textsuperscript{108} Mt. Olive & Staunton Coal Co. v. Industrial Commission, 374 Ill. 461, 30 N.E. (2d) 32 (1940); General Concrete Const. Co. v. Industrial Commission, 375 Ill. 483, 31 N.E. (2d) 963 (1941).
\textsuperscript{109} 375 Ill. 462, 31 N.E. (2d) 940 (1941).
\textsuperscript{110} 375 Ill. 107, 30 N.E. (2d) 615 (1940).
a second and independent writ, and give a new number to the case, did not affect the Circuit Court's jurisdiction where the claimant filed a praecipe for the new writ within the time required under section 19, even though no clerk's fee was paid in advance by the claimant.

In *Biddy v. Blue Bird Air Service*,111 a contract of employment was entered into in Michigan, and both the employer and employee agreed to be bound by the Michigan Workmen's Act. The employee was killed while at work under the contract in Illinois, and the Supreme Court held the Illinois Act inapplicable, citing *Cole v. Industrial Commission*.112 *Miller v. Yellow Cab Company*,113 might be termed a companion to the Blue Bird Air Service case, with some of the facts reversed. In the Miller case, the plaintiff resided in Texas and was an employee of Sears Roebuck & Co., a New York corporation, doing business in Texas and in Illinois and subject to the Compensation Acts of the several states in which it did business. Miller's contract of employment was made and was to be performed principally in Texas. While he was temporarily in Illinois and while riding as a passenger in Chicago in a Yellow Cab, he was injured. He brought a common law action against the Yellow Cab Company for negligence. The defendant contended that the plaintiff, his employer, and the defendant were all operating under the Illinois Compensation Act and that, therefore, the plaintiff could not maintain a common law action inasmuch as his employer is automatically subrogated to such action and the recovery limited to the amount of compensation payable under the act.114 The defendant contended further that even under the Texas law, which plaintiff contended was controlling, the plaintiff must choose between compensation and his common law right against the wrongdoer, and that the plaintiff had already elected by receiving compensation.

The court, through Mr. Justice Burke, held the action to be maintainable and not opposed to public policy. The Texas act

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111 374 Ill. 506, 30 N.E. (2d) 14 (1940).
112 353 Ill. 415, 187 N.E. 520, 90 A.L.R. 116 (1933). The real controversy involving a constitutional question as to whether or not the Michigan statute was entitled to full faith and credit will be found discussed under Conflict of Laws.
114 Ill. Rev. Stat. 1941, Ch. 48, § 166.
applied under the terms of the contract of employment, and under Texas law, the employee could recover against a third party, whether or not the third party and its employees were under the act. The election argument was met by calling attention to the fact that originally the insurer of the Texas employee had joined as party plaintiff, and had then been given leave to withdraw with the consent of the defendant and the co-plaintiff Miller. This explanation was rather lightly sketched, and might have caused the plaintiff some difficulty upon further appellate review.

FAMILY

The procedure for securing a license to marry has been altered by requiring that both applicants appear in person and furnish the necessary affidavits as to their respective ages and the legality of the contemplated marriage.\(^{115}\) The provision enacted in 1937 requiring a three-day delay between application and issuance of license,\(^{116}\) has been abolished, it probably being deemed unnecessary by reason of the provisions requiring physical examination for venereal disease. The medical certificate, however, must now be signed by the applicant in the presence of the examining physician, under penalty, to prevent the possibility of substitution.\(^{117}\)

An attempt to revive the "family purpose" doctrine, so as to establish liability upon the car owner for the negligent conduct of his wife while driving the same, has been made through the guise of the Family Expense Act\(^{118}\) in the decision in O'Haran v. Leiner.\(^{119}\) Despite the earlier rejection of the doctrine by the Illinois Supreme Court,\(^{120}\) the Appellate Court, Fourth District, under an unusual set of facts there found that defendant's wife, without express permission, while driving her husband's car to purchase a Halloween party dress for their daughter, was the "agent" of the husband-owner in making such purchase, inasmuch as under


\(^{118}\) Ill. Rev. Stat. 1941, Ch. 68, § 15.


\(^{120}\) Andersen v. Byrnes, 344 Ill. 240, 176 N.E. 374 (1931).
such statute he might have been obliged to pay for the same, so that her tort was chargeable to him as principal.

The extent of the dower right of a divorced spouse in the estate of the deceased former spouse\(^{121}\) is to be measured by the terms of the statute providing for dower as it stands at the time the divorce is granted according to Opdahl v. Johnson.\(^{122}\) Subsequent changes in such statute, even though made while the right of dower remains inchoate because the former spouses continue alive, will not, therefore, increase the dower portion due the successful divorced spouse.

While, upon adoption, the adopted child becomes an heir of the adopting parent,\(^{123}\) even though the latter died testate leaving a will executed prior to the adoption proceedings,\(^{124}\) nevertheless, such adopted child may not, under the decision in Continental Illinois National Bank & Trust Co. v. Hardeen,\(^{125}\) participate as a legatee in a subsequently drawn will providing for the distribution of income to "my then surviving lawful issue," since the latter term must, at law, be confined to the children born to the testator in lawful wedlock. Upon adoption, the natural parents of the adopted child not only lose the right of custody,\(^{126}\) but also, as an incident, lose even the right of visitation under People ex rel. Witton v. Harriss.\(^{127}\)

The fact that the natural parent may be called upon to support the adopted infant if necessity arises\(^{128}\) is not enough to overcome the clear provision that, upon adoption, "the child shall, to all legal intents and purposes, be the child of the petitioner...."\(^{129}\)

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\(^{121}\) Dower right is retained only by the successful spouse in the divorce proceedings, and forfeited by the guilty spouse. Ill. Rev. Stat. 1941, Ch. 3, § 173.

\(^{122}\) 306 Ill. App. 145, 28 N.E. (2d) 308 (1940). The divorced wife secured her decree in 1896, at which time the dower right was confined to lands of which the deceased spouse was seized during the marriage. Ill. Rev. Stat. 1874, Ch. 41, § 1. The amendment of 1927, effective at the death of the divorced husband, conferred dower right in personal property as well. Ill. Rev. Stat. 1939, Ch. 41, § 1. Following Kent v. McCann, 52 Ill. App. 305 (1893), it was held that, upon divorce, the relationship of the parties ceased except in so far as preserved by the then existing Dower Act.

\(^{123}\) Ill. Rev. Stat. 1941, Ch. 3, § 165.


\(^{126}\) Ill. Rev. Stat. 1941, Ch. 4, § 8.

\(^{127}\) 307 Ill. App. 283, 30 N.E. (2d) 169 (1940).


\(^{129}\) Ill. Rev. Stat. 1941, Ch. 4, § 3.
The right of an infant to repudiate a contract made during minority, even though induced by his fraudulent misrepresentations as to his age, while not denied in Berryman v. Highway Trailer Company,\textsuperscript{130} is now, by reason of the counterclaim provisions of the Illinois Civil Practice Act,\textsuperscript{131} subject to the right of the adult to recoup the damage he has suffered by reason of such fraud should he wish to present a counterclaim therefor. One further fact may be mentioned concerning minors. While a female minor attains her majority in Illinois on reaching the age of eighteen,\textsuperscript{132} she has been disqualified from exercising certain privileges until she has reached the age of twenty-one.\textsuperscript{133} She may now, by reason of a change in the Notaries Public Act,\textsuperscript{134} qualify as a notary public upon attaining her legal majority.

\section*{PROPERTY}

\section*{TRUSTS}

Legislative action this year overshadows in importance the work of the courts in the development of trust law. The adoption of a modified form of the Uniform Principal and Income Act\textsuperscript{135} marks the first important statutory addition in Illinois to the law of trusts in many years. In a state where there has been remarkably little statutory trust law the enactment of this act may forecast increased legislative regulation.

The purpose of the act is to provide rules for the guidance of trustees in handling the difficult problems of apportionment and allocation of receipts and disbursements between income and principal, as well as to provide rules for apportionment between life tenant and remainderman in non-

\textsuperscript{130} 307 Ill. App. 480, 30 N.E. (2d) 761 (1940); note, 19 Chicago-Kent Law Review 302.

\textsuperscript{131} Ill. Rev. Stat. 1941, Ch. 110, § 162.

\textsuperscript{132} Ill. Rev. Stat. 1941, Ch. 3, § 283.

\textsuperscript{133} See, for example, the right to vote, Ill. Rev. Stat. 1941, Ch. 46, § 338; right to serve as a juror, Ill. Rev. Stat. 1941, Ch. 78, § 2.


trust estates. The act has been adopted in substance in ten states.\textsuperscript{136}

The rules set forth are designed to govern only in the absence of controlling provisions in the trust instrument or other document creating the estate. Thus a settlor may himself specify the duties of the trustee or may leave the entire matter to the trustee's discretion.\textsuperscript{137} In view of this fact the established practices of corporate trustees in regard to apportionment need not be disturbed. The act is applicable only to inter-vivos trusts created on or after its effective date and to testamentary trusts only where the testator died on or after such date.\textsuperscript{138}

Section 3 of the act is a detailed statement of the items to be considered income and of those to be considered principal. A uniform rule of apportionment between successive beneficiaries entitled to income is provided for those cases where some portion of such income is derived from periodic payments. Hence a beneficiary who ceased to be entitled to income at a time between two periodic payments will be entitled to his proportionate share of the second payment regardless of whether the payment is rent, interest, or of other character.\textsuperscript{139} In the case of inter-vivos trusts, income earned or accrued but not paid at the date of creation is to be treated as income; while in the case of testamentary trusts income earned or accrued but not paid at the date of the testator's death is to be added to principal.\textsuperscript{140} Unless otherwise provided, the income beneficiary in a testamentary trust is entitled to income from the date of the testator's death.\textsuperscript{141}

Section 7 establishes the principle of amortization in the case of bonds or obligations purchased at a premium but provides that there shall be no amortization in the case of bonds or obligations purchased at a discount, and the entire proceeds upon collection shall be credited to principal.\textsuperscript{142}

\textsuperscript{137} § 2, Ill. Rev. Stat. 1941, Ch. 30, § 160.
\textsuperscript{138} § 16, Ill. Rev. Stat. 1941, Ch. 30, § 174.
\textsuperscript{139} § 4 (1), Ill. Rev. Stat. 1941, Ch. 30, § 162(1).
\textsuperscript{140} § 4 (2), Ill. Rev. Stat. 1941, Ch. 30, § 162(2).
\textsuperscript{141} § 4 (3), Ill. Rev. Stat. 1941, Ch. 30, § 162(3).
\textsuperscript{142} § 7 (4), Ill. Rev. Stat. 1941, Ch. 30, § 165(4).
Of particular interest is the section dealing with the problem of the sale of unproductive property. An apportionment is directed only where the trustee is expressly directed to sell such property and there is a delayed sale. In cases where there is no express direction to sell, the rule in Illinois against apportionment would appear to remain as laid down in *Love v. Engelke*. Other provisions of the act deal with the problems of wasting assets and the allocation and apportionment of expenses. The act provides uniform and well-considered rules for the guidance of trustees and others in the handling of questions which are often neglected in the drafting of trust instruments.

The case law dealing with trusts during the past year is mainly cumulative. One interesting case involving the creation of inter-vivos trusts deserves notice. The late Arthur W. Cutten, well-known Chicago financier, carried a brokerage account in the name of his brother-in-law, Boomer. In 1924 he seems to have decided to give certain securities which were in the account to Boomer on condition that Boomer would execute a trust instrument reserving the life income to himself and providing for ultimate distribution to the Home for Destitute Crippled Children. Boomer executed such a trust instrument naming Cutten and two others as trustees. The securities were not then withdrawn from the brokerage account. Ten years later, upon the closing of the Chicago office of the brokerage firm, the certificates were delivered to Boomer and were later placed in a safety deposit box to which both Cutten and Boomer had access. In litigation involving the disappearance of the certificates from the box it was contended that no trust had ever arisen, inasmuch as there had been no delivery of the certificates to the trustees. The Appellate Court held that "a present unequivocal assignment of shares of stock in a corporation with intention to pass the title will accomplish the transfer of the title to the shares to the assignee as between the parties without delivery of any stock certificates."
A problem of purchase money resulting trusts was before the Supreme Court in the case of *Frasier v. Finlay*.\(^{148}\) According to the complaint a mortgage on real estate belonging to the plaintiff was being foreclosed. Defendant suggested that plaintiff execute a judgment note to defendant who would cause a judgment to be entered which would entitle defendant to redeem from the foreclosure sale. Defendant agreed to advance $5,000 if plaintiff would provide the balance necessary to effect a redemption. A redemption was accordingly accomplished and defendant became the title holder, but refused to recognize any interest of the plaintiff. The court held the transaction to be in the nature of a loan of a portion of the purchase price by the defendant to the plaintiff, and decided that if the allegations of the complaint were proved the plaintiff would be entitled to a decree establishing a resulting trust of the whole property subject to the defendant's right to hold the title as security for the repayment of the amount advanced. The case is of interest because the court overruled the contention that the plaintiff was not in equity with clean hands because the note had been given for the express purpose of putting the defendant in position to redeem. In view of the facts this ruling is clearly correct.

Confidential relationships as the basis of constructive trusts were discussed by the Supreme Court in two cases.\(^{149}\) In the Steinmetz case the court divided constructive trusts into two general classes: one, where actual fraud forms the basis, and the other where there is a confidential relationship. A confidential relationship was said to exist "where trust and confidence are reposed by one person in another who, as a result, gains an influence and superiority over the other."

The Appellate Court passed upon three cases involving questions of administration which are of passing importance. A trustee who distributed trust funds to himself in good faith, but in the mistaken belief that he was a beneficiary, was held not entitled to the protection of an exculpatory clause

\(^{148}\) 375 Ill. 78, 30 N.E. (2d) 613 (1940).

\(^{149}\) Gilbert v. Cohn, 374 Ill. 452, 30 N.E. (2d) 19 (1940); Steinmetz v. Kern, 375 Ill. 616, 32 N.E. (2d) 151 (1941).
to avoid restoring such funds. In another case the court held that a trustee might properly employ a real estate broker to sell property which the trustee was authorized to dispose of, and that a successor trustee might be sued in an effort to compel the payment of commission out of the trust estate, although the successor trustee was not personally liable. The opinion does not discuss the question of whether the suit was considered to have been brought at law or in equity. In the case of Rothbart v. Metropolitan Trust Co. it was held that attorneys who rendered services to the trust could recover fees out of the trust estate in equity rather than be compelled to proceed against the trustees personally at law. In this case the trust instrument provided against the personal liability of the trustees, and the court spelled out an intention to charge the trust estate. The case involved two liquidation trusts. An instructive discussion of the cy pres doctrine in charitable trusts is to be found in the per curiam opinion of the Supreme Court in Village of Hinsdale v. Chicago City Missionary Society.

A rather unusual problem, involving the duties of trustees under deeds of trust after foreclosure, was before the Supreme Court in the case of Chicago Title and Trust Company v. Rogers Park Apartments Building Corporation. In this case property was sold at foreclosure sale to a committee representing the holders of a large percentage of the bonds and was paid for by cancellation of bonds held by the purchaser and an additional sum in cash. The court entered a decree providing for the payment of the cash to the trustee to be disbursed to the nondepositing bondholders and reserved jurisdiction to supervise the distribution. A deficiency decree was also entered. Eight years later, the case having been dormant for that period, the court of its own motion and without the intervention of any interested person directed the trustee to account and to pay over any unclaimed funds to the clerk of the court.

The Supreme Court called this order void, indicating that the issue was whether or not the trustee held the funds

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152 307 Ill. App. 271, 30 N.E. (2d) 183 (1940).
153 375 Ill. 220, 30 N.E. (2d) 657 (1940).
154 375 Ill. 599, 32 N.E. (2d) 137 (1941).
as trustee or merely as a depositary for the convenience of the court. In view of the terms of the trust deed, the decree, and the purpose for which the money was paid over, it seems clear that the trustee continued in its trust capacity as long as any of the res remained in its hands and any of its duties were unperformed. The trial court seems to have been motivated by a desire to effect some solution of the problem created where unclaimed funds remain in the hands of trustees indefinitely. In view of the fact that the doctrine of escheat is inapplicable, and of expressions to the effect that the doctrine of *bona vacantia* is not law in Illinois, legislation seems to be the only answer.\(^1\)

**WILLS AND ADMINISTRATION**

Probably the most significant case in the field of probate law in the period of this survey is that rendered in *Furst v. Brady*,\(^2\) in which the Supreme Court overruled the decision of the Appellate Court and held that the county or probate court has jurisdiction to appoint an administrator for a non-resident decedent whose only asset in Illinois is an unsealed contract of public liability insurance with a company licensed to do business in Illinois. The result of the decision is to allow an injured person or the personal representative of a deceased person to maintain in this state a suit for personal injuries or wrongful death which occurred in Illinois although the guilty person was a nonresident who died before suit.

A claim filed against the estate of a decedent on the last day for filing may be allowed by the probate court although a copy thereof was not mailed to the attorney for the estate at the time of filing, as required by Rule 11 of the Probate Court of Cook County, but was mailed a few days later. This decision of the Appellate Court in *In re Estate of Kurlandsky*\(^3\) seems obviously correct, but in view of the fact that this is a question that frequently occurs in practice, it appears worth noting.

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2. The problem is discussed fully in 8 U. of Chi. L. Rev. 802.
3. 375 Ill. 425, 31 N.E. (2d) 606 (1940); notes, 19 CHICAGO-KENT LAW REVIEW 293; 54 Harv. L. Rev. 1401; 29 Ill. B. J. 404; 8 U. of Chi. L. Rev. 789.
At the last session of the Legislature, Section 46 of the Probate Act was amended to conform to the prior law. The 1939 law read, "Marriage by the testator shall revoke any existing will ...." The former act had read, "Marriage ... shall be deemed to revoke ...." The word "deemed" was relied on in Ford v. Greenawalt,\textsuperscript{159} where the court decided that marriage did not revoke a will which stated that it was made for the benefit of, and in contemplation of the testator's marriage to, the principal beneficiary. The same reason was given for the same result in the case of Kuhn v. Bartels,\textsuperscript{160} which was decided in 1940 under the old act. But the court in the latter case distinguished the language of the old act from that of the statutes of other jurisdictions where the word "deemed" is not present. Under such statutes the will has been held to have been revoked by the testator's marriage regardless of the testator's apparent intent. It is likely, therefore, that, but for the recent amendment which reinserts the word "deemed" in the statute, the Illinois courts would have been obliged to hold a will to be revoked by the testator's marriage although the will expressly stated that it was made for the benefit of the testator's intended spouse.

\textit{Koelmel v. Kaelin}\textsuperscript{161} may be added to a long list of cases which undertake to determine whether devised land is sufficiently described, after words of false description are deleted, to admit extrinsic evidence of identification. In that case the court found the remaining description adequate, although in previous cases of like facts the court had excluded extrinsic evidence on the ground that it alone would identify the land. Although the court did not say that it considered the decision in the early leading case of \textit{Kurtz v. Hibner}\textsuperscript{162} to be incorrect, the conclusion seems inescapable that the court here did not approve that decision.

