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Survey of Illinois Law for the Year 1941-1942

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SURVEY OF ILLINOIS LAW FOR THE YEAR 1941-1942*

I. BUSINESS ORGANIZATIONS

CORPORATIONS

As the work of clearing up the affairs of the closed banks progresses, problems begin to arise with regard to the possible right of shareholders who have paid their statutory super-added liability to secure refunds. The action, in Burket v. Reliance Bank & Trust Company,\(^1\) denying such a shareholder the right to claim satisfaction of a judgment pronounced against him, even though amounts collected from others in his class had been sufficient to cover all unpaid liabilities arising during the period of stock ownership, was given a logical extension in Holderman v. Moore State Bank.\(^2\) In that case, certain shareholders, having paid their assessment in full, sought a refund on the ground that the amount collected from them exceeded the amount of unpaid liabilities due depositors who held claims against the closed bank during the period of their stock ownership.\(^3\) The court, nevertheless, dismissed such petition on the ground that the

\*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 376 Ill. 486 to 379 Ill. 625; from 310 Ill. App. 486 to 314 Ill. App. 574; and from 119 F. (2d) 785 to 127 F. (2d) 864.

1 306 Ill. App. 563, 29 N. E. (2d) 297 (1940).
2 313 Ill. App. 299, 40 N. E. (2d) 97 (1942).
3 The facts disclosed that the total of depositors claims during the period of stock ownership was $25,428.46. Of this total, the liquidating receiver had realized and paid $18,019.33 from assets of the closed bank, computed at the rate of 63 cents per dollar on total claims allowed. Against a balance of $9,408.53 still due such depositors, the receiver in the stockholders liability suit had collected $17,502. A refund of $8,093.47 was, therefore, sought on a pro-rata basis.
liability of the shareholders, after judgment rendered, was to the creditors generally and not to only a class or portion thereof,\textsuperscript{4} hence, until all creditors had been paid in full, no refund could be made. \textit{People ex rel. Barrett v. Farmers State Bank of Irvington}\textsuperscript{5} was distinguished on this ground.

In another banking case, \textit{O'Connell v. Chicago Park District},\textsuperscript{6} the bank, to secure the deposits of a municipal corporation, had pledged certain of its bonds with the defendant pledgee. When the bank became insolvent, the pledgee sold the bonds, applying a portion of the proceeds to satisfy its claim for the deposit therein, and turned the balance over to the bank receiver. An action was later instituted by the receiver as in trover on the ground that, the pledge being illegal,\textsuperscript{7} the conduct in selling the bonds so pledged amounted to a conversion. Defendant moved to dismiss the suit on the ground the same was barred by the statute of limitations,\textsuperscript{8} since more than five years had elapsed from the date of the original pledge, though not from the date of sale. The trial court granted such motion, its order was affirmed in the appellate court,\textsuperscript{9} and again affirmed by the Illinois Supreme Court.\textsuperscript{10} In arriving at this result, the court held that since the pledge was unlawful in its inception, the holding of the bonds was adverse from the moment the pledge was made so as to give rise to an immediate cause of action, hence sufficient to commence the running of the period of limitation. This is the first time this issue has been before the court, but the treatment accorded the depositors of the closed bank seems unfortunate particularly since the illegal deposit is not likely to be discovered prior to the appointment of a receiver,\textsuperscript{11} by which time all chance of recovery thereon may be gone.

\textsuperscript{4} Heine v. Degen, 362 Ill. 357, 199 N. E. 832 (1936).
\textsuperscript{5} 371 Ill. 222, 20 N. E. (2d) 502 (1939).
\textsuperscript{7} Knass v. Madison & Kedzie State Bank, 354 Ill. 554, 188 N. E. 836 (1934), and \textit{People ex rel. Nelson v. Wiersema State Bank}, 361 Ill. 75, 197 N. E. 537 (1935).
\textsuperscript{8} Ill. Rev. Stat. 1941, Ch. 83, § 16.
\textsuperscript{9} 305 Ill. App. 294, 27 N. E. (2d) 603 (1940).
\textsuperscript{10} Farthing, J., and Murphy, J., each wrote dissenting opinions.
By Section 104 of the Business Corporation Act\(^\text{12}\) the Secretary of State is prohibited from issuing a certificate of authority to do business to any foreign corporation whose name is the same as, or deceptively similar to, the name of any domestic corporation or other foreign corporation already authorized to transact business in this state. It was held, in *Investors Syndicate of America v. Hughes,*\(^\text{13}\) that such mandate was not alone provided to protect other corporations from unfair competitive practices but was also intended to protect the public from being deceived, hence the willingness of a parent corporation that its subsidiary should bear a deceptively similar name was not enough to require the Secretary of State to issue the certificate of authority. An attack on the same section of the statute, on the ground that it was unconstitutional because the legislature had failed to provide any adequate standard by which the Secretary of State could interpret and apply the phrase "deceptively similar," hence involved a delegation of legislative power, was rejected on the ground that the words had a definite and accepted meaning.\(^\text{14}\) The case is also important because the court upheld Section 148 of the act\(^\text{15}\) which provides for a method of review of the decision of the Secretary of State refusing to accept or approve any document sought to be filed in his office. Though denominated an "appeal," the section does not impose administrative duties upon the court\(^\text{16}\) but rather provides for a trial de novo of the question upon pleadings made up from the document sought to be filed and the written disapproval thereof by the Secretary of State. Upon the filing thereof in the proper court, the case proceeds as would any justiciable controversy rather than as a mere review of the administrator's decision.\(^\text{17}\)


\(^{13}\) 378 Ill. 413, 38 N. E. (2d) 754 (1942).

\(^{14}\) Though not there challenged on this ground, the power of the Secretary of State to refuse a certificate was upheld in People ex rel. Felter v. Rose, 225 Ill. 496, 80 N. E. 293 (1907), as applied to a not-for-profit corporation, and in Illinois Watch Case Co. v. Pearson, 140 Ill. 423, 31 N. E. 400, 16 L. R. A. 429 (1892).


\(^{16}\) City of Aurora v. Schoberlein, 230 Ill. 496, 82 N. E. 860 (1907).

\(^{17}\) Analogous provisions may be found in Laws, 1911, p. 481, § 35, upheld in Railroad & Warehouse Commission v. Litchfield and Madison Railway Co., 267 Ill. 337, 108 N. E. 347 (1915), and Ill. Rev. Stat. 1941, Ch. 111-2/3, § 72, held con-
The "alter-ego" theory of corporate existence, as applied to a parent corporation and its wholly-owned subsidiary, operated in reverse fashion in Superior Coal Company v. Department of Finance, in which case the parent company, a steam railroad, objected to paying sales taxes upon purchases of coal made by it from the subsidiary on the ground that the transactions amounted to a mere interdepartmental transfer of property and not a sale. Though the pertinent facts showed that, to all intents and purposes, the subsidiary was merely a department in the parental organization, receiving cost price for its product with all overhead expenses borne by the parent, nevertheless, the fact of separate charters seemed enough to require a holding that the transactions between the two were "sales" within the meaning of the Retailers' Occupation Tax Act. The fact that the parent received no economic benefit from maintaining the subsidiary was brushed aside with the suggestion that, if sales between affiliated corporations were to be exempted from the tax, the argument should be addressed to the General Assembly.

The same doctrine was also applied in Ruthfield v. Louisville Fuel Company, where the plaintiff learned that a claim against a dissolved corporation on certain bonds issued by it could not be asserted against a newly-formed corporation having the same name, even though the latter had taken over the business of the former. In so deciding, the court reaffirmed the proposition that suits against dissolved corporations must be brought within the period fixed

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18 377 Ill. 282, 35 N. E. (2d) 354 (1941), noted in 22 Bost. L. Rev. 127 and 30 Geo. L. J. 90.

19 See, for example, Consolidated Indiana Coal Co. v. National Bituminous Coal Commission, 103 F. (2d) 124 (1939), that the wholly-owned subsidiary of another carrier was exempt from the operations of the Bituminous Coal Act of 1937, 15 U. S. C. A. § 833(1). Compare with Keystone Mining Co. v. Gray, 120 F. (2d) 1 (1941).

20 Ill. Rev. Stat. 1941, Ch. 120, § 440 et seq.

21 312 Ill. App. 415, 38 N. E. (2d) 832 (1942).

22 It should be noted that the action was predicated on the express promise to pay contained in the bond. The court did not decide what result would follow had the suit been one in fraud, or brought by a creditor seeking to discover assets belonging to the dissolved corporation. On that point, see Ill. Rev. Stat. 1941, Ch. 32, § 157.69(e) and Ch. 121 1/2, § 80(a).
by statute,\textsuperscript{23} and, if not, the authority of the agent upon whom service may be made ceases, even though he may be the registered agent for the successor corporation.

Of special interest to lawyers concerned with corporate reorganizations is \textit{Friedberg v. Schultz},\textsuperscript{24} in which case the court held that the trustees under a voting trust could not vote the shares held so as to elect directors whose terms would outlast the duration of a voting trust created at the time of the reorganization. The rationale of such decision is not clear, but it would seem to place a limitation upon the power of the registered stockholder to vote his shares which is not contained in the statute\textsuperscript{25} nor justified on any other ground. On a somewhat related question, it may be noted that, in general, a corporation is not bound to respect the rights of a transferee of shares until such person has completed the transfer by having his name registered on the books of the corporation.\textsuperscript{26} In the same way, the pledgee of shares receives no rights against the corporation unless the shares are registered in his name as pledgee.\textsuperscript{27} The purpose of registration is, of course, to provide notice to the corporation, but, according to \textit{Garvy v. Blatchford Calf Meal Co.},\textsuperscript{28} if the corporation has received notice by other means than registration of the transfer, it may not thereafter pay dividends to the registered holder or apply the same to the satisfaction of his indebtedness to it in derogation of the rights of such transferee or pledgee.\textsuperscript{29}

The liability of directors has been given consideration in two noteworthy cases. In one of them, \textit{McGuire v. Outdoor Coal Co.}, 274 Ill. App. 405 (1934). See also \textit{Consolidated Coal Co. v Flynn Coal Co.}, 132 Ill. App. 171, 38 N. E. (2d) 182 (1941), noted in 20 \textit{CHICAGO-KENT LAW REVIEW} 269, 30 Ill. B. J. 378, and 41 Mich. L. Rev. 166 (1942).

\textsuperscript{23} Ill. Rev. Stat. 1941, Ch. 32, § 157.94. See also \textit{Consolidated Coal Co. v Flynn Coal Co.}, 274 Ill. App. 405 (1934).


\textsuperscript{25} Ill Rev. Stat. 1941, Ch. 32, § 157.34 provides that the term of office, for other than initial directors, shall be from annual meeting to annual meeting, though staggered terms may be sanctioned if by-laws have been adopted pursuant to Ill. Rev. Stat. 1941, Ch. 32, § 157.35.

\textsuperscript{26} \textit{Uniform Stock Transfer Act} § 3; Ill. Rev. Stat. 1941, Ch. 32, § 418.

\textsuperscript{27} Ill. Rev. Stat. 1941, Ch. 32, § 157.30.

\textsuperscript{28} 119 F. (2d) 973 (1941).

\textsuperscript{29} \textit{Farbank v. Merchant's National Bank}, 132 Ill. 120, 22 N. E. 524 (1889), had announced the same view but was decided prior to the enactment of the \textit{Uniform Stock Transfer Act}.
Life Publishing Company, a foreign corporation not licensed to do business in this state, though in fact operating here, had entered into a contract of employment with the plaintiff. Having used plaintiff's services for a portion of the time, the corporation wound up its affairs and ceased doing business, resulting in the discharge of plaintiff without legal reason. In a suit brought in Illinois for breach of such contract, the plaintiff named the corporation and its board of directors as defendants seeking to hold the latter liable as for the debt of a partnership on the theory that, by transacting business on behalf of an unlicensed foreign corporation, they had personally incurred such liability. It was held that the complaint stated a good cause of action against the individual defendants under the provisions of the 1919 Business Corporation Act, which was applicable to the facts of the case, though no such liability has been carried over into the present statute. The court intimated, however, that the same rule could apply today on common law principles independent of any statutory provision.

In the other, Aiken v. Insull, certain bondholders filed a representative suit against the directors of a defunct corporation seeking to impose personal liability for having declared or assented to the declaration of dividends at a time when the corporate capital was, or would thereby be, impaired. Certain of the directors, relying on the fact that the actual declaration was made by an executive committee of

30 311 Ill. App. 267, 35 N. E. (2d) 817 (1941).
31 Ill. Rev. Stat. 1931, Ch. 32, § 149; Laws, 1919, p. 348, § 149, reads: "If any person or persons being, or pretending to be, an officer or agent or board of directors of any corporation... shall assume to exercise corporate powers or use the name of such corporation... before it has been authorized to do business, under the laws of this state, then they shall be jointly and severally liable for all debts and liabilities made by them and contracted in the name of such corporation... and suits at law may be prosecuted therefor by creditors individually."
32 Ill. Rev. Stat. 1941, Ch. 32, § 157.125, merely provides that the unlicensed foreign corporation doing business in this state shall not be permitted to use our courts as plaintiff until license is secured, but does not invalidate acts done or contracts made by such corporation, nor does it prevent such corporation from defending any action brought against it.
33 See Joseph T. Ryerson & Son v. Shaw, 277 Ill. 524, 115 N.E. 650 (1917).
34 122 F. (2d) 746 (1941), noted in 30 Ill. B. J. 338 and 26 Minn. L. Rev. 400. Another aspect of the case, dealing with a question of release of liability, is discussed in 36 Ill. L. Rev. 898. See also DeMet's Inc. v. Insull, 122 F. (2d) 755 (1941).
the board, moved to dismiss the complaint as it applied to them. An order granting such relief was reversed on the ground that the delegation of responsibility to an executive committee would not absolve the directors from the liability specifically imposed on them by the statute. The liability thereby imposed was also attacked on the ground that it was penal in character and not enforcible in equity, but it was found that the obligation was a mere private one, similar, in many respects, to that of a surety. Another attack, on the ground that the statutory attempt to create a conclusive presumption of evidence was unconstitutional, was likewise rejected because, the court held, even if such presumption were unconstitutional, the other portions of the statute, upon which liability depended, could be treated as separate and independent, hence not subject to such criticism.

The liability of a charitable corporation, such as a hospital, for the carelessness of its servants and agents has generally been denied for the reason that, to permit recovery for such torts, an improper diversion of trust funds would be said to result. Where, however, the action grows out of a valid contract entered into by such organization, even though the breach may have been produced by carelessness, no such rule is applied, although the result of the decision will accomplish the same diversion of trust funds. These incongruous holdings have led to much dissatisfaction with the rule as applied, but, according to the holding in Wattman v. St. Luke’s Hospital Association, the Illinois courts

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37 Defendants relied on Loverin v. McLaughlin, 161 Ill. 417, 44 N.E. 99 (1896), which involved an earlier statute than the present one.
38 But see M. H. Vestal Co. v. Robertson, 227 Ill. 425, 115 N.E. 629 (1917); In re Beachy & Co., 170 Ill. 825 (1909).
40 Carolene Products Co. v. McLaughlin, 365 Ill. 62, 5 N.E. (2d) 447 (1936).
42 Armstrong v. Wesley Hospital, 170 Ill. App. 81 (1912).
43 In President and Directors of Georgetown College v. Hughes, 130 F. (2d) 810 at 812 (1942), the court said: "The cases are almost riotous with dissent. Reasons are even more varied than results. These are earmarks of law in flux. They indicate something wrong at the beginning or that something has become wrong since then. They also show that correction, though in process, is incomplete."
44 314 Ill. App. 244, 41 N.E. (2d) 314 (1942).
are not yet ready to surrender the principle, even though the action be contractual in nature, if the gist of the claim is the carelessness of the servants of the charitable corporation. 45

Since the expiration of the period of the last survey, the Illinois legislature has amended Section 2 of the Joint Rights and Obligations Act 46 so as to allow corporations authorized to do business in this state to pay or deliver profits, dividends, or other rights to any of the several persons holding jointly, with right of survivorship, any stocks, bonds, or other evidence of indebtedness whether the other holders be living or not, provided an agreement permitting such payment or delivery is signed by all the persons to whom such evidence is issued either at the time of the issuance thereof or subsequent thereto. 47

PRINCIPAL AND AGENT

But one case of significance dealt with doctrines of agency law, that of Williams’ Estate v. Tuch, 48 in which a joint tenant’s interest in a bank account was construed to be a mere agency. It appeared from the facts therein that an aged woman had signed a joint tenancy agreement with her grand-nephew respecting the former’s checking account. Upon her death, the executrix made claim to the balance on deposit which proceeding was resisted by the surviving joint tenant on the ground the proceeds inured to him. While the joint tenancy agreement included a survivorship clause, the evidence showed that the purpose of the decedent in signing the agreement had been merely to enable the co-tenant to pay her bills as they became due. It was, therefore, decided that the co-tenant had acquired only the right to act as agent to issue checks against the account of the decedent and that, upon the latter’s death, the agency terminated. 49 Whatever legal title to the fund that may have

45 It is understood that Frankhauser, J., in a similar action in tort, recently refused to extend the immunity to a charitable corporation which had taken out liability insurance on the ground that no diversion of trust funds could occur since the loss, if any, would fall on the insurance carrier. See his opinion filed in Shaleen v. The Newberry Library, 39-5-11479, Superior Court of Cook County, Illinois.
become vested in the co-tenant by reason of these facts, was held to be owned in trust for the benefit of the decedent’s estate.

LABOR LAW

In the realm of labor law, occasion was found to apply the principles of the Swing\(^{50}\) and the Meadowmoor\(^{51}\) cases, along the lines laid down in the Ellingsen\(^{52}\) and Van Heck\(^{53}\) cases, in Maywood Farms Co. v. Milk Wagon Drivers’ Union\(^{54}\) and also in Baker v. Retail Clerks’ International Protective Association.\(^{55}\) The Maywood case presented facts closely paralleling those in the Ellingsen decision and disposition of the case rested squarely on that decision. The facts in the Baker case, however, differed. In that case the defendant union had requested the plaintiffs, who were husband and wife, owners and proprietors of a delicatessen which employed no outside help, to close their store at stated hours on weekday nights and not to open it at all on Sundays, in accordance with regulations followed by the union. Upon the plaintiffs’ refusal, the defendants instituted picketing and in connection therewith displayed a sign describing the plaintiffs as "Unfair to Organized Labor" and orally stated the same thing to a number of plaintiffs’ customers. The plaintiffs sought and obtained an injunction in the lower court restraining the picketing, which injunction, on appeal, was set aside. Finding support in the facts of Senn v. Tile Layers’ Protective Union,\(^{56}\) the appellate court concluded that the subject matter of the dispute "contains elements of common interest,"\(^{57}\) and that consequently the picketing was within the protection afforded to free speech.


\(^{52}\) Ellingsen v. Milk Wagon Drivers’ Union, 377 Ill. 76, 35 N.E. (2d) 349 (1941).

\(^{53}\) Lawrence Avenue Building Corporation v. Van Heck, 377 Ill. 37, 35 N.E. (2d) 373 (1941).

\(^{54}\) 313 Ill. App. 24, 38 N.E. (2d) 972 (1942).

\(^{55}\) 313 Ill. App. 432, 40 N.E. (2d) 571 (1942).

\(^{56}\) 301 U.S. 468, 57 S. Ct. 857, 81 L. Ed. 1229 (1937), noted in 37 Col. L. Rev. 1227, 8 Fordham L. Rev. 474, 6 Geo. Wash. L. Rev. 137, 22 Minn. L. Rev. 271, 4 Ohio St. L. J. 110, and 1938 Wis. L. Rev. 170.

\(^{57}\) 313 Ill. App. 432 at 435, 40 N.E. (2d) 571 at 573.
by the Fourteenth Amendment to the Federal Constitution. There is thus emerging a test to establish the "element of common interest" which may serve to answer the question as to just how broad the decision in the Swing case might be.58

Following the lead set long ago by the federal courts,59 the Appellate Court for the First District has now recognized a union as an entity apart from its members. In Almon v. American Carloading Corporation60 the plaintiffs, members of a union, sued the union officials and the employer company for withholding checks allegedly belonging to the plaintiffs. The union officials directed the attorney retained by the union, toward whose pay each union member contributed a fixed amount, to represent the union in the suit. The plaintiffs then sought to have him removed as attorney on the theory that he represented each of them through his arrangement with the union and hence was "disqualified from appearing on behalf of a part of the members of (the organization) in any proceeding involving a dispute with other members. . . ."61 While the court recognized that an attorney cannot serve two masters, it said:

The pleadings here disclose that the only defense interposed to this suit is one made by direction of the joint council in behalf of the local union . . . Notwithstanding earlier decisions to the contrary, the later and better

58 The right to confine even peaceful picketing "to the area of the industry within which a labor dispute exists," has already been recognized. See Carpenters & Joiners Union v. Ritter's Cafe, 315 U.S. 722, 62 S. Ct. 807, 86 L. Ed. 785 (1942), noted post this issue. One limitation on the scope of the Swing case is thereby indicated.