The 1941 Session of the Illinois Legislature also amended the Probate Act\textsuperscript{163} by adding an article designated as II A.\textsuperscript{164} This article eliminates the confusion formerly present in situations involving "simultaneous deaths." The amendment applies to the simultaneous deaths of benefici-

\begin{footnotesize}
\textsuperscript{159} 292 Ill. 121, 126 N.E. 555 (1920).
\textsuperscript{160} 374 Ill. 231, 29 N.E. (2d) 84 (1940).
\textsuperscript{161} 374 Ill. 204, 29 N.E. (2d) 106 (1940); note, 19 CHICAGO-KENT LAW REVIEW 222.
\textsuperscript{162} 55 Ill. 514 (1870).
\textsuperscript{163} Ill. Rev. Stat. 1941, Ch. 3, §§ 151 et seq.
\end{footnotesize}
aries, and of the insured and beneficiary in life or accident insurance policies. Provision is made for the testator or settlor who wishes to set up his own rules. The new article does not apply to distribution of the estate of a person who dies prior to its effective date.

Two cases dealing with construction of wills and trusts may be mentioned as of some interest. In the case of Hor-mann v. Northern Trust Company, the instrument provided that "in case of the death of said John Tanner," his share was to go to the testatrix' daughter. The testatrix died some thirty-three years before the said John Tanner, and it was held that upon his death his share went not to the daughter or her heirs, but to the heirs of John Tanner. The court applied the usual rule of construction that where property is devised to one person and "in case of his death" to another, the testator will be presumed to have had in mind the death of the daughter before his own and not at some future time after his own. While there was perhaps sufficient evidence of actual intent in the will to indicate that this was the testatrix' intention and therefore there would be no reason to apply the presumption, still the conclusion reached was proper under the circumstances.

In the other case, Countiss v. Whiting, a trust instrument provided that in case of the death of certain beneficiaries, the income from a certain portion of the trust was to be paid to the "lawful heirs" of such deceased daughter. Upon the death of the daughter, the daughter's husband claimed to be entitled to the income therefrom as heir. The court held that he did not come under the description of "heir," which was taken in its technical sense, that is to say, the person who would take by law the intestate realty of the decedent. At the time the facts in issue arose, a husband or wife would not by statute have been entitled to share in the intestate realty without first having renounced dower. That fact alone presumably stood in the way of considering the surviving

170 114 F. (2d) 118 (1940); note, 29 Ill. B. J. 228.
spouse as an heir. Should the situation arise since the adoption of the Illinois Probate Act,\(^{172}\) effective in 1940, the result would presumably be otherwise, since by that act the surviving spouse inherits a share in the realty absolutely unless he perfects his right to dower.\(^{173}\)

The Illinois Supreme Court carried the presumption of due execution of a will arising from the genuineness of the signatures and appearance of proper execution to the full extent in *Brelie v. Wilkie*.\(^{174}\) In that case the two witnesses testified, one that the testatrix' signature was not on the will when she signed as witness, and the other that he could not see whether it was signed or not because the will was so folded as to conceal the place for the testatrix' signature. Because of the court's belief that the witnesses were falsifying for the purpose of defeating the will, the will was admitted despite their testimony and with the aid of no other evidence save that of the physical appearance of the will.

In *Groesbeck v. Beaupre*,\(^{175}\) the Appellate Court allowed a contingent claim, which could not be filed prior to the expiration of the nonclaim statutory period, against the executor to the extent of uninventoried assets and against the distributee of personal property to the extent of assets received. The result is a sensible one, but serves to raise a question as to why the new Probate Act failed to make specific provision for the means of satisfying contingent claims.

An interesting question of jurisdiction was raised in *London and Lancashire Indemnity Company v. Tindall*.\(^{176}\) The circuit court had taken jurisdiction of a suit to establish a right of subrogation to a distributee's share claimed by the surety of a defaulting executor who was also a distributee. The fund was also being claimed by the divorced wife of the distributee who held a conditional garnishment judgment for unpaid alimony against the administrator who succeeded the defaulting executor. Objection was made that the probate court had jurisdiction, but the Circuit Court of Jackson County held that it had the right to determine the matter and

\(^{172}\) Ill. Rev. Stat. 1941, Ch. 3, §§ 151 et seq.
\(^{174}\) 373 Ill. 409, 26 N.E. (2d) 475 (1940); note, 29 Ill. B. J. 314.
\(^{175}\) 307 Ill. App. 215, 30 N.E. (2d) 531 (1940); note, 29 Ill. B. J. 475.
\(^{176}\) 307 Ill. App. 45, 29 N.E. (2d) 941 (1940).
thereupon took jurisdiction and decided the case on its merits. The Appellate Court reversed the decision of the trial court, giving the reason that the probate court had jurisdiction exclusive of the chancery court. The dissenting judge pointed out that, while the court of equity will usually refuse to exercise or assume jurisdiction in ordinary cases of administration, it may in the exercise of its discretion assume jurisdiction in special instances, and that in all of the prior Illinois cases where the issue had been raised, the equity court had refused to take jurisdiction, and it had been held on appeal to be a proper course because the probate court was competent to render a decision; but that once the equity court has in its discretion taken jurisdiction it is not proper to reverse the judgment after a decision on the merits merely because of the fact that the probate court might perhaps have been in a position to decide the matter under the exercise of its equity powers. It may be noted at this point that the Appellate Court decision has recently been reversed in the Supreme Court for reasons stated in the dissenting opinion of the Appellate Court.

Cox v. Rice raised the question of whether or not a conservator who was unable to comply with the court's order to pay over all moneys which had come into his hands, as conservator, could be imprisoned for contempt of court. The conservator, Cox, contended that the statute did not apply to him because he did not have actual possession of the trust fund belonging to his ward at the time the rule to show cause was filed and that it was therefore not in his "custody or control." The court reiterated its holding in Tudor v. Firebaugh, stating that the statute did not apply where a conservator has never had actual possession or control over the assets of his ward or of the res of a trust, but that since Cox had wrongfully disposed of the ward's money by investing it without obtaining the court's approval, "it remained, in

178 375 Ill. 357, 32 N.E. (2d) 137 (1941); 30 Ill. B. J. 112.
179 Ill. Rev. Stat. 1939, Ch. 86, §§ 9 and 35.
180 The money had been invested in one of several notes secured by a mortgage since foreclosed and a time deposit certificate in the Dime Savings Bank, but these investments had never been approved by the county court.
181 364 Ill. 283, 4 N.E. (2d) 393 (1936).
contemplation of law, in his custody and control, and his inability to pay is no defense to the contempt proceeding."

MORTGAGES

For years every instrument purporting to transfer land titles, including real estate mortgages and trust deeds, had to be sealed in order to be effectual. The requirement of sealing still continues, but, if apt language appears in the instrument, or the acknowledgment thereof, to the effect that the same was sealed, a presumption arises now that such was the case, and any omission of a seal in a certified copy of such instrument is deemed to have arisen by the failure of the recorder in making the transcription thereof. Further, recitation in the instrument or the acknowledgment thereof that the same was sealed shall constitute the adoption by the grantor of any seal appearing thereon, including the seal of the notary public. Mortgages heretofore irregularly executed in this particular are now validated.

While the purchaser of mortgaged premises does not become personally bound to pay the mortgage thereon unless the language in the deed or contract clearly imports such assumption, still a subsequent assumption of such liability, as at the time an extension thereof is granted, is enough to make such purchaser liable for any deficiency arising under foreclosure proceedings. A common form of extension agreement in use in Cook County, after providing for the extension of the maturity date of the principal, makes such extension conditional "so long as the said party of the second part [owner of the equity of redemption] shall promptly pay interest thereon . . . and shall further keep and perform all and singular the covenants and agreements in said note . . . and trust deed contained." It was held in Albers v. Moe.

182 Ill. Rev. Stat. 1941, Ch. 30, § 1. This statute was originally enacted in 1827; Rev. Laws 1827, 95. For the effect to be given to an unsealed deed see Barger v. Hobbs, 67 Ill. 592 (1873); Wilson v. Kruse, 270 Ill. 298, 110 N.E. 359 (1915).
183 Laws, 1941, 416; Ill. Rev. Stat. 1941, Ch. 30, § 34.
185 Laws, 1941, 417; Ill. Rev. Stat. 1941, Ch. 30, § 35b following § 34. Albert E. Jenner, Jr., explains the necessity for the amendment by saying: "It seems that the word 'seal' was omitted from a series of printed form deeds circulated in the Peoria area." 30 Ill. B. J. 21.
186 Siegel v. Borland, 191 Ill. 107, 60 N.E. 983 (1901).
that the execution of such an extension agreement bound the owner of the equity of redemption to pay both interest and principal, and hence that a personal deficiency decree against him was proper, despite his contention that his only promise was to pay the interest accruing, as evidenced by his personally executed extension interest coupons.

The mortgagee bringing foreclosure proceedings is warned by Home Owners' Loan Corporation v. Joseph

\[188\] to include in the foreclosure decree all sums then due, whether for principal, interest, or taxes paid pending the litigation, or else risk the loss thereof. In that case, the mortgagee, after instituting suit and prior to decree, paid certain general taxes but inadvertently failed to include the amount thereof in the decree or to reopen the same to take further proof thereon. After unsuccessful attempts to prevent redemption unless such tax claim was discharged, the mortgagee sued in equity to secure subrogation to the tax lien of the state, but was denied relief, even though it alleged full knowledge on the part of the mortgagor of such facts, upon the ground that such payment does not grant any lien or liability apart from that of the mortgage. While the statute is explicit as to the manner of securing repayment of funds advanced after sale to pay taxes, in the event a redemption occurs, \[189\] this is the first time the instant problem has arisen in Illinois.

The question of the right to the rents in the hands of a receiver in foreclosure proceedings took an unusual turn in Metropolitan Life Insurance Co. v. Schwarz, \[190\] in which case, after proceedings had been instituted and a receiver appointed, the parties agreed upon a conveyance of the premises in full satisfaction of the mortgage indebtedness. No decree was ever entered. Upon the final report of the receiver, the former owners sought an order directing the delivery of the balance to them, which the mortgagee contested, contending that the right thereto was in it, either because such was the understanding of the parties at the time of the settlement, though not included in the written agreement, or else by virtue of certain assignment provisions in

\[188\] 306 Ill. App. 244, 28 N.E. (2d) 330 (1940).
\[189\] Ill. Rev. Stat. 1941, Ch. 77, § 28.
\[190\] 310 Ill. App. 205, 33 N.E. (2d) 934 (1941).
the mortgage itself. The court, finding the conveyance of
the premises was treated as full satisfaction of the mortgag-
or's obligation, denied the mortgagee any right to the fund,
following earlier cases in which foreclosure proceedings had
been dismissed without any decree, or in which a strict
foreclosure had been granted. Foreclosure settlements,
such as that in the instant case, should now be drafted with
definite provisions therein for the disposition of funds in the
hands of the court.

The omission of a known junior encumbrancer, or de-
scription of him as an "unknown owner," in foreclosure pro-
ceedings based on the senior encumbrance, will not defeat
his right to secure statutory redemption, according to Callner v. Greenberg, even though the statutory period
of redemption has expired, and such junior encumbrancer
still has an equitable right of redemption available, if it ap-
ppears that such omission or misdescription was fraudulently
motivated. Of further interest to the practitioner is the fact
that while litigation involving the validity of a certificate of
sale issued pursuant to a foreclosure decree does not ordin-
arily involve a freehold, and that, hence, direct appeal to the
Illinois Supreme Court is not possible, such may be the
case, according to Litwin v. Litwin, where the period of
redemption has expired and a decision on the question of the
ownership of the certificate of sale is concerned, since a de-
termination thereof, with the consequent right to obtain the
customary deed, will involve a freehold.

A judgment creditor who asserts the right to re-
deem from a mortgage foreclosure sale may purchase at
the ensuing redemption sale but, according to First National
Bank of Assumption v. Gordon, he may acquire only the
title held by his judgment debtor in the premises so sold, even

191 Corcoran v. Witz, 252 Ill. App. 473 (1929).
193 376 Ill. 212, 33 N.E. (2d) 437 (1941), reversing 304 Ill. App. 501, 26 N.E. (2d)
675 (1940); note, 19 CHICAGO-KENT LAW REVIEW 387.
194 Kronenberger v. Heinemann, 190 Ill. 17, 60 N.E. 64 (1901).
195 375 Ill. 90, 30 N.E. (2d) 619 (1940). In that case the husband, holder of the
certificate of sale, assigned the same to his wife, induced so to do by her fraud.
Upon her application for an order to compel the issuance of a deed after redemp-
tion period had expired, he filed a cross-petition seeking cancellation of the assign-
ment and surrender of the certificate. Held: cross-petition granted.
196 374 Ill. 242, 29 N.E. (2d) 246 (1940); note, 29 Ill. B. J. 187.
though he thereby relieves the other title holders of the consequences of the foreclosure. In that case four tracts of land covered by the same mortgage had been sold *en masse* under foreclosure proceedings. A judgment creditor, whose debtor owned but a single parcel, had redeemed and purchased at the subsequent redemption sale. The deed issued thereunder purported to convey all four parcels, but was held to have been effective only as to the single parcel owned by the judgment debtor.\textsuperscript{197}

Legislative tinkering with the limitation statutes affecting mortgages has again occurred. The statute enacted in 1935 has been repealed\textsuperscript{198} and replaced by a new provision which puts a twenty-year limitation on all mortgages, to be measured from the stated maturity date thereof (thirty years from date if no due date stated) unless, within apt time, an extension agreement or an affidavit be filed by the holder thereof, in which case the lien shall extend for an additional period of ten years, with like provision for renewal thereafter. The act is expressly made applicable to both registered and unregistered lands.\textsuperscript{199}

The statute regarding chattel mortgages on personal property has also been amended to permit the duration thereof to continue for five years, instead of three years as heretofore, and, if the stated maturity date is less than five years, permits the continuation of the lien for an additional year so as not to exceed a total of five years, if an affidavit setting forth the facts is recorded within ninety days of the maturity date.\textsuperscript{200}

**TITLES**

Of interest to conveyancers is *Herrick v. Lain*,\textsuperscript{201} in which a grant was made "to Edith M. Lafferty, . . . and to her children." The court held that Edith M. Lafferty re-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{197} Decisions in Schroeder v. Bozarth, 224 Ill. 310, 79 N.E. 583 (1906), sale of life tenant's interest; Sledge v. Dobbs, 254 Ill. 130, 98 N.E. 243 (1912), sale of interest of a co-tenant; and Huber v. Hess, 101 Ill. 305, 61 N.E. 61 (1901), sale of interest of owner of a portion of the premises, were followed.
\item \textsuperscript{199} Laws 1941, p. 853, Ill. Rev. Stat. 1941, Ch. 83, § 11b.
\item \textsuperscript{201} 375 Ill. 569, 32 N.E. (2d) 154 (1941); note, 29 Ill. B. J. 480.
\end{itemize}
\end{footnotesize}
ceived a fee since she had no children at the time of the conveyance. The decision was based upon the well-settled rules in Illinois that a deed takes effect at the time of delivery and that all who take by purchase must be in esse at the time.\textsuperscript{202} It will be noted that the grant does not include any words of procreation. The court said,

The requisites of such a deed are that there be persons able to contract with for the purpose intended by the deed, so that in every grant there must be a grantee, a grantor and the thing granted.\textsuperscript{203}

In this case Edith M. Lafferty was the only person “able to contract with.” The last portion of the deed grants to her, “her heirs and assigns forever.” Instead of limiting the grant, these words convey a fee to Edith M. Lafferty. The same view was also taken in \textit{Hartwick v. Heberling}.\textsuperscript{204} A conveyance to Isabella Grimes, “her children and lawful heirs,” contained the added recital that it was the intention of the grantor to give Isabella a life estate only. In Illinois, where an estate is not limited expressly, by construction, or operation of law, words of inheritance are not necessary to grant a fee. In this deed there are no limitations on the grant to Edith M. Lafferty.

In \textit{Magnolia Petroleum Co. v. West}\textsuperscript{205} it was held that the words “to be used for road purposes” limited the grant to an easement for a road and that the oil rights did not pass by such a conveyance. Under Section 13\textsuperscript{206} of our Conveyancing Act, the grant would have passed a fee except for the fact that the words “to be used for road purposes” were added after the description of the premises. The Supreme Court said that when words of inheritance are not used, every word, no matter where situated in the deed, is to be given weight in determining the estate granted and that where the granting clause does not specify the estate granted, Section 13 does not require that words repugnant to a fee be disregarded, if a fee, in fact, is not clearly granted, but words of limitation may be construed as declaratory of intention, and the deed, taken as a whole, may be con-

\textsuperscript{202} Miller v. McAlister, 197 Ill. 72, 64 N.E. 254 (1902); Morris v. Caudle, 178 Ill. 9, 52 N.E. 1036 (1899).

\textsuperscript{203} Quoting from Duffield v. Duffield, 268 Ill. 29, 108 N.E. 673 (1915).

\textsuperscript{204} 364 Ill. 523, 4 N.E. (2d) 965 (1936).

\textsuperscript{205} 374 Ill. 516, 30 N.E. (2d) 24 (1940); note, 29 Ill. B. J. 265.

\textsuperscript{206} Ill. Rev. Stat. 1941, Ch. 30, § 13.
sidered and construed as conveying a lesser estate. The surrounding facts and circumstances were also used to determine the intention of the grantors.

By similar deeds, decisions in the Federal courts have sometimes found that a fee has been conveyed, and that the words "for right of way" were descriptive of the use and not words of limitation. In Magnolia Petroleum Company v. Thompson, the Circuit Court of Appeals held that an easement was created, but this case was appealed to the United States Supreme Court and that court declined to pass on the point pending a decision in the Illinois courts. The instant case may settle the point for Illinois, but it is possible that if all surrounding circumstances are to be considered in construing such a deed, they may sometimes so influence the result that a court might hold that a fee had been conveyed.

In Shell Oil Company v. Manley Oil Company a court in Illinois, seemingly for the first time, passed upon the meaning of the words "surface only" in a deed conveying land where the grantor had previously conveyed the coal rights. These words were used in the habendum clause. The court found that at the time of the deed all the coal had been previously conveyed and was excepted from this conveyance. The Federal District Court said that it was a custom in Franklin County, Illinois, to use "surface only" in a deed to convey all that was left of the fee after all coal had been conveyed. The court looked to all parts of the deed and surrounding circumstances in arriving at the meaning of "surface only" and held that it conveyed a fee, except for the coal rights, and did grant the oil and gas. The word "surface" used in a deed is not rigid in meaning and does not always mean that portion of the land used for agricultural purposes. The word so used is ambiguous and will be construed against the grantor, the court ruled.

It would seem that the safe thing for future grantors to do in cases like this would be to write in a specific reservation or exception with respect to gas and oil.

208 112 F. (2d) 299 (1941).
209 106 F. (2d) 217 (1939).
210 37 F. Supp. 289 (1941); note, 19 CHICAGO-KENT LAW REVIEW 386.
211 Tiffany, Real Property (3d ed.), § 978, and cases cited therein.
In *Carter Oil Company v. McQuigg*, a grantor, back in 1919, gave a quit claim deed to his five children, providing that "this deed is not to take effect during the lifetime of either of the grantors." (The grantor's wife joined in the conveyance). The subsequent discovery of oil resulted in bitter litigation. The District Court held that, under Illinois law, such a provision had the effect of granting a remainder in fee to the children and reserving a life estate to the parents, and that while a life tenant may not open new wells, he may prevent the remainderman from drilling for oil during the existence of the life estate. This decision put the oil beyond the reach of all parties in interest. On appeal the Circuit Court stated that, were it not for the previous Illinois decisions, the deed here would have been construed so as to permit the parents to deal with the land as though they still had the fee. It seems to be well settled in Illinois that such a conveyance creates a life estate in the grantors.

Another case of interest is *Joliet and Chicago Railroad Company v. United States*, which arose in connection with an attempt to collect income taxes from the Joliet & C. R. R. Co. from land alleged to be owned by them. Many years ago this corporation had conveyed to the Chicago and Alton on a lease form, which by its terms stated that the grantee was "to have and hold, the said above demised and leased premises, together with all appurtenances thereof without reservation . . . forever. . . ." By the terms of the lease the Chicago and Alton agreed to pay direct to the stockholders of the Joliet and Chicago Railroad Co. 7 per cent dividends. The grantee was to pay all taxes. The defense was that the Joliet and Chicago Railroad Co. had no property as a basis for the tax herein sought to be imposed. Although the Chicago and Alton entered in their books income from this road as "income from lease road" and "rent for lease," the court held that the Joliet and Chicago Railroad Co. owned no taxable property. When all issues, rents and profits are granted forever, the title goes with the grant.

212 112 F. (2d) 275 (1940); note, 29 Ill. B. J. 224.
213 Shackelton v. Sebree, 86 Ill. 616 (1877); Harshbarger v. Carroll, 163 Ill. 636, 45 N.E. 565 (1896).
214 118 F. (2d) 174 (1941); note, 55 Harv. L. Rev. 147.
It will be noticed that no rent or income was paid to the company making the grant, but rather to stockholders as individuals.

In *Seggebruch v. Stosor*, the Illinois Appellate Court passed on a point involving a lease wherein premises were leased for use as an oil station with rentals to be determined by a percentage of sales on the demised premises. The lessee obtained other land adjacent to these premises and neglected the pump on the demised premises, thereby shifting the bulk of the oil business to the adjacent premises. This cut down sales on the demised premises to a very small amount, compared to former sales thereon when it was operated normally. The court followed decisions in other states holding that business transacted on such adjacent premises should be computed in determining the rental charge. The decision was placed upon the proposition that the contract implied that the lessee would diligently apply himself on the demised premises, and that the arrangement here involved was fraudulent as to the lessor.

The court considers remedies for breach of lease in two other cases of recent decision. In *Broniewicz v. Wysocki*, the defendant was in possession of the premises under a year lease, and, having failed to pay the rent after two months of possession, was served with a five-day notice to vacate. The lease provided that the lessee was to pay rent for the full term even though the lessor should re-enter. The lessor instituted forcible entry and detainer suit. The court said, "There is nothing illegal or improper in an agreement that the obligation of the tenant to pay all rent to the end of the term . . . notwithstanding there has been a re-entry for default." The defendant suggested that the notice served on him should have stated, "that unless the rent due is paid by a specified time 'your lease will be

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terminated under the terms of said lease,' or words to that effect.' Ordinarily, a tenant will not be liable for rent after his lease has been terminated, but the court holds that the tenant may bind himself to pay rent for the full term if he chooses. For that reason the court regards as hyper-critical, the defense of termination of the lease by re-entry. The case seems justified on the ground that the payments falling due after re-entry were agreed liquidated damages for breach of tenant's contract.

In Commonwealth Building Corporation v. Hirschfield, the tenant held over one day because he could not, or did not, obtain a conveyance to remove certain bedroom furniture. Removal was made the day after the lease expired. The court stated that it took into consideration the fact that the day the lease expired was a general moving day in Chicago, when, no doubt, it would be difficult to obtain conveyances. The court would not take notice of part of a day. Holding over a part of a day would not seriously jeopardize the ability of the landlord to re-lease. The lessor notified the lessee that he was being held for another term under the lease. The lease provided for liquidated damages of double rent for the period that possession was withheld. Suit was brought for a whole year's rent. Because provision was made in the lease for this contingency, the appeal court held for the defendant. Plaintiff's right of recovery is covered by statute providing that the holding over must be willful and requiring written notice.

CONTRACTS

INSURANCE

Aside from minor statutory changes affecting the administration of insurance law, there has been no enactment or judicial decision of significant novelty during the past year. But of interest on the facts was the case of Obartuch v. Security Mutual Life Insurance Company. 222

219 307 Ill. App. 533, 30 N.E. (2d) 790 (1941); notes, 19 CHICAGO-KENT LAW REVIEW 305; 30 Ill. B. J. 118.
220 Ill. Rev. Stat. 1939, Ch. 80, § 2.
221 Ill. Rev. Stat. 1941, Ch. 73, §§ 507, 737, 833.1, 833.2, 833.3, 833.4, 833.5, 833.6, 833.7, 833.8, 833.9, 833.10, 833.11, 833.12, 979, 1021, 1056.
222 114 F. (2d) 873 (1940).
The action involved two life insurance policies and was defended on the ground of fraud, in that some person other than the named assured was substituted for medical examination. To overcome this defense, the plaintiff beneficiaries relied upon the incontestable clause of the policies ("incontestable after it has been in force . . . for a period of two years from date of issue except for non-payment of premiums . . .") and payment of premiums for more than two years. The court held for the defendant without considering whether the assured actually signed the application or whether his signature had been forged, inasmuch as it appeared conclusively that the insurance company physician examined some person other than the named assured. As the opinion states, "Insurance companies do not insure names. They insure lives." The court assumed that the physician acted in good faith and was deceived by the substitution. It went on to state, however, that even if the physician had been a party to the conspiracy, the company would not have been bound, as he would have been acting beyond the scope of his authority. In this regard the court cited *Mutual Life Insurance Company v. Hilton-Green*.

The doctrine of the Obartuch case may be summarized by a statement that an incontestable clause does not validate an insurance contract void *ab initio* for fraud, and that in Illinois, parol evidence is admissible to show that the execution of said contract was procured by fraud.

Two Illinois cases have held that where an insurance agent received sufficient cash toward the payment of a premium to pay the company, the agent might waive payment of the balance due as his commission and receive it in property or services, but not until recently has there been a case where the agent attempted to trade the policy for nothing but personal services and this without the company's knowledge. In *Elowe v. Superior Fire Insurance Company*, the Appellate Court held the company not liable. This is consistent with the majority view.

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224 The court cited Hicks v. Stevens, 121 Ill. 186, 11 N.E. 241 (1887).
The extent to which knowledge and acts of an agent are binding on an insurer was also involved in Mousette v. Monarch Life Insurance Company. The insured sustained a laceration to his arm, after applying for insurance but before the policy was delivered, which injury was discussed with both the agent and the insured's physician. It was thought not to be at all serious, and the agent thereupon delivered the policy and received the first premium. A few days later the insured died of infection resulting from the injury. Recovery was allowed on the policy despite the fact that it contained the usual clause exempting the insurer from liability unless the policy was delivered during the sound health of the insured. The Appellate Court held that the company, through its agent, had received full disclosure of the injury and by the same agent had expressed the desire to enter into the contract and had delivered the policy and accepted the premium.

In view of the increasing demand for "business insurance," Wagner v. National Engraving Company is of interest. Policies were taken out on the life of each member of a three-man corporation in the amount of $15,000. The proceeds were to be used to buy a deceased member's stock under the customary stock purchase agreement. It will be generally admitted that a corporation may take out a policy of life insurance upon an important member where his death would cause considerable loss to it. However, one of the policies contained a double indemnity feature of $10,000 in case of accidental death, and it was this additional sum which the plaintiff executrix tried to reach. While oral testimony was admitted to show that, in addition to their written agreement, the three members had contemplated double indemnity, the result reached did not really require this evidence. The executrix failed in her claim that the corporation had no insurable interest above and beyond the amount

227 309 Ill. App. 224, 32 N.E. (2d) 1004 (1941); note, 30 Ill. B. J. 70.
229 307 Ill. App. 509, 30 N.E. (2d) 750 (1940); notes, 25 Corn. L.Q. 497; 29 Ill. B. J. 482.
agreed upon for the specific purpose stated. The court indicated that the additional $10,000 might well be used for exigencies arising because of the sudden death of the insured.

An attempt to qualify as the party entitled to the proceeds of a policy was also unsuccessful in *The Maccabees v. Stone*, where the Appellate Court was required to determine whether or not the insured resident of a home for the aged was dependent upon the home. The insured's policy provided for payment to the named beneficiary; in the event of the death of the beneficiary prior to the insured, the proceeds were to be paid to the widow, if any, the children, if any, and finally (if there were no takers previously named) to the "dependent or dependents, person or persons upon whom the member is dependent. . . ." The insured had entered the home under a contract which would have permitted it to eject the resident without cause. The home contended the contract was void, in order that it could then show the "dependency" of the deceased resident. The court held that the home had rendered its services to the decedent either by virtue of the contract or as a voluntary charity, and therefore could not qualify as the person upon whom the insured was dependent.

**BILLS AND NOTES**

Two promissory note cases involving alleged "high finance" in attempts to circumvent the banking laws have been decided by different divisions of the Appellate Court consistently with each other and with public policy, but upon quite different bases and by quite different techniques. *Jefferson Trust & Savings Bank v. W. Heller & Son* was decided by the Appellate Court for the second district. The note in suit was made by a corporation and endorsed by its officers payable to plaintiff bank. This note was the last of a series in renewal of an original note, which was made by the corporation and Sam Heller, one of its officers, and endorsed by the other officers, payable to one Wynd, and by him endorsed without recourse to the plaintiff bank. This note had been executed as Sam Heller's contribution to the

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assets of the plaintiff bank, which was organized by the stockholders of a defunct bank to take over its assets and assume its liabilities, a plan evolved as an alternative to simply responding to bank stockholders’ liability. Sam Heller had first tendered his individual note to the extent of his liability, but the corporate note was finally given because the other was not “bankable,” and upon the representation by the organizers that when the bank had been organized and passed out of the hands of the bank examiners and into those of the organizers, he would be permitted to substitute his individual unsecured note.

The defense was that the defendants other than Sam Heller had signed only for the plaintiff’s accommodation, which was known to the plaintiff. It was also contended that the plaintiff was not a holder in due course because of the lapse of time—some fifty-seven days—between issuance of the note and its transfer to the plaintiff bank. Judgment for defendants was entered upon a jury verdict reached under instructions which the Appellate Court conceded were correct. Holding that the question of whether or not the lapse of time was unreasonable so as to preclude the plaintiff from being a holder in due course was one of fact for the jury, the Appellate Court reversed and remanded for a new trail upon the ground that the verdict was contrary to the manifest weight of the evidence.

The court refused to charge plaintiff bank with knowledge of the understanding with the organizers, now directors, upon the principle that they were dealing for their own interest and contrary to that of the bank. The court then passed on to hold that, however these matters might be, the defendants had waived any such defenses by entering into the renewals. This last would seem the sounder basis for setting aside the verdict of the jury, in view of the holding that the jury would have been justified in refusing to hold plaintiff bank to be a holder in due course because of the lapse of time.

The other case, *Central Republic Trust Company v. Evans*, 232 decided by the second division of the Appellate Court for the first district, involved a suit on a note signed

232 307 Ill. App. 605, 30 N.E. (2d) 921 (1941).
individually by a number of officers of the Madison Square State Bank. The defense was that the note had been given as part of an elaborate conspiracy—set out in great detail—on the part of the plaintiff bank, its officers, stockholders, and affiliates to engage illegally in branch banking, by holding the stock of smaller banks, among them the Madison Square State Bank, through an affiliate. Defendants alleged an oral agreement with the chairman of the board of the payee bank that the note was given merely as a matter of form and that the makers would never be called upon to pay from their own funds.\(^2\)

The trial court had directed a verdict for the defendants. The Appellate Court reversed and ordered judgment entered for the plaintiff. Again there are, seemingly, two bases for the decision: first, that since the plaintiff has made out a prima facie case without referring to the illegal transaction, the defendant cannot set up the illegal transaction by way of defense; second, that to permit such a defense to be interposed is contrary to the public policy, which “has always carefully guarded the ‘well being’ of banks” as “quasi-public institutions.” The soundness of the first ground seems doubtful, inasmuch as the principle there invoked is ordinarily restricted to a situation where plaintiff is attempting to recover money or property which he owned or to which he would have been entitled without reference to the illegal transaction.\(^3\) It would seem that the court might have done better to approach the problem with the idea that the parties to such illegal transaction were not \textit{in pari delicto},\(^4\)

\(^{233}\) Allegedly, the proceeds of the note were to be used to purchase from the Madison Square State Bank all of the capital “stock of Madison Square Safe Deposit Company, a corporation which owns the bank building and premises, together with all furniture, fixtures and vault equipment located therein for the sum of $210,000 cash.” This step, i.e., of reducing and rendering more liquid the assets of the bank, was for the purpose of facilitating acquisition of the stock of the bank by plaintiff’s affiliate. After such acquisition, it was allegedly understood that the stock of the safety deposit company would be repurchased from the defendants, and that such purchase money would be used to discharge the note.

\(^{234}\) Restatement of Law of Agency, § 412; Kearney v. Webb, 278 Ill. 17, 115 N.E. 844 (1917), where agent held money for use in gambling operations; Brady v. Horvath, 167 Ill. 610, 47 N.E. 757 (1897); Snell, Taylor & Co. v. Pells, 113 Ill. 145 (1885), where agent received money on a contract not criminal, but contrary to public policy; School Dist. No. 39 v. Casey, 243 Ill. App. 434 (1927), where school director received prize on ticket received with purchase of school supplies; Kubasiak v. Los, 190 Ill. App. 112 (1914).

\(^{235}\) Restatement of Law of Contracts, § 604.
a theory which blends with the second basis for the decision, i.e., the public interest in the bank.\textsuperscript{236}

Two cases involving confessions of judgment may be noted. In \textit{Holmes v. Partridge},\textsuperscript{237} the Illinois Supreme Court held that where a warrant of attorney to confess judgment on a note was signed by several persons, and singular pronouns were used throughout, the warrant was not simply "joint," but "joint and several." The court reiterated the general proposition that warrants to confess judgment must be strictly construed,\textsuperscript{238} and that a "joint" warrant will not justify confession against less than all of the signers.\textsuperscript{239} In \textit{National Builders Bank of Chicago v. Simons},\textsuperscript{240} the Appellate Court, likewise, recognized the strict construction rule with respect to warrants to confess judgment, but sustained the execution of such warrant against an indorser, because of the presence of special circumstances. The corporate note had been signed by the appellant as president of the maker, as well as being indorsed by him. The warrant expressly authorized confession against "makers, endorsers and guarantors" and by virtue of a special agreement on the reverse side of the note, he became "a party to" the note and adopted all of its terms.\textsuperscript{241}

Two other cases merit mention at least. In \textit{Gillett v. Williamsville State Bank},\textsuperscript{242} the Illinois Supreme Court held that where a drawee bank accepts a check through mistake, such acceptance may be revoked, and that whether or not the acceptance was by mistake is a question of fact. In this instance the drawee bank had cancelled the check but had not debited the drawer's account. In \textit{O'Connor v. Central

\textsuperscript{236} Ibid., § 601.  
\textsuperscript{237} 375 Ill. 521, 31 N.E. (2d) 948 (1941).  
\textsuperscript{238} Mayer v. Pick, 192 Ill. 561, 61 N.E. 416 (1901); Frye v. Jones, 78 Ill. 627 (1875); Trucker v. Gill, 61 Ill. 236 (1869).  
\textsuperscript{239} Keen v. Bump, 286 Ill. 11, 121 N.E. 251 (1918); Mayer v. Pick, 192 Ill. 561, 61 N.E. 416 (1901).  
\textsuperscript{240} 307 Ill. App. 552, 31 N.E. (2d) 269 (1940).  
\textsuperscript{241} "For value received, the undersigned and each of the undersigned in addition to the obligations imposed by indorsement and waiving all notices of every character and nature, hereby become a party to, adopt, agree to, accept, guarantee and assume all the terms, conditions and waivers contained in the note on the reverse side hereof, guarantee the payment of said note at maturity and consent without notice of any kind to any and all extensions of time made by the holder of said note. Nothing except cash payment to the holder of said note shall release the undersigned or any of the undersigned. Robert L. Simons."  
\textsuperscript{242} 310 Ill. App. 395, 34 N.E. (2d) 552 (1941).
National Bank & Trust Company, the Appellate Court seemingly held a registered bond negotiable, but held against the bank which had purchased the bond from a converter on the ground that the bank was not an innocent party. Although the result was doubtless correct and can be justified on other grounds, it seems clear that the court erred in assuming that the bond was negotiable, inasmuch as it is payable to the "registered owner" and not to "order or to bearer."

MISCELLANEOUS

The Circuit Court of Appeals for the Seventh Circuit, in Robert Gordon, Inc., v. Ingersoll-Rand Company, indicated that the doctrine of promissory estoppel might be applied under circumstances such as the following: A manufacturer makes an offer to a contractor to sell him materials he will need for a construction job on which he is bidding, and, after the bid is made in reliance on the manufacturer's offer but before the contractor's acceptance of it, the offer is terminated. The Circuit Court of Appeals for the Second Circuit, Judge Learned Hand writing the decision, rejected the application of the doctrine of promissory estoppel to such a case in James Baird Company v. Gimbel Brothers, Inc. In the opinion of Judge Kerner in the Seventh Circuit case, he says, "We choose not to follow the Baird case." The statement was dictum, however, since on the facts of the case the doctrine could not be applied because justifiable reliance and irreparable detriment—necessary to promissory estoppel—were lacking.

The Illinois Appellate Court, in an action by a subcontractor against the surety on the bond of a contractor employed by a school board, denied the subcontractor a right of action as third party beneficiary under the common law theory, but recognized the plaintiff's claim under a statutory

244 I.e., estoppel with respect to nonnegotiable registered bond not available to one who is not innocent party. See discussion of this point in note, 29 Ill. B. J. 261.
245 Ill. Rev. Stat. 1941, Ch. 98, § 21: "An instrument payable in money to be negotiated must conform to the following requirements: . . . 4. Must be payable to the order of a specified person or to bearer. . . ."
246 117 F. (2d) 654 (1941).
247 64 F. (2d) 344 (1933).
provision that requires government units to demand of the contractor a bond conditioned for the payment of all labor and material whether furnished by a subcontractor or not. Since a satisfactory solution was reached, criticism may seem useless; but this decision might influence later decisions on bonds for contractors not doing public work. It is felt that the court could have allowed a recovery on the common law theory more readily than on the statutory one. The court denied a recovery on the former theory because it found no intent to benefit the subcontractor. But it is submitted that the bond and contract disclosed as much intent to benefit as was declared to be necessary in Carson Pirie Scott & Company v. Parrett, a case involving not a contractor's surety bond but a guaranty contract on facts sufficiently similar to have controlled the decision in the instant case. The defendant's argument to the plaintiff's claim as based on the statute was that, while the statute required the contractor to furnish a bond which would protect the subcontractor, the board of education here did not actually require such a bond and the contractor did not in fact furnish such a one. There is some merit to the contention, but it is not likely to be made again, for the last Legislature added an amendment to the statute providing that the bond shall be deemed to contain the required provision whether or not it actually contains it.

In People v. Chicago Lawn State Bank, the Appellate Court held that a surety company which had made good the loss of public funds in a closed bank was subrogated to the preferential rights of the sovereign as against the debtor bank. This is, of course, a proper application of a well-accepted principle to a somewhat novel situation. In this particular case, however, the surety was denied priority to the claim for want of proof that the funds in question were in fact undistributed tax funds and so entitled under the statute to such priority.