60 312 Ill. App. 225, 38 N.E. (2d) 362 (1941), noted in 55 Harv. L. Rev. 1038. McSurely, J., dissented on the ground that the attorney, not being a party to the proceedings, was not entitled to appeal from the order disqualifying him from acting as counsel. On this point, see People ex rel. Yohnka v. Kennedy, 367 Ill. 236, 10 N.E. (2d) 806 (1937). The facts of the case place it in advance of the position taken in Franklin Union No. 4 v. People, 220 Ill. 355, 77 N.E. 176 (1906), where it was held that the union might be adjudged guilty of contempt of court apart from its officers. It appeared, however, that the union was incorporated: 220 Ill. 355 at 370, 77 N.E. 176 at 181.

authorities are to the effect that associations such as the Joint Council No. 25 and Local Union No. 710 have 'juristic personalities.'

As a consequence it concluded, therefore, that the "relationship of attorney and client does not now and never has existed" between the attorney in question and any one of the members of the union.

In a somewhat related situation the Federal District Court held, in Milk Wagon Drivers' Union v. Associated Milk Dealers, that while there can be little doubt that a labor union, though unincorporated, is a legal entity, the union could not maintain an action to recover for the benefit of the individual members of the union sums of money allegedly due them under an award of arbitration. The court pointed out that the union had not agreed under its contract to furnish employees who would accept the award and work for the wages specified therein. It simply obtained the agreement of the employer to pay "the stipulated wages to such members of the union as cared to accept employment on those terms." Though the union had an interest in the contract, this interest did not, in the court's opinion, run to the extent of protecting the rights of the individual members to compensation.

Three other cases should be noted. In Anderson v. City of Chicago it was held that the strikers in the Republic Steel strike of 1937 did not constitute a mob, within the meaning of an Act to Suppress Mob Violence, so that an onlooker who had been maliciously beaten by a member of the city police force was not entitled, in an action against the city, to recover damages under that statute. In Nathaniel v. Wilson & Company it was held, in an action brought under the Assignment of Wages Act, that "where a demand is made (on the employer) under the act, suit brought and judgment obtained and satisfied, the assignee before he can enforce any further claim against the employer must serve another

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63 42 F. Supp. 584 (1941).
64 Ibid, at 585.
67 310 Ill. App. 486, 34 N.E. (2d) 721 (1941).
demand on the employer." The decision of the appellate court in People v. Maggi, noted last year, which held that the Illinois Minimum Fair Wage Standards Act for women and minors applied to beauty shop operators, was affirmed by the Supreme Court.

WORKMEN'S COMPENSATION

The usual grist of compensation cases passed before the courts for review but one case, that of Thornton v. Herman, involving Section 29 of the Workmen's Compensation Act, stands out as of highest importance. It appeared therein that plaintiff's intestate was killed through the negligence of the defendant. Both decedent and defendant were in the employ of separate employers bound by the act. Upon proceedings under the act the plaintiff had been awarded $6,000 against the decedent's employer. Plaintiff thereafter brought tort action for wrongful death against the defendant employee. The defendant, to defeat such action, urged that he was under the act and therefore not subject to suit by plaintiff; that plaintiff had lost her right of action by being paid an award; and that decedent's employer, who had paid such award, had already started subrogation proceedings against the employer of defendant. Plaintiff nevertheless recovered a judgment, which judgment was affirmed by the appellate court; two of the judges holding that, on appeal, the court must assume the defendant is not under the act in the absence of stipulation or evidence to the contrary. The opinion further stated that the words "bound by the act," as used in Section 29, mean "subject to its terms" and are to be applied only to employers. The appellate court decision was foreshadowed by Botthof v. Fenske in which case the appellate court had discussed

69 310 Ill. App. 486 at 490, 34 N.E. (2d) 721 at 722.
70 310 Ill. App. 101, 33 N.E. (2d) 925 (1941), noted in 20 CHICAGO-KENT LAW REVIEW 16.
71 Ill. Rev. Stat. 1941, Ch. 48, § 198 et seq.
72 378 Ill. 595, 39 N.E. (2d) 317 (1942).
73 380 Ill. 341, 43 N.E. (2d) 934 (1942).
74 Ill. Rev. Stat. 1941, Ch. 48, § 166.
76 280 Ill. App. 362 (1935). See also 18 CHICAGO-KENT LAW REVIEW 117.
the theory and effect of liability or non-liability as to the wrong-doing employee.

An appeal was thereafter allowed to the Supreme Court and the holding of the appellate court was reversed. The sole question presented was the plaintiff's right to maintain her action for damages under the Injuries Act against an employee of an employer also under the Workmen's Compensation Act. That court reviewed its finding in O'Brien v. Chicago City Railway Co., and found no need to add further to, but merely to apply, the principles there announced. Answering specifically the contention of the appellate court that the statute lends itself to another construction, the Supreme Court said:

It is argued that the statute should be construed as distinguishing between being bound by the act to pay compensation and being bound by the act in reference to right of recovery for accidental injury. If such construction was applied, the statute in effect would read that a person bound by the act was a person who was by the act required to pay compensation. We find nothing in any of the sections of the act which will support such a construction. 'Bound by the act' as applied to employees means that in the right to recover damages for accidental injury the provisions of the Compensation Act control.

Since the defendant was a person "bound" by the act within the meaning of Section 29, then the right of action that plaintiff had against him as a negligent third party was, under said section, transferred to the employer of the decedent, and the measure of damage was limited to the amount of compensation for which the latter became liable. The decision, therefore, clarifies the section in question.

In Thompson v. Industrial Commission the Supreme Court further defined and reiterated language it had previously used to fix the scope of the jurisdiction of the circuit courts to review decisions of the Industrial Commission. The commission had there held that the employer was engaged in interstate commerce, but the circuit court, on certiorari, held that the local act applied, and therefore ordered the case remanded to the commission with directions to deter-

77 Ill. Rev. Stat. 1941, Ch. 70, § 1.
78 305 Ill. 244, 137 N.E. 214 (1922).
79 380 Ill. 341 at 346, 43 N.E. (2d) 934 at 936.
80 377 Ill. 587, 37 N.E. (2d) 350 (1941).
mine the liability. From this order, an appeal was taken to the Supreme Court. That court dismissed the appeal on the ground that the order of the circuit court, not being a final order, was not reviewable by writ of error, since the jurisdiction of the Supreme Court was limited to that of reviewing final judgments.

**PARTNERSHIP**

In those states which have adhered to the "aggregate" rather than the "entity" theory of a partnership, the decision in the case of *Lewis v. West Side Trust & Savings Bank*\(^8^{1}\) will present nothing new. Illinois is included in this group, but as the case presents the issues very clearly and as the decision is clear cut, it is worthy of notice for it disposes of an idea current among some lawyers that either the Uniform Partnership Act, the Civil Practice Act, or the rules of court may have modified the historical conception of a partnership. In that case a complaint was filed against "B. Cohen & Sons" but it contained no statement that such defendant was a partnership, a corporation, or any other particular type of association. The return of the sheriff on the summons issued thereunder showed that the defendant was served "by leaving a copy with John M. Cohen, a co-partner in B. Cohen & Sons, a partnership." Judgment followed by default. John M. Cohen, individually, was in fact neither sued or summoned, nor could a valid judgment under these circumstances be entered against him. The sheriff's return itself was, of course, no evidence that John M. Cohen was a partner, or that there was a partnership. The Supreme Court said, quoting in part from an Oregon case,\(^8^{2}\) that: "A partnership cannot be sued as such. The names of its members must be set out in the complaint and in the summons. This is an old and well established rule. . . ." Efforts to change the common law rule by rule of court or by service statutes have heretofore failed in Illinois. The common law is still in force and the Uniform Partnership Act has changed nothing on this particular point.

\(^{81}\) 377 Ill. 384, 36 N.E. (2d) 573 (1941), noted in 30 Ill. B. J. 336.

\(^{82}\) Dunham v. Shindler, 17 Ore. 256, 20 P. 326 (1889).
II. CONTRACTS

The field of general contract law was barren of significant decisions, but a few cases dealing with rather specialized branches of that subject are worthy of notice.

INSURANCE

The question of coverage, and the related problem as to which of two or more companies shall pay when the insured happens to have "double," excess, or additional insurance and where no fraud or over-reaching is involved, has troubled the courts from time to time. Insurance companies have been brought into collision with one another over this point as each company is anxious to have the other pay the greater part or all of the loss. One such situation was recently before the court in Zurich General Accident & Liability Insurance Company, Ltd. v. Clamor.1 According to the facts therein, B struck and injured a third person while driving A's car with the latter's permission. Both B and A were insured. A's policy was applicable for the reason that the insurance carrier had extended coverage to any person using the automobile with A's permission. B's policy bore an endorsement, dated later than A's policy, which protected B while driving the car of another person with permission, but which limited the coverage to "excess insurance over any other valid and collectible insurance." A declaratory judgment rendered by the lower court held A's insurer subject to liability for the full amount of its policy even though the policy contained a provision that it should not apply to any person "with respect to any loss against which he has other valid and collectible insurance." On appeal, the court treated A's insurance company as being primarily liable, with B's carrier liable only for the "excess." It further held that B's policy was not "other" insurance within the meaning of the quoted clause. It seems only fair that when two companies have underwritten the same risk but from two different approaches that neither should be allowed to set up the "other" insurance as

1 124 F. (2d) 717 (1942), affirming 36 F. Supp. 954 (1941), noted in 55 Harv. L. Rev. 1218.
excluding its own liability. The application given to the term "excess insurance" can be justified if it be construed to cover the risk of inadequate protection, that is inadequate in amount or nature of coverage, in the primary carrier. The court also suggested that pro-rating the loss would be equitable in cases where the driver is only seeking sufficient protection and where the two or more policies concerned contain identical coverage clauses.\(^2\)

In *People ex rel. Palmer v. Peoria Life Insurance Company*,\(^3\) the Supreme Court held that where an insurance company is liquidated and the receiver, under order of court, enters into a re-insurance agreement with another company so as to continue in force all existing policies whose holders assent thereto, the agents of the liquidated company are not entitled to commissions on renewal premiums received whether received after appointment of the receiver or after the date of the re-insurance agreement. In that case, the plaintiffs were former agents of the Peoria Life Insurance Company holding contracts calling for commissions on renewal premiums. Such premiums were not, in fact, "net" premiums but contained a loading charge from which to pay such renewal commissions. Upon insolvency of the company, its receiver made an agreement with the Alliance Life Insurance Company to "re-insure" the assenting policy-holders, but such contract expressly stipulated that the re-insurer should not be liable upon the agency contracts of the insolvent company. Certain assenting policy-holders paid premiums to the receiver and thereafter later continued to pay the re-insurer. Plaintiffs brought suit for commissions allegedly due on such payments. Judgment for the defendants in the trial court was affirmed on appeal to the Supreme Court, since the latter could find no legal basis under which the agents could recover. The liquidation proceedings were regarded as terminating all agency contracts. If the insolvency of the company discharged or terminated its policies, it would be hard to find a legal basis for

\(^2\) On this point see note in 55 Harv. L. Rev. 1218.

\(^3\) 376 Ill. 517, 34 N.E. (2d) 829, 136 A.L.R. 151 (1941), noted in 30 Ill. B. J. 251 and 26 Minn. L. Rev. 562. Gunn, Ch. J., and Wilson, J., dissented.
a recovery from the insolvent company\(^4\) of commissions on renewal premiums paid either to the receiver during liquidation proceedings or to the new company\(^5\) for the purpose of securing re-insurance. On the other hand, there seems to be little doubt that, from an equitable viewpoint, inasmuch as the insolvent company had received the loading charge through premiums paid to it, then it might be said to hold the same in trust for the benefit of the agents who had secured the contracts and whose efforts had created the additional assets intended eventually to be paid to such agents as "renewal" commissions.\(^6\) Two judges dissented, therefore, relying on *General American Life Insurance Company v. Roach*\(^7\) as authority.

It seems rather unusual that, until the current year, the appellate courts of this state should not have been confronted with the question of the assignability of a fire insurance policy to which has been attached the standard mortgage clause. That question was, however, involved in *Reinhardt v. Security Insurance Company*,\(^8\) in which case a standard fire policy had been issued with a standard mortgage clause which made the insurance payable to a named trustee as his interest might appear "... and not to be invalidated by any act or neglect of the mortgagor." This policy was in the hands of the trustee as additional security for a note and mortgage executed by the insured. Sometime thereafter the trustee assigned the note, mortgage and policy to another trustee without the knowledge of the insurer. Not until a fire occurred did the company learn of the change of trustees by assignment. The second trustee, after notice to the company, brought suit on the policy. Several defenses were set up by the insurer which need not be mentioned, but among them was that of the inability of the second trustee to show "privity" to the contract or to maintain suit upon it inasmuch as the company had not been notified nor had recognized the assignment. In reviewing the cases, the


\(^6\) For discussion of this point see note in 26 Minn. L. Rev. 562.

\(^7\) 179 Okl. 301, 65 P. (2d) 458 (1937).

\(^8\) 312 Ill. App. 1, 38 N.E. (2d) 310 (1941).
appellate court found authority outside of Illinois justifying the reversal of a judgment in favor of the defendant, but could find no Illinois case in point. The court held that, since there was no provision in the policy or in the mortgage clause preventing any such assignment nor was there any statutory prohibition, therefore the second trustee received by the transfer all the rights of the first trustee. The holding seems eminently sound under the facts.

SALES

The court was asked, in *Zenith Radio Distributing Corporation v. Mateer,*⁹ to interpret the meaning of the words "the major part" as used in the Illinois Bulk Sales Act¹⁰ when applied to the sale of an interest in an established business. Though the question had never before been presented, the court came to the conclusion that the words necessarily meant something greater or larger than fifty per cent. It, therefore, held that a sale of exactly fifty per cent. of a business was not a sale within the contemplation of that statute.

III. CIVIL PRACTICE AND PROCEDURE

As is usually the case, much of the work of the courts of review during the current period has been concerned with procedural questions. Cases which do not involve some issue of practice or procedure are rare, yet many of the questions presented may be dismissed as being trite from long application of the principle of *stare decisis.* Those cases which present some novelty in procedural law are here summarized and presented in roughly the same order as would be followed by a lawyer presenting his client's case.

REMEDIES AT LAW

By reason of the years of their existence, the jurisdiction of the various Illinois courts has come to be a fairly well understood matter. Of considerable importance, therefore, is the decision of the Illinois Supreme Court in *Werner v.*

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⁹ 311 Ill. App. 263, 35 N.E. (2d) 815 (1941), noted in 30 Ill. B. J. 298.
¹⁰ Ill. Rev. Stat. 1941, Ch. 121½, § 78.
Illinois Central Railroad Company\(^1\) which has resulted in a surprising reversal of former opinions held regarding the civil jurisdiction of the various city courts throughout the state. The act defining that jurisdiction states that such city courts shall have concurrent jurisdiction with the circuit court within the city in which the same may be "in all civil cases both law and chancery and in all criminal cases arising in said city. . . ."\(^2\) The words "arising in said city" have been understood to limit the city courts in their power to pass on criminal cases, but it was the belief that such limitation did not apply to civil transitory causes of action, provided the defendant could be found within the city.\(^3\) The Supreme Court has, however, now indicated that the phrase "arising in said city" applies to all proceedings, both civil and criminal, so that the jurisdiction of such courts must, hereafter, be deemed limited to matters occurring within the city area. Use of such courts for other types of cases, such as divorce proceedings,\(^4\) should be given serious consideration.

The ancient common law writ of quo warranto and the information in the nature of quo warranto were utilized to secure not only the ouster of the usurper of public office or public functions but also to insure his punishment as a criminal.\(^5\) They were not available to procure redress for private wrongs nor could they be utilized at the suit of the private litigant. Their modern statutory counterpart is essentially a civil proceeding,\(^6\) but its use by the private litigant is restricted to situations where the interest is personal and then only after application has first been made for action by the proper public official. Moreover, leave must first be obtained from the court to institute the proceeding.\(^7\) These factors lead the Illinois Supreme Court to decide, in Rowan

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\(^1\) 379 Ill. 559, 42 N.E. (2d) 82 (1942), reversing 309 Ill. App. 292, 33 N.E. (2d) 121 (1941), noted post in this issue.

\(^2\) Ill. Rev. Stat. 1941, Ch. 37, § 333.

\(^3\) See, for example, McGlynn & McGlynn v. Louisville & N. R. Co., 313 Ill. App. 396, 40 N.E. (2d) 539 (1942).


\(^5\) 3 Black. Comm. 263.

\(^6\) Ill. Rev. Stat. 1941, Ch. 112, § 9 et seq. Section 15 specifically provides that the Civil Practice Act shall apply to quo warranto proceedings.

\(^7\) Ill. Rev. Stat. 1941, Ch. 112, § 10.
v. City of Shawneetown,\(^8\) that the private property owner is not entitled to use this writ when his property rights are damaged if the same type of damage is being inflicted on other property owners in the same area, for the wrong is then a "public" one and not "personal and peculiar" to himself. In so holding, the court appears to have nullified language in the present statute which was not in the earlier act\(^9\) and which was probably inserted to clarify the effect of the decision in People ex rel. Miller v. Fullenwider.\(^10\) It is rather difficult to see how the private property owner in the instant case failed to measure up to the present statutory requirement of "having an interest in the question on his own relation,"\(^11\) and the introduction of a further requirement that it be "peculiar" to himself seems unwarranted.

Two of the appellate courts of the state have come to opposite conclusions on the right of a blind person to assign a claim for benefits under the statute for the relief of the blind\(^12\) so as to permit suit thereon by the assignee.\(^13\) In one case\(^14\) recovery was allowed to the representative of the deceased blind person's estate on the ground that the claim for benefits, once determined as being due the blind person, was a debt and not a mere expectancy, hence could be enforced by suit during lifetime,\(^15\) or collected by the legal representative after death under an assignment by operation of law.\(^16\) In the other,\(^17\) despite the fact that the pension was admittedly due, it was held that the failure

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\(^{8}\) 378 Ill. 289, 38 N.E. (2d) 2 (1941).

\(^{9}\) Smith Hurd Anno. Stat., Ch. 112, § 1, permitted the Attorney General, either of his own accord, or "at the instance of any individual relator," to present a petition for leave to file the necessary information.

\(^{10}\) 329 Ill. 65, 160 N.E. 175 (1928), which holds that a tax-payer, as such, has not sufficient interest.

\(^{11}\) Ill. Rev. Stat. 1941, Ch. 112, § 10.

\(^{12}\) Ill. Rev. Stat. 1941, Ch. 23, § 279 et seq.

\(^{13}\) Ill. Rev. Stat. 1941, Ch. 110, § 146.

\(^{14}\) People ex rel. Powles v. Alexander County, 310 Ill. App. 602, 35 N.E. (2d) 92 (1941).

\(^{15}\) Proffitt v. Christian County, 370 Ill. 530, 19 N.E. (2d) 345 (1939).

\(^{16}\) The action by the administrator must, according to People ex rel. Powles v. Alexander County, 310 Ill. App. 602, 35 N.E. (2d) 92 (1941), be brought within five years or be barred by Ill. Rev. Stat. 1941, Ch. 83, § 16.

\(^{17}\) People ex rel. Rude v. LaSalle County, 310 Ill. App. 541, 34 N.E. (2d) 865 (1941). The action of the Appellate Court in refusing the writ of mandamus was
of the pensioner to collect during his lifetime precluded action by his administrator, since, absent any statute permitting a survival of action, the claim abated on his death.\textsuperscript{18} Clarification of the issue by the Supreme Court is desirable.