250 346 Ill. 252, 178 N.E. 498, 81 A. L. R. 1262 (1931).
251 Ill. Rev. Stat. 1941, Ch. 29, § 15.
252 306 Ill. App. 107, 28 N.E. (2d) 294 (1940); note, 29 Ill. B. J. 188.
253 Ill. Rev. Stat. 1941, Ch. 36, §§ 17, 21 and 22.
The Supreme Court, in *Beckett v. F. W. Woolworth Company*, reversed the decision of the Appellate Court. The latter had held that liability on an express warranty was made out where a salesgirl in the defendant's store had called attention to the words, "Run-proof—harmless" printed on a card to which the manufacturer had attached a tube of mascara. The Supreme Court pointed out what the Appellate Court had disregarded: regardless of whether or not the salesgirl's statement could have been considered an express warranty, it was made after the sale and did not induce it.

The Illinois Appellate Court recently held void for illegality an agreement by which a frontage consent was given for the erection of a gasoline filling station in return for a covenant not to use an adjoining vacant tract but rather to create and maintain a lawn thereon. The decision was based upon prior decisions holding void frontage consents given for a money consideration. The court apparently took no notice of the fact that the reason for holding illegal the previous agreements was because the public might be injured where a frontage consent is given solely for personal gain, while in the instant case the restrictive covenant would inure to the benefit of all property holders in the neighborhood.

**TORTS**

Two cases involving guest passengers may be worthy of mention. In *Connett v. Winget* the Illinois Supreme Court has given an interesting definition of a "guest passenger" as used by statute. The court said:

In determining whether a person is a guest within the meaning of the "Guest statutes" in the several States, consideration is given to the person or persons advantaged by the carriage; if it confers only a benefit incident to hospitality, companionship or the like, the passenger is a guest, but if the carriage tends to promote mutual interests of both the person carried and the driver, or if the carriage is primarily for the

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254 376 Ill. 470, 34 N.E. (2d) 427 (1941).
257 374 Ill. 531, 30 N.E. (2d) 1 (1940); notes, 30 Ill. B. J. 64, 66.
attainment of some objective or purpose of the operator, the passenger is not a guest within the meaning of such enactments.

The court distinguishes between the meanings of "guest" and "passenger" and finds that all are not guests who do not pay for their ride; that the intention of the passenger alone does not determine whether he becomes a guest, inasmuch as the invitation and the purpose of the ride may originate wholly with the owner of the automobile.

McGraw v. Oелиг⁵⁹ was an action by an administrator to recover for the wrongful death of his intestate. The court appears to have imputed to the intestate the negligence of the driver of the car in which intestate was a guest passenger at the time of his death, on the ground that the driver was a brother of the decedent, and as next of kin, entitled to a distributive share in any recovery.

The "attractive nuisance" doctrine has received attention if not appreciable clarification. Harrison v. City of Chicago⁶⁰ is an apparent extension of the liability of a municipal corporation under the "attractive nuisance" doctrine. Here, the city was held liable for injuries to a child, who, with another child, was playing on and around a stand which was owned and operated by a news vendor in accordance with a permit duly issued by the city. One of the children, swinging on the stand, tipped it over upon the plaintiff, causing the injuries. In an interesting dissent, Mr. Justice Burke points out that a newspaper stand is not inherently dangerous, and that it could not reasonably be anticipated that children would swing upon it. His comment to the effect that, on the reasoning of the majority opinion, anything that a child could swing from, even a parked automobile, would be an attractive nuisance, is interesting in view of Schlatter v. City of Peoria⁶¹ where the court refused to find that a parked garbage truck was an attractive nuisance. The truck carried a trailer which was equipped with a footrest, upon which the plaintiff's intestate, a child eight years old, climbed while truck and trailer were parked. When they were subsequently put in motion, the child fell off, was run over by the trailer and killed.

²⁵⁹ 309 Ill. App. 628, 33 N.E. (2d) 758 (1941).
²⁶¹ 309 Ill. App. 636, 33 N.E. (2d) 730 (1941).
However, the court followed former Illinois decisions in *Shapiro v. City of Chicago,* in holding an abandoned automobile to be an attractive nuisance, and imposing liability upon the city which had notice thereof. The plaintiff, a boy six years old, was playing in the alley where the automobile had been abandoned, when a playmate threw a lighted match into the gasoline tank, causing an explosion. It is difficult to find complete consistency in these three latest "attractive nuisance" cases.

Some inconsistency may, perhaps, be found also in the recent cases where liability was sought to be imposed under the Dram Shop Act. In *Klopp v. Benevolent Protective Order of Elks,* the court held that defendant's claim that it was purely a charitable organization and therefore not liable under the act was without merit, since it maintained a licensed bar at which liquor was sold. This case also holds that intoxicating liquor need not be the sole cause of the injury to entitle the plaintiff to recovery under the act, and that to construe the act otherwise would fall short of the measure of remedy intended.

In *James v. Wicker,* however, the court appears to have reduced, materially, the measure of remedy intended under the act. The court here denied recovery on the ground that the plaintiff herself was intoxicated when she accepted the invitation of the intoxicated defendant to ride as a passenger in his car. This case would appear to be authority to the effect that an intoxicated person may assume the risk despite an intoxicated condition which would negative the ability to appreciate it, or, in the alternative, that contributory negligence is a defense to an action founded upon absolute liability, neither of which propositions, it is submitted, have previously been the law in Illinois. *James v. Wicker* becomes still more difficult to reconcile in view of the subsequent case of *Thompson v. Wogan,* where the same court held that an action under the Dram Shop Act is not, in any sense, a common law negligence action, and that the manifest in-

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262 308 Ill. App. 613, 32 N.E. (2d) 338 (1941).
263 Ill. Rev. Stat. 1941, Ch. 43, § 135.
265 309 Ill. App. 397, 33 N.E. (2d) 169 (1941).
266 309 Ill. App. 413, 33 N.E. (2d) 151 (1941).
tention of the legislature in adopting the act was to create liability in a class of cases in which there was no liability at common law. It is submitted that the Thompson case is much more consistent with the previous Illinois Dram Shop Act cases, wherein it has repeatedly been held that the act must be so construed as to carry out the manifest intent of the legislature, i.e., to impose liability upon persons who contribute to intoxication subsequently resulting in damage by the intoxicated persons to another.

The only res ipsa loquitur case found worthy of comment is *Brooks v. Hill-Shaw Co.*,267 involving the explosion of a glass coffee-maker, commonly known as a “Vaculator,” which was partly filled with hot water and coffee. The court refused to apply the doctrine of res ipsa loquitur. The case can, however, easily be reconciled with those in which the doctrine has been applied to exploding soda bottles and the like. The plaintiff’s claim was that the utensil which exploded was a new one, purchased only a day or two before, but on trial, was unable to establish this fact to the satisfaction of the court. She admitted that she had several others which had been in use for several months. The broken utensil was in evidence and the court found, from the condition of a rubber gasket which was a part thereof, evidence that the utensil might have been in her possession, and hence, under her management and control, for a considerable period.

Several other miscellaneous tort cases may be worthy of very brief notice. In *Trust Co. of Chicago v. Lewis Auto Sales, Inc.*,268 the plaintiff attempted to impose liability for injury to a pedestrian upon the conditional vendor of the automobile which caused the accident, although driven at the time by the conditional vendee, on the ground that the vendor was negligent in selling the car, knowing that the brakes were defective. There was evidence to show that the conditional purchaser also knew of the defective brakes, had returned the car several times to the vendor for repair, but that the vendor had been unable to make the brakes effective. In refusing to hold the conditional vendor liable, the

267 117 F. (2d) 682 (1941).
268 306 Ill. App. 132, 28 N.E. (2d) 300 (1941); note, 8 U. of Chi. L. Rev. 162.
court suggested a moral obligation, but found no legal obligation existing on the part of the conditional vendor to the pedestrian. The court appears to have predicated its decision, not upon the point that the dealer could not have anticipated the injury, but that its duty was merely to inform the buyer of the defective brakes, which the defendant in this case had done.

*Partridge v. Enterprise Transfer Company*\(^{269}\) is interesting only as to the limitation on the “right of way” rule contained in the instructions which the court held proper. The instruction was:

The Court instructs the jury that while the law gives the right of way to vehicles approaching along intersecting highways from the right over those approaching from the left, the law does not contemplate that such right may arise when the vehicle from the right is so far from the intersection at the time the car from the left enters upon it, that, with both vehicles running within the lawful limits of speed the vehicle on the left will reach the line of crossing before the other will reach the intersection and if you believe from the preponderance of the evidence that at the time the automobile of the plaintiff entered the intersection in question, the truck of the defendant was so far from the intersection that with both vehicles running within the lawful limits of speed the plaintiff’s automobile would reach the line of crossing before the defendant’s truck would reach the intersection, then you are instructed that the said defendant’s truck did not have the right of way.

In *Schiermeier v. Hoeffken*\(^{270}\) the defendant was held liable for negligence resulting in injury to a trespasser, on the ground that this defense was not available to a defendant who had no interest in the property upon which the plaintiff was alleged to have trespassed.

*Drake v. Thomas*\(^{271}\) extends the privilege of family discipline and corporal punishment to a school-teacher, on the ground that the authority of a teacher over a pupil is a delegation of parental authority.

### CRIMINAL LAW AND PROCEDURE

The practitioner must take notice of several new statutory offenses created during the recent session of the legis-

\(^{269}\) 307 Ill. App. 386, 30 N.E. (2d) 947 (1940).

\(^{270}\) 309 Ill. App. 250, 33 N.E. (2d) 147 (1941).

\(^{271}\) 310 Ill. App. 57, 33 N.E. (2d) 889 (1941).
lature. Knowingly entering a horse in a horse race within twenty-four hours after such horse has been drugged,272 and entering, or causing to be entered, any horse by any other name or designation than the registered one, are now both condemned.273 Doing business under an assumed or trade name without having registered certain essential information with regard thereto has also been made criminal.274 The possession, or carrying, of tear gas devices, except by certain authorized persons, have been brought within the terms of the Deadly Weapons Act.275 The prohibition against the use of explosives to destroy buildings has been expanded to cover other forms of tangible property.276 Abuse of the processes of garnishment by making demand on the employee and employer without first having secured judgment and having had execution returned unsatisfied is now made a misdemeanor.277 In the 1939 amendment to the crime of trespass to land, the legislature provided punishment by fine and imprisonment.278 The latter form of punishment has now been deleted.279

The Illinois Supreme Court has held that voluntary communication by a private citizen with the grand jury, through other than authorized channels, is to be regarded as a criminal contempt of court.280 The disavowal of any intention to "insult" either the court or the grand jury will not constitute any justification for such conduct, although it may be considered in mitigation of the offense. Prosecutions under the Illinois Securities Act281 must be based on the unlawful sale

272 Laws, 1941, 51; Ill. Rev. Stat. 1941, Ch. 8, § 37hl(2). Prior thereto only the conduct of the person administering the drug was criminal under Ill. Rev. Stat. 1939, Ch. 8, § 37hl(1).
273 Laws, 1941, 52; Ill. Rev. Stat. 1941, Ch. 8, § 37hl(3).
280 People v. Parker, 374 Ill. 524, 30 N.E. (2d) 11 (1940), cert. den.—U.S.—, 61 S. Ct. 836, 85 L. Ed. 748; notes, 8 U. of Chi. L. Rev. 561; 30 Ill. B. J. 67. See also People v. McDonnell, 307 Ill. App. 368, 30 N.E. (2d) 80 (1940), noted in 30 Ill. B. J. 67, affirmed in 377 Ill. 568, 37 N.E. (2d) 159 (1941), in which attorney's unintentional absence during trial of a capital case, causing mistrial, was deemed contemptuous, the question of intent being available only for purpose of mitigation.
281 Ill. Rev. Stat. 1941, Ch. 121 1⁄2, § 96 et seq.
of securities covered thereby, but in such prosecutions the state is now not obliged to allege and prove that the defendant's conduct was not within one of the many exemptions therein created. Such exemption, if existing, must be proved by the defendant according to People v. Wilson,\textsuperscript{282} which rejects dictum in People v. Johnson\textsuperscript{283} purporting to place the burden on the prosecution.

The Habitual Criminal Act,\textsuperscript{284} providing for maximum punishment whenever a person has previously been convicted, among other offenses, for grand larceny, was held inapplicable in People v. Sarosiek\textsuperscript{285} to a situation involving a prior conviction of larceny from the person,\textsuperscript{286} even though such prior offense is, for purpose of punishment, regarded as grand larceny,\textsuperscript{287} in the absence of any showing that the value of the property so taken from the person exceeded $15. Analogy in support of such decision was drawn from an earlier case involving a prior conviction for theft of a motor vehicle, which, under People v. Crane,\textsuperscript{288} is to be regarded as a separate and distinct offense from grand larceny,\textsuperscript{289} and hence not properly the basis for the application of the provisions of the Habitual Criminal Act. Following such decisions, the legislature amended the act in question to include earlier convictions for larceny of a motor vehicle, larceny from the person, rape, arson, kidnaping, confidence game, and extortion by threats, whenever the punishment therefor was by imprisonment in the penitentiary, so as to become the basis for a charge that the defendant is an habitual criminal within the purview of such act.\textsuperscript{290}

An unexpected turn appears to have been given to the offense of larceny by bailee\textsuperscript{291} by the decision in People v. Moses\textsuperscript{292} in which the defendant had received an automo-

\textsuperscript{282} 375 Ill. 506, 31 N.E. (2d) 959 (1941). Defendant relied on the ground that the sale in question was exempt under Ill. Rev. Stat. 1941, Ch. 121\textsuperscript{1/2}, § 100 (1) covering class "B" securities sold in good faith by a vendor who was not an issuer, underwriter or promoter. Held: The burden of proof was on defendant, as being a negative averment peculiarly within his knowledge.

\textsuperscript{283} 355 Ill. 380, 189 N.E. 271 (1934).

\textsuperscript{284} Ill. Rev. Stat. 1941, Ch. 38, § 602.

\textsuperscript{285} 355 Ill. 631, 32 N.E. (2d) 311 (1941).

\textsuperscript{286} Ill. Rev. Stat. 1941, Ch. 38, § 387.

\textsuperscript{287} Ill. Rev. Stat. 1941, Ch. 38, § 389.

\textsuperscript{288} 356 Ill. 276, 190 N.E. 355 (1934).


\textsuperscript{291} Ill. Rev. Stat. 1941, Ch. 38, § 394.

\textsuperscript{292} 375 Ill. 336, 31 N.E. (2d) 585 (1941); note, 29 Ill. B. J. 479.
bile from the prosecuting witness with directions to sell the same and to apply the proceeds toward the purchase of a smaller car. The defendant did sell as directed though he never accounted for the proceeds, yet his conviction on a charge of larceny by bailee of an automobile was affirmed. It would seem as though reversal thereof would have been proper for failure of the indictment to correspond with the proof.  

Very slight modification of the law relating to criminal procedure has occurred. The effect of the decision in People v. Scornavache, which required the State to consent to the waiver of a jury trial in a criminal case, has been removed by a brief statutory provision giving that right exclusively to the defendant. In yielding jurisdiction over lands acquired by the United States, the State has reserved the right to make arrests thereon of persons violating state laws. A complete revision has been made of the Prison and Parole Act, the principal change therein being one which permits the trial court to fix a minimum punishment in excess of the legal minimum, though less than the maximum, which shall control the right to parole unless amended by the concurrence of four of the five members of the Division of Correction and approved by the Director of the Department of Public Safety. Furthermore, the power to grant probation to persons convicted of the crime of incest is hereafter denied to the trial court.

The following cases also presented some important problems regarding criminal procedure. Thus, upon the amendment of the Jurors Act, making women eligible for jury service, the defendant in a certain criminal case moved to quash the indictment because there was no woman on the grand jury which returned the same. The Supreme Court,  

293 People v. Kennedy, 356 Ill. 151, 190 N.E. 296 (1934), an indictment for theft of money not supported by proof of larceny of checks.  
294 347 Ill. 403, 179 N.E. 909, 79 A. L. R. 553 (1931).  
295 Laws 1941, Vol. 1, p. 574; Ill. Rev. Stat. 1941, Ch. 38, § 736. If trial by jury in a criminal case is but a privilege accorded the defendant and not an integral part of the governmental structure [People ex rel. Swanson v. Fisher, 340 Ill. 250, 172 N.E. 722 (1930)], it would logically follow that he, and he alone, should be the one to determine whether to insist on such privilege or waive it.  
in *People v. Fognini*,

held the mere omission of women in the composition of the grand jury was not enough to warrant quashing the indictment, though they refused to determine whether women may or must be called to serve on grand juries. To obviate the doubt thus raised, the legislature passed an emergency amendment to the statute specifically making women eligible for such service.

Though the Attorney General is recognized as the chief law officer of the state, his right to interpose in criminal prosecutions is limited to consulting with and advising the local state's attorney. Under the decision in *People v. Flynn* such right does not extend to taking exclusive charge of the proceedings before the grand jury, in the absence of any showing that the local state's attorney was disqualified; hence, an indictment procured under such circumstances must be quashed. The court in charge of the grand jury may not, by designating the Attorney General as the “officer” to attend the sessions of the grand jury, prevent the local state’s attorney from exercising the statutory powers of his office.

While a petition for change of venue is, generally, not available in proceedings to punish for contempt of court, a motion may be made for an assignment of the cause to another judge, according to *People ex rel. Rusch v. Cun-

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300 374 Ill. 161, 28 N.E. (2d) 95 (1940).
301 Norris v. Alabama, 294 U.S. 587, 55 S. Ct. 579, 79 L. Ed. 1074 (1935), distinguished on ground of a settled policy, therein shown, deliberately to exclude negroes.
302 The court called attention to the fact that the amendment of 1939 referred solely to petit jurors, since Ill. Rev. Stat. 1941, Ch. 78, § 9, providing for the grand jury, makes no cross-references to the amended section 1. In a later case, *People v. Thurman*, 377 Ill. 453, 38 N.E. (2d) 747 (1941), subsequent to the period of this survey, the court held an indictment returned prior to the present amendment valid even though the vote of certain women members of the grand jury was essential to secure its return.
306 375 Ill. 366, 31 N.E. (2d) 591 (1941). *People v. Looney*, 314 Ill. 150, 145 N.E. 365 (1924) was held not applicable under the facts of the case.
310 Ill. Rev. Stat. 1941, Ch. 140, § 18, permits change of venue in proceedings by indictment or information, but the information for contempt is not covered thereby. *Crook v. People*, 16 Ill. 534 (1855). Specific provision is made in Ill. Rev. Stat. 1941, Ch. 146, § 21a, for change of venue in contempt proceedings where the prosecution is based on attacks upon the character or conduct of the judge, but not otherwise.
ningham,\textsuperscript{311} if it appears that the judge against whom the contempt was committed is otherwise disqualified. In that case, certain election officials were proceeded against for alleged misbehavior in the conduct of a primary election at which the county judge was himself a candidate. Pointing out that such fact made him personally interested, it was held that to allow him to hear such cause would violate the canon against one being both a party and a judge in the same cause; hence the said judge was required to grant such motion and thereby, in effect, grant a change of venue.

The necessity of preserving the distinction between the function of the judiciary on the one hand, and that of the executive department on the other, was stressed in \textit{People ex rel. Day v. Lewis},\textsuperscript{312} in which, by habeas corpus, the relator sought to test the validity of the forfeiture by the Department of Public Welfare of his statutory good time allowance. The conduct leading to such forfeiture, the killing of a fellow-inmate of the penitentiary, had been made the basis of separate criminal proceedings resulting in relator’s acquittal thereof. It was contended, therefore, that such acquittal demonstrated no fault on relator’s part, and hence deprived the Department of any ground for forfeiture. In the absence of arbitrary action, the granting or withholding of credit for good behavior is within the exclusive power of the executive department; hence, it is not open to judicial review.\textsuperscript{313} It was held consequently that the determination by the judicial department that relator’s conduct was noncriminal in no way bound the other branch of the government nor prevented the latter from making a separate and a different decision thereon.

\textbf{REMEDIES}

\textbf{CIVIL PRACTICE}

Neither the legislature nor the courts have been idle during the past year in their efforts to make the judicial process into a more efficient, more understandable system.


\textsuperscript{312} 376 Ill. 509, 34 N.E. (2d) 712 (1941).

\textsuperscript{313} \textit{People ex rel. Titzel v. Hill}, 344 Ill. 246, 176 N.E. 360 (1931).
for the solution of legal conflicts. In the following materials the evidence of such efforts is arranged roughly in the order approximating that which a lawyer would follow in presenting a client’s case.

The Theory and Scope of the Case

A new statutory form of action has been provided\(^{314}\) for the enforcement of liens, in amounts of $25 or less, upon chattels, in favor of the person who has expended labor, services, skill or material thereon, by permitting a public sale of the chattel, upon a single publication of certain essential data, after a ten-day redemption period has expired. Any surplus arising from the sale is to be deposited with the county treasurer for the account of the owner, and compliance with the act shall constitute a bar to any action to recover the chattel. Common law methods for the enforcement of such lien still remain.

The hope for a change in the law relating to separate recoveries in cases involving wrongful death, the first for the death itself and the second to recover damages to the estate, has been extinguished by the decision in *Susemiehl v. Red River Lumber Company*,\(^ {315} \) which reaffirms the earlier decision in *Holton v. Daly*,\(^ {316} \) so that all damages caused must be recovered in the one action or else be deemed waived.

An oral promise to pay an unwritten obligation barred by the five-year statute of limitations\(^ {317} \) is regarded as enough to revive the same,\(^ {318} \) but it was previously the rule that a similar parole promise would be insufficient to revive a judgment, whether domestic or foreign, once the same had become barred.\(^ {319} \) Upon re-examination of the latter point, it was held in *Truscon Steel Company of Canada, Ltd. v. Biegler*\(^ {320} \) that such rule was inapplicable to a suit brought upon a foreign judgment, so that, if, within five years, a new promise has been made to pay the same,

\(^{315}\) *376 Ill. 138, 33 N.E. (2d) 211 (1941) affirming 305 Ill. App. 473, 27 N.E. (2d) 285 (1940).*
\(^{316}\) *106 Ill. 131 (1882).*
\(^{317}\) *Ill. Rev. Stat. 1941, Ch. 83, § 16.*
\(^{318}\) *Abdill v. Abdill, 292 Ill. 231, 126 N.E. 543 (1920).*
\(^{319}\) *Ludwig v. Huck, 45 Ill. App. 651 (1892).*
\(^{320}\) *306 Ill. App. 180, 28 N.E. (2d) 623 (1940).*
the fact that the judgment itself is barred will not prevent an action, as in debt, to recover the amount due.

Though, generally, a court will not entertain moot proceedings, it was held in *People ex rel. Courtney v. Botts*,\(^\text{321}\) that quo warranto proceedings do not become moot even though the term of office which is the subject of the inquiry may have expired pending the outcome of such proceedings.

Comfort may be derived by the proponents of the claim that equity and law have been consolidated in Illinois\(^\text{322}\) from the decision in *Westerfield v. Redmer*,\(^\text{323}\) in which case an equitable action for specific performance was originally instituted, but the chancellor, upon finding that no ground for equitable relief existed, proceeded to treat the cause as a suit for breach of contract and awarded money damages. The contention that such action was highly improper, predicated upon the decisions rendered under the earlier system involving distinct separation between law and equity,\(^\text{324}\) was rejected by reason of the provisions of Section 31 of the Illinois Civil Practice Act\(^\text{325}\) and the applicable rules of the Illinois Supreme Court,\(^\text{326}\) particularly since the defendants had made no demand for a jury trial, nor protested the action of the court in deciding the legal issues. The remark that, "It would be useless to send the case back to the trial court to have the chancellor enter an order that he should hear it [the case] through his legal instead of his equitable ear"\(^\text{327}\) seemed sufficient to dispose of all argument. Does it not seem, however, slightly unfair to the defendant to notify him, by the endorsement on the complaint, that the suit is one on equitable grounds, to

\(^{321}\) 376 Ill. 476, 34 N.E. (2d) 403 (1941).

\(^{322}\) See "Equity and 'Fusion' in Illinois," 18 CHICAGO-KENT LAW REVIEW 333 (1940), and, particularly, works noted on p. 355 thereof.

\(^{323}\) 310 Ill. App. 246, 33 N.E. (2d) 744 (1941).

\(^{324}\) Toledo, St. Louis and New Orleans R. Co. v. St. Louis and Ohio River R. Co., 208 Ill. 623, 70 N.E. 715 (1904).

\(^{325}\) Ill. Rev. Stat. 1941, Ch. 110, § 155, which abolishes the distinctions respecting the manner of pleading between actions at law and suits in equity.

\(^{326}\) Ill. Rev. Stat. 1941, Ch. 110, § 259.9, requiring endorsement of the complaint as being "at law" or "in chancery"; §259.10, permitting the consolidation of equitable claims in one complaint without the use of the count system; and § 259.11, permitting the joinder of legal and equitable causes in one complaint under separate designations, with further provision for separate hearings; especially where a jury demand has been made.

\(^{327}\) 310 Ill. App. 246 (at p. 250), 33 N.E. (2d) 744 (at p. 746) (1941).
which, in all probability no jury demand would be proper, and then, because accidental allegations in the complaint will support relief at law, to convert the action, at the hearing, into an instrument for the enforcement thereof? It should also be remembered that, in a community like Cook County, the nisi prius judges are assigned to hear only certain types of cases, although they are, of course, competent to pass on any business properly before the court. May not such additional fact serve to put the defendant off guard?

Despite a provision in a contract that, upon breach, the plaintiff might procure a temporary injunction without notice and without bond, it was held in Wagner v. Okner that such provision should not be allowed to override the clear language of the statute denying the right to grant an injunction unless the complaint, or affidavit accompanying the same, shows that undue prejudice will occur if such injunction be not issued immediately and without notice.

A slight change has been made in the Limitations Act so as to require that litigation which would survive the death of the person against whom the same might be brought must, in the event of his death prior to suit, be instituted against his executor or administrator within nine months after issuance of letters. The representative still has one year from the date of death in which to file suit upon any claim belonging to the decedent which had not been barred in his lifetime, although the period of limitation might expire within such year. The change is doubtless intended to make the statute conform to the claims section of the Administration Act.

Another new provision in the Limitations Act provides that no deed, will, estate, proof of heirship, plat, affidavit, or

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328 Rules, Circuit Court of Cook County, as amended May 1, 1939, Title I, rules 1 and 2.
330 Ill. Rev. Stat. 1941, Ch. 69, § 3.
331 Language in Kessie v. Talcott, 305 Ill. App. 627, 27 N.E. (2d) 857 (1940), to the effect that, upon finding the injunction was improvidently issued because of lack of notice, the reviewing court must reverse the order without consideration of the merits of the case, was ordered modified in Wagner v. Okner, 306 Ill. App. 601, 29 N.E. (2d) 385 (1940), to allow the reviewing court an opportunity to consider the merits in order to determine if notice was, in fact, necessary.
other document, or any court record, or any agreement, or any fact, event, or statement relating to or affecting titles to real estate, occurring more than seventy-five years prior to the effective date of the amendment shall adversely affect the title to real estate. The limitation does not apply or operate against the United States, the State of Illinois, or any other state, or to land held by a municipality for public purposes, or in favor of vendees or lessees as against their vendors or lessors, nor does it bar any person who, during the period within which title might be reasserted, did not have the right to sue for and protect his title.

Pursuant to rule of the Municipal Court of Chicago the defendant in Universal Credit Company v. Antonsen was ordered to reveal the whereabouts of the res, and, upon refusal so to do, was punished for contempt of court. On appeal the decision was reversed on the ground that such rule was unconstitutional as being not merely a rule of procedure, but actually created an additional remedy to those already provided by the Replevin Act. The court distinguished the situation from one in which the defendant interfered with the property after official seizure thereof, which conduct, even without a rule, would be contempt of court.

The Initial or Pleading Stages

Over seven years of experience with the sections of the Illinois Civil Practice Act relating to the preparation of, and objections to, the pleadings in a civil case has resulted in smoothing most of the difficulties. Occasional debatable points do, however, arise. Thus a former provision of the act read as follows: "Every civil action, unless otherwise expressly provided by statute shall be commenced by the issuance of summons." A foreclosure suit was instituted but no summons was issued therein as all defendants filed a

336 The period may be extended an additional ten years if a written claim is recorded (a) within three years after the effective date of the act; or (b) within three years prior to the expiration of the limitation period; or (c) after the period has run and within two years after removal of disability or within two years after the appointment of a guardian or conservator.

337 Now Rule 71 of the Revised Municipal Court Rules, in force July 1, 1940.

338 374 Ill. 194, 29 N.E. (2d) 96 (1940), reversing 301 Ill. App. 334, 22 N.E. (2d) 790 (1939); notes, 18 CHICAGO-KENT LAW REVIEW 190; 19 CHICAGO-KENT LAW REVIEW 64; 35 Ill. L. Rev. 988.


written appearance. Subsequently a suit was filed to remove such proceedings, and the action taken thereunder, as a cloud on the title, the plaintiff contending the same were null and void on the ground that the court never acquired jurisdiction by reason of noncompliance with such provision. It was held in Koberlein v. The First National Bank of St. Elmo\textsuperscript{341} that failure to issue summons under such circumstances did not prevent the court from acquiring jurisdiction, and that hence the earlier proceedings were valid. Since 1937, a civil action is commenced in Illinois by the filing of a complaint;\textsuperscript{342} therefore, the identical problem cannot now arise.

Heretofore, when any person was made a defendant under the designation of an "unknown owner," the practitioner was obliged to file two separate affidavits at the commencement of the suit; one to establish the fact that such person's name was unknown, the other for the purpose of showing nonresidence, to support service by publication.\textsuperscript{343} The two statements may now be contained in the one affidavit provided it is drafted in such manner as to enable the court to distinguish between the two subjects.\textsuperscript{344} The right of the litigant to name as "unknown owners" all defendants whose names are unknown must be carefully exercised in the light of Callner v. Greenberg\textsuperscript{345} which, reiterating the caution laid down in Graham v. O'Connor,\textsuperscript{346} decided under the former practice, notes that such proceedings, if fraudulently brought, may not operate to destroy the rights of such "unknown" persons.

The doctrine announced in Zielinski v. Pleason\textsuperscript{347} that the failure to appoint a guardian ad litem for an infant party is not enough to warrant reversal unless it be made to appear that some injustice has thereby been committed, was practically nullified by Kroot v. Liberty Bank of Chicago,\textsuperscript{348} in which a decree was reversed, even though the infant was

\textsuperscript{341} 376 Ill. 450, 34 N.E. (2d) 388 (1941).
\textsuperscript{342} Laws 1937, p. 989; Ill. Rev. Stat. 1941, Ch. 110, § 129.
\textsuperscript{343} Ill. Rev. Stat. 1939, Ch. 110, § 153 and § 138.
\textsuperscript{345} 376 Ill. 212, 33 N.E. (2d) 437 (1941); note, 19 CHICAGO-KENT LAW REVIEW 387.
\textsuperscript{346} 350 Ill. 36, 182 N.E. 764 (1932).
\textsuperscript{347} 299 Ill. App. 594, 20 N.E. (2d) 620 (1939); note, 17 CHICAGO-KENT LAW REVIEW 383.
\textsuperscript{348} 307 Ill. App. 209, 30 N.E. (2d) 92 (1946), Burke, J., dissenting; note, 19 CHICAGO-KENT LAW REVIEW 239.
represented by a guardian ad litem, merely because the latter filed an answer admitting the allegations of the complaint. More energetic conduct on the part of the guardian ad litem, rather than a tendency to dispense with his services, seems now to be the required policy.

The validity of personal service of a summons in a civil action when made on a Sunday was questioned in Pedersen v. Logan Square State & Savings Bank, and regarded, by the Appellate Court, First District, as being improper by reason of a provision in the Criminal Code forbidding any disturbance of the peace by unnecessary labor on the Sabbath. Though noting earlier decisions in Illinois which hold that ministerial acts by judicial officers may be performed on that day, the court deemed that service of process, being the initial step to the acquisition of jurisdiction over the defendant, was essentially a judicial act and hence within the common law principle that no judicial act may be performed on a dies non juridicus.

The effectiveness of the procedural devices provided by Section 48 of the Illinois Civil Practice Act and by Rule 21 of the Illinois Supreme Court for testing an attack on the jurisdiction of the court on account of lack of service of process on defendant and for permitting his continued participation in the case, in the event such attack fails, without involving a submission to such jurisdiction, was demonstrated in Albers v. Bramberg, in which case the defendant, despite a judgment against him on the merits, was able to secure a reversal thereof because the purported service was invalid. The lesson of Brandt v. St. Paul Mercury Indemnity Company seems to have been thoroughly learned.

349 309 Ill. App. 54, 32 N.E. (2d) 644 (1941); note, 19 Chicago-Kent Law Review 278. The case was reversed, and service held good, in 377 Ill. 408, 36 N.E. (2d) 732 (1941), subsequent to the period of this survey. See note, post, this issue.


Motion practice, substituting for the use of the common law general or special demurrer, has also given rise to some questions, whether the motion is directed to the complaint or the subsequent pleadings. The propriety of repeating a motion to dismiss a suit or counterclaim after the same has once been decided was involved in *McGraw v. Oelig*356 and it was held that no sound objection exists thereto today357 any more than was the case hitherto.358 If an answer has been filed in the interim between the two motions, leave should be secured to withdraw the same upon such terms as the court may impose.359

In *Connett v. Winget*360 an occasion arose for the Supreme Court of Illinois to apply, for the first time, that part of Section 42(3) of the Illinois Civil Practice Act361 which deals with the waiver of defects in pleadings if not objected to in the trial court. There a complaint, based on negligence, alleged generally that plaintiff was a passenger with the defendant in the latter’s automobile. The defensive answer relied on the fact that the plaintiff was a guest. The defendant’s failure to question the sufficiency of the language of the complaint until after verdict was held to be a waiver of any defect therein, hence the complaint was regarded as sufficient to support a judgment for the plaintiff.362

As used to attack subsequent pleadings, the motion has seemingly been expanded in scope. In *The Department of Finance v. Schmidt*,363 a suit to collect taxes, the defendant filed a sworn answer setting forth new facts tending to show that the plaintiff’s claim had been previously adjudicated

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357 Ill. Rev. Stat. 1941, Ch. 110, § 172(4) applies only to a ruling on a motion under section 48 of the Illinois Civil Practice Act and a subsequent attempt to raise the same point in a later answer.
358 Shaw v. Dorris, 290 Ill. 196, 124 N.E. 796 (1919).
359 Ill. Rev. Stat. 1941, Ch. 110, § 170.
361 Ill. Rev. Stat. 1941, Ch. 110, § 166(3).
362 Left undetermined is the problem as to whether the responsibility is on the plaintiff to allege in his complaint the essential facts showing he was a paying passenger, or upon defendant to plead and prove that plaintiff was a guest within the meaning of Ill. Rev. Stat. 1941, Ch. 95½, § 58a.
363 374 Ill. 351, 29 N.E. (2d) 530 (1940).
adversely to plaintiff's contentions. Plaintiff moved to strike such answer on the ground that the prior proceedings relied on were not *res judicata*, inasmuch as the same had been dismissed without prejudice. Defendant made no objection that such motion was unverified, and his answer was stricken. On appeal from the subsequent judgment, defendant urged as error the granting of the unsworn motion to strike the verified answer. The Illinois Supreme Court held that verification of a motion to strike a sworn pleading is required only if such motion sets forth new matter, but that defendant's failure to raise such question in the trial court prevented consideration of the point on appeal. More interesting, perhaps, is the problem of what decision should have been rendered had proper objection been made. The motion under Section 45 of the Illinois Civil Practice Act is in the nature of a common law demurrer. No affidavit for the latter was necessary under the former practice except by reason of a rule of court requiring an affidavit that the same was not interposed for purpose of delay. The verified motion under Section 48 of the Act is available only for the purpose of dismissing plaintiff's complaint or defendant's counterclaim. It is not clear by what authority plaintiff could file a motion to strike defendant's answer and in support thereof supply new matter to the record. If the matter in the answer is insufficient to present a defense, a simple motion to strike should be enough. If plaintiff desires to controvert the defensive material, he should use a reply pursuant to Section 32 of the Civil Practice Act.

*Steps Subsequent to the Pleading Stage*

The provisions of the act relating to summary judgment expressly apply to actions "(a) upon a contract, express or implied; or (b) upon a judgment or decree for the payment

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364 Ill. Rev. Stat. 1941, Ch. 110, § 159, requires verification of subsequent pleadings if an earlier pleading has been so verified. Query: Is a motion to strike a "pleading?" The common law demurrer was not regarded as such. Puterbaugh, Common Law Pleading and Practice (10th ed.), p. 91, § 98; nor is its substitute included in the designation of pleadings covered by section 32 of the Illinois Civil Practice Act, Ill. Rev. Stat. 1941, Ch. 110, § 156.


366 Rules, Circuit and Superior Courts of Cook County, May 16, 1929. Rule 8 thereof is similar to present Rule 20, adopted December 5, 1937.


368 Ill. Rev. Stat. 1941, Ch. 110, § 156.
of money. . . ."\textsuperscript{369} It was held, therefore, in \textit{Eagle Indemnity Company v. Haaker}\textsuperscript{370} that proceedings thereunder were proper even though the foundational claim, upon which the initial judgment was rendered, was one sounding in tort. A further sidelight was thrown on summary judgment procedure by a second point therein presented. The plaintiff failed to file a reply to the defendant’s answer containing new matter but instead moved for summary judgment. The defendant joined in such motion without questioning the plaintiff’s omission to file a reply. It was held, consequently, that, by joining in the summary judgment proceeding, the defendant had waived the point.\textsuperscript{371}

The most complete discussion of the summary judgment procedure\textsuperscript{372} given so far appears in \textit{Gliwa v. Washington Polish Loan & Building Association},\textsuperscript{373} in which the court found that defensive affidavits were wilfully evasive, failed to state facts necessary to raise a triable issue, and hence entitled plaintiff to summary judgment. Of interest, though not decided, were the further questions of the defendant’s right in such proceedings to question (a) any variance between the plaintiff’s complaint and his summary judgment affidavits, and (b) the existence of fatal defects in the plaintiff’s complaint by reason of which it failed to state a cause of action. Neither of these defects was found to exist in the instant case, but presumably either could be relied on to defeat the use of summary judgment proceedings, at least until the complaint is amended.