\textbf{REMEDIES IN EQUITY}

The interest of bar associations in preventing the unauthorized practice of law has again been recognized by the Illinois courts as entitled to equitable protection. In \textit{Chicago Bar Association v. United Taxpayers of America}\textsuperscript{19} the appellate court held that a certified public accountant who solicited authority from various persons to represent them in the preparation and presentation of claims to the Department of Finance for refunds of taxes paid under the Illinois Retailers Occupation Tax Act\textsuperscript{20} was practicing law. In reaching this conclusion the court relied primarily on the Goodman case,\textsuperscript{21} involving the conduct of a person not a lawyer in presenting workmen's compensation claims before the Industrial Commission. The defendant in the instant case attempted to justify his activities by virtue of the provisions of Rule 1 of the Department of Finance, which provided that certified public accountants might be designated by taxpayers to represent them in matters before the department. The court relied upon the well-established doctrine in Illinois that the regulation of the practice of law is the province of the courts. The doctrine of the separation of powers prevents even the legislature from authorizing a layman to practice law.\textsuperscript{22} The court indicated that the rule of the Department of Finance was void.

\textsuperscript{18} Wilcox v. Bierd, 330 Ill. 571, 162 N.E. 170 (1928).
\textsuperscript{19} 312 Ill. App. 243, 38 N.E. (2d) 349 (1942).
\textsuperscript{20} Ill. Rev. Stat. 1941, Ch. 120, §§ 440-53.
\textsuperscript{21} People ex rel. Chicago Bar Association v. Goodman, 366 Ill. 346, 8 N.E. (2d) 941 (1937).
\textsuperscript{22} In re Day, 181 Ill. 73, 54 N.E. 646 (1899).
In the case of *Fletcher v. City of Paris*,23 the Supreme Court considered the problem of whether a court of equity should restrain the holding of a municipal election on the ground that the ordinance pursuant to which the election was to be held was void. The city council had passed an ordinance for the construction of a municipal power plant and provided for the submission of the question to a referendum vote as required by the municipal ownership act.24 Plaintiffs, as citizens, voters, property owners, and taxpayers, filed suit to enjoin the holding of the election and to restrain the paying out of any money by the city for the expenses thereof. The trial court dismissed the complaint for want of equity and the Supreme Court affirmed this ruling. Several reasons were given by the court why equity should not interfere. It was said to be a settled rule in Illinois that the courts will not enjoin the holding of an election. A policy against interference with orderly governmental processes lies back of this rule. The court pointed out that the election here was a step in the legislative process authorized by the municipal ownership act and that equity would not interfere with the passage of invalid laws, but only with their enforcement. The lack of any immediately threatened injury and the remote interest of taxpayers in the trifling expenditures arising out of elections were also assigned as reasons. The election had already been held when the Supreme Court considered the case and jurisdiction was retained only because of the prayer to restrain expenditures. It should be noted that the opinion does not contain language indicating that equity is without power to act in cases involving political questions such as characterized some of the earlier cases dealing with similar problems.25

The case of *Simpson v. Adkins*26 is of passing interest on the question of when it is proper for a court of equity to appoint a receiver in litigation involving the determination of conflicting interests in land. It was stressed in the opinion

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23 377 Ill. 89, 35 N.E. (2d) 329 (1941).
25 See, for example, Dickey v. Reed, 78 Ill. 261 (1875), and compare with the opinion in the recent case of Daly v. Madison County, 378 Ill. 357, 38 N.E. (2d) 160 (1941).
26 311 Ill. App. 543, 37 N.E. (2d) 355 (1941).
that only circumstances of extreme emergency will justify the appointment of a receiver without notice to the adverse parties.

The use of the class or representative suit has been sanctioned whenever it appears that the parties are so numerous that it is inconvenient to bring them all before the court provided it appear that "they all stand in the same situation, and have one common right or one common interest, the operation and protection of which will be for the common benefit of all, and can not be to the injury of any."27 The requirement of a "common right" or a "common interest" is not the same thing as the "common question of law" which permits the joinder of distinct claims by separate plaintiffs in the one action,28 hence one attempting to use the representative form of action gets no assistance from the provisions of the Civil Practice Act, and must justify his right to proceed on the fundamental rule stated above. The "common right" was found to exist in one case during the period under consideration and was denied in another. In the former, Flanagan v. City of Chicago,29 one of some five hundred property owners was allowed to maintain a representative suit to compel a city to make a refund of a surplus arising from a special assessment proceeding even though the proportionate shares of the individual owners in such surplus were varied in amount. In the other, Peoples Store of Roseland v. McKibbin,30 a single store proprietor, claiming to act on behalf of all other persons similarly situated, was denied the right to compel the distribution of a fund accumulated from alleged improper collections of the Retailer's Occupational Tax on the ground that the same did not constitute a common fund in which the several taxpayers had a common interest. The distinction seems to lie in treating the special assessment fund as a trust fund in which all con-

27 Hale v. Hale, 146 Ill. 227 at 237, 33 N.E. 858 at 867 (1893).
28 Ill. Rev. Stat. 1941, Ch. 110, § 147.
29 311 Ill. App. 135, 35 N.E. (2d) 545 (1941). The claim that the court having jurisdiction of the special assessment proceeding should have exclusive jurisdiction over refunds, since the final certificate of cost and completion required by Ill. Rev. Stat. 1939, Ch. 24, § 790 must be filed therein, was rejected on the ground that such court had no power to compel a refund.
30 379 Ill. 148, 39 N.E. (2d) 995 (1942).
tributeors participate as beneficiaries, while regarding the sales tax fund as a pool made up of individual contributions resulting from many separate and distinct transactions.

Further emphasis for the doctrine that litigants may not "disturb the courts and vex the parties with many actions" was provided by the decision in Skolnik v. Petella, as a consequence of which the attorney, preparing a complaint in a foreclosure proceeding, should be certain to include sufficient allegations to support a deficiency decree not only against the makers but also against any assuming grantee of the mortgaged premises. A separate suit for the purpose of enforcing liability on the assumption contract after the grantee has been named as defendant in the foreclosure proceedings will be defeated by the defense of res adjudicata.

The historical differences between law actions and proceedings in equity were not eliminated by Section 31 of the Illinois Civil Practice Act so the pleader should not fail to distinguish between the several possible theories supporting each. If, by mistake, one form is chosen when the other would have been proper, the act provides that the trial court may transfer the cause from the law docket to the equity side, or vice versa. According to Barger v. First National Bank of Danville, however, this power is not conferred on the court to exercise against the wishes of the plaintiff, so if the latter does not request the transfer or even protests against it being made, the court can only dismiss the proceedings erroneously instituted on the wrong theory.

PREPARATION OF PLEADINGS

By statute effective January 1, 1942, certain changes have been made in the Illinois Civil Practice Act. Thus the sec-

31 The proceeds of special assessments, when collected, are undoubtedly trust funds at least so far as the rights of holders of special assessment bonds are concerned: Conway v. City of Chicago, 237 Ill. 128, 86 N.E. 619 (1908); Rothschild v. Village of Calumet Park, 350 Ill. 330, 183 N.E. 337 (1932).
36 Ill. Rev. Stat. 1941, Ch. 110, § 169(2).
37 310 Ill. App. 628, 35 N.E. (2d) 556 (1941), noted in 20 CHICAGO-KENT LAW REVIEW 97.
tion dealing with venue has been enlarged so as to fix the same with regard to suits against quasi-municipal corporations. That provision dealing with service outside the county has now been changed so as to deny the service officer the right to have the additional mileage taxed as costs, and, in lieu thereof, permits the return of the writ to be made by mail.

The pleader preparing a complaint in a tort action for personal injuries against a municipal corporation must be sure to see that notice of the injury has been served on the corporate defendant as required by statute and should make suitable allegation of that fact in the complaint. Inasmuch as the requirement of notice is mandatory, it will not suffice, according to *McCarthy v. City of Chicago*, to allege that the city in fact knew of the claim, as by the submission thereof to the city council for approval and payment, unless written notice was also duly served on the officials enumerated in the statute. The fact that the written claim presented to the city council necessarily passed through the hands of any such official was not regarded as sufficient to comply with statutory requirements.

When preparing a complaint for the foreclosure of a mortgage, though, the attorney may apparently fix the limits of the controversy, according to *Korngabel v. Fish*, as broadly or narrowly as he pleases. He may, since a common subject matter is involved, litigate therein all questions affecting the title, or, following the older view, may confine the case to issues growing out of the mortgage itself. If

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38 Laws 1941, II, 464, § 8(3); Ill. Rev. Stat. 1941, Ch. 110, § 132(3).
39 Laws 1941, II, 465, § 10(1); Ill. Rev. Stat. 1941, Ch. 110, § 134(1). See also Amended Rule 4(2) of the Supreme Court, 378 Ill. 10.
40 Ill. Rev. Stat. 1941, Ch. 24, § 1-11 and Ch. 70, § 7.
41 Prior to the enactment of the Civil Practice Act, an omission of this allegation was fatal and could not be cured, even though notice in fact had been given, if the attempted amendment came after the period of limitation had run: Walters v. City of Ottawa, 240 Ill. 259, 88 N.E. 651 (1909). For the present rule see Schafer v. City of Edwardsville, 308 Ill. App. 437, 32 N.E. (2d) 779 (1941), abst. opin.
42 Erford v. City of Peoria, 229 Ill. 546, 82 N.E. 374 (1907).
43 312 Ill. App. 288, 38 N.E. (2d) 519 (1941).
45 Kronan Building & Loan Association v. Medeck, 368 Ill. 118, 13 N.E. (2d) 66 (1938), noted in 16 Chicago-Kent Review 279.
he chooses the latter, other persons may not force an expansion of the proceedings by the process of intervention\textsuperscript{47} unless the court, in its discretion, should permit the same.

The purpose of Section 43 of the Illinois Civil Practice Act\textsuperscript{48} was obviously that of making it possible for the plaintiff who had an honest doubt as to the exact basis for his claim, but knew that one of several possible theories could support it, to state the same in alternative fashion. When he avails himself of this method, the defendant may not, according to Wattman v. St. Luke's Hospital Association,\textsuperscript{49} compel an election between the several alternatives prior to the close of the evidence. If defendant should feel in any way aggrieved by such alternative joinder, especially if the several theories are inconsistent,\textsuperscript{50} his only remedy is to move, pursuant to Section 44 (1) of the act,\textsuperscript{51} for separate trials upon the several counts. The motion to compel an election is not the same as a motion for severance.

Under the former practice exhibits attached to a pleading in a law action were of no consequence,\textsuperscript{52} and, if attached to pleadings in equitable proceedings, were cognizable only if incorporated therein by apt reference.\textsuperscript{53} The Civil Practice Act changed this by requiring that all pertinent documents or exhibits should be attached, and further provided that, when so attached, the same should "constitute a part of the pleading for all purposes."\textsuperscript{54} Significance was given to this last phrase by the decision in Pure

\textsuperscript{47} Lake View Trust and Savings Bank v. Rice, 279 Ill. App. 538 (1935).
\textsuperscript{48} Ill. Rev. Stat. 1941, Ch. 110, § 167 (2).
\textsuperscript{49} 314 Ill. App. 244, 41 N.E. (2d) 314 (1942).
\textsuperscript{50} In the case under consideration, a suit for malpractice, plaintiff alleged in the first count that defendant's carelessness had caused the death of her husband and therefore sought recovery under the Injuries Act, Ill. Rev. Stat. 1941, Ch. 70, § 1. In the second count, plaintiff alleged, in the alternative, that the defendant doctor had breached a contract with his patient to treat the latter skilfully, thereby causing injury, but that such breach was not the proximate cause of death. An argument over whether this latter cause of action survived, since no suit had been brought thereon by decedent in his lifetime, was decided by interpreting Ill. Rev. Stat. 1941, Ch. 3, § 494, to cover not only "actions" but also "causes of action" under the authority of Genslinger v. New Illinois Athletic Club, 229 Ill. App. 428 (1923).
\textsuperscript{51} Ill. Rev. Stat. 1941, Ch. 110, § 168 (1).
\textsuperscript{52} Riley v. Yost, 58 W. Va. 213, 52 S.E. 40, 1 L.R.A. (N.S.) 777 (1905).
\textsuperscript{53} Rubin v. Chicago Title & Trust Co., 249 Ill. App. 486 (1928).
\textsuperscript{54} Ill. Rev. Stat. 1941, Ch. 110, § 160.
Oil Co. v. Miller-McFarland Drilling Co.,\textsuperscript{55} which holds that the contents of such exhibits must be regarded as so many additional allegations in the pleading to which they are attached so as to require the opposing counsel to controvert the same or be regarded as admitting the truth thereof.\textsuperscript{56} When attached to an answer, the exhibits may, therefore, operate as an affirmative defense requiring the plaintiff to take issue therewith by a reply.\textsuperscript{57}

The Illinois Civil Practice Act also requires that the defendant shall specifically set forth in his answer any defense which, if not so stated, "would be likely to take the opposite party by surprise," and, by way of illustration, enumerates among others the defense of payment.\textsuperscript{58} When so pleaded, a question is likely to arise as to whether or not the burden of proof on the issue has thereby been cast upon the defendant. Litigants have, apparently, been acting on the assumption that such was the necessary result of so pleading, but a caveat has been expressed, in the concurring opinion in First National Bank & Trust Company of Evanston v. Simon,\textsuperscript{59} to the effect that the duty to prove non-payment in suits on money contracts is still with the plaintiff though the issue must be introduced by the defendant's answer.

It is not unusual for an attorney to stipulate with opponent's counsel for an enlargement of the time within which some step in the litigation should be taken. Such professional courtesy, if not violative of any right of the client, is to be commended. Care should, however, be observed in drafting any such stipulation to prevent any question arising as to the scope thereof. Thus, in Woods v. First National Bank of Chicago,\textsuperscript{60} plaintiff's counsel agreed that defendant might have an additional ten days in which to file "a sworn answer" to the complaint. On the tenth day the defendant's attorney filed a motion to strike the complaint for failure to

\textsuperscript{55} 376 Ill. 486, 34 N.E. (2d) 854 (1941).
\textsuperscript{56} Ill. Rev. Stat. 1941, Ch. 110, § 164(2).
\textsuperscript{57} Ill. Rev. Stat. 1941, Ch. 110, § 156.
\textsuperscript{58} Ill. Rev. Stat. 1941, Ch. 110, § 167(4).
\textsuperscript{59} 312 Ill. App. 214, 38 N.E. (2d) 380 (1941), noted in 20 CHICAGO-KENT LAW REVIEW 171.
\textsuperscript{60} 314 Ill. App. 340, 41 N.E. (2d) 235 (1942).
state a cause of action. Plaintiff contended that, in view of the limited nature of the stipulation, defendant was in default for failure to answer.\textsuperscript{61} Despite this the trial court refused to enter the default order, but instead sustained defendant's motion and entered judgment dismissing the suit. On appeal such action was affirmed, the court being of the opinion that the enforcement of a stipulation is within the discretion of the court and that the word "answer" was broad enough to cover a motion to strike.\textsuperscript{62}

In \textit{Book v. Ewbank}\textsuperscript{63} a judgment had been taken against a non-resident defendant by virtue of a confession clause in a note which authorized any attorney to appear in any court and confess judgment. When garnishment proceedings appeared likely to result in collection, the judgment debtor moved for leave to open up the judgment and plead to the merits. He later contended that the court lacked jurisdiction of his person inasmuch as the authority to confess judgment had become \textit{functus officio} by the passage of time.\textsuperscript{64} It was held, however, that the defendant, by his conduct in asking leave to plead, had, in effect, entered a general appearance and had thereby conferred jurisdiction on the trial court.

\textbf{THE TRIAL OF THE CASE}

Summary judgment proceedings have now been extended, by statute, to counterclaims and equitable proceedings, in certain enumerated classes, as well as to original suits and may, therefore, be now utilized by defendants as well as plaintiffs;\textsuperscript{65} pre-trial discovery may now include compulsory answers to written interrogatories;\textsuperscript{66} and, subject to rules, pre-trial conferences may be compelled.\textsuperscript{67}

The trial and disposition of cases hereafter must also be handled in the light of certain revisions now effective. Thus

\textsuperscript{61} Ill. Rev. Stat. 1941, Ch. 110, § 259.8(1).
\textsuperscript{62} Steele v. Moss, 69 Wis. 496, 34 N.W. 237, 2 Am. St. Rep. 756 (1887).
\textsuperscript{63} 311 Ill. App. 312, 35 N.E. (2d) 961 (1941), noted in 30 Ill. B. J. 213.
\textsuperscript{64} Matzenbaugh v. Doyle, 156 Ill. 331, 40 N.E. 935 (1895).
\textsuperscript{65} Laws 1941, II, 465, § 57; Ill. Rev. Stat. 1941, Ch. 110, § 181. See also Amended Rules 15 and 16 of the Supreme Court, 378 Ill. 10-2.
\textsuperscript{66} Laws 1941, II, 466, § 58; Ill. Rev. Stat. 1941, Ch. 110, § 182.
\textsuperscript{67} Laws 1941, II, 466, § 58\(\frac{1}{2}\); Ill. Rev. Stat. 1941, Ch. 110, § 182a. See also added Rule 23A of the Supreme Court, 378 Ill. 12.
trial by jury in a law action should be demanded at time of
suit or upon filing of appearance, but, if the proceedings be
of an equitable nature, such demand would be improper. If,
however, an equitable action should be later transferred to
the law docket, the plaintiff is now allowed three days after
such order of transfer to present his demand for jury trial;
the defendant is granted six days in which so to do. Failure
to act in the allotted time amounts to a waiver of trial by
jury. The objection to the decision in Westerfield v. Red-
mer is thereby obviated.

The propriety of establishing a prospective juror's con-
nection with an insurance company on voir dire examina-
tion was again under consideration in Kavanaugh v. Par-
ret which case held that the plaintiff's affidavit to show
good faith permitting such interrogation could be over-
come by defendant's counter-affidavit showing lack of ne-
cessity for such line of questioning.

A provision has also been added under which the defendant
in an equitable proceeding may, at the close of the plain-
tiff's case, move for a finding in his favor or to dismiss for
want of equity. Such motion constitutes a submission of the
case on the merits, but, if it results in an adverse ruling, the
defendant may still offer proof of his defense.

The nature of the proof which may be offered at the trial
of a case is fairly well understood. One case, however, war-
rants consideration. In Kanne v. Metropolitan Life Insurance
Company, the plaintiff sued to recover upon a double in-
demnity clause contained in a life and accident policy. The
death of the insured occurred in a lake in California where
the body was found floating in the water. A doctor who had
examined the body was permitted to testify at the trial to
the effect that the death could or might have been due to
an illness. His opinion was not based on any facts in the evi-

68 Laws 1941, II, 466, § 64(1); Ill. Rev. Stat. 1941, Ch. 110, § 188(1).
69 310 Ill. App. 246, 33 N.E. (2d) 744 (1941), noted in 20 CHICAGO-KENT LAW
REVIEW 59.
70 379 Ill. 273, 40 N.E. (2d) 500 (1942), noted in 20 CHICAGO-KENT LAW REvIEW 371.
71 Smithers v. Henriquez, 368 Ill. 588, 15 N.E. (2d) 499 (1938). See also note in
16 CHICAGO-KENT LAW REvIEW 371.
72 Laws 1941, II, 466, § 64(4); Ill. Rev. Stat. 1941, Ch. 110, § 188(4).
73 310 Ill. App. 524, 34 N.E. (2d) 732 (1941), noted in 17 Ind. L. J. 440.
dence. The jury gave credence to his testimony and brought in a verdict for the defendant. The trial judge, notwithstanding the verdict, rendered judgment on the policy in favor of the plaintiff. The appellate court, in affirming the judgment, indicated that, under the pertinent statute, such motion for judgment notwithstanding the verdict reaches the question of whether or not there is any evidence which may be considered by the jury, and is properly used where, as here, there is no evidence to sustain the defendant's contention. The physician's testimony was a pure guess unsupported by any facts in the record. The plaintiff, therefore, having proved the fact of death and the attendant circumstances, could well rest his case upon the presumption against suicide. The decision seems entirely correct whether considered as a question of evidence or dealt with as a question involving the burden of proof. It should be further noted that a death certificate introduced into evidence was merely evidence of the fact of death, and could not be used as proof of the cause of death since the causes recited therein were mere conclusions on the part of the issuing officer.

A statute now provides that the instructions given to the jury are to be taken by them to the jury room and are to be returned with the verdict and then filed as a part of the proceedings.

**DAMAGES**

The vexing question as to whether or not an allowance for attorney's fees may be made as damages when the defendant's tortious conduct has required plaintiff to expend money for that purpose in conducting antecedent litigation was again before the court in *Ritter v. Ritter.* It there appeared that the defendant had wrongfully acquired and retained title to certain lands properly belonging to plaintiff.

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74 Ill. Rev. Stat. 1941, Ch. 110, § 192(3a).

75 Laws 1941, II, 466, § 67(2); Ill. Rev. Stat. 1941, Ch. 110, § 191(2).

76 313 Ill. App. 407, 40 N.E. (2d) 565 (1942), in which Dady, J., dissented. An appeal to the Illinois Supreme Court has been allowed. In an earlier appeal on the pleadings in the same case, *Ritter v. Ritter*, 308 Ill. App. 337, 32 N.E. (2d) 165 (1940), noted in 20 *Chicago-Kent Law Review* 83, the complaint had been sustained against objection that it failed to state a cause of action and the further objection of res adjudicata.
A prior suit in equity between the same parties had lead to a decree compelling a conveyance of the premises, but no claim for attorney's fees was advanced or allowed in that proceeding. Thereafter, plaintiff brought the instant case as a suit at law in tort to recover the fees paid in conducting the prior suit.\(^7\) It was admitted that had the expense been incurred in securing a return of the property from some third person the claim would have been proper.\(^7\) The defendant contended, however, that the failure to assert the demand in the equity proceeding had resulted in the decree therein becoming res adjudicata. The majority viewed the claim as being one separate from the original demand, since predicated on defendant's malicious tort in refusing to recognize his obligations as constructive trustee, consequently, though it might have been urged in the chancery proceeding,\(^7\) the decree therein did not preclude this suit. The dissenting opinion, which seems the sounder view, regarded the problem as no different than the ordinary case in which plaintiff is obliged to sue to assert his rights under which, absent any statute, the public policy has been to make each party bear his own expense.\(^8\) Even though it were different, plaintiff had been given his opportunity in the chancery proceeding hence should not be allowed to relitigate the issue.\(^8\)

If the decision should be permitted to stand, it could become

\[^7\] For a comparable problem see Marvin v. Prentice, 94 N.Y. 295 (1884), in which grantor was obliged to sue in equity to establish the fact that a deed absolute in form was really a mortgage, and was successful therein. In a new suit to recover the expense and counsel fee incurred in the first proceeding, held: recovery denied. See also Chicago Coliseum Club v. Dempsey, 265 Ill. App. 542 (1932).

the basis for an expansion in the field of tort law creating a new tort arising from the malicious defense of litigation comparable to the present claims based upon malicious prosecution and malicious abuse of process.

The fine print on the back of a telegraph money-order blank stated: "In any event, the company shall not be liable for damages . . . beyond the sum of $500, at which amount the right to have this money order promptly and correctly transmitted . . . is hereby valued. . . ." Such language was held, in Siegel v. Western Union Telegraph Co., to constitute a mere limitation on liability and not to be a provision for liquidated damages. As a consequence, the plaintiff, who had wired a sum of money to be bet on a horse race, but receipt of which had been delayed until after the race had been run, was denied the right to recover the maximum sum above stated and was limited to an allowance merely for interest during the period of withholding. The actual loss sustained exceeded the maximum sum, but plaintiff's failure to prove notice to the company of any special circumstance likely to produce unusual damage required the court to apply the ordinary rule of damage in cases involving non-payment of money. Though the point is not new, it is interesting to note that the United States Supreme Court was considering the same problem at about the time of the decision in the instant case and arrived at the same conclusion.

Whenever defendant's tortious conduct has been motivated by malice or premaditation, the Illinois courts have permitted the jury to assess punitive or vindictive damages. It would seem, from the case of Karpluk v. Daniszewicz, that the defense that the actionable assault was an unpredenti-

82 312 Ill. App. 86, 37 N.E. (2d) 868 (1941).
83 The rule of Hadley v. Baxendale, 9 Exch. 341, 156 Eng. Rep. 145 (1854), was held applicable to telegraph cases in Lust v. Western Union Telegraph Co., 243 Ill. App. 624 (1926). This case was not reported in full, but the substance of the holding is, however, set forth in the instant case.
84 5 Williston, Contracts, Rev. Ed., § 1410.
85 Wernick v. Western Union Telegraph Co., 290 Ill. App. 569, 9 N.E. (2d) 72 (1937), had held the language in question to be a limitation on liability and not an agreement for liquidated damages.
86 Western Union Telegraph Co. v. Nester, 309 U.S. 582, 60 S. Ct. 769, 84 L. Ed. 960, 128 A.L.R. 628 (1940), reversing 106 F. (2d) 587 (1939).
tated "flare-up" will not be availing if the jury can say there was no provocation present, hence an award of punitive damages would be proper. According to the facts of that case, plaintiff, a woman, was standing on a public sidewalk next to defendant's tavern engaged in conversation with a male companion. She was holding a dog attached by a leash. Defendant, without provocation, seized the dog's tail, whirled it around in the air, and then dropped it. The male companion was knocked down by defendant when he remonstrated, and when plaintiff also protested she too was knocked down. A verdict that such conduct was wilful, wanton and malicious, carrying with it an allowance of $2,250.00 for damages, was sustained on the ground that the assault need not be premeditated to warrant such allowance.

**APPEAL AND APPELLATE PROCEDURE**

Persons seeking to appeal from a decision of the trial court are required, by Section 74 of the Illinois Civil Practice Act, 89 to present a notice of appeal within the time permitted by law. The form of such notice is prescribed by Rule 33 of the Illinois Supreme Court90 which further requires that the same shall be signed "by or on behalf of the party or parties joining in the notice of appeal." A common-sense application was given to this rule, in Logemeyer v. Fulton State Bank,91 where it was held that a notice of appeal signed by "Henry Logemeyer, et al., plaintiffs" was sufficient to indicate that the appeal was taken on behalf of all 137 plaintiffs who had joined in the original proceeding. The contention that each one should have either signed the notice or else filed a separate notice of appeal was rejected as imposing a useless burden on court and litigants with benefit to nobody, and utterly opposed to the spirit of the act.92

That the rules of court are to have the force of law on persons using the judicial processes is axiomatic. Persons who will not comply with such rules should, justifiably, be

89 Ill. Rev. Stat. 1941, Ch. 110, § 198.
90 Ill. Rev. Stat. 1941, Ch. 110, § 259.33.
91 313 Ill. App. 270, 40 N.E. (2d) 316 (1942).
92 Ill. Rev. Stat. 1941, Ch. 110, § 128.
denied the assistance of the courts. Yet the application of this principle may work some unusual results. Thus, in Knecht v. Sincox, a petition for leave to appeal to the Supreme Court was dismissed for failure to comply with Rule 32 of that court because such petition failed to set forth the essentials required thereby. On the other hand, the appellant in Swain v. Hoberg, whose brief contained all the essential data, though arranged in a different fashion than dictated by the court rules, was likewise denied a review of his case even though his opponent had made no motion to dismiss the appeal. While the first ruling may be justified, the decision in the second instance seems unduly harsh.

The jurisdiction of the Illinois Appellate Court is limited to reviewing final judgments in any suit or proceeding at law or in chancery. It may not exercise jurisdiction except as conferred by statute. It therefore seemed obvious to the court, in City of Freeport v. Kaiser, that it had no jurisdiction to review proceedings to revoke a liquor license since the statute, while permitting review by "appeal" to the local circuit court, is silent as to further procedure. In so deciding, however, the court has indirectly reflected on the possible unconstitutionality of such statute, for, if the "appeal" to the circuit court is a mere review of the work of the administrative body, it runs counter to the decision in City

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63 376 Ill. 586, 35 N.E. (2d) 68 (1941).
94 Ill. Rev. Stat. 1941, Ch. 110, § 259.32.
96 Ill. Rev. Stat. 1941, Ch. 110, § 259.39.
97 A motion was made to dismiss, as well as a counter-motion for leave to amend, but not until after the case had been submitted, hence both came too late. The court, therefore, acted on its own motion.
98 Fortunately for the litigant in Swain v. Hoberg, the Illinois Supreme Court granted leave to appeal and, in 380 Ill. —, 44 N.E. (2d) 38 (1942), outside the period of this survey, reversed such decision on the ground that the purpose of the rule was to promote justice and not to serve to entrap litigants. Gyure v. Sloan Valve Co., 367 Ill. 489, 11 N.E. (2d) 963 (1937), was distinguished.
99 Ill. Rev. Stat. 1941, Ch. 110, § 201(1).
of *Aurora v. Schoeberlein*, whereas if it be a statutory proceeding in the nature of certiorari still further review of the decision of the circuit court in the appropriate appellate tribunal should be available.

When declaring unconstitutional that portion of Section 92 of the Illinois Civil Practice Act which purported to confer power on the reviewing court to receive original evidence not offered in the trial court, the Illinois Supreme Court spoke solely of its own inability to receive such evidence. The same reasoning has now been applied, and with the same result, to the several Appellate courts under the decision in *Ockenga v. Alken*. In the same way, the action taken in the Goodrich case, which declared Section 68(3c) of the Illinois Civil Practice Act unconstitutional as attempting to confer original jurisdiction on appellate tribunals, foreshadowed the result in *Scott v. Freeport Motor Casualty Co.* The decision therein now forbids the appellate courts, when passing on an appeal from an order granting a new trial, from entering final judgment on the verdict if it should decide the trial court erred in granting such motion. Its power, as an appellate tribunal, is confined to reversing the order and remanding the case to the trial court. An attempt made in that case to have Section 77 of the Civil Practice Act declared unconstitutional because in conflict with Section 8 of the Appellate Courts Act, on the ground that an order granting a new trial is not a "final" judgment.

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4 230 Ill. 496, 82 N.E. 860 (1907). See also *Borreson v. Department of Public Welfare*, 368 Ill. 425, 14 N.E. (2d) 485 (1938).
7 Ill. Rev. Stat. 1941, Ch. 110, § 216 (1d).
8 *Schmidt v. Equitable Life Assurance Society of the United States*, 376 Ill. 183, 33 N.E. (2d) 485 (1941).
9 314 Ill. App. 389, 41 N.E. (2d) 548 (1942). On petition for rehearing, plaintiff sought to supplement the record with photographs, maps and other data tending to show a change in the facts since the trial. The offer was rejected, but without prejudice to the plaintiff's right to submit the same to the trial court in a proceeding to modify the decree.
11 Ill. Rev. Stat. 1941, Ch. 110, § 192 (3c).
13 Ill. Rev. Stat. 1941, Ch. 110, § 201.
14 Ill. Rev. Stat. 1941, Ch. 37, § 32.
within the meaning of the latter, failed as the court recognized a legislative intention to bring about an amendment of the latter provision through the enactment of the former.

Of like nature is the decision in *Herb v. Pitcairn*\(^1\) which indicates that, whenever judgment has gone for defendant on a motion non obstante veredicto, the appellate court, if it should decide to reverse the same, must remand the proceedings to the trial court to entertain a motion for a new trial if one be made, since, upon the earlier ruling, the trial court had no occasion to consider this point. The defendant’s right to so move is not waived by the presentation of the motion for judgment non obstante veredicto,\(^1\) and, as the appellate court may not pass thereon, remandment is essential.

Review by the Illinois Supreme Court of the decisions of the appellate courts is circumscribed by the statutory requirement that, in actions ex contractu and all cases sounding in damages, the judgment “... shall be for fifteen hundred dollars ($1500.00) or more.”\(^7\) This requirement is not satisfied, according to *Martin v. Martin’s Estate*,\(^1\) by allowing plaintiff to cumulate demands found in his favor but totalling less than the jurisdictional amount with other demands which were rejected by the trial court. For that matter, under the ruling in *Antosz v. Goss Motors, Inc.*,\(^1\) the claims of several plaintiffs who have joined their individual separate demands in one proceeding\(^2\) may not be reviewed by the Supreme Court even though the total sum awarded them aggregates more than the jurisdictional amount if the individual allotments are each below that figure.

Changes in both statutory provisions and rules of court affecting appeals and appellate procedure, effective since January 1, 1942, must be noted. In the past the jurisdiction of the several appellate courts has been confined to appellate review only, and, as a consequence, it has been limited to

\(^{15}\) 377 Ill. 405, 36 N.E. (2d) 555 (1941), reversing 306 Ill. App. 583, 29 N.E. (2d) 549 (1940).

\(^{16}\) Cockrum v. Keller, 258 Ill. 276, 101 N.E. 594 (1913).

\(^{17}\) Ill. Rev. Stat. 1941, Ch. 110, § 199 (2).

\(^{18}\) 377 Ill. 392, 36 N.E. (2d) 742 (1941), noted in 20 CHICAGO-KENT LAW REVIEW 174.

\(^{19}\) 378 Ill. 608, 39 N.E. (2d) 322 (1942), noted in 20 CHICAGO-KENT LAW REVIEW 174.

\(^{20}\) Joinder is permitted by Ill. Rev. Stat. 1941, Ch. 110, § 147.
reversing and remanding or else affirming the trial court’s decision. Frequently, the effect of the remanding order is such that the trial court has only to enter a particular type of order disposing of the case. At times, however, a new trial becomes proper. It is now possible for the litigant, in the latter situation, to signify that such new trial, if had, could accomplish nothing and he may, therefore, request the appellate court to delete that portion of the mandate remanding the cause,\(^{21}\) so as to make it competent for the Supreme Court to grant leave to appeal. The argument made on behalf of the plaintiff in *Corcoran v. City of Chicago*\(^ {22}\) has thus been enacted into law.

In much the same way, statutory revision has been made to clarify the doubt which has developed over the litigant’s right to secure review of an adverse decision. If, for any reason not involving the litigant’s culpable negligence, the “short” appeal should fail because not properly carried through, the statute now expressly authorizes the reviewing court to grant leave to appeal within the period permissible for “long” appeals.\(^ {23}\) The decision in *Spivey Building Corporation v. Illinois Iowa Power Company*,\(^ {24}\) which denied the right to two appeals even though one had failed for reasons beyond the control of the litigant, is thereby rendered nugatory.

Other slight statutory modifications have been made with regard to appeals from orders granting new trials;\(^ {25}\) appeals from interlocutory orders such as injunctions;\(^ {26}\) treating the appeal as a supersedeas;\(^ {27}\) giving the appellate tribunal the right to recall a mandate already issued;\(^ {28}\) and

\(^{21}\) Laws 1941, II, 467, § 75(2); Ill. Rev. Stat. 1941, Ch. 110, § 199(2). See also added Rule 31A of the Supreme Court, 378 Ill. 14.

\(^ {22}\) 373 Ill. 567, 27 N.E. (2d) 451 (1940), noted in 19 Chicago-Kent Law Review 91.

\(^ {23}\) Laws 1941, II, 468, § 76; Ill. Rev. Stat. 1941, Ch. 110, § 200(1). See also Rule 29 of the Supreme Court, 378 Ill. 13.

\(^ {24}\) 375 Ill. 128, 30 N.E. (2d) 841 (1940), noted in 19 Chicago-Kent Law Review 274.

\(^ {25}\) Laws 1941, II, 469, § 77(1); Ill. Rev. Stat. 1941, Ch. 110, § 201(1). See also Amended Rule 30 of the Supreme Court, 378 Ill. 13.


\(^ {27}\) Laws 1941, II, 470, § 82; Ill. Rev. Stat. 1941, Ch. 110, § 206.

\(^ {28}\) Laws 1941, II, 470, § 82(4); Ill. Rev. Stat. 1941, Ch. 110, § 206(4).
making notice of filing of the mandate in the inferior court unnecessary except in cases where the cause is remanded for new trial or further hearing.\textsuperscript{29}

ENFORCEMENT OF JUDGMENTS

In the case of \textit{Reconstruction Finance Corporation v. Maley\textsuperscript{30}} the local federal court was called upon to interpret a state statute relating to the enforcement of judgments and decrees.\textsuperscript{31} It appeared therein that the plaintiff had secured a decree in its favor in a federal court located in a district in which the debtor owned no real property. A certified copy thereof was thereafter filed with the clerk of the state circuit court in a county wherein the debtor did own land. Execution was issued by the originating federal court directed to the marshal of the adjacent federal district who, in due time, returned the same unsatisfied. No proceedings, beyond the mere filing of the certified copy, were had in the state court. In a later dispute over the effectiveness of such steps to make the judgment a valid lien on the lands in question, it was held the same were insufficient to establish a lien since the execution which had been issued was ineffective and the filing of the certified copy was not alone enough to give statutory effect to the judgment for a period of more than one year. To extend the life of such judgment as to lands located in a county outside the jurisdiction of the court of rendition, it was regarded as essential that execution should issue from the court of the county in which the certified copy had been filed. In so holding, the court affirmed the rule that the lien of a judgment rendered by a federal court is subject to the rules imposed by both the state\textsuperscript{32} and the federal statute.\textsuperscript{33} One interesting problem was left unanswered by the decision, i.e. whether a certified copy of a decree or judgment was a "transcript of judgment" within the meaning of the pertinent statute.\textsuperscript{34} The district court

\textsuperscript{29} Laws 1941, II, 471-2, § 88(2) and (4); Ill. Rev. Stat. 1941, Ch. 110, § 212(2) and (4).
\textsuperscript{30} 125 F. (2d) 131 (1942).
\textsuperscript{31} Ill. Rev. Stat. 1941, Ch. 77, § 1.
\textsuperscript{32} Ill. Rev. Stat. 1941, Ch. 77, §§ 69-69a.
\textsuperscript{33} 28 U. S. C. A. § 812.
\textsuperscript{34} Ill. Rev. Stat. 1941, Ch. 77, § 1.
had held it was not such, but on appeal the court, though intimating that perhaps it was, found it unnecessary to pass specifically thereon. In view of the problem thus raised but left unanswered, the judgment creditor must look carefully to the preservation of his rights.

The case of *Haugens v. Holmes*35 dealt with a problem of priority of lien, as between a recorded chattel mortgage and an execution and levy under a judgment, upon chattels not originally located within the county where the judgment was rendered but into which they had been subsequently brought and there seized. The court therein rejected the judgment creditor's contention that his lien should be given retroactive effect and should date back to the time when the sheriff had first received the original execution. It was, instead, held that the judgment lien took effect only from the time when the chattels were brought into the county. A mortgage lien, which had arisen from proper execution and recording of a chattel mortgage in the county where the chattels were then located, was held to possess priority over the rights of the judgment creditor, even though the judgment had been rendered earlier in point of time.

Two rather interesting cases dealt with the subject of fraudulent conveyances. Though not involving the rights of judgment creditors, they fit into situations frequently observed in attempts to defeat such rights. In *Prickett v. Prickett*36 the court held that the relationship of attorney and client was so confidential that a court of equity was warranted in extending its aid to a defrauded client to recover the property even though the conveyance was made by him to hinder, delay or defraud his creditors. The relationship of the parties therein was held enough to bring the case within the exception to the general rule that equity will leave the parties where they have placed themselves whenever they have joined in a scheme to defraud.37 The case of *Ford v. Caspers*,38 on the other hand, involved a client and a real

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36 379 Ill. 181, 39 N.E. (2d) 984 (1942).
37 Rosenbaum v. Huebner, 277 Ill. 360, 115 N.E. 558 (1917); Lang v. Lang, 284 Ill. 148, 119 N.E. 963 (1918).
38 42 F. Supp. 994 (1941).
estate agent. The court there refused to intervene. Although
the court did not specifically deny that the relationship of
the parties was an exception to the general rule, such is the
necessary effect of the decision.

Reaffirming an old rule of law to the effect that assign-
ments for the benefit of creditors should not be so worded
or designed as to cut off non-assenting creditors,\(^\text{39}\) is the
case of Tribune Company v. Canger Floral Company,\(^\text{40}\) which holds that, although common law assignments for the
benefit of creditors are still valid in Illinois, if the instrument
of assignment uses the words "full release" and "full settle-
ment" it must be regarded as void as to non-assenting credi-
tors because an element of duress is involved. The creditor
who does not participate will be sacrificing something to
which he has a right, hence the element of compulsion, no
matter how accomplished, renders the assignment void. The
decision may have a far-reaching effect on practices utilized
in the dissolution of business enterprises experiencing finan-
cial difficulties.

One statutory provision is of significance. Citation pro-
ceedings to discover the assets of a judgment debtor, such
as have been in use in the Municipal Court of Chicago for
many years,\(^\text{41}\) have now been made available to the other
courts of the state.\(^\text{42}\) The burden of proof in cases of alleged
fraudulent conveyances has wavered from time to time, be-
ing placed at times on the creditor,\(^\text{43}\) and, conversely, at
times on the grantee.\(^\text{44}\) The latest expression on the sub-
ject, found in Cairo Lumber Company v. Landenberger,\(^\text{45}\)
considers the responsibility to be that of the donee-grantee
who must prove that the debtor retained ample assets, fail-
ing which the gratuitous conveyance to himself must yield
to the superior rights of the creditor.