Discretionary control by the court over the litigant’s right to take a non-suit, was sanctioned in \textit{O’Brien v. McCarthy},\textsuperscript{374} which approved a rule of the Municipal Court

\textsuperscript{369} Ill. Rev. Stat. 1941, Ch. 110, § 181.
\textsuperscript{370} 309 Ill. App. 406, 33 N.E. (2d) 154 (1941); note, 19 \texttt{CHICAGO-KENT LAW REVIEW} 374.
\textsuperscript{371} Watt v. Cecil, 368 Ill. 510, 15 N.E. (2d) 292 (1938), holds that by joining in a trial of the issue, the defendant thereby waives the plaintiff’s failure to file a reply. Though not squarely in point, the analogy is sound, since both involve an inquiry on the facts: in summary judgment proceedings, to ascertain if there is any “fact” to be determined, and, in a trial, to determine if that “fact” has been established.
\textsuperscript{372} Ill. Rev. Stat. 1941, Ch. 110, § 181.
\textsuperscript{373} 310 Ill. App. 465, 34 N.E. (2d) 736 (1941); note, 30 Ill. B.J. 115.
\textsuperscript{374} 306 Ill. App. 151, 28 N.E. (2d) 334 (1940), Matchett, J., dissenting; note, 19 \texttt{CHICAGO-KENT LAW REVIEW} 195.
of Chicago then in force, on the ground such rules merely regulate practice and procedure, despite a strong dissent that the right to take a non-suit is a substantive right and, consequently, not subject to control by a mere rule of court.

Actions by persons allowed to sue in forma pauperis may not, hereafter, be settled or dismissed without the payment, to the proper public official, of the costs of such litigation. A lien has now been created for the amount thereof in favor of such official, binding not only the litigants but also insurers or other third persons in anywise liable, enforceable by petition in the court in which the suit is pending. Attorneys contemplating the settlement of litigation should ascertain the applicability of such statute, since no notice of the lien is required beyond the mere entry of the order granting leave to file such suit as a poor person.

Mere passage of time between the verdict and the entry of judgment is not enough to cause the trial court to lose jurisdiction of the proceedings. Hence, according to the case of The Wallace Grain & Supply Company v. Cary, an application for judgment on the verdict over five years after the return thereof is not open to objection, inasmuch as a cause once docketed is deemed, in law, pending until the matters in controversy have been finally determined.

The finality of a judgment order, once entered, has produced some significant decisions. In one case the term of the presiding judge expired shortly after the rendition of judgment. Within thirty days the unsuccessful litigant moved to vacate the same. Hearing on such motion was provided by the successor judge and the requested relief was granted by him. It was contended that such action was improper in the absence of statutory authority conferring power on

375 Civil Practice Rules of the Municipal Court of Chicago, 1933, 90; rule 122. The present rule 46, in force July 1, 1940, follows the text of Ill. Rev. Stat. 1941, Ch. 110, § 176.
377 374 Ill. 57, 28 N.E. (2d) 107 (1940), reversing 303 Ill. App. 221, 24 N.E. (2d) 907 (1940); note, 19 CHICAGO-KENT LAW REVIEW 115.
378 The court intimated that the objection might have been sustained had there been a showing of laches causing a change in the rights of the parties or of third persons.
380 The Department of Public Works and Buildings v. Legg, 374 Ill. 306, 29 N.E. (2d) 515 (1940).
the successor judge to vacate the final orders of his predecessor. The court held, however, that the final judgment, when entered, is the judgment of the court and not that of the individual judge, and that the court itself, no matter how constituted, has jurisdiction over its final judgments for a period of thirty days after rendition, and hence may, upon good cause shown, vacate the same. On the other hand, reopening proceedings after final judgment or decree to permit the addition of new parties does not come within the provisions of Section 46 of the Illinois Civil Practice Act, according to Trupp v. First Englewood State Bank of Chicago, in which an unsuccessful attempt was made to add some 1250 additional defendants, shareholders in a bank stock holding company, and to recover superadded liability from them, over two years after the original decree had been rendered. Any attempt to permit such amendment, and thus confer jurisdiction on the court, would be regarded as an unconstitutional infringement, in the guise of procedural regulation, of the provisions of the statute relating to the finality of judgments and decrees.

Trial court review of its own law judgments, upon proper grounds, was hitherto accomplished by the proceedings in the nature of a writ of error coram nobis. Similar review of proceedings in equity was by means of a bill of review. Neither method was applicable to the other system. Upon the adoption of the Illinois Civil Practice Act, the former provision regarding proceedings in the nature of a writ of error coram nobis was re-enacted. The statute was silent as to the method for the review of equitable decrees, although it purported to abolish the formal differences between law and equity procedure. Such silence induced the Appellate Court, in Frank v. Newburger, to hold that the statu-

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381 Ill. Rev. Stat. 1941, Ch. 110, § 174(7).
382 Ill. Rev. Stat. 1941, Ch. 110, § 170. Clause 1 thereof permits such action "before" final judgment. Clause 3, permitting amendment of pleadings even "after" judgment, says nothing about bringing in new parties.
384 Ill. Rev. Stat. 1941, Ch. 77, §§ 82-85.
385 Ill. Rev. Stat. 1933, Ch. 110, § 89.
387 Ill. Rev. Stat. 1941, Ch. 110, § 196.
388 298 Ill. App. 548, 19 N.E. (2d) 147 (1939); note, 17 CHICAGO-KENT LAW REVIEW 276.
tory method for review of legal proceedings applied likewise to chancery suits. In no uncertain terms this view was rejected by the Illinois Supreme Court, so that, hereafter, the person seeking judicial re-examination of an earlier decree in equity must use the bill of review.

A person desiring to revive a judgment may have recourse to either the common law proceedings by scire facias or use the newer method provided by Section 55 of the Illinois Civil Practice Act. The distinctions between them and the appropriate procedure to follow must, however, be borne in mind. If the judgment creditor elects to pursue the former course he must not fail to have the writ of scire facias issued, according to The First National Bank of Chicago v. Craig, inasmuch as the use of the ordinary summons in civil actions will not suffice to notify the defendant, even though actually served, of the nature of the proceedings nor require him to answer the same.

**Appeal and Appellate Procedure**

Upon substantially the same problem, the second and third divisions of the Appellate Court, First District, have arrived at opposite results as to the right of a litigant to appeal from an order denying a motion to quash the service of process and directing the defendant to plead to the merits. In one case the court, of its own motion, raised the point and decided that such order was not a final order under Section 77, nor an appealable interlocutory order under Section 78, of the Illinois Civil Practice Act, and consequently dismissed the appeal. In the other case the problem of the appealability of the order in question appears to have escaped the attention of the court, and it decided, on the facts, that the trial court erred in denying such motion, hence reversed the order. The situation thus created

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394 Thomas v. Ritholz, 310 Ill. App. 166, 33 N.E. (2d) 932 (1941, 3rd div., 1st dist.)
395 The plaintiff-appellee filed no appearance or brief.
397 Snyder v. Whitney, 310 Ill. App. 297, 34 N.E. (2d) 95 (1941, 2nd div., 1st dist.)
398 Again the successful plaintiff-appellee filed no appearance or brief.
is unfortunate, but doubtless the rule is correctly stated in the Thomas case. 399

While, generally, the right of appeal exists only in cases of final judgments, order, or decrees, 400 unless otherwise specifically permitted by statute, 401 it has been held in Durkin v. Hey 402 that an appeal from an order compelling the production of books pursuant to the provisions of the Unemployment Compensation Act 403 is proper as the same is regarded as a final appealable order. 404 It was further held that the fact that the writ of error should more properly be used to review such proceedings 405 is not alone ground for the dismissal of the appeal under the saving effect of Rule 28 of the Illinois Supreme Court. 406

The provisions of the Illinois Civil Practice Act purporting to give the Appellate Court power to enter judgment on the verdict if it found the trial court had erroneously granted a motion for judgment notwithstanding the verdict 407 were declared unconstitutional in Sprague v. Goodrich 408 as an attempt to confer original jurisdiction on a tribunal possessing only appellate jurisdiction. A potential method by which the same result could be accomplished, that of having the trial court pass on the two issues presented by the alternative motion for judgment notwithstanding the verdict or for a new trial, giving the appellate tribunal an opportunity to review both rulings and enter judgment accordingly, was tacitly indicated as the proper method to pursue. Upon somewhat similar grounds the Illinois Su-

399 Thomas v. Ritholz, 310 Ill. App. 166, 33 N.E. (2d) 932 (1941, 3rd div., 1st dist.)
400 Ill. Rev. Stat. 1941, Ch. 110, § 201.
401 Ill. Rev. Stat. 1941, Ch. 110, § 202, permits such an appeal in cases involving interlocutory orders relating to injunctions and receiverships. Rule 31 of the Illinois Supreme Court (Ill. Rev. Stat. 1941, Ch. 110, § 259.31) merely supplements Ch. 110, § 202.
402 376 Ill. 292, 33 N.E. (2d) 463 (1941).
403 Ill. Rev. Stat. 1941, Ch. 48, § 228.
404 Lester v. Berkowitz, 125 Ill. 307, 17 N.E. 706 (1888), and Illinois Trust & Savings Bank v. Howard, 165 Ill. 332, 57 N.E. 39 (1900), distinguished as applying merely to orders to produce documentary evidence in a pending case.
406 Ill. Rev. Stat. 1941, Ch. 110, § 259.28.
407 Ill. Rev. Stat. 1941, Ch. 110, § 192(3c).
The true function of the *amicus curiae* is to protect the court in the consideration of a cause by providing such aid as is necessary or advisable when it appears that the parties to the litigation are not so doing. The mere fact that a pending cause may vitally affect other litigation or controversies is not enough to warrant intervention by persons connected with such other litigation. The Illinois Supreme Court has now, in a supplemental opinion to *Froehler v. The North American Life Insurance Company of Chicago*,\(^{411}\) announced that in the future, before that court, no such application for leave to file a brief as *amicus curiae* will be received or considered if accompanied by a brief, and no such motion, except in unusual cases, will be allowed unless in such motion it be shown that the parties to the litigation have overlooked or insufficiently briefed points and authorities essential to a proper consideration of the cause.

The time within which a notice of appeal must be filed\(^{412}\) does not begin to run if, within thirty days from the date of the judgment or order appealed from, a motion to vacate the same is filed by either party. If and when, even though at a much later period, the court finally disposes of such motion, the statutory period of limitation on the right to appeal then first commences running according to *Toman v. The Park Castles Apartment Building Corporation*;\(^{413}\) hence, a motion to dismiss an appeal taken within such extended period should not be granted.

Under the rules of the Illinois Supreme Court\(^{414}\) the rec-

\(^{409}\) 376 Ill. 183, on 197, 33 N.E. (2d) 485, on 492 (1941). While speaking solely of the power of the Supreme Court to receive such evidence, the reasons propounded for unconstitutionality are fully applicable to the several appellate courts.

\(^{410}\) Ill. Rev. Stat. 1941, Ch. 110, § 216(1d).

\(^{411}\) 374 Ill. 17 (at p. 27), 27 N.E. (2d) 833 (at p. 838) (1940).

\(^{412}\) Ill. Rev. Stat. 1941, Ch. 110, § 200.

\(^{413}\) 375 Ill. 293, 31 N.E. (2d) 299 (1941), reversing 303 Ill. App. 205, 24 N.E. (2d) 868 (1940), which fails to indicate any decision in that court upon the instant problem.

\(^{414}\) Ill. Rev. Stat. 1941, Ch. 110, § 259.36.
ord upon which the appeal is based must be filed in the trial court within fifty days after the appeal has been perfected, and transmitted to the reviewing court not more than sixty days after the notice of appeal has been filed. Such rules further provide that in the event the trial judge extends the time for filing, then the time within which the record on appeal shall be transmitted to the reviewing court is correspondingly extended.\textsuperscript{415} Despite such clear language, an attempt was made in \textit{Finn v. Williams}\textsuperscript{416} to dismiss an appeal because the record was filed too late under the first portion of the rule, though within ample time under the latter portion. The motion was unsuccessful.

The distinction between the "short" and "long" appeal, under Section 76 (1) of the Illinois Civil Practice Act,\textsuperscript{417} must be observed according to \textit{Spivey Building Corporation v. Illinois Iowa Power Company},\textsuperscript{418} and a litigant having taken recourse to the former may not subsequently seek to use the latter, even though his former appeal may have been dismissed through reasons beyond his control.\textsuperscript{419}

House Bill 531, effective January 1, 1942, contains many changes relating to civil practice and procedure. Attorneys not familiar with the provisions thereof should consult the brief synopsis thereof by Albert E. Jenner, Jr., former chairman of the Illinois Bar Association's section on Civil Practice and Procedure,\textsuperscript{420} as well as the language of the current statutes. The principal sections affected or added are those dealing with summary judgment procedure, the machinery for discovery including pre-trial conference, the time of making jury demand upon the transfer of a cause from the equity to the law docket, service of process outside the county, venue in cases involving quasi-municipal corporations, supplemental proceedings to discover assets, and many changes with reference to the right of appeal and the

\hspace{1cm}\textsuperscript{415} Ill. Rev. Stat. 1941, Ch. 110, § 259.36(2a).
\textsuperscript{416} 376 Ill. 95, 33 N.E. (2d) 226 (1941).
\textsuperscript{417} Ill. Rev. Stat. 1941, Ch. 110, § 200(1).
\textsuperscript{418} 375 Ill. 128, 30 N.E. (2d) 641 (1940); note, 19 \textit{CHICAGO-KENT LAW REVIEW} 274.
\textsuperscript{419} Under House Bill 531, effective January 1, 1942, applicable to actions thereafter brought and to actions then pending, an attempt has been made to save to the litigant the remedy of the "long" appeal if his recourse to the "short" appeal has been defeated without his culpable negligence. Ill. Rev. Stat. 1941, Ch. 110, § 200, as amended.
\textsuperscript{420} 30 Ill. B. J. 23.
time within which steps relating thereto must be taken. Changes in the rules of the Illinois Supreme Court will probably become necessary by reason thereof. Until a full statement of the act, with the accompanying rules, is available further comment thereon is valueless.

EVIDENCE

An appellate court rarely notices error on its own motion and then usually only to prevent obvious injustice. Such decisions are usually debatable, and the recent case of United States v. Dressler,\textsuperscript{421} is no exception. In this case, the Circuit Court of Appeals for the Seventh Circuit on its own motion noticed error in the admission of evidence to which no exception had been taken. The inadmissible evidence consisted of "criminal history" of the accused on the back of a card bearing the fingerprint of the accused which was properly introduced into evidence and given to the jury for the purpose of comparing them with other fingerprints. Due to an oversight, this error was not urged upon the court until the motion for a new trial was argued. The Court of Appeals considered the error sufficiently prejudicial to the defendant to reverse the judgment.

Judge Evans dissented for the reasons that, (a) the trial was fair and the failure to discover the character of the evidence submitted, bound the defendant, (b) there was no certainty that the jury considered anything but the proffered part of the card exhibit, (c) the jury could not have been prejudiced even had they read the inadmissible "criminal history" on the back of the exhibit, and, finally, that (d) an appellate court should not lightly contravene the exercised discretion of the trial judge who saw and heard the evidence and who refused to grant a new trial.

It will be generally agreed that opportunity must be given to cross-examine a witness who has testified on direct examination or that his testimony should be stricken out. An exception is made in some jurisdictions where severe illness or death intervenes. This question was presented in Illinois for the first time in the case of Kubin v. Chicago

\textsuperscript{421} 112 F. (2d) 972 (1940).
Title & Trust Company, in which a suggestion rather than a decision appears in the opinion to the effect that the trial judge may, in the exercise of his discretion, under the above mentioned circumstances, admit the direct testimony, insofar as the loss of cross-examination can be shown by the direct examiner to be immaterial.

EQUITY

The work of defining the relationship between equity and law under the Civil Practice Act of 1933 proceeds steadily if slowly. This year both legislature and courts have made contributions. The controversy involved in the much-discussed case of Frank v. Newburger has finally reappeared in the Supreme Court as Frank v. Salomon. It is now finally decided that Section 72 of the Civil Practice Act, substituting motions for writs of error coram nobis, is not applicable to chancery proceedings. Mr. Justice Smith points out that the Civil Practice Act preserves the distinction between actions at law and in equity:

These provisions demonstrate it was not the legislative intent to abolish substantive distinctions. Considering together all the provisions quoted, it was the obvious intention to do away with forms of pleading but to preserve separate procedure in law and equity. Presumably the legislature knew that the constitutional requirement of trial by jury in actions at law necessitates a distinction between legal and equitable proceedings, and we may assume that fact was taken into consideration when the statute was enacted.

The conclusion that "actions at law" and "actions in equity" remain in Illinois is further reinforced by the amendment to Section 64 of the Civil Practice Act which will become effective January 1, 1942. This amendment is intended to

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422 307 Ill. App. 12, 29 N.E. (2d) 859 (1940). Since the court quotes from Wigmore on Evidence (3rd ed.), V, § 1390, and since this reference does not distinguish chancery cases from cases in law with respect to this rule, it is possible that the Kubin case which was an equitable action will be followed in later cases sounding in law. It should be noted that the Kubin case was actually decided on other grounds so that the holding herein discussed was dictum.


424 376 Ill. 439, 34 N.E. (2d) 424 (1941); note, 19 CHICAGO-KENT LAW REVIEW 372.

425 Ill. Rev. Stat. 1939, Ch. 110, § 196.

426 376 Ill. at p. 444, 34 N.E. (2d) at p. 428.


clarify the problem of jury trial under the act. Plaintiff, desiring a jury trial, is required to file a demand at the time suit is commenced, and defendant is required to file his demand at the time of filing his appearance. In the event a case is transferred in whole or in part from the equity docket to the law docket a plaintiff is given three days and a defendant is given six within which to file a jury demand.

Although the act has been severely criticized for retaining the distinction referred to, it is apparent that a more harmonious partnership between equity and law has been accomplished. A recent case before the Appellate Court\(^{429}\) began as a suit for specific performance. The chancellor ruled that there was no equitable ground for specific performance but retained the case and assessed damages as in a law action. The Appellate Court held this to be proper procedure under the Civil Practice Act and ruled that a jury had been waived by failure to demand it. Apparently in such a case it is discretionary with the trial court to retain the case. Mr. Justice Matchett remarked, "It would be useless to send the case back to the trial court to have the chancellor enter an order that he should hear it through his legal instead of his equitable ear."\(^{430}\)

Two other cases involved procedural questions which should be noticed. The Appellate Court considered the propriety of an injunction order granted without either notice or bond under provisions of the Illinois injunction statute.\(^{431}\) It was held that allegations in the complaint that notice to defendant would unduly and prejudicially delay the hearing were insufficient to justify such an injunction restraining the breach of a contract to purchase dairy products exclusively from the plaintiff.\(^{432}\) Such allegations did not touch the merits of plaintiff's case. The Appellate Court also discussed generally and at length in another case the circumstances under which interpleader will lie.\(^{433}\)

The confidential relationship concept received an inter-

\(^{429}\) Westerfield v. Redmer, 310 Ill. App. 246, 33 N.E. (2d) 744 (1941).
\(^{430}\) 310 Ill. App. at p. 250, 33 N.E. (2d) at p. 746.
\(^{431}\) Ill. Rev. Stat. 1939, Ch. 69, §§ 3 and 9.
testing application in *Pidot v. Zenith Radio Corporation.* \(^434\)

Here it was held that a confidential relationship arose when a designer of radio cabinets submitted sketches to officials of a radio manufacturer with a view to having them adopted by the manufacturer. In the action, wrongful appropriation of plaintiff's designs was charged and it was said that the burden of establishing that the designs were originated independently was upon the defendant. The decree of the lower court dismissing the complaint was affirmed. Another opinion of the Appellate Court\(^435\) contains a significant discussion of the ownership of literary property as between employer and employee. There are indications that the courts will devise some more satisfactory means of protecting ideas than now exist apart from the patent and copyright laws. The "clean hands" maxim was applied in *People v. Depositors State Bank.*\(^436\) *In Hayes v. Davis*\(^437\) the Appellate Court followed the familiar rule in equity that where the owner of land on which permanent improvements have been placed by mistake seeks relief in equity he must be willing to allow the mistaken defendant compensation to the extent that the improvements have enhanced the value of the property.