\(^{39}\) Marshall Field & Co. v. Obeler, 251 Ill. App. 529 (1929); International Shoe

\(^{40}\) 312 Ill. App. 149, 37 N.E. (2d) 906 (1941), noted in 30 Ill B. J. 333.

\(^{41}\) Ill. Rev. Stat. 1941, Ch. 37, § 424.

\(^{42}\) Laws, 1941, II, 467, § 73(2); Ill. Rev. Stat. 1941, Ch. 110, § 197(2). See also
added Rule 26A of the Supreme Court, 378 Ill. 12.

\(^{43}\) McKee v. McCoid, 298 Ill. 556, 132 N.E. 233 (1921).

\(^{44}\) Birney v. Solomon, 348 Ill. 410, 181 N.E. 318 (1932).

\(^{45}\) 313 Ill. App. 1, 39 N.E. (2d) 596 (1942), noted in 30 Ill B. J. 380.
IV. CRIMINAL LAW AND PROCEDURE

For many years the Illinois Criminal Code has contained an unusual distinction between the crimes of burglary and attempt to commit burglary. The former may be committed at any time, day or night, with or without the use of force or breaking. The latter, on the other hand, can only occur in the night-time. The reason for the distinction is not apparent and probably results from an oversight. The distinction, however, was used to the advantage of the defendant in People v. Glickman, in which case an indictment charging burglary, but not mentioning that the same occurred at night, was held inadequate to support a conviction for attempt to commit burglary. The general rule that an indictment charging the greater offense also includes the lesser was held to be inapplicable to this special situation. A further argument to sustain the conviction on the ground that it was predicated on the "attempt" section of the statute was repudiated because that section, by its own wording, applies only where no other express provision is made, hence could not fit this case.

The person who strikes the first blow may, even though the aggressor, regain the privilege of self-defense particu-

1 Ill. Rev. Stat. 1941, Ch. 38, § 84.
2 Ibid, § 85.
3 The first statute in Illinois on the subject appears to be R. L. 1827, p. 133, § 60, which punished the completed crime if occurring in the night time. It made no provision for the punishment of attempted burglary. This statute was amended in various particulars from time to time. See Laws, 1831, p. 111, § 29, changing form of punishment; Laws, 1859, p. 154, § 3, extending the coverage to certain other structures; and Laws, 1869, p. 112, § 2, giving protection to every building. These provisions were consolidated in Rev. Stat. 1874, p. 348, § 36, at which time the requirement that the offense occur in the night time was still a part of the law. The statute punishing attempt to commit burglary first appears in the 1874 revision. See Rev. Stat. 1874, p. 348, § 37, having the exact wording it bears today: Ill. Rev. Stat. 1941, Ch. 38, § 85. The burglary statute was amended in 1877 by eliminating the requirement that the offense occur at night, and by adding protection to certain other forms of property: Laws, 1877, p. 85, § 1. It is probable that the oversight occurred at this session. Though the burglary statute has been amended twice since then (Laws, 1885, p. 73, § 1, and Laws, 1927, p. 398, § 1), no change has been made in the section covering attempt to commit burglary since its first enactment.
4 377 Ill. 360, 36 N.E. (2d) 720 (1941), noted in 30 Ill. B. J. 161.
larly if he has withdrawn in good faith and has made his intention known to the original victim. Where such is the case, the original victim, according to People v. Booker, may not thereafter pursue the former assailant and, upon killing him, claim the privilege of self-defense since the essential element that the danger must be reasonably apparent at the time of killing would be lacking. In a somewhat similar situation, told in People v. Jersky, the defendant was permitted to rely on inconsistent defenses to the effect that (a) the killing was done in self-defense, i.e. intentionally inflicted, and (b) the gun went off accidentally, i.e. without defendant’s intention that it should. Any confusion engendered thereby was held to be the fault of the defendant, and, consequently, he could not be heard to complain that the jury might, therefore, have been unable to arrive at the proper verdict.

Protection given to public utilities against the theft of their products has been increased by the decision in People v. Kraus which holds that water in the pipes of a waterworks system is as much the subject of larceny as any other tangible personal property. Though not an original idea, the decision was foreshadowed in Woods v. People, dealing with the theft of illuminating gas and People v. Menagas, holding that tapping electric power wires constituted larceny.

Although the common law offense of forgery required the false making of a writing, so that affixing one’s genuine

7 Rowe v. United States, 164 U.S. 546, 17 S. Ct. 172, 41 L. Ed. 547 (1896).
8 378 Ill. 334, 38 N.E. (2d) 32 (1941), noted in 26 Minn. L. Rev. 662.
10 377 Ill. 261, 36 N.E. (2d) 347 (1941), noted in 26 Marq. L. Rev. 167.
11 The probable basis for the decision, though not cited, is People v. Lee, 248 Ill. 64, 93 N.E. 321 (1910), in which defendant, charged with poisoning by mingling carbolic acid in beer, sought to prove (a) he was not guilty, and (b) the poison was not sufficient to cause death. It was regarded as error to deny defendant the right to offer evidence on the latter point, the court saying: “... it is no objection to testimony which tends to prove one defense that it is inconsistent with other defenses that may be relied on.” — 284 Ill. 64 at 70, 93 N.E. 321 at 323.
12 377 Ill. 539, 37 N.E. (2d) 182 (1941).
signature could not involve that offense,\textsuperscript{16} the present statutory definition of that crime\textsuperscript{17} is apparently broad enough to prohibit that sort of conduct, if done with intent to defraud, according to \textit{People v. Mau.}\textsuperscript{18} In so deciding, the court not only negatived the earlier decision in \textit{People v. Kramer}\textsuperscript{19} but also placed this state among a minority of states so holding.

In the realm of criminal procedure, the case of \textit{People v. Klemick}\textsuperscript{20} is worthy of note for two reasons. In the first place, the court decided that it was not erroneous to place a defendant on trial at one time upon both an indictment and an information, provided each covered related offenses. In so joining the two accusations, the state was not violating the positive rule that an indictment may not be amended,\textsuperscript{21} but the right to consolidate was limited by the requirement that the added charge named in the information must not be one which might subject the defendant to a more severe punishment than could have been imposed under the indictment. To permit consolidation where such result might be possible was regarded as denying defendant the right to a fair and impartial trial. The second point decided dealt with the right to plead a former conviction for the purpose of aggravating punishment.\textsuperscript{22} According to the view in some states, the prior conviction may be relied upon, irrespective of the time when the offense was committed, so long as the conviction antedated the return of the indictment in the instant case.\textsuperscript{23} Other states hold that the second offense must have been committed after verdict returned on the first offense.\textsuperscript{24} The Illinois Supreme Court adopted the latter view,

\textsuperscript{17} Ill. Rev. Stat. 1941, Ch. 38, § 277.
\textsuperscript{18} 377 Ill. 199, 36 N.E. (2d) 235 (1941), noted in 20 CHICAGO-KENT LAW REVIEW 180, 30 Ill. B. J. 297, and 26 Marq. L. Rev. 165.
\textsuperscript{19} 352 Ill. 304, 185 N.E. 590 (1933).
\textsuperscript{20} 311 Ill. App. 508, 36 N.E. (2d) 846 (1941), noted in 26 Minn. L. Rev. 402.
\textsuperscript{21} Gannon v. People, 127 Ill. 507, 21 N.E. 525, 11 Am. St. Rep. 147 (1889); Patrick v. People, 132 Ill. 529, 24 N.E. 619 (1890). An information, on the other hand, may be amended at will so long as the exercise of the privilege does not interfere with the orderly conduct of judicial business: Long v. People, 135 Ill. 435, 25 N.E. 851, 10 L.R.A. 48 (1890).
\textsuperscript{22} Ill. Rev. Stat. 1941, Ch. 38, § 325.
\textsuperscript{23} See, for example, State v. McCormick, 104 N. J. L. 288, 140 A. 297 (1928).
\textsuperscript{24} Singer v. United States, 278 F. 415 (1922), cert. den. 258 U.S. 620, 42 S. Ct.
deeming the legislative purpose to be aimed at offenders who, after one conviction, do not reform but persist in committing other offenses. While the "Habitual Criminal" Act was not involved, the decision reflects the policy thereof, since that statute specifically refers to second offenses committed after the first conviction.

The Illinois Supreme Court has previously announced that informality in the trial and disposition of criminal cases cannot be tolerated if the defendant’s constitutional right to a fair and impartial trial is to be observed. Despite this injunction, the informality persists according to People v. Hoffman, in which case a conviction for burglary was reversed because the hearing in no way resembled a trial. The transcript therein showed that after some discussion about a continuance, an informal colloquy occurred between the assistant state’s attorney and a police officer concerning the alleged facts. What probably started out to be the dictation of a stipulation of facts degenerated into a recital of hearsay to which the defendant’s counsel made no objection. It was also practically impossible to tell, from reading the record, where the trial began and concluded. Such informality should not be tolerated, counsel permitting it should be criticized, and, even though the case be tried without a jury, the trial judge should insist that the forms of law be observed.

The power of the court to grant probation to a convicted defendant is conditioned by a requirement that, upon request for admission to probation, the court "shall require the probation officer to investigate accurately and promptly... such... facts as may aid the court as well in deter-

25 In the instant case, the prosecution relied upon an earlier conviction predicated upon an indictment dated April 12th, but trial upon which was incomplete on November 2nd, when the instant indictment was returned. The judgment for the earlier offense was not pronounced until November 10th, though the same was in existence prior to the filing of the information consolidated with the indictment.
28 People v. Gardiner, 303 Ill. 204, 135 N.E. 422 (1922); People v. Nitti, 312 Ill. 73, 143 N.E. 448 (1924).
29 379 Ill. 318, 40 N.E. (2d) 515 (1942).
30 Ill. Rev. Stat. 1941, Ch. 38, § 784.
mining the propriety of probation, as in fixing the conditions thereof. It was held, in *People v. Donovan*, that neither the letter nor spirit of that statute had been observed when the trial court, after plea of guilty, had denied probation solely upon the statement of the State's Attorney to the effect that the defendant had admitted other offenses. Though the granting of probation is a matter of discretion, it is now made clear that the duty to investigate before acting on a request for probation is not subject to the exercise of discretion.

Conviction for an infamous crime carries other consequences beside imprisonment in the penitentiary. According to the Illinois statute, every person so convicted is, forever thereafter, rendered incapable of holding any office of honor, trust, or profit, of voting at any election, or of serving as a juror, unless such rights be restored. Though retaining citizenship, the person's status is necessarily something less than that of full citizenship. Because of this fact, the convicted person, under the decision in *Austin v. United States*, may not receive the benefit of those provisions in the law permitting a person to sue, or prosecute an appeal, as a poor person unless such right is specifically made available to him or her.

Further regulation of the business of retail selling of fireworks, and the conduct of exploding the same except under the supervision of a competent handler, is provided by a statute which became operative on January 1, 1942, and which statute, besides providing criminal penalties, permits the seizure and destruction of the contraband property.

V. FAMILY LAW

Three significant cases affecting the law of the family have been decided during the past year. In the first, the case of

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31 Ill. Rev. Stat. 1941, Ch. 38, § 786.
32 376 Ill. 602, 35 N.E. (2d) 54 (1941).
33 Ill. Rev. Stat. 1941, Ch. 38, § 785.
36 Amy v. Smith, 1 Litt. (11 Ky.) 326 (1822).
37 40 F. Supp. 777 (1941).
Peirce v. Peirce,¹ the Illinois statute declaring “common law” marriages null and void² was held to be confined, in its application, to this state and, hence, could have no bearing upon such irregular unions as may be formed elsewhere. Children born to parents so united would be deemed illegitimate in this state,³ though they might later be made legitimate through parental compliance with the statutory requirements of securing a license and having a ceremony performed.⁴ It would now seem, from the decision in the Peirce case, that the same result might be accomplished if the parents were to enter into a “common law” union in a foreign jurisdiction where such forms of marriage are permitted, since the Illinois requirements of license and ceremony would not there apply. Also implicit in the case, is the fact that mere continued cohabitation after the impediment to valid marriage has been removed, as by death or divorce of the pre-existing spouse of one of the parties to such union, will be enough to constitute a marriage even though the other party is unaware of such fact.⁵

The ex-spouse who seeks to avoid his alimony obligations by migrating to Illinois will, hereafter, find small comfort in the decision in Rule v. Rule.⁶ In that case the successful plaintiff in a Nevada divorce sought to enforce the provisions of the decree respecting the payment of alimony, both past due and to accrue, through an equitable proceeding before an Illinois court. The obligated defendant, now resident in this state, moved to dismiss the proceedings on the ground that the only relief open to plaintiff was by a suit as in debt on a foreign judgment for such of the past due alimony as had been reduced to formal judgment in Nevada.⁷ The “full faith and credit” to be given to the Nevada decree, in compliance with constitutional mandate,⁸ he argued, should be

¹ 379 Ill. 185, 39 N.E. (2d) 990 (1942).
³ Brainard v. Brainard, 373 Ill. 459, 26 N.E. (2d) 856 (1940).
⁶ 313 Ill. App. 108, 39 N.E. (2d) 379 (1942), noted in 37 Ill. L. Rev. 89.
⁸ U. S. Const., Art. IV, § 1.
confined solely to its legal aspects, and should not require the equitable enforcement thereof. Despite this, the Illinois Appellate Court held, for the first time in this state, that the decree of Nevada should be given equitable enforcement in this state utilizing, if necessary, the full powers of equity as by way of contempt proceedings, in order to give full faith and credit to the foreign decree. Provision was made, however, to make the Illinois decree conform to the one rendered in Nevada by requiring that, if modification of the latter should occur, then similar modification should be made in the former. If the decision should stand, Illinois has been added to the respectable minority of states already granting co-operative enforcement of foreign alimony decrees. 9

The common law duty of the parents to support their children was enlarged, by the Paupers Act, 10 so as to impose the obligation upon a larger class of relatives and in favor of a larger group of dependents. A statutory form of action to compel support is also authorized thereby to obviate the necessity of using an action as in general assumpsit for "necessaries" already furnished. 11 The same statute also permits one town to secure reimbursement from another for the support which it may have been obliged to furnish to the migrant dependent. It became necessary for the court, in Town of Aroma Park v. Town of Papineau, 12 to point out that the two obligations are different, both in scope and method of enforcement. The former is prospective in nature, is not the basis for liability prior to the rendition of a judgment in proceedings brought under Section 3 of the act, 13 and imposes no duty on the able relatives to reimburse the town for advancements already made. The latter is, however, retroactive as it permits recovery by the one town from the other for all advancements made. 14 Moreover, while the proceeding against the relatives of the dependent must be

10 Ill. Rev. Stat. 1941, Ch. 107, §§ 1-3.
11 The statutory action is made more effective than the common law action through the use of attachment as for contempt: Ill. Rev. Stat. 1941, Ch. 107, § 11.
13 Ill. Rev. Stat. 1941, Ch. 107, § 3.
14 Ill. Rev. Stat. 1941, Ch. 107, § 16.
brought in the county court, the case for reimbursement instituted by the town may properly come before the circuit court.

VI. PROPERTY

REAL PROPERTY

The oil boom in Illinois can be credited with responsibility for many interesting decisions and some new law emanating from both the higher courts and the federal courts sitting in this state during the past year. The case of Pure Oil Company v. Miller-McFarland Drilling Company1 involved the effect of an attempted conveyance of a possibility of reverter. In 1896 one Hubble conveyed a tract of land to the trustees of a certain church "to belong to the Church . . . so long as used by aforesaid Church this deed to be in full force at any time if not used by said Church the aforesaid described land to revert back to the original owner." Thereafter in the same year Hubble made a conveyance of the same land or whatever interest he had in it to Ann Behymer. The church ceased holding services in 1927. In 1938 John Hubble gave a mineral deed for the property involved to the Pure Oil Company. In 1940 the trustees of the church gave an oil lease to Miller-McFarland Drilling Co., Inc., who prepared to drill for oil. Pure Oil Company sued to enjoin the drilling company from proceeding with their designs.

After holding that the estate conveyed to the church trustees was a fee on conditional limitation and not on condition subsequent, the court was confronted with the problem of deciding among three possible results. It could hold the conveyance to Ann Behymer was of no effect whatever; that it extinguished the possibility of reverter so as to leave the church in possession of an unconditional fee; or that the deed to Ann Behymer, though ineffective at the time, became effective by virtue of Section 7 of the Conveyances Act2 after the estate reverted to Hubble. As all the necessary evidence was not before the court, the case was remanded for further

15 Ill. Rev. Stat. 1941, Ch. 107, § 3.
1 376 Ill. 486, 34 N.E. (2d) 854 (1941), noted in 30 Ill. B. J. 334.
proceedings, but the court remarked that the attempted conveyance of the possibility of reverter did not extinguish it and that if the deed from Hubble to Ann Behymer had been a warranty deed, the Conveyances Act would have operated to vest the title in her after title had reverted to Hubble.

_Shell Oil Company v. Manley Oil Corporation_ is probably the first case in which a court of appellate jurisdiction has been called upon to determine whether, in Illinois, a grant of "surface only" subject to a deed theretofore made to another of certain minerals, gives to the grantee a right to such minerals as might remain in the land, or whether, by implication, the grantor is reserving such minerals to himself. The court considered the cases decided in West Virginia where "surface," when used in conjunction with an exception or reservation of certain minerals less than all, is given a meaning different from that where the word is used alone. But the court decided that in Illinois "surface" was to be understood in its commonly accepted sense, whether used _simpliciter_ or in conjunction with exceptions or reservations of certain minerals, and that the grantor in the case before it had reserved to himself the mineral rights not previously conveyed.

Whether the reservation of a fractional interest in the rents and royalties that might arise out of present or future leases constituted a reservation of the rights in a proportionate amount of the oil in place was the question presented to the court in _Vandenbark v. Busiek_ and answered in the affirmative on the ground that where the entire profit of land is given perpetually, the land itself passes. By analogy, the royalty being the profit of the oil, a perpetual reservation of the royalties would be a reservation of the oil in place as real property.

In another case, that of _Chicago, Wilmington & Franklin Coal Company v. Herr_, by a deed made in 1905 to the predecessors of the plaintiff, there had been conveyed "all the coal, oil, and gas in and under" certain lands, together with

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3 124 F. (2d) 714 (1942).
4 126 F. (2d) 893 (1942).
5 127 F. (2d) 1010 (1942), affirming 40 F. Supp. 311 (1941), which was discussed in 9 U. of Chi. L. Rev. 514.
the right to "take and use so much of the surface of said lands as the grantee" might deem necessary or convenient for the production thereof, provided that "all the land at the surface which is so taken shall be paid for when so taken at the rate of $50 per acre." The defendants argued that this constituted an option to acquire an easement when the land should be designated and that, since the easement might not vest within the period prescribed by the rule against perpetuities, the grant was void. The court rejected this contention, however, relying upon an Illinois decision which had decided that the right to use the surface was vested at the time of the deed as a right incident to the right to remove the minerals and that therefore the deed added nothing by its terms except the details of payment.

In yet another case, involving the same plaintiff, the deed had granted the oil and gas together with the right, for the purpose of removal thereof, to select and use surface areas provided the selection and payment therefor was made within a time fixed by the deed. That time expired before the surface areas were selected and paid for, and the court held that the right of the grantee to the use of the surface was gone, but that the minerals had been granted in fee simple and were still the property of the grantee and the owner of the surface could not himself take such oil and gas.

The troublesome question of the nature of a railroad's interest in land conveyed for its use was again before the court in *Hicks v. Thomson*. The granting clause of the deed to the railway "conveyed and quitclaimed . . . a strip of land 50 feet in width on each side of the center line of the track. . . ." The habendum clause recited that the grantee was "to have and to hold . . . for railroad purposes only." The grantor's successors in title claimed that the grant was of an easement only and not a fee and that to lease a part of that property for the operation of an automobile filling station constituted an abandonment of the easement. The court,

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6 Threlkeld v. Inglett, 289 Ill. 90, 124 N.E. 368 (1919).
7 Chicago, Wilmington & Franklin Coal Co. v. Minier, 127 F. (2d) 1006 (1942), affirming 40 F. Supp. 316 (1941), which was discussed in 9 U. of Chi. L. Rev. 345 and 31 Ill. B. J. 74.
relying upon the recent Illinois Supreme Court decision of Tallman v. Eastern Illinois and Peoria Railroad Company, held that the railway's interest was an easement and not a fee, but held that there was not an abandonment but merely a misuser. In the latter case, the court had applied the language of Section 13 of the Conveyances Act and construed the deed as giving an easement rather than a fee, but the language used in the deed indicated a much plainer intent to give an easement than did the language in the Hicks case by calling the instrument a "Right of Way Deed," and by several times using the expression "right of way." From the Hicks case we may assume that, in the construction of a deed, the words "for railroad purposes only" are the equivalent of "right of way for a railroad."

The rule in Shelley's case was given application to the peculiarly ambiguous language of a will in Henry v. Henry. The will read:

I leave and bequeath unto my beloved wife Sarah A. Henry all my estate, consisting of all property, both real and personal property, to have and to hold the same during her natural life and at her death, the residue, if any, shall be equally divided between my brothers and sisters and her heirs in equal parts.

The testator had nine brothers and sisters. The court was called upon to determine the extent of the widow's interest in fee under the rule in Shelley's case—whether she took one-half or one-tenth. As a matter of construction, the court determined that the widow took one-half in fee.

The compensation for land taken on eminent domain proceedings was allocated entirely to the holder of a fee on condition subsequent in United States v. 1,119.15 Acres of Land, Williamson County. Under the language of the deed therein involved, which recited "... when said land ceases to be used for school purposes it is to revert to the above grantor, his heirs," the argument was made that the grantor would be entitled to the compensation, because, as a result of the eminent domain proceedings, the land would cease to be

9 379 Ill. 441, 41 N.E. (2d) 537 (1942).
11 378 Ill. 581, 39 N.E. (2d) 18 (1942), noted in 36 Ill. L. Rev. 798.
12 378 Ill. 581 at 582, 39 N.E. (2d) 18 at 19.
used for school purposes and, consequently, the reversioner should receive the compensation in lieu of the land which would have reverted. The court followed the weight of authority in other jurisdictions and held that in the absence of a showing of imminence or likelihood of abandonment by the school for its purposes, the school was entitled to the full compensation.

Real estate speculators have, in the past, taken conveyances of land with the name of the grantee left blank, intending to fill in the name of some subsequent purchaser when, and if, secured. Such practice would result in the conveyance being a nullity unless the grantor authorized the speculator, as agent, to complete the deed before delivery. Apparently, to obviate such result, the speculator has now developed the idea of presenting a deed, naming a fictitious person as grantee, for signature by the grantor. Later, the speculator would then make a retransfer of the property using a deed signed by some genuine person writing the name of the fictitious grantee. Such practice, according to Chance v. Kimbrell, is no more effective than the former method since a valid conveyance requires a person capable of receiving the grant. The case, however, should be distinguished from a conveyance to an existing grantee to whom title is intended to pass but under a name other than the correct one.

Echoes of the depression, and the wholesale forfeiture of real estate instalment purchase contracts which followed in its wake, still resound in the courts. Thus, in Forest Preserve Real Estate Improvement Corporation v. Miller, the vendor, after substantial default in payment and long delay, had notified the purchaser that the latter's interest in the premises was terminated and all payments forfeited. The purchaser vacated the premises, but later asserted that a recission had occurred, through his election to treat an im-

15 376 Ill. 615, 35 N.E. (2d) 48 (1941).
16 Wilson v. White, 84 Cal. 239, 24 P. 114 (1890); Chapman v. Tyson, 39 Wash. 523, 81 P. 1066 (1905); Thomas v. Wyatt, 31 Mo. 188, 77 Am. Dec. 640 (1860).
17 379 Ill. 375, 41 N.E. (2d) 526 (1942).
proper forfeiture as such, and demanded the return of all sums paid under the contract. The vendor sued to remove the contract as a cloud upon the title.\textsuperscript{18} To this suit, the purchaser filed a counterclaim to recover the sums so paid. In denying recovery under the counterclaim, the court found that the vendor had taken all proper steps and had allowed a reasonable time to remedy defaults before declaring the forfeiture, but also dismissed the vendor's complaint on the ground that the forfeiture had not become consummate because written declaration of forfeiture had not been recorded in compliance with the terms of the contract itself which fixed the manner of forfeiture. Since forfeitures are not favored, the result is no doubt correct, but the case suggests the possibility that other similar suits might arise in the future where the parties may have thought that a complete forfeiture had occurred, but where the facts may still allow the defaulting vendee a chance to salvage his investment.

\textbf{MORTGAGES}

Several significant decisions affecting the law of mortgages and related matters have been handed down during the period under consideration. For example, in earlier days the practitioner who was about to institute a mortgage foreclosure proceeding had to draw some nice distinctions between claims arising under the mortgage and those independent of it. The latter, of course, had to be excluded since they were not germane.\textsuperscript{19} Since the enactment of the Civil Practice Act it would seem as though this distinction is no longer necessary,\textsuperscript{20} but, according to \textit{Korngabiel v. Fish},\textsuperscript{21} if counsel insist upon observing the older rule, the holder of the independent claim may not interject his dis-

\textsuperscript{18} The court pointed out that this form of remedy was not available in the instant case since the contract in question had not been recorded: Allott v. American Strawboard Co., 237 Ill. 55, 86 N.E. 685 (1908); Parker v. Shannon, 121 Ill. 452, 319 N.E. 155 (1887); Howe v. Hutchison, 105 Ill. 501 (1883).

\textsuperscript{19} Prudential Insurance Co. of America v. Hoge, 359 Ill. 36, 193 N.E. 660 (1934).


\textsuperscript{21} 313 Ill. App. 286, 40 N.E. (2d) 314 (1942), noted in 20 CHICAGO-KENT LAW REVIEW 354.
pute into the foreclosure proceedings. Even though the act contemplates a "complete determination of the controversy," 22 it seems to have been the view of the court therein that the decision of plaintiff's counsel as to the scope of the foreclosure proceeding should control.

Mistakes made by the draftsman may prevent a mortgage from becoming a valid legal mortgage with all the incidents usually appertaining thereto. It may, nevertheless, be still enforceable as an equitable lien provided the court can find an intention to make some particular property stand as security for the debt, 23 hence, since most foreclosure proceedings are brought in equity, 24 such mistakes may easily be overcome. Such was the case in Harney v. Colwell 25 where the mortgagors, though signing the purchase money mortgage and principal note, forgot to endorse the note which was payable to themselves, so as to make the same negotiable. It was, nevertheless, held that the mortgage constituted an enforceable equitable lien since the requisite intention was apparent and subsequent transfers of the mortgage and note by manual delivery were enough to constitute equitable assignments of the same.

The problem of the continuing liability of the mortgagor, after sale of the mortgaged premises to a grantee who assumes and agrees to pay the debt, has been before the court on many occasions. Complications are added to the case when, at maturity of the debt, the holder grants an extension without securing the consent of the mortgagor. A new wrinkle was introduced, in Conerty v. Richsteig, 26 when the holder sought to impose liability for a deficiency on the original makers, some eleven years after maturity date and over thirteen years after they had parted with the property, by reason of a provision in the mortgage which read: "The grantors covenant and agree . . . to pay said indebtedness

22 Ill. Rev. Stat. 1941, Ch. 110, § 149.
24 Foreclosure under power of sale was abolished by statute in Illinois in 1879. See Ill. Rev. Stat. 1941, Ch. 95, § 23.
and the interest thereon, as herein and in said notes pro-
vided, or according to any agreement extending time of pay-
ment."\textsuperscript{27} The holder contended the debt had not been out-
lawed since the assuming grantee had entered into exten-
sion agreements which, so it was claimed, kept the obliga-
tion of the original mortgagors alive. The Illinois Supreme 
Court, however, came to the conclusion that the provision in 
the mortgage did not operate to perpetuate the personal ob-
ligation on the note since the two documents were to be re-
garded as separate undertakings.\textsuperscript{28} As the pertinent language 
did not appear in the note either expressly or by refer-
ence,\textsuperscript{29} and as the right to a deficiency judgment could, 
under the statute,\textsuperscript{30} only be predicated thereon, it followed 
that the running of the statutory period barred the liability 
of the maker thereof.

The principle that the plaintiff should not be allowed to 
"disturb the courts and vex the parties with many actions"\textsuperscript{31} 
operated, in \textit{Skolnik v. Petella},\textsuperscript{32} to relieve an assuming 
grantee of the mortgaged premises from personal liability 
on the assumed mortgage debt. It appeared from the facts 
therein that, upon default, the trustee foreclosed naming 
the makers and the assuming grantee as defendants. After 
sale, a deficiency judgment was rendered against the mak-
ers but not against the assuming grantee, even though the 
latter had been served personally. The reason for the omis-
sion was not made apparent, but probably resulted from 
oversight. Later on, one of the bondholders brought an ac-
tion as in assumpsit to recover the unpaid balance due from 
the assuming grantee upon the bonds held. Motion by de-
fendant to dismiss the suit, based upon the proposition that 
the earlier foreclosure proceedings were res adjudicata, was

\textsuperscript{27} Italics added.

\textsuperscript{28} It has been held, for example, that provisions in the mortgage for the pay-
ment of costs, taxes, insurance, etc., cannot be regarded as increasing the personal 
liability of the maker of the note when sued on the latter instrument: Hunter v. 
Clarke, 184 Ill. 158, 56 N.E. 297, 75 Am. St. Rep. 160 (1900).

\textsuperscript{29} Oswianza v. Wengler & Mandell, Inc., 358 Ill. 302, 193 N.E. 123 (1934).

\textsuperscript{30} Ill. Rev. Stat. 1941, Ch. 95, § 17.

\textsuperscript{31} Travelers' Ins. Co. v. Mayo, 170 Ill. 498 at 502, 48 N.E. 917 at 919 (1897).

\textsuperscript{32} 376 Ill. 500, 34 N.E. (2d) 825 (1941), affirming 304 Ill. App. 331, 26 N.E. (2d) 
sustained, the court pointing out that the mortgage holder may not rely upon Section 16 of the Mortgages Act for the purpose of securing a deficiency judgment against one person and refuse to be bound by it as against another liable on the same debt. Failure to make the necessary allegations in the complaint to support a decree against both does not, and should not, change the rule.

During the period from 1917 to 1921 the law relating to the foreclosure of mortgages provided for a different manner of dealing with the sale of the mortgaged premises than presently exists, but when that method was abolished, a saving clause kept the same alive as to mortgages made during that period. As a consequence, the attorney for the mortgagee must be careful to determine which method should be used, since a deed issued under an erroneous sale would probably be a nullity. If, however, the wrong method has been followed, some comfort may be obtained from the decision in *Flanagan v. Wilson* which holds that the mortgagor may not remove such deed as a cloud on the title unless he is prepared to do equity by paying either the mortgage debt or the amount bid at the sale with accumulated interest. The claim that not only was the deed a nullity but the mortgage had been extinguished by the proceeds of

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33 Stone, J., specially concurring, deemed that the failure of the trustee to seek a personal judgment against the assuming grantee was to be regarded as a "waiver" of such claim rather than a matter of res adjudicata. To the argument that such waiver should not be considered that of the bondholder since the foreclosure proceedings were under the exclusive management of the trustee, he answered that the latter's conduct was binding upon the beneficiaries whom he represented.

34 Ill. Rev. Stat. 1941, Ch. 95, § 17.

35 The mortgagee is not obliged to rely on Section 16 to secure a personal judgment. He may use his legal remedy on the note against the mortgagor, *Hazle v. Bondy*, 173 Ill. 302, 50 N.E. 671 (1898), or sue at law on the assumption contract, *Harts v. Emery*, 184 Ill. 560, 56 N.E. 865 (1900). He may, of course, secure only one satisfaction. If the liability asserted is purely secondary as, for example, against a guarantor, the claim may not be asserted in the foreclosure proceeding, but must be relegated to a subsequent action: *Walsh v. Van Horn*, 22 Ill. App. 170 (1887), *Christensen v. Niedert*, 259 Ill. App. 96 (1930).

36 See Rev. Stat. 1917, Ch. 77, §§ 16-30a, which provided that the sale should come at the end of the redemption period instead of initiating it, as is the present rule under Ill. Rev. Stat. 1941, Ch. 77, § 18.

37 Ill. Rev. Stat. 1941, Ch. 77, § 32.

38 310 Ill. App. 557, 35 N.E. (2d) 87 (1941), in which plaintiff's appeal to the Illinois Supreme Court had been transferred: 375 Ill. 179, 30 N.E. (2d) 647 (1940).
sale was there held to be untenable. As a consequence, a decree granting such relief on condition that the mortgagor do equity within a short day or else be barred from asserting any right to the mortgaged premises was upheld.

Three decisions concerning chattel mortgages are worthy of note. Thus the conditional interest of a buyer of goods under conditional sale is sufficient to support a chattel mortgage according to *Automobile Service Corporation v. Community Motors, Incorporated*,\(^3^9\) so that a third person dealing with such property in derogation of the rights of the holder of the chattel mortgage is bound to answer for the damage thereby caused. Necessarily, though, the rights of the chattel mortgagee are inferior to those of the conditional vendor. In the second case, *Illinois National Bank & Trust Company v. Holmes*,\(^4^0\) the validity of a chattel mortgage as affecting the rights of third persons, particularly with reference to the issue of whether or not the date of the instrument or the actual date of execution is controlling, was there considered. The statutory requirement\(^4^1\) that the mortgage, to be valid, must be recorded within ten days after execution, was called into question since doubt was involved as to whether date of "execution" meant stated date or actual date. It was held that, no showing of fraud being present, the date of execution was the basic date.

The lien of a chattel mortgage may extend to the proceeds of sale of the mortgaged property, according to *Acme Feeds, Inc. v. Daniel*,\(^4^2\) so as to prevent a creditor, through garnishment, from acquiring a better right thereto provided the mortgagee, in giving consent to the sale, expressly stipulates that the proceeds shall go toward the satisfaction of the mortgage debt. An argument that, to be effective, such conditional consent must be in writing so as to prevent a possible fraud on the rights of the attaching creditor was rejected on the ground that such creditor can ac-

\(^3^9\) 312 Ill. App. 263, 38 N.E. (2d) 512 (1941), noted in 20 CHICAGO-KENT LAW REVIEW 267.
\(^4^0\) 311 Ill. App. 286, 35 N.E. (2d) 823 (1941), noted in 20 CHICAGO-KENT LAW REVIEW 99.
\(^4^1\) Ill. Rev. Stat. 1941, Ch. 95, § 4.
\(^4^2\) 312 Ill. App. 330, 38 N.E. (2d) 530 (1941), noted in 30 Ill. B. J. 381.
quire no better right to the fund than is possessed by the mortgagor.\textsuperscript{43}

Only one decision of importance dealt with a question of mechanics' lien law. The sufficiency of an affidavit given pursuant to Section 5 of the Mechanics' Liens Act\textsuperscript{44} was considered in *Ceco Steel Products Corporation v. Couri*\textsuperscript{45} It was there found to be insufficient to defeat the claim of a materialman who had not been paid by the general contractor.\textsuperscript{46} It appeared that certain asbestos shingles had been used on defendant's residence, and, at the time of payment, the general contractor had furnished an affidavit stating that the materials used "belonged to us and were our exclusive property no one having any interest or claim therein." Despite the fact that the materials had been sold, and title thereto had passed, to the general contractor, the lien claim was upheld on the ground that the affidavit did not comply with Section 5 which required that it should disclose "the names of all parties furnishing materials. . . ." The court distinguished the situation from one in which the general contractor furnishes a false affidavit disclosing the name of the materialman but representing that he had been paid in full, in which case, absent any knowledge or suspicion of the falsity thereof, the owner would be protected.\textsuperscript{47}

**TRUSTS**

The steady accumulation of precedents has not made the distinction between the trust and the equitable charge easier to draw. In a recent case \textsuperscript{48} the Supreme Court considered the effect of the following language:

I give, devise and bequeath the remaining undivided half of my real estate, subject to the life estate therein of my said wife, to my said son, Earl H. Dial, as trustee for my daughter Mildred Dial, who is afflicted, and I enjoin upon him to see that she has proper care and attention as long as she lives. Upon the death of my said daughter, the title in fee

\textsuperscript{43} Elzy v. Morrison, 180 Ill. App. 711 (1913).
\textsuperscript{44} Ill. Rev. Stat. 1941, Ch. 82, § 5.
\textsuperscript{45} 311 Ill. App. 297, 35 N.E. (2d) 810 (1941).
\textsuperscript{46} Ill. Rev. Stat. 1941, Ch. 82, § 32.
\textsuperscript{47} Knickerbocker Ice Co. v. Halsey Co., 262 Ill. 241, 104 N.E. 665 (1914).
\textsuperscript{48} Dial v. Dial, 378 Ill. 276, 38 N.E. (2d) 43 (1941).
to the share so bequeathed to my said son as trustee, shall go to my said son Earl H. Dial, in fee simple absolute. 49

The daughter of the testator was an inmate of an institution for the mentally afflicted. The son died and his administratrix filed a suit to construe the will. The majority of the court, relying upon Section 10 of the Restatement of Trusts, held that the language created a trust and imposed fiduciary obligations upon the son. It was said that a successor trustee should be appointed and an accounting decreed. Mr. Justice Wilson thought that the language created an equitable charge or incumbrance on the property. He also relied on Section 10 of the Restatement. His dissenting opinion attaches considerable significance to the fact that the sole duty imposed upon the alleged trustee was to provide the same care for the daughter after the testator's death as she had received before, and the accumulation of a fund for her benefit could have served no purpose. Hence, it was submitted, the true intention was to vest the beneficial interest in the son subject only to the charge for the care of the daughter. The case well illustrates the need for careful draftsmanship when dealing with trusts to distinguish them from other property devices to which they have a marked similarity. The line between the trust and the equitable charge is especially fine when the latter is coupled with a personal obligation.

In spite of the growing dissatisfaction with the spendthrift trust it appears well entrenched, for the time being at least, in the law of Illinois. The case of McKeown v. Pridmore 50 presented a novel situation respecting the protection afforded by the spendthrift clause. The beneficiary and the trustee were involved in a controversy over the right of the trustee to apply money due the beneficiary against an indebtedness of the beneficiary to the estate. The beneficiary hired an attorney to assert his claim against the trustee, agreeing to pay such attorney a contingent fee. The attorney served notice of attorney's lien upon the trustee and was finally successful in overcoming the trustee's claim to set

49 378 Ill. 276 at 278, 38 N.E. (2d) 43 at 45.
50 310 Ill. App. 634, 35 N.E. (2d) 376 (1941), noted in 36 Ill. L. Rev. 674 and 9 U. of Chi. L. Rev. 360.
off the amount due the beneficiary. The trustee paid the beneficiary and the attorney sought to collect his fee from the trustee individually and as trustee. The appellate court relied on *Baker v. Baker*\(^{51}\) as authority to the effect that the notice of attorney's lien operates as an assignment of an interest in the proceeds of any settlement, but held that the spendthrift clause operated to prevent the beneficiary from making any effective assignment.

A second point of interest in the McKeown case arose out of the fact that the beneficiary had voluntarily allowed money due him to remain with the trustee. Upon the death of the beneficiary it was held that the protection of the spendthrift clause ceased, hence the trustee had a right to apply such money toward the satisfaction of the indebtedness owed by the beneficiary to the estate.

Two cases involving questions of administration are of interest. One of them, *Heyl v. Northern Trust Company*,\(^{52}\) involved the troublesome problem of apportionment between income and principal. The trust was created in 1910 by will and the trustee was directed to sell the real estate as soon as it could be done without sacrifice, and add the proceeds to the principal. All the real estate was sold by 1911 except an undivided interest in certain land in Texas. In 1936 the trustee entered into an oil lease of this land, and, when oil and gas were discovered in 1937, the trustee received a cash payment and royalties under the lease. The court, citing Illinois cases,\(^{53}\) held that the oil lease amounted to a sale of a portion of the property. The trustee, after paying expenses, allocated the sums received on the basis of ascertaining the sum which, with simple interest thereon at the rate of five per cent. per annum from the date of the discovery of oil and gas, would equal the net amount received by the trustee. The sum so ascertained was treated as principal and the balance was income. The court held this apportionment proper, citing Section 241 of the Restatement of Trusts. The opinion did not discuss the possibility that the

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\(^{51}\) 258 Ill. 418, 101 N.E. 587 (1913).

\(^{52}\) 312 Ill. App. 207, 38 N.E. (2d) 374 (1942).

testator indicated a contrary intent by directing that the
proceeds be added to the principal.\textsuperscript{54} Apportionment of the
costs of the proceeding, which the chancellor had ordered
charged one-half to income and one-half to principal, was
approved.