As was reported in the Survey last year\(^438\) the Supreme Court of the United States reversed the Supreme Court of Illinois in the case of *Hansberry v. Lee.*\(^439\) It was held that the doctrine of res judicata could not be constitutionally applied to class suits where there was no adequate representation of substantial interests involved. The case has received extensive treatment in the law reviews.\(^440\)

**CONFLICT OF LAWS**

Two important decisions involving conflict of laws problems in the field of workmen's compensation were handed down by Illinois courts this year. The opinion of the Supreme

\(^{434}\) 308 Ill. App. 197, 31 N.E. (2d) 385 (1941).


\(^{436}\) 306 Ill. App. 365, 28 N.E. (2d) 825 (1940).

\(^{437}\) 307 Ill. App. 440, 30 N.E. (2d) 521 (1940).

\(^{438}\) 19 CHICAGO-KENT LAW REVIEW, pp. 69-71.

\(^{439}\) 311 U. S. 32, 61 S. Ct. 115, 85 L. Ed. 11 (1940).

\(^{440}\) 26 Corn. L. Q. 317; 39 Mich. L. Rev. 829; 89 U. of Pa. L. Rev. 525. The decision of the Supreme Court of Illinois was commented on in 35 Ill. L. Rev. 213 and 7 U. of Chi. L. Rev. 563.
Court in Biddy v. Blue Bird Air Service\(^4^4^1\) dealt with the considerations of policy involved in the recognition and application of provisions of the compensation law of another state. Biddy, a resident of Michigan, was employed as a camera man by a Michigan corporation having a studio in Chicago but its principal place of business in Detroit. Biddy was killed in the crash, near Naperville, Illinois, of a plane belonging to Blue Bird Air Service chartered to take Biddy on an assignment. The contract of employment had been entered into in Michigan and both employer and employee had elected to be bound by the compensation law of that state. An award for dependents under the provisions of the Michigan statute had been paid by the employer's insurance carrier. The administratrix brought suit in Illinois under the Injuries Act\(^4^4^2\) of this state. The defendants contended that the suit could not be maintained, first, because the compensation law of Illinois applied, and, second, because under the law of Michigan if the employee or his dependents elected to take compensation any right of action against a negligent third person passed to the employer.

The Supreme Court disposed summarily of the first contention, pointing out that the contract of employment was made in Michigan and citing Cole v. Industrial Commission\(^4^4^3\) as authority for the proposition that the Illinois act did not apply to the situation. But, relying partly on the decision of the Supreme Court of the United States in Bradford Electric Light Company v. Clapper,\(^4^4^4\) the court held that it should recognize and enforce the provisions of the Michigan statute which made election to take compensation a bar to a suit against a third person whose negligence caused the death. In response to a contention that the provision of the Michigan act which permits such an election by the employee was contrary to public policy in Illinois, the court pointed out that the right of election was not involved and that plaintiff was in the same position as though compensation had been paid under the Illinois act. Since plaintiff would not be entitled to maintain this action under

\(^{4^4^1}\) 374 Ill. 506, 30 N.E. (2d) 14 (1940).

\(^{4^4^2}\) Ill. Rev. Stat. 1941, Ch. 70, §§ 1 et seq.

\(^{4^4^3}\) 353 Ill. 415, 187 N.E. 520 (1933).

\(^{4^4^4}\) 286 U. S. 145, 52 S. Ct. 571, 76 L. Ed. 1026 (1932).
the Illinois act, the giving effect to the provisions of the Michigan act was in accord with public policy in Illinois.

A related problem came before the Appellate Court in *Miller v. Yellow Cab Company*. In this case the principal question was whether or not the provisions of the Illinois Workmen’s Compensation Act apply to an employee injured while temporarily in Illinois where the contract of employment was made outside of the state and the principal employment was also outside of the state. The court refused to apply the Illinois act to a suit by the employee against a third person allegedly negligent, where the contract of employment was made and the employment carried on in Texas. Reliance was placed here also principally on the case of *Cole v. Industrial Commission* and upon *Bradford Electric Light Company v. Clapper*. Public policy was held not to forbid an action by an employee against a negligent third person where such action is permitted under the applicable compensation law of another state. Thus, in these two cases, the courts in Illinois have held that where the Illinois compensation act does not apply it is not contrary to public policy here to permit or to deny an action by the employee or his representative against a negligent third person according to the provisions of the applicable compensation act of another state. The results are justified, since in ordinary cases no harmful consequences arise from either course.

The Supreme Court has apparently disapproved of the position taken in the Restatement of Conflict of Laws that only the state of the domicile can exercise jurisdiction to determine the custody of children or to create the status of guardian of the person. In the case of *People v. Wignate*, a father, residing temporarily in Georgia, placed his infant daughter, after her mother’s death, in the custody of a maternal uncle and aunt in Illinois. Upon the death

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446 333 Ill. 415, 187 N.E. 520 (1933).
448 A valuable treatment of the decision is to be found in a note by L. B. Marshall in 18 Chicago-Kent Law Review 397.
449 Restatement of Conflict of Laws, § 117.
450 376 Ill. 244, 33 N. E. (2d) 467 (1941).
of the father the child's paternal grandmother, domiciled in Massachusetts, petitioned a probate court in that state for an order appointing her as guardian of the person and property of her granddaughter. The prayer of the petition was granted. Thereafter the grandmother sought a writ of habeas corpus in Illinois, claiming that she was entitled to custody of the child by force of her appointment as guardian by the Massachusetts court. No question was raised as to the moral fitness of any of the parties or as to the care which the child had received from the defendants. The circuit court remanded the child to the custody of the defendants, and an appeal was taken directly to the Supreme Court on the issue of whether the Illinois court was obliged to extend full faith and credit to the order of the Massachusetts probate court.

The Supreme Court held that the father was domiciled in Massachusetts, the domicile of the child was that of its father, and that the act of the father in placing the child in the care of the defendants in Illinois did not affect that domicile. However, the court decided that "the jurisdiction of a State to regulate the custody of infants found within its territory does not depend upon the domicile of the child." Residence within the state was said to be sufficient to confer jurisdiction to determine custody. Since the primary consideration in all such custody cases is "the present and prospective welfare of the child," full faith and credit was said not to require the Illinois court to consider the Massachusetts order a bar to the exercise by the court of the power to determine the status of the child. The position was taken that the courts of the state in which the child resides are in better position to determine what is for its best interests than are the courts in the state of its domicile. In view of a tendency to overrefine the law of domicile and to lose sight of its function and purpose the decision seems to reflect sound common sense. To deny jurisdiction to the Illinois courts under facts like those in the present case, as the restatement seems to do on the basis of a technical domicile elsewhere, is scarcely realistic.451

451 Of course the Restatement recognizes the power of a state in which the child is found to make a temporary order for its protection (Section 118), and such state may award control while in the state to another person upon a finding
The importance of domicile in relation to the validity of a marriage was considered by the Appellate Court in *In re Peirce's Estate.* In this case a ceremonial marriage was contracted in Mexico before a previous marriage of the husband had been dissolved. After the ceremony the parties established their domicile in Illinois. One child had been born of the first and four were born of the second marriage. The husband began divorce proceedings in Nevada some years later against his first wife, who appeared, contested, and won a decree of divorce and alimony from him. The second wife joined the husband in Nevada after the divorce and remained there three or four weeks with him. Thereafter, the parties returned to Illinois where they lived together for many years as husband and wife. Upon the death of the husband a contest arose over the right to administer the estate. An attempt was made to invoke the Nevada rule to the effect that if parties attempt a valid marriage but one is under a disability, cohabitation, after the removal of the disability, matrimonially intended, will give rise to a valid marriage. They interpreted the Nevada law to apply only to Nevada citizens and held that the parties were domiciled in Illinois. Illinois had therefore the right to determine their status. Recognizing the hardships involved in the decision holding the second marriage invalid the court said:

Sentiment and companionship go far in the sum of human lives. It is with sympathy, patience, and understanding that we view the disappointments and sorrows of life. They teach many things not found in books. However, an affirmance of this case, in our opinion, would violate the intent and purpose of the statute of this state.453

The Illinois domicile, here held to require the application of the policy of this state regarding common law marriages, was no mere technical domicile.

One other case of interest involving the enforcement of foreign judgments should be mentioned. An action on a Canadian judgment was held to be a "civil action" within

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452 310 Ill. App. 481, 34 N.E. (2d) 564 (1941).
453 310 Ill. App. at p. 486, 34 N.E. (2d) at p. 566.
the meaning of the provision of Section 15 of the Limitations Act\textsuperscript{454} requiring "all civil actions not otherwise provided for" to be brought within five years after the cause of action accrued. Disapproving of two prior decisions, the Appellate Court held that an oral promise to pay by the judgment debtor within the five-year period was sufficient to lift the bar of the statute.\textsuperscript{455}

CREDITORS' RIGHTS

In \textit{Hood v. Commonwealth Trust & Savings Bank},\textsuperscript{456} the Supreme Court has extended to an apparently new type of situation its rather strict rule concerning bank stockholders liability. One of the stockholders had transferred his shares to the bank "for reissue" and a new certificate was issued to the stockholder and his wife as "joint tenants." The court held that the transfer started a new period of stock ownership, and sustained the imposition of separate liability upon the husband, and upon the husband and wife jointly. The opinion contains an interesting and informative, if not too novel, discussion of a number of other points touching bank stockholders liability—particularly with respect to accounting and evidentiary matters.

A similarly strict attitude is taken with respect to a different phase of bank stockholders' liability by the Appellate Court in \textit{Burket v. Reliance Bank & Trust Company}.\textsuperscript{457} Three years after judgment had been taken against the defendant upon his liability, he petitioned the court to enjoin the collection of the judgment on the ground that the total amount paid in by stockholders holding stock between 1917 and 1928, including payments made subsequent to the judgment against him, exceeded the amount of the bank's unsatisfied liability for that period, and that the period during which he had held stock was included within those years.\textsuperscript{458} The court denied the petition on two grounds, first, that there was no allegation or proof that the payments for which

\textsuperscript{454} Ill. Rev. Stat. 1939, Ch. 83, § 16.
\textsuperscript{456} 376 Ill. 413, 34 N.E. (2d) 414 (1941).
\textsuperscript{457} 306 Ill. App. 563, 29 N.E. (2d) 297 (1940); note, 29 Ill. B. J. 307.
\textsuperscript{458} Defendant had held his stock in the bank during the period from March 3, 1921, to July 2, 1924.
credits were claimed were made by contemporaneous stockholders, and, second, that payments made by contemporaneous stockholders could be relied upon only as a defense to the suit against the stockholder and not by way of satisfaction subsequent to judgment.

In Peiffer v. French, the Supreme Court has handed down what would seem to be the last of a series of cases on body executions, and has apparently been carried away by its own dictum in Ingalls v. Raklios. In order to support a body execution the statute requires that "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."

The statute seems unambiguous and clear, and not to require such a finding in the judgment when the case has been tried to a jury and a suitable finding is made by the jury. In the instant case, nevertheless, the Supreme Court requires such finding to be included in the judgment in addition to the finding by the jury. The court based the requirement upon its decision in the Raklios case in which it held that the finding must be included in the judgment itself. In that case, however, there was no jury, and the true basis of the decision was that there was no finding at all such as required by the statute. The Raklios case gave effect to the purpose of the amendment of the statute, i.e., to have the question of malice finally determined at the time of the trial. The Peiffer case goes beyond this and, as indicated by Mr. Justice Farthing in his dissent, adds to the statute, in effect, the following:

459 376 Ill. 376, 33 N.E. (2d) 591 (1941).
461 Ill. Rev. Stat. 1941, Ch. 77, § 5.
462 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 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. Laws 1935, p. 937.]"
And this same finding that malice is the gist of the action must be included in the judgment in the former case [where there is a jury trial] as well as in the latter [where there is no jury].

It may be well to mention two Appellate Court cases passing upon points of some interest if of no great difficulty. In *Ring v. Palmer*, the court invalidated a garnishment proceeding commenced within seven years of the rendition of the judgment, but in which the writ was not served until after the expiration of that period. The court does not indicate whether the result would have been the same had the writ been served before the judgment lapsed. It does, however, seem to feel that the same rule applies to garnishments as to executions. If so, it might be that a remedy analogous to that of *venditioni exponas*, which permits sale under an execution even after the expiration of the normal judgment period.

In the second case, that of *Brown v. Nelson*, the Appellate Court held that failure to have homestead set off does not invalidate an execution sale, although it does not, of course, defeat the right to have such homestead set off.

**DAMAGES**

The Appellate Court of Illinois for the Fourth District took an important step in approving an action brought to recover attorney's fees incurred in previous litigation between the same parties. This appears to be the first time in Illinois that an appellate court has recognized this right. Previous cases merely recognized a common law right to recover such fees incurred in an action between the plaintiff and a third person where the litigation had been occasioned by the defendant's wrong. The prior litigation here involved was a suit in equity, brought by the heirs of one who had been defrauded of his interest in land by the defendant, to reclaim that interest. The present decision is new not only in

463 309 Ill. App. 333, 32 N.E. (2d) 956 (1941).
464 Ill. Rev. Stat. 1941, Ch. 77, § 6: "No execution shall issue upon any judgment after the expiration of seven years from the time the same becomes a lien, except upon the revival of the same by scire facias; but real estate, levied upon within said seven years may be sold upon a venditio rei [venditioni] exponas, at any time within one year after the expiration of said seven years."
466 Ritter v. Ritter, 308 Ill. App. 337, 32 N.E. (2d) 185 (1941); notes, 8 U. of Chi. L. Rev. 760, 30 Ill. B. J. 69.
recognizing the right to such fees but also in approving the subsequent action brought solely for the purpose of recovering those fees. One judge dissented on the grounds, first, that this decision was opposed to the policy of the law in this state and, second, that the matter was res judicata because the matter might have been raised in the equity suit. The latter point is not well taken, however, because the doctrine of res judicata applies to matters which might have been raised in the previous suit only if they could have been raised in support or defense of the cause of action there litigated, and it does not apply to such matters as might properly have been joined as a demand or used as a counterclaim. As to the matter of policy, it remains for the Supreme Court to decide whether it will so interpret its previous declarations.

GOVERNMENT TAXATION

*Mobile & Ohio Railroad Company v. State Tax Commission*\(^{467}\) presents the most perplexing tax problem of the year. The Tax Commission, pursuant to the statutory mandate to tax railroad property as a unit,\(^{468}\) fixed the full value of the property, divided such value among the counties and other taxing districts through which the line of railroad operated, and then equalized the values so allocated for each county at the average level of assessment in force in the particular county. The Supreme Court invalidated the assessment upon the ground that, despite the fact that no statewide property taxes were levied, the state is a taxing district for the purpose of taxing railroad property, and that such property must be assessed "as a unit and upon no higher valuation for one mile than another." The method employed by the Tax Commission prior to 1938 had been to equalize as a unit the full valuation of the property, using as an equalizing factor the average level of assessment throughout the state. The change of method was doubtless prompted by a realization that the former method gave an unfair advantage to counties using a low level of assessment and worked an undue hardship upon counties using a rela-

\(^{467}\) 374 Ill. 75, 28 N.E. (2d) 100 (1940); note, 35 Ill. L. Rev. 766.

\(^{468}\) Ill. Rev. Stat. 1941, Ch. 120, § 561.
tively higher level. It would seem that the former practice departs further from the ideal of uniformity envisioned by the court than does the method employed in the instant case. For the years 1933 through 1937 the average level of assessment used was 37 per cent, whereas immediately adjacent property in one county was assessed at a level as low as 24 per cent and in another county as high as 78 per cent. The Tax Commission now seems confronted with two alternatives: (1) to revert to the former inequitable practice, or (2) to undertake the burden and expense of equalizing the assessment levels throughout the state. The mere clerical expense in connection with the latter alternative would be staggering, and otherwise quite unnecessary since no state property tax is now levied. It is submitted that the method invalidated by the court has precisely the same effect such an equalization would have, and without the burden and expense thereof. It is regrettable that this intelligent innovation in the direction of true uniformity of assessment has run ashore on the rocks of a highly artificial concept of uniformity.

The case of French v. Toman raises several questions involving Illinois taxation and gives only a partial answer to one of them. After tax foreclosure proceedings, a redemption was made by the plaintiff, who had acquired title subsequent to the period for which the taxes foreclosed had accrued. The state's attorney, for some reason which does not appear, instead of permitting the customary suit to enjoin the collection of the balance of the tax to go by default, contested it. The Supreme Court ruled that the plaintiff held the property free of liability for the balance of the taxes and that the injunction should be issued. The decision

469 "The enforcement of the uniformity requirements of the constitution is not a new problem in this court nor with the legislature, and it cannot truthfully be said that either branch of government has ever yet arrived at a satisfactory solution. It may be that the ideal is beyond attainment through available human agencies, yet the quest cannot be abandoned either by the legislative or judicial branch of government. The problem is administrative rather than legislative or judicial, and the administrative difficulties have so far proved insurmountable in so far as any exact attainment of the desired end is concerned."

470 For an excellent discussion of the opinion, see note, 35 Ill. L. Rev. 766.

471 375 Ill. 389, 31 N.E. (2d) 801 (1941); note, 19 CHICAGO-KENT LAW REVIEW 310.

472 See discussion of Brown v. Jacobs, 367 Ill. 545, 12 N.E. (2d) 1210 (1937), in 17 CHICAGO-KENT LAW REVIEW 64. This same technique has been applied to foreclosures.
was not as broad, however, as it was originally hoped by the bar that it might be. The court deliberately refrained from determining whether or not there is personal liability for the payment of real property taxes. The court stressed the fact that the plaintiff had acquired title after the taxes became a lien, and reached its decision by application of ordinary principles governing redemption from foreclosure of liens. It seems clear that the decision furnishes no basis for dispensing with the independent injunction suit now in use in tax foreclosure.\footnote{473}

During the period of the survey the Supreme Court has handed down three decisions affecting substantive liability to pay occupational sales tax, the tenor of which is quite different from that of previous decisions, and in all three of which the rules of the Department of Finance were sustained. In \textit{Ahern v. Nudelman},\footnote{474} the rule\footnote{475} had required the payment of tax by undertakers upon caskets, grave vaults, gravedressing and flowers, but not upon receipts from services. The unsuccessful taxpayer had sought to bring sales to the taxable articles within the sweeping doctrine of the Babcock,\footnote{476} Adair,\footnote{477} Burgess,\footnote{478} Mallen\footnote{479} and Marshall\footnote{480} cases, holding not taxable the transfer of tangible property incidental to the rendition of professional or skilled services. In \textit{Sluis v. Nudelman},\footnote{481} the rule\footnote{482} required the payment of

\footnote{473 For an excellent discussion of the whole problem, see note by M. Eulette, \textit{19 Chicago-Kent Law Review} 310.} 
\footnote{474 374 Ill. 237, 29 N.E. (2d) 268 (1940).} 
\footnote{475 Department of Finance Rule No. 8: "A funeral director or undertaker is engaged in the business of selling taxable personal property to consumers, including such articles as caskets, grave vaults and occasionally gravedressing and flowers. He is also engaged in the business of rendering services such as embalming and providing livery service and other equipment in the conducting of funerals. A funeral director is liable for tax measured only by the gross receipts from sales of tangible personal property. No tax applies on receipts from services which he renders such as those which are enumerated above."} 
\footnote{476 Babcock v. Nudelman, 367 Ill. 626, 12 N.E. (2d) 635 (1937); note, 32 Ill. L. Rev. 685.} 
\footnote{477 Adair Printing Co. v. Ames, 364 Ill. 342, 4 N.E. (2d) 481 (1936).} 
\footnote{478 Burgess Co. v. Ames, 359 Ill. 427, 194 N.E. 565 (1935).} 
\footnote{480 C. & E. Marshall Co. v. Ames, 373 Ill. 381, 26 N.E. (2d) 483 (1940); note, \textit{19 Chicago-Kent Law Review} 80.} 
\footnote{481 376 Ill. 457, 34 N.E. (2d) 391 (1941).} 
\footnote{482 Department of Finance Rule No. 60: "Sale of seeds to a person who plants them in the soil for the purpose of growing agricultural products are sales to a purchaser for use or consumption and not a sale for the purpose of resale."}
tax upon sales of seed to farmers. The contention of discrimination based upon the more favorable treatment accorded feed dealers, was rejected rather curtly with the comment that the rule there involved "is entirely separate and is not in issue in this case."