In \textit{Campbell v. Albers},\textsuperscript{55} the appellate court held that the
Illinois statute on the investment of trust funds\textsuperscript{56} is not in-
tended to absolve trustees from the duty of exercising care
in the selection of investments within the approved classes.
The conduct of the trustees, in purchasing bonds in the name
of the bank of which they were officers and, two days later,
transferring the bonds to the trust at a profit, was disap-
proved. In this case the trustees had also deposited trust
funds in a savings account in the same bank. It later closed.
The court indicated that the bank had knowledge, through
its officers, the trustees, of the improper character of these
deposits, hence a preferred claim was allowed against the
receiver. The court said that "a trustee is not permitted to
place himself in a position where it will be difficult for him
to be honest and faithful to his trust."

\begin{center}
\textbf{WILLS AND ADMINISTRATION}
\end{center}

The evolution of a law and the ability of the legislature
and courts to make it conform to changing economic con-
ditions and practices is well illustrated in the case of \textit{In re
Edwards' Estate},\textsuperscript{57} in which the appellate court construed
Section 336 of the Probate Act,\textsuperscript{58} dealing with the fees of
executors, administrators, administrators to collect, guar-
dians and conservators. Prior to the adoption of the present
statute, Section 133 of the former Administration Act had
provided that executors and administrators:

\begin{center}
shall be allowed as compensation for their services a sum not exceeding
six per centum on the amount of personal estate, and not exceeding three
per centum on the money arising from the sale of real estate, with such
\end{center}

\textsuperscript{54} See the discussion of intent in \textit{Love v. Engelke}, 368 Ill. 342, 14 N.E. (2d) 228
(1938), noted in 17 \textit{Chicago-Kent Law Review} 44.

\textsuperscript{55} 313 Ill. App. 152, 39 N.E. (2d) 672 (1942).

\textsuperscript{56} Ill. Rev. Stat. 1941, Ch. 148, § 32.

\textsuperscript{57} 312 Ill. App. 645, 39 N.E. (2d) 72 (1942).

\textsuperscript{58} Ill. Rev. Stat. 1941, Ch. 3, § 490.
additional allowances for costs and charges in collecting and defending the claims of the estate and disposing of the same as shall be reasonable.\textsuperscript{59}

In the earlier case of \textit{Willard v. Bassett}\textsuperscript{60} it was held, under the statute then in force, that an administrator or executor should not take the office as a business or as a means of making money, but that it was to a certain extent associated with the idea of benevolence or philanthropy. But that case was decided at a time when the decedent’s estate usually consisted of real estate and, perchance, a few items of tangible personal property, and at a time when there were no such things as inheritance taxes, estate taxes, and income taxes. The work of the executor or administrator then was obviously very limited.

In this modern age, however, the decedent’s estate frequently consists of a large number of items of personal estate, the titles to which pass to the executor or administrator for purposes of administration and, along with the modern tax problems, there is thereby necessitated a great deal of work and the exercise of far more judgment than was formerly the case. When the present Probate Act was passed, therefore, it provided that “an executor, administrator, administrator to collect, guardian or conservator shall be allowed reasonable compensation for his services....”\textsuperscript{61} By this language, the legislature obviously intended to recognize that acting in one of the foregoing capacities is now recognized as a business or as a legitimate basis for receiving reasonable compensation. Following that view, the appellate court in the case of \textit{In re Edwards’ Estate}\textsuperscript{62} has now

\textsuperscript{59} \textit{Ill. Rev. Stat.} 1939, Ch. 3, § 135. The former Guardian and Ward Act, \textit{Ill. Rev. Stat.} 1939, Ch. 64, § 43, and the Lunatics, Idiots, Spendthrifts and Drunkards Act, \textit{Ill. Rev. Stat.} 1939, Ch. 86, § 36, provided that guardians and conservators should be allowed “reasonable compensation for their services.”

\textsuperscript{60} 27 \textit{Ill. App.} 645, 39 N.E. (2d) 72 (1942).

\textsuperscript{61} \textit{Ill. Rev. Stat.} 1941, Ch. 3, § 490. The former provision, fixing maximum fees of six per cent and three per cent was eliminated, probably because the presence of the six per cent rule in the statute tended to detract attention from the reasonableness of the fees sought. The result of the former law often was that in some estates, particularly the larger ones, fees of six per cent of the amount of the personal estate were charged when that figure was unreasonably high, while in other estates, six per cent was often inadequate compensation. The flexible provision for reasonable compensation in the new act makes “reasonableness” the sole question in each case.

\textsuperscript{62} 312 \textit{Ill. App.} 645, 39 N.E. (2d) 72 (1942).
definitely overruled the doctrine expressed in the Willard case and has recognized instead that, because of the change which has taken place in the character of estates and in the additional duties and obligations now imposed on the executor or administrator, he is entitled to have reasonable compensation for the services he renders and the duties and obligations he assumes. The case is also interesting because it holds that the duty does not devolve upon the executor or administrator to show the number of hours spent in each activity, as would be the case of a master in chancery itemizing his fees, and that, if any interested party desires to question the testimony as to the total amount of time necessarily spent, he must do so by cross-examination or by other testimony.63

Section 337 of the Probate Act,64 relating to attorney's fees for the attorney of the executor, provides that the attorney shall be allowed reasonable compensation for his services. It will be observed that this language closely parallels that of Section 336 dealing with executor's fees, so it would be safe to assume that what the court said in the Edwards case will be equally applicable when it is called upon to construe the section dealing with attorney's fees.

In the case of Bley v. Luebeck,65 the court had occasion to determine what evidence is admissible under the Probate Act in the county or probate court, or in the circuit court on appeal, where it is sought to establish a lost will. It was held that the nisi prius court is required to pass upon the issues of loss or destruction of the will and whether it was in existence at the time of the testator's death and had not been revoked by him during his lifetime and that, for these purposes, either party had the right to offer evidence on these issues. In arriving at this decision, the court recognized that Sections 69 and 71 of the Probate Act,66 dealing with the testimony which may be offered where the will is in exist-

63 Schedules of fees are published by trust companies. These schedules, the court indicates, in and of themselves, prove nothing, unless they purport to be based upon services actually rendered in a given case and can be shown to represent the reasonable, usual and customary fees for the services so rendered.
64 Ill. Rev. Stat. 1941, Ch. 3, § 491.
65 377 Ill. 50, 35 N.E. (2d) 334 (1941).
ence, restricts the issues before the court in the first instance to questions relating to the execution of the will, the sanity of the testator, and the possibility of fraud, forgery, compulsion or other improper conduct which might be sufficient to destroy the will. It was held, however, that these sections do not control the nature and extent of the evidence which may be offered when the court is required to pass on the issues of loss or destruction of the will. Such decision is obviously in accord with the intention of the legislature. The rule announced prevailed before the passage of the present act and there is nothing in Sections 69 and 71 to indicate that the legislature intended in any manner to change the law with respect to the proof of lost wills.

The status of a conservator, upon the death of the ward, received consideration by the Supreme Court in the case of *Hire v. Hrudicka*. In that case, a citation proceeding to discover assets had been commenced by a conservator and an order had been entered directing the respondent to turn over certain funds. The respondent appealed to the circuit court, and, when the matter came on for hearing, filed a motion to abate the proceeding on the ground that the ward had died. Such motion was predicated on the ground that since the ward was the real party in interest, the conservator had no power to proceed with the suit. The court sustained the motion, and its decision was affirmed by the appellate court. In reversing, the Supreme Court, after pointing out that the case was governed by the Probate Act, compared the provision contained in the former law relating to the conservator’s settlement of the deceased ward’s estate with the corresponding provision in the new act. It found that the only difference in the two acts is that the present one is a little more clear and specific and shortens the time to thirty days for the filing of an application for the appointment of an administrator. It therefore stated: “In any event there is a proper party appellant in this case—i.e., Bessie L.

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67 The earlier decisions and statutes are correlated and reviewed in the opinion in *Bley v. Luebeck*, 377 Ill. 50, 35 N.E. (2d) 334 (1941).
68 379 Ill. 201, 40 N.E. (2d) 63 (1942), reversing (sub nom. *In re Hire’s Estate*) 309 Ill. App. 566, 33 N.E. (2d) 652 (1941).
70 Ill. Rev. Stat. 1941, Ch. 3, § 476.
Hire, conservatrix and ex officio administratrix of the estate of Herman R. Hire, deceased, a party fully competent and qualified under the law to prosecute this litigation to an end,"71 and remanded the cause with directions to overrule the motion and to proceed with the cause.

The decision indicates that upon the death of the ward, without any affirmative action on the part of the conservator or the court, the conservator by operation of law, becomes ex-officio administrator. Assuming this to be true, there then arise several interesting questions. Under the Probate Act, the "claim date" is automatically fixed in a decedent's estate.72 Also, under that act, the surviving spouse is allowed a period of time within which to perfect a right of dower.73

As a consequence, the following problems are presented:
1. Does a claim date occur by operation of law under the Probate Act when an incompetent or a minor dies and the guardian or conservator becomes ex-officio administrator?
2. If so, would it be the first Monday in the second month following the month in which the ward died, or would it be the first Monday in the second month following the month in which the thirty-day period for the appointment of an administrator expired?
3. When would the time commence to run for the surviving spouse to perfect his or her right of dower in real estate owned by the deceased ward?

These questions existed to a greater or lesser extent under the former laws, and were not created by the passage of the Probate Act. The decision does, however, suggest the advisability of suitable amendment of the act to clarify these problems.

In Fleming v. Yeazel74 the Supreme Court considered the right of the executor of a will to deduct from the share due a legatee the amount of a note executed by the legatee where suit on the note was barred by the statute of limitations. The court held that where the will evidences an intention to divide an estate equally and there is nothing to show an intention to cancel notes owed by certain legatees, which notes had been given for money borrowed from the testatrix, de-

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71 379 Ill. 201 at 207, 40 N.E. (2d) 63 at 66.
74 379 Ill. 343, 40 N.E. (2d) 507 (1942), noted in 20 Chicago-Kent Law Review 277.
duction of the amounts so due from the shares of such legatees is proper even though suit thereon might be otherwise barred. The court predicated its decision very largely upon the equitable principle that "no one should be permitted to share in a fund until he has discharged his obligation to contribute to that fund." In so deciding, the court settled a question which apparently has never before been directly passed upon in this state.

The Supreme Court had occasion to consider the subject of demonstrative legacies in Lenzen v. Miller in which case it definitely recognized these legacies, thereby bringing Illinois into line with the great majority of states. Certain rules of construction, for the purpose of determining whether the language used by the testator creates a demonstrative legacy or not, were there laid down. Thus it was said that the first inclination of the courts is to hold legacies to be general or demonstrative rather than specific, and that to make a legacy specific the terms employed must clearly require such a construction. Another rule requires that the testamentary intention, which the courts will carry into effect, must be that expressed by the language of the will to be ascertained from the circumstances surrounding the testator. Evidence of these circumstances may be received, but they cannot be permitted to import into the will an intention different from that expressed by its language. The hardships arising from the use of specific legacies have long been condemned and, it would appear, have now been instrumental in persuading the court to recognize demonstrative legacies.

Section 11 of the new Probate Act, dealing with the descent of real and personal estate, was construed in part in Dial v. Dial. The former Descent Act and the Dower Act gave to the surviving spouse, where there were no descendants of the decedent but there was a surviving parent,
brother or sister, one-half of the real estate in fee and a
dower interest in the remaining half. The new act, how-
ever, changed this rule and allows such surviving spouse,
at least so far as the real estate is concerned, only one-half
of each parcel of real estate of which the decedent died
sieved and in which the surviving spouse does not perfect
his or her right to dower in the manner provided in Section
19 thereof. The change so affected was recognized by the
court, which held that the surviving spouse was entitled to
one-half of the real estate in fee and the other relatives were
entitled to the remaining one-half free and clear of any claim
to dower therein. The court further considered the meaning
of the words "died siezed" as used in such statute, and held
that these words were not used by the legislature in their
technical sense but rather were to be treated as if the word
"owned" had been used.

The appellate court had occasion, in In re Gilbert's Estate,82
to construe Sections 74 and 77 of the former Administration
Act. Section 77 thereof had provided, in part, that:
When the person dying is, at the time of his or her death, a housekeeper,
the head of a family, and leaves no widow or surviving husband, there
shall be allowed to the children of the deceased, residing with him or her
at the time of his or her death (including all males under eighteen years
of age, and all females), the same amount of property, and money, sub-
ject to the review of the court as provided in Section 75, is allowed to
the widow for herself and children by this Act...83
The court concluded that, under such statute, an unmarried
dughter who lived with her widowed father in a suite in an
apartment hotel was not entitled to a child's award. Sec-
tion 179 of the Probate Act84 likewise uses the words "resid-
ing with" when referring to female children of the decedent
over twenty-one years of age. It may well be that the con-
struction placed on these words in the Gilbert case may be
helpful in construing their meaning. It should, however, be
noted that this section does not retain the former require-
ment that the decedent shall be "a housekeeper, the head

81 Ill. Rev. Stat. 1941, Ch. 3, § 162, sub-sec. 3, and § 171.
82 311 Ill. App. 28, 35 N.E. (2d) 400 (1941), noted in 30 Ill. B. J. 209.
83 Ill. Rev. Stat. 1939, Ch. 3, §§ 75 and 78.
of a family” so it is possible that the words may be more liberally construed than was the case under the former law.

VII. PUBLIC LAW

CONFLICT OF LAWS

The enforcement of rights and obligations arising under the laws of other jurisdictions has been given consideration by our courts during the past year. Thus, the Appellate Court for the Second District has decided that the decree for alimony rendered in another state can now be enforced in Illinois by appropriate equitable action, both as to past due and future installments. In the case of Rule v. Rule¹ the complaint asked enforcement of a Nevada divorce decree which provided for alimony payable in weekly installments. The trial court entered a decree substantially following the terms of the Nevada decree, but providing that should the Nevada court modify its decree a corresponding modification might be had in Illinois. The Appellate Court, emphasizing its freedom of choice in view of the fact that the case was one of first impression, adopted the rule “that a divorce decree in one State can be established as a foreign decree and enforced” in the local courts. The court said that the principles of equity and justice were better served than by adopting the rule followed in many states that a decree for alimony can be enforced only through the medium of an action at law for past due installments. The question of whether a decree must be enforced as to future installments under the “full faith and credit” clause has not been passed upon by the Supreme Court of the United States.² The court in the instant case relied on decisions from Mississippi, Iowa, California, South Carolina, Washington, Oregon and Oklahoma, while noting that a contrary result had been reached in Massachusetts, Michigan, New York, New Jersey, and the District of Columbia. The view taken, if adopted by the Illinois Supreme Court, will greatly facilitate the enforcement of the obligation of support for the divorced wife and children, a problem magnified by the modern tendency to move

from state to state. It is to be hoped that the case is indicative of a tendency toward a more liberal attitude on the problem of enforcement of equitable decrees generally.

Another decision of interest involved the enforcement of an attorney's lien where a settlement of the claim had been reached and made the basis of a judgment in the courts of another state. In *McCallum v. Baltimore & Ohio Railroad Company,* a resident of Indiana employed by the defendant was killed in that state while in the course of his employment. His wife and executrix employed an attorney who filed suit in Indiana against the defendant. While this suit was pending, she employed a Chicago attorney to represent her in the prosecution of her claim. This attorney gave notice to defendant of his claim for a lien in accordance with the Illinois statute. Subsequently, a settlement was concluded between the executrix and the defendant. She was represented by her Indiana attorneys in the making of this settlement, one of the terms of which was that the matter should be concluded by a hearing and the entry of a judgment in the suit pending in Indiana. At the instance of the defendant, the Indiana court impounded the money until there could be a settlement of the claims of the attorneys. The court fixed a date for hearing on these claims and the Chicago attorney was duly notified. He did not appear to establish his claim, and the Indiana court held it invalid. In accordance with the court's order, the amount of the judgment was paid to the executrix. The Chicago attorney thereupon filed his action in Illinois to collect the amount of his fee from the defendant carrier. Plaintiff appealed to the Illinois Supreme Court after a judgment for the defendant had been affirmed by the appellate court. The Supreme Court, relying on the theory that the Indiana proceedings were, in nature, quasi in rem, upheld the judgment for the defendant.

A dissenting opinion by Mr. Justice Farthing took the position that, under the Illinois cases, an attorney's lien does not attach to the sum paid over or paid into court but merely imposes upon the person liable to pay the same, the duty of

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3 379 Ill. 60, 39 N.E. (2d) 340 (1942).
4 310 Ill. App. 189, 33 N.E. (2d) 920 (1941).
withholding a sum sufficient to meet the claim. Assuming this view to be correct, it is difficult to see how the Indiana court obtained jurisdiction to adjudicate the plaintiff's claim. The situation suggests an analogy to interpleader proceedings. Where several persons claim the same debt, it has been held that the interpleader court cannot determine the conflicting claims unless all the claimants are personally before the court. Payment of the amount of the debt into court does not convert the action into one quasi in rem. The federal Interpleader Act recognizes this principle. Moreover, in the instant case, it would seem that the several claims for attorney's fees were independent of each other, being based upon separate contracts. The majority opinion relies heavily upon the fact that defendant could not protect itself in any other way than by attempting to get the Indiana court to settle the entire matter.

The Supreme Court has reversed the appellate decision in the case of Peirce v. Peirce, noted last year. The controversy there concerned conflicting claims to administer the estate of a decedent. Peirce, domiciled in Illinois at the time of his death, had gone through a ceremonial marriage in Mexico before a divorce had been granted terminating his first marriage. One child had been born of the first union, four were born of the second. Peirce and his second wife spent the year after their marriage in Mexico, Cuba, and New York. They lived in Texas for six years, and finally returned to Illinois. Peirce left his second wife in Illinois while he went to seek business opportunities in the west. While in Nevada he filed suit for divorce against his first wife, but that court granted her a divorce on her cross-bill. Peirce's second wife then joined him in Nevada and they lived there as husband and wife for about one month after the divorce had been granted. They thereafter returned to Illinois and so remained until Peirce's death. The appellate court had held that, since the parties were domiciled in Illinois at the

8 379 Ill. 185, 39 N.E. (2d) 990 (1942).
time of the divorce, no common law marriage could be recognized. The Supreme Court disagreed, holding that there was insufficient evidence to establish an Illinois domicile at the time of the divorce and, therefore, the parties were to be regarded as being domiciled in Nevada. Under the laws of that state, where parties attempt a valid marriage, the fact of cohabitation with matrimonial intent, after removal of the disability, will give rise to a valid marriage. The opinion stresses the fact that the real question concerned the legitimacy of the children rather than the validity of the marriage. It may be that Illinois public policy prevents the recognition of a common law marriage contracted elsewhere, but it does not prevent the recognition of a marriage status so far as the legitimacy of children is concerned. While intent is of importance in determining domicile, the court does not elaborate upon the evidence which induced it to reach a different conclusion from that reached by the intermediate appellate tribunal.

Two other cases are deserving of passing mention. In *Campbell v. Albers*\(^9\) the court held that an equity court in Illinois had jurisdiction to determine the liabilities of trustees under a testamentary trust created by the will of a person whose domicile at the time of death was in Idaho, despite the fact that an Idaho statute apparently reserved jurisdiction to the probate courts of that state in cases of testamentary trusts arising out of estates administered there. In the second, that of *Oakes v. Chicago Fire Brick Company*,\(^10\) the Illinois Statute of Frauds was held to be substantive and not procedural, so the court held that the statute in force where the contract is made determines the formal validity thereof. The ruling follows the prevailing view and the opinion does not attempt a discussion of the function of the substance-procedure distinction.

**CONSTITUTIONAL LAW**

The case involving a constitutional question which attracted the widest attention during the year was *City of

\(^9\) 313 Ill. App. 152, 39 N.E. (2d) 672 (1942).
\(^10\) 311 Ill. App. 111, 35 N.E. (2d) 522 (1941).
Blue Island v. Kozul. In this case, the defendant, a member of the Jehovah’s Witnesses, was convicted for the violation of a municipal ordinance which forbade peddling on the city streets without a license. The defendant had been selling and giving away certain religious magazines. The Supreme Court held that, as applied to defendant’s activities, the ordinance interfered with freedom of speech and of the press and violated both the state and federal constitutions. Principal reliance was placed upon recent decisions of the Supreme Court of the United States in Lovell v. City of Griffin and Schneider v. Irvington. The court refused to distinguish these cases on the ground that a tax was here involved, instead of censorship through licensing, holding that freedom of the press was involved in either event. The argument that the ordinance involved only a valid police regulation of the use of the city streets with a reasonable charge to defray expenses was rejected with the observation that the ordinance contained no provision relative to the manner in which licensees were to conduct their businesses. The decision is of interest in view of subsequent decisions of the Supreme Court of the United States upholding similar ordinances, which decisions have been extensively criticized.