Continental Can Co. v. Nudelman<br>present an unusually interesting problem of "incidental" sales. The dozen taxpayers here involved were corporations engaged in manufacturing and processing personal property, none of which they sold at retail. The tax liability which they unsuccessfully resisted was for receipts from the sale of food to their employees in cafeterias operated without profit and merely for convenience. Citing and relying upon the Franklin County Coal case,<br>the Supreme Court distinguished the exemption arising in the case of "isolated or occasional sales made by one who does not hold himself out as engaging in the business of selling such property at retail. . . ."

One sales tax case not touching substantive liability may be mentioned. In Hoffman v. Department of Finance,<br>the Supreme Court reiterated the questionable doctrine of People v. Fisher,<br>to the effect that on review of orders of the department on certiorari the trial court is limited to the common law relief of quashing the record or quashing the writ.<br>The court also held inadmissible in evidence for the purpose of showing sales in interstate commerce ninety-four statements and letters purporting to have been signed by as many individuals which, in effect, stated each of these persons lived outside the State of Illinois, that they purchased certain merchandise on a day named, from appellees, and that these goods were delivered to them at their places of residence.

The court characterized the letters as hearsay and cited the Novicki case.<br>It may be queried, however, whether the

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483 376 Ill. 446, 34 N.E. (2d) 397 (1941).
484 Franklin County Coal Co. v. Ames, 359 Ill. 178, 194 N.E. 268 (1935).
485 374 Ill. 494, 30 N.E. (2d) 24 (1940).
486 373 Ill. 228, 25 N.E. (2d) 785 (1940).
487 See discussion in connection with infra, under Public Utilities.
488 Novicki v. Department of Finance, 373 Ill. 342, 26 N.E. (2d) 130 (1940); note, 19 CHICAGO-KENT LAW REVIEW 81.
admissibility of such documents does not fall within the proposition that the department shall not be bound by technical rules of evidence,\textsuperscript{490} and if not, just what does fall within that provision.

\textit{In re Globe Varnish Company}\textsuperscript{490} involves the problem of sales taxes and interstate commerce. The merchandise in question was sold and delivered to an interstate carrier in Chicago consigned to the carrier’s shops in Milwaukee, Wisconsin. Treating the railroad as occupying the dual capacity of purchaser and carrier, the court held the transaction not subject to Illinois retailers’ occupational tax on the ground that such a tax would constitute an interference with interstate commerce. The court emphasized the fact that this type of transaction had been used by the seller and the carrier for twenty-five years.\textsuperscript{491}

**TRADE REGULATION**

Two cases, one amended and two new statutes deserve attention in this field. \textit{E. Edelman & Company v. Stromberg}\textsuperscript{492} raises the question of whether or not good will may be sold with the physical assets of a corporation in a bankruptcy sale. The court quite properly held that it may and restrained the defendant from unfair competition in his use of advertisements and names similar to those used by the defunct corporation.\textsuperscript{493}

In \textit{Phillips v. W.G.N., Inc.},\textsuperscript{494} the plaintiff’s suit to restrain defendants from broadcasting a program known as “Painted Dreams” was dismissed because of a finding that when plaintiff had originally written the program for defendants she had done so under such circumstances that all “ownership in the result of what was done belonged to

\textsuperscript{490} Ill. Rev. Stat. 1941, Ch. 120, § 475: “In the conduct of any investigation or hearing, neither the Department nor any officer or employee thereof shall be bound by the technical rules of evidence. . . .” The court does not appear to limit the benefit of this provision to the department, which might offer a solution here.

\textsuperscript{491} For an excellent analysis of the decision, see 35 Ill. L. Rev. 972.

\textsuperscript{492} 306 Ill. App. 118, 28 N.E. (2d) 128 (1940).

\textsuperscript{493} The alternative would seem to be to hold that the good will is extinguished since it is recognized that it cannot pass except with the physical assets.

\textsuperscript{494} 307 Ill. App. 1, 29 N.E. (2d) 849 (1940).
defendants." Plaintiff had claimed ownership and rested her case on her common law rights, charging defendants with unfair competition.495

The Illinois Fair Trade Act496 permitting resale price maintenance contracts within the exceptions which the Miller-Tydings Act497 carves out of the Sherman Anti-Trust Act498 was amended by the 1941 legislature499 to except from the provisions of the Act "any commodity for library purposes" which may be sold or offered for sale to the State or any political subdivision thereof or to any public, endowed or school library.500

Two acts501 were passed by the 1941 Legislature, both of which related to "uneconomic practices" in the sales of merchandise. The first is directed toward private business and, with certain exceptions, forbids the sale by any person, firm or corporation to his or its employees, or any person, of any article of merchandise "not of his or its own production or not handled in his or its regular course of trade, excepting meals, cigarettes and tobacco, and excepting such specialized appliances and paraphernalia as may be required in said business enterprise for the safety or health of its employees."502 The second is directed toward the State or any political subdivision thereof and its officers, agents and employees. With certain exceptions the Act forbids each of them to sell to or procure for sale or have in its or his possession or under its or his control for sale to any officer, agent or employee of the State or any political subdivision thereof or municipality therein any article, material, product or merchandise of whatsoever nature, excepting meals, public services and such specialized appliances and paraphernalia as may be required for the safety or health of such officers, agents or employees.503

495 The case is referred to not because of any novelty in legal conclusions, but because, strangely enough, it apparently presents a problem of first impression in our state courts.
496 Ill. Rev. Stat. 1941, Ch. 121 1/2, §§ 188-191.
497 Public Act No. 314, 75th Congress.
499 § 190 was added.
500 The effect of the amendment is, of course, to render invalid resale price maintenance contracts on such commodities.
502 Ill. Rev. Stat. 1941, Ch. 121 1/2, § 204.
503 Ill. Rev. Stat. 1941, Ch. 121 1/2, § 206.
Criminal penalties are imposed for violation of each act.\textsuperscript{504} Plainly the object is to prevent the unlimited wholesale buying through the offices of a business or a political agency, which is now so common. While the object in each case may be praiseworthy, serious doubts as to the constitutionality of the former act are raised by reason of the indefiniteness with which it is drawn and the possible logical extension of its application to cover sales not conceivably within the power of the State to prohibit.

**PUBLIC UTILITIES**

In *Brotherhood of Railroad Trainmen v. Elgin, Joliet & Eastern Railway Company*,\textsuperscript{505} the Illinois Supreme Court has gone perhaps further than before in clarifying the scope of review of orders of the Commerce Commission by the Circuit Court. Apparently the Circuit Court may not in any way modify the order of the Commission, even to the extent of reversing in part and affirming in part, but must either confirm the order or set it aside. The analogy of the quashing of the record or of the writ under common law certiorari is obvious. The statute would seem susceptible of an interpretation permitting modification of the Commission's orders without simply quashing them entirely.\textsuperscript{506} The desirability of the present interpretation may be seriously questioned. A similar attitude was taken with respect to review of orders of the Department of Finance,\textsuperscript{507} with the result that the Circuit Court is frequently compelled to invalidate large assessments by the Department simply because some small part of it may not be supported by evidence or otherwise invalidated. There was perhaps more justification for doing so there than with respect to orders of the Commerce Commission, inasmuch as the statute provides for review of decisions of the Department of Finance by "certiorari."\textsuperscript{508}

\textsuperscript{504} Ill. Rev. Stat. 1941, Ch. 121\(\frac{1}{2}\), §§ 205, 207.
\textsuperscript{505} 374 Ill. 60, 28 N.E. (2d) 97 (1940).
\textsuperscript{506} Ill. Rev. Stat. 1941, Ch. 111\(\frac{1}{2}\), § 72.
\textsuperscript{507} People v. Fisher, 373 Ill. 228, 25 N.E. (2d) 785 (1940).
\textsuperscript{508} Ill. Rev. Stat. 1941, Ch. 120, § 451: "The Circuit and Superior Court of the County wherein the hearing is held shall have power by writ of certiorari to the Department to review all questions of law and fact determined by the Department in administering the provisions of this Act presented by such record."
It might be appropriate to mention at this point another decision involving review, that of Toledo, Peoria & Western Railroad v. Illinois Commerce Commission,\textsuperscript{509} in which the Supreme Court held that appeals from a judgment reviewing orders of the commission must be taken within the sixty days specified in the Public Utilities Act\textsuperscript{510} and not simply within the ninety days prescribed in the Civil Practice Act,\textsuperscript{511} inasmuch as they are within the "special statute" exceptions of the latter act.\textsuperscript{512}

In Barry v. Commonwealth Edison Company,\textsuperscript{513} the Supreme Court reversed the decision of the Appellate Court by that same name,\textsuperscript{514} but has apparently left standing, and perhaps even strengthened what was said therein concerning estoppel by order of the Commerce Commission operating by analogy, at least, to the doctrine of res judicata. It seems that the defendant had disconnected the plaintiff's electric service on the ground that he was procuring unmetered current for his tavern by use 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 other relief. Upon dismissal of the complaint, he filed a complaint in the Superior Court of Cook County in three counts to recover: (1) for 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. In reversing this decision, the Supreme Court did so upon the ground that the matters in dispute had not been determined by the Commission, indicating that the Commission had no jurisdiction to award damages for injury to the plaintiff's business [as distinguished from reparations for the overcharge, if any] and, of course, no jurisdiction of the slander suit. It would seem clear that the

\textsuperscript{509} 375 Ill. 35, 31 N.E. (2d) 293 (1940).
\textsuperscript{510} Ill. Rev. Stat. 1941, Ch. 111\%\%\%, § 73.
\textsuperscript{511} Ill. Rev. Stat. 1941, Ch. 110, § 200.
\textsuperscript{512} Ill. Rev. Stat. 1941, Ch. 110, § 125.
\textsuperscript{513} 374 Ill. 473, 20 N.E. (2d) 1014 (1940).
\textsuperscript{514} 302 Ill. App. 558, 24 N.E. (2d) 220 (1939); note, 19 CHICAGO-KENT LAW REVIEW 86.
lower court went too far in dismissing the slander suit. Is it equally clear, however, that the adverse determination of the Commission on the reparation claim might not be determinative not only of that count, but of the right to damages as well? At all events, the court bolsters its decision upon all counts by reference to the provisions of the Commission's order "that the complaint for reparations be dismissed and the parties left to their respective remedies at law." That the court apparently recognizes the conclusiveness of the determinations of the Commission is illustrated by language such as the following:

The present suit does not involve the same claim or issue as that presented before the Commerce Commission and, therefore, the rule that everything that might have been litigated is settled does not apply. In order that the finding of the commission operate as an estoppel under the other branch of the rule there must have been an issue decided against appellant that is material to his right of recovery in the present suit. Such an order of finding does not appear in the record.

In Railway Express Agency v. Illinois Commerce Commission, the Illinois Supreme Court makes virtually ex cathedra and without citation of supporting authorities a statement of interest and perhaps of considerable future significance:

The order of the Commerce Commission granting the certificate of necessity and convenience did not give petitioner a vested interest that could not be changed by legislative enactment. It was the granting of a privilege or license to do a certain thing issued by an agency of the state in the exercise of the police power, and was subject to modification or revocation.

The certificate of convenience and necessity referred to had been granted to a motor carrier by an order of the Illinois Commerce Commission, which was subsequently set aside by the Circuit Court. While appeal from this decision was pending, the Legislature transferred control of motor carriers from the Commerce Commission to the Department of Public Works and Buildings. The Supreme Court now holds that the proceeding has been thereby rendered moot.

In general, a fairly sharp distinction is recognized between the granting of certificates of convenience and neces-

515 374 Ill. 151, 28 N.E. (2d) 116 (1940).
516 Ill. Rev. Stat. 1939, Ch. 95½, §§ 240 et seq.
sity and the issuance of licenses, the former being associated with admission to public utility status and regarded as conferring contractual rights of a more or less exclusive character.\footnote{Frost v. Corporation Commission of Oklahoma, 278 U. S. 515, 49 S. Ct. 235, 73 L. Ed. 483 (1929); West Suburban Transp. Co. v. Chicago & W. T. Ry. Co., 309 Ill. 87, 140 N.E. 56 (1923).}
The Legislature doubtless has the power to create for motor carriers to whom it grants certificates of convenience and necessity some status inferior to that protected one of other carriers and public utilities, and it is possible that such may be the policy in Illinois.\footnote{See Egyptian Transportation System v. Railroad Co., 321 Ill. 580, 152 N.E. 510 (1926).} If so, the statement quoted is justifiable. It would seem desirable, however, that some such explanation accompany a statement so sweeping, and contain not only the reason for declaring such inferior status but some clarification and definition of the status itself.

An interesting bit of the aftermath of the Peoples Gas case\footnote{Peoples Gas Light & Coke Co. v. Slattery, 373 Ill. 31, 25 N.E. (2d) 482 (1940); notes, 18 CHICAGO-KENT LAW REVIEW 279, 19 CHICAGO-KENT LAW REVIEW 84.} was disposed of by the Appellate Court in \textit{Peoples Gas Light & Coke Company v. Hart.}\footnote{310 Ill. App. 351, 34 N.E. (2d) 88 (1941).} As a condition to the granting of the interlocutory injunction in the original rate proceeding, the company was required to deposit in the custody of the court the part of its collections allocable to the portion of the rates in controversy. After the Supreme Court had upheld the Commission's rates, and after refunding under a decree agreed upon by the Attorney General, representing the Commission, the Corporation Counsel, representing the city, and the attorney for the gas company, certain customers of the gas company sought leave to file an intervening petition for the purpose of compelling the company to pay interest at the legal rate upon the impounded funds. Such leave was denied in the instant case. The court pointed out that the statute\footnote{Ill. Rev. Stat. 1941, Ch. 74, § 12.} requiring the gas company to pay such legal rate of interest on funds required to be deposited was limited to funds deposited for credit purposes, and held that since such funds were in the custody of the court and not subject to the company's use, the customers were en-
CONSTITUTIONAL LAW

The controversy between the City of Chicago and the milk dealers over the selling of milk in paper containers produced a carefully considered decision of the Circuit Court of Appeals for the Seventh Circuit on the troublesome problem of requisite interest to contest constitutionality. A manufacturer of machinery for the production of paper containers and a manufacturer of such containers for milk each sought declaratory judgments to determine the constitutionality of a city ordinance alleged to forbid the sale of milk in such containers within the city. Neither was considered to have a sufficient interest to maintain an action.

The court began with the familiar language of the Supreme Court of the United States in Massachusetts v. Mellon and discussed the decisions of state and federal courts in many cases. The policy underlying the requirement of a sufficient interest was outlined, and it was said that the effect of the ordinance upon plaintiffs was "incidental," "consequential," and "indirect" as distinguished from effects "direct" and "inevitable." It was said that inevitable pecuniary damage is not the test; otherwise, the policy behind the requirement would be violated.

The difficulties inherent in the problem are caused partly by the use of such words as those inclosed in quotation marks above. The court indicates, however, that a requisite interest exists only where the ordinance or statute by its terms restricts conduct of the plaintiff or affects the conduct of some other person in entering into a relation with him. In the case in hand, the only effect was to decrease the market for plaintiffs' products, an effect to which the court applied the terms "indirect" and "consequential."

The doctrine of separation of powers was involved in the decision in People ex rel. O'Meara v. Smith in which

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522 Ex-Cello-O Corporation v. City of Chicago, 115 F. (2d) 627 (1940).
524 The case is discussed and the problem is examined in a note in 35 Ill. L. Rev. 983.
525 374 Ill. 286, 29 N.E. (2d) 274 (1940).
the Supreme Court held unconstitutional the statute which vested exclusive jurisdiction over claims for damages under the Eminent Domain Act in the Court of Claims.\textsuperscript{526} Following earlier Illinois holdings the court decided that proceedings for the condemnation of property are judicial in character and that jurisdiction cannot be taken away from the constitutional courts.

Due process of law, always a fruitful source of litigation, seems to have produced only one noteworthy case, apart from those involving questions of taxation. A 1939 amendment to the Pauper's Act, providing that no local government shall provide relief to any person who has not resided within the territory of such government for a period of three years immediately preceding his application for relief, was upheld as constitutional.\textsuperscript{527} The Supreme Court said that the three years' residence requirement was reasonable as applied to persons who, although they had resided within the state for the requisite period of time, were unable to meet the requirement of residence within the local governmental unit. The opinion lays large stress on the point that the state is under no legal duty to furnish support for paupers and hence enjoys a wide discretion in fixing eligibility requirements. The qualification in question was said to be in furtherance of a policy to restrict the influx of indigent transients from other states.\textsuperscript{528}

Two other cases involving constitutional problems may be briefly mentioned here. In \textit{Clements v. Hughes},\textsuperscript{529} Section 77b of the Motor Vehicle Anti-Theft Act of 1939\textsuperscript{530} was declared unconstitutional. This section, which imposes a tax of $25 on the registration of a new automobile brought into the state by its owner if application for registration is made within ninety days from the date of acquisition, was held to be an attempt to restrict interstate commerce. In the case of \textit{Cox v. Rice},\textsuperscript{531} the Supreme Court reiterated the doc-

\textsuperscript{526} Ill. Rev. Stat. 1939, Ch. 47, §§ 18 et seq.

\textsuperscript{527} People ex rel. Heydenreich v. Lyons, 374 Ill. 557, 30 N.E. (2d) 46 (1940). Rehearing den. Dec. 10, 1940.

\textsuperscript{528} The decision and the policy and operation of the statute are discussed in 8 U. of Chi. Law Rev. 544.

\textsuperscript{529} 375 Ill. 170, 30 N.E. (2d) 643 (1940).

\textsuperscript{530} For a full treatment of the decision see a note by G. Maschinot in 19 Chicago-Kent Law Review 286 (1940).

\textsuperscript{531} 375 Ill. 357, 31 N.E. (2d) 786 (1941); note 30 Ill. B. J. 112.
trine that a court order to a fiduciary to account for and pay over fiduciary funds did not create a debt within the constitutional provision against imprisonment for debt.