In Daly v. County of Madison the old question of judicial interference to compel a redistricting of the state for election purposes was again before the Supreme Court. A petition had there been filed under the act relating to suits by taxpayers to restrain the disbursement of public monies asking leave to file a complaint to enjoin the expenditure of funds for holding the primary and general elections in 1942. The basis of the complaint was that the 1901 Congres-

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11 379 Ill. 511, 41 N.E. (2d) 515 (1942).
12 303 U. S. 444, 58 S. Ct. 666, 82 L. Ed. 949 (1938).
13 308 U. S. 147, 60 S. Ct. 146, 84 L. Ed. 155 (1939).
14 Jones v. City of Opelika, — U. S. —, 62 S. Ct. 1231, 86 L. Ed. 1174 (1942), with which case was consolidated Bowden and Sanders v. City of Fort Smith, and Jobin v. Arizona.
15 These cases are discussed in 20 CHICAGO-KENT LAW REVIEW 349, as is also the principal case.
16 378 Ill. 357, 38 N.E. (2d) 160 (1941).
17 Ill. Rev. Stat. 1941, Ch. 102, §§ 11-7.
sional Apportionment Act\textsuperscript{18} was void due to changes in population in the several districts thereby created. The circuit court denied the petition and the Supreme Court affirmed that decision. The opinion by Mr. Justice Smith stressed the lack of power in the equity court to interfere with elections and the usual refusal to deal with political questions. In response to the argument that the statute had changed the equity rule and gave the taxpayer a right to sue, the court held that the statute was intended to limit and not to enlarge the jurisdiction of the equity courts. The opinion did, however, discuss the merits of the controversy to a considerable extent. Federal law and the Fourteenth Amendment were said not to impose upon the states the duty of creating districts equal in population. The petitioner relied upon a number of cases in the United States Supreme Court in which legislation initially valid had become invalid in the course of time due to changed conditions. But it was pointed out that these cases involved either emergency legislation or the exercise of the police power, and were, therefore, inapplicable to the present problem.

Separation of powers was likewise the basis for holding that the provisions of the Judges Retirement System Act relating to refunds\textsuperscript{19} were unconstitutional.\textsuperscript{20} The other provisions of the act which provided for a system of voluntary participation in a pension plan were upheld as constitutional. In holding the refund provisions invalid, the court pointed out that the act did not state the terms and conditions upon which refunds were to be made. If this was left to be determined by the trustees, there was an unconstitutional delegation of legislative power.

Two other cases deserve mention. Difficulties with special assessments and the bonds issued against them appear in the recent holding\textsuperscript{21} that an ordinance allowing a bondholder to exchange his special assessment bonds for others identical except for denomination impairs the obligation of the bonds held by others. Under Illinois decisions, the special

\textsuperscript{18} Ill. Rev. Stat. 1941, Ch. 46, §§ 154-6.
\textsuperscript{19} Ill. Rev. Stat. 1941, Ch. 37, § 441.6, § 441.7, §441.11(b), and § 441.18.
\textsuperscript{20} People ex rel. v. Wright, 379 Ill. 328, 40 N.E. (2d) 719 (1942).
\textsuperscript{21} Murray v. Village of Skokie, 379 Ill. 112, 39 N.E. (2d) 671 (1941).
assessments, when collected, are trust funds for the discharge of the bonds issued against them. A modification of denomination and the use of the bonds to discharge the holder's own assessment impairs the contract right of other holders to participate rateably in the distribution of moneys collected.

In *Lasdon v. Hallihan*\(^{22}\) the court held Section 5 of the Dental Practice Act\(^ {23}\) to be a valid exercise of the police power. This section included in the definition of practicing dentistry the furnishing of full or partial dentures to the general public. A proviso made the section inapplicable to those who furnished dentures only to practicing dentists. The reasonableness of the statutory restrictions against advertising by dentists was pointed out, and the court held that the legislature might extend these restrictions to persons engaged in the business of furnishing artificial teeth, since the evils attendant upon commercialization of the profession could not otherwise be prevented.

A recent case, that of *Clark v. Quick*,\(^ {24}\) involving the construction of the Absent Voters Law,\(^ {25}\) may be noted here although it does not determine any constitutional question. It appeared from the facts of that case that several absentee ballots in an election for county clerk were handed by the voters to an official of a political organization instead of being mailed or delivered to the proper public official. The political officer retained the ballots for a time and then delivered them or mailed them to the county clerk. The Supreme Court held that, under the circumstances, these ballots were void since the statutory requirements had to be construed as being mandatory and not directory, even though there was no evidence that any of the ballots had been tampered with. Mr. Justice Smith dissented, taking the view that since the failure to comply with the statute did not affect the result of the election, the court should not adopt a view which would disenfranchise these voters.\(^ {26}\)

\(^{22}\) 377 Ill. 187, 36 N.E. (2d) 227 (1941).
\(^{23}\) Ill. Rev. Stat. 1941, Ch. 91, § 60.
\(^{24}\) 377 Ill. 424, 36 N.E. (2d) 563 (1941).
\(^{25}\) Ill. Rev. Stat. 1941, Ch. 46, § 462 et seq.
MUNICIPAL CORPORATIONS

Cases of substantial importance in the law of Municipal Corporations were decided during the past year. *Fieldcrest Dairies, Inc. v. City of Chicago*\(^2\) involved the validity of a city ordinance regulating the distribution of milk under which the plaintiff, a Michigan corporation engaged in delivering milk in the Chicago area, had been denied a permit to market milk in paper containers. Suit in the federal district court to secure a favorable interpretation of the ordinance, or in the alternative to have the same declared invalid, had resulted in a decision that the city could regulate the sale of milk but that portions of the ordinance in question were invalid because they conflicted with a state statute on the subject. The city was, therefore, enjoined from enforcing the ordinance pending review of the decision by the United States Supreme Court.\(^2\) It should be a matter of judicial notice that the sale of milk in paper containers has leaped in geometrical progression since the decision. While the reviewing court will, undoubtedly, be concerned with a problem of statutory construction viewed legalistically, both the public interest and economic concern may be factors in the final decision. Although the Illinois Milk Statute\(^2\) and a decision thereunder\(^2\) permit a municipality to insist upon more rigorous regulation than the minimum standards fixed by the statute, still the whims of a municipality should not be permitted to block progress in the safe and economical distribution of milk.\(^3\)

A question of tort liability was involved in *Anderson v. City of Chicago*.\(^4\) It appeared that the plaintiff therein was an onlooker but not a participant in a clash between striking workers and the municipal police. During the rout of the

\(^{27}\) 122 F. (2d) 132 (1941), modifying 35 F. Supp. 451 (1940), noted in 36 Ill. L. Rev. 578, 30 Ill. B. J. 257.

\(^{28}\) Petition for certiorari was granted: 314 U. S. 604, 62 S. Ct. 301, 86 L. Ed. 145 (1941). The United States Supreme Court later vacated the judgment and remanded the case to the District Court to await the outcome of proceedings brought in the state court to test the constitutionality of the ordinance in question: Chicago v. Fieldcrest Dairies, — U. S. —, 62 S. Ct. 986, 86 L. Ed. 888 (1942).

\(^{29}\) Ill. Rev. Stat. 1941, Ch. 56½, §§ 152-69.

\(^{30}\) Kizer v. City of Mattoon, 332 Ill. 545, 164 N.E. 20 (1928).

\(^{31}\) See note in 36 Ill. L. Rev. 578.

\(^{32}\) 313 Ill. App. 616, 40 N.E. (2d) 601 (1942).
strikers, the plaintiff was felled by a bullet and overtaken by policemen, who then beat and kicked him mercilessly in the apparent belief that he was a striker. On jury trial, a verdict and judgment was returned in plaintiff's favor, but on appeal it was held that the melee in which the plaintiff was injured was not caused by a "mob" and that, therefore, the city could not be held liable under the terms of the pertinent statute. The court deemed that the intention of the legislature was to impose a duty upon municipalities to prevent mobs from arrogating to themselves the powers given by the state to the municipalities, but since the plaintiff was not the object of the strikers' action, even if they could be said in popular language to be a mob, recovery was denied. Injuries inflicted by the police, which was all that the plaintiff's evidence tended to show, were regarded as falling within the recognized immunity accorded to instrumentalities exercising the powers of the state.

In Boehne v. Board of Trustees Firemen's Pension Fund the appellate court was asked to construe certain sections of the Firemen's Pension Act. It was held that Section 7 thereof was surplusage, that Section 6 covered all cases otherwise coming under either Sections 5 or insofar as the widow and child of a deceased pensioner were concerned, and, consequently, that where a pensioner remarried after retirement, his widow and the child of that marriage were not entitled to a continuation of the benefits provided by the pension fund.

Municipal control over streets and alleys has been considered elsewhere in connection with the use thereof by public utilities, but one case dealing with the right to permit the use thereof for switch track purposes should be considered. In Greenlee Foundry Company v. Borin Art Products Corporation the court held that it was improper to

34 313 Ill. App. 291, 40 N.E. (2d) 94 (1942).
36 Ibid. § 923. 37 Ibid. § 922 and 924.
38 Remarriage before retirement is covered by Ill. Rev. Stat. 1941, Ch. 24, § 923.
39 Ill. Rev. Stat. 1941, Ch. 24, § 69-1 et seq.
40 See discussion of Geneseo case in section dealing with Public Utilities.
41 379 Ill. 494, 41 N.E. (2d) 532 (1942), noted in 20 Chicago-Kent Law Review 366.
grant such use to a private industry, even though others might later wish to connect with the tracks so laid.

PUBLIC UTILITIES

During the period covered by this survey the Supreme Court of Illinois rendered two decisions of tremendous importance in the field of public utility law. In the first of these, that of City of Geneseo v. Illinois Northern Utilities Company, the court in effect held that when a municipal franchise granted to a utility has expired, the city has the right to compel the utility occupying its streets to remove its properties therefrom. In reaching this decision the court said that the problem before it was principally one of statutory construction to determine whether or not the Public Utilities Act had withdrawn from the cities and vested in the Illinois Commerce Commission the power otherwise given to cities by the Cities and Villages Act to control the presence of utilities in municipal streets. It decided the former statute had not withdrawn this power.

Exactly the contrary conclusion had been reached by the court in 1936, in a case between the same parties. There the city had sought a mandatory injunction to compel the removal of the utility property pursuant to an ouster ordinance passed by the city at the expiration of the franchise. The utility company answered that the Public Utilities Act had removed from the cities, including plaintiff, the power to control the presence of utilities in the streets and had placed that power in the commission. Plaintiff's motion to strike the answer was allowed. An appeal was taken directly to the Illinois Supreme Court for the reason that the validity of an ordinance was involved. Finding the ordinance invalid

42 378 Ill. 506, 39 N.E. (2d) 26 (1941), Stone, J., and Shaw, J., dissented. The case of the Village of Heyworth v. Central Illinois Electric & Gas Co., involving the same principle and to which the point of res adjudicata was equally applicable, was consolidated with the instant case. Certiorari was denied by the United States Supreme Court, — U. S. —, 62 S. Ct. 1046, 86 L. Ed. 937 (1942). See also note in 30 Ill. B. J. 255.


on the ground that the act in question had removed municipal power over utilities located in its streets, the Supreme Court reversed the decision with directions that the motion be overruled. Pursuant to the mandate, judgment on the answer was entered for the defendant.

Following that decision, proceedings were instituted before the commission, which found that public convenience and necessity did not demand the removal of the utility properties. On appeal to the circuit court, this finding was affirmed. The case again reaching the Illinois Supreme Court, the latter did not discuss the commission's findings as to convenience and necessity, but re-examined the statutory question it had once before decided. In overruling the prior Geneseo decision, a re-examination of which would seem to have been barred by the doctrine of res adjudicata,\textsuperscript{46} the decision sets aside principles heretofore recognized in a long series of decisions construing the Public Utilities Act.\textsuperscript{47}

Mr. Justice Stone, who had dissented in the Chicago Motor Coach Company case\textsuperscript{48} and in the prior Geneseo case\textsuperscript{49} on the ground that the Public Utilities Act had not removed the power of cities to control the presence of utilities in their streets, dissented in the instant case pointing out that, while he had previously disagreed on the question of statutory construction, the rule announced therein had become well settled, was known to the legislature, and had been acquiesced in by it. He said that a change, therefore, was within "the province of the General Assembly, and not of this court."\textsuperscript{50} He referred also to the tremendous investments made by the public in utility securities in reliance on the

\textsuperscript{46}This point was urged by the utility company. Had the decision rested on the question of convenience and necessity, such plea would have been inapposite. The first opinion in the instant case was filed April 10, 1941. It expressly overruled the prior Geneseo decision. In the petition for rehearing, the point of res adjudicata was strongly urged. Rehearing was granted, but the second opinion avoided the doctrine by stating that the basis of the prior case was not plain.

\textsuperscript{47} See Chicago Motor Coach Co. v. City of Chicago, 337 Ill. 200, 169 N.E. 22, 66 A. L. R. 834 (1929), and cases therein cited. See also cases listed in 363 Ill. 91 at 95, 1 N.E. (2d) 392 at 394.

\textsuperscript{48} See note 47 ante.

\textsuperscript{49} See note 45 ante.

\textsuperscript{50} 378 Ill. 506 at 535, 39 N.E. (2d) 26 at 40.
prior rule all of which, by the decision, were subjected to drastic shrinkage in value.

In the other decision, that of Inter-State Water Company v. City of Danville,\textsuperscript{61} the court held that a city has the right under Section 68 of the Public Utilities Act\textsuperscript{52} to appeal from an order of the Illinois Commerce Commission increasing the domestic and industrial rates of utility customers within the city, although the rates charged the city itself were not increased. It was pointed out that Sections 64 to 66 of the act\textsuperscript{53} contemplate a participation by municipalities in commission proceedings where "rates or other charges or services of public utilities within such" municipalities are involved and that it would, therefore, be absurd to conclude that a city had no right to appeal from the decision in such proceedings, particularly where the right of appeal was given to "any person . . . affected by the order of the Commission." The case squarely presented to the court for the first time the issue decided by it.

**TAXATION**

Several interesting points under the Chicago budget law\textsuperscript{54} relating to the listing of assets and liabilities of cities as the basis for taxation were settled in People ex rel. Toman v. B. Mercil & Sons Plating Company.\textsuperscript{55} Among other things, the court decided that the listing among the current assets of a sum as to which a judgment had been rendered in favor of the city but from which judgment an appeal had been taken so that it was clear that the judgment, even if sustained, could not be collected during the taxable year, was proper. The listing of estimated revenue from the licensing of pari-mutuel brokers was likewise regarded as proper, the court saying: "Corporate authorities, in making their estimates, are not required to take the risk of having an appropriation held invalid by omitting estimated revenue because they fear the authority authorizing it may be voided. . . ."\textsuperscript{56} The

\textsuperscript{51} 379 Ill. 41, 39 N.E. (2d) 356 (1942).
\textsuperscript{52} Ill. Rev. Stat. 1941, Ch. 111-2/3, § 72.
\textsuperscript{53} Ibid., §§ 68-70.
\textsuperscript{54} Ill. Rev. Stat. 1941, Ch. 24, § 22-1 et seq.
\textsuperscript{55} 378 Ill. 142, 37 N.E. (2d) 839 (1941).
\textsuperscript{56} 378 Ill. 142 at 148, 37 N.E. (2d) 839 at 844.
inclusion of certain items as liabilities, such as accounts payable and unvouched bills, was deemed proper although these liabilities had been incurred in the past and were to be paid out of prior levies, the court stating:

There is nothing in the Budget law requiring the city to determine whether it can pay a liability with tax money after it is collected, nor is there anything requiring it to decide whether a prior debt can be paid out of a prior tax, when collected.... Whether the accounts payable have become void by reason of not having been paid out of current revenue is not for us to determine in this proceeding.57

It was determined, in People ex rel. Larson v. Thompson,58 that while the failure to publish an appropriation ordinance within ten days from its adoption does not render it void, the enactment of a levy ordinance within ten days of the date that the appropriation ordinance is finally published, operates to void the levy ordinance.

Three cases involving alleged discriminations under the general property tax law were before the Supreme Court and the results indicate that the case of a taxpayer seeking relief on this ground is still hard. In the first of these, that of People v. Southwestern Bell Telephone Company,59 the defendant had paid some but not all of the taxes assessed against its personal property. It took the position that the board of review, which had made an order decreasing real estate values in general by twenty per cent. for the purpose of taxation, had in fact employed an equalization factor of thirty per cent. and that it should have applied the same factor to personalty. The court found that the board had not changed the equalization factor but had simply reduced the assessment of real estate, which it had power to do under the statutes. As to such debasement, the court said that the requirement of uniformity60 went only to "property of like kind and character"61 and that it did not apply as between distinct classes of property. Justices Stone and Smith dissented on the ground that it appeared from the stipulation of

57 378 Ill. 142 at 152, 37 N.E. (2d) 839 at 845.
58 377 Ill. 104, 35 N.E. (2d) 355 (1941), noted in 36 Ill. L. Rev. 689.
59 377 Ill. 303, 36 N.E. (2d) 362 (1941), noted in 36 Ill. L. Rev. 796 and 30 Ill. B. J. 300.
60 Ill. Const. 1870, Art. 9, § 1.
61 377 Ill. 303 at 306, 36 N.E. (2d) 362 at 364.
facts that the board had reduced the equalization factor as to real estate and that it should similarly have reduced it as to personalty. Justice Murphy separately dissented on the ground that Article 9, Section 1 of the Illinois Constitution\textsuperscript{62} required uniformity as between classes of property in debasing assessed valuation as well as in applying an equalization factor.

In the second case, \textit{Tuttle v. Bell},\textsuperscript{63} some 158 individual farmers in a suit brought to enjoin the county treasurer from collecting a portion of the taxes levied against their real estate, alleged that the assessed value of farm lands had been fixed at thirty-five per cent of their fair cash value, while city property had been fixed at twenty-five per cent of such value. They attempted to show this by the reports of three different surveys, one made under the supervision of the State Tax Commission, which relied on data obtained from studying eighty voluntary sales of farm lands and two hundred twenty-nine voluntary sales of city property. It did not appear that the lands of any of the plaintiffs were among those checked by the surveys;\textsuperscript{64} nor did it appear that they were similar to any of the lands so checked. The court pointed out that the gist of the plaintiffs' claim was that their property should be relieved from a part of the taxes levied for the reason that other real estate was not assessed high enough. In dismissing the suit for want of equity, the court said: "A court of equity will not grant injunctive relief under such circumstances."\textsuperscript{65}

In the third case, that of \textit{People ex rel. Toman v. Pickard},\textsuperscript{66} plaintiff, as owner of unimproved real estate, claimed that the assessor had debased the full value of buildings on improved land by thirty per cent. before applying the equalization factor but that in valuing unimproved real estate there had been no similar debasement in value. This, the taxpayer claimed, violated the rule of uniformity. The

\textsuperscript{62} That section reads: "... every person ... shall pay a tax in proportion to the value of his ... property...."

\textsuperscript{63} 377 Ill. 510, 37 N.E. (2d) 180 (1941).

\textsuperscript{64} What effect, if any, the inclusion of some of the lands belonging to the several plaintiffs among those checked would have had is speculative.

\textsuperscript{65} 377 Ill. 510 at 514, 37 N.E. (2d) 180 at 182.

\textsuperscript{66} 377 Ill. 610, 37 N.E. (2d) 330 (1941).
court found, however, that the evidence did show that the value of buildings had been determined by taking reproduction cost new, less thirty per cent. because of lack of marketability, less depreciation and obsolescence. The taxpayer, it said, had no right to have unimproved real estate valued by the same method.

The most striking changes and decisions during the period of this survey are found under the Retailers' Occupation Tax Act. Section 6 thereof formerly contained broad refund provisions, as a consequence of which many retailers who had passed on their tax burden to consumers were in a position to come into a windfall in the event the tax had been improperly assessed against them. To correct this situation, Section 6 was amended and it now provides that no credit shall be allowed or refund made unless it shall appear: (a) that the claimant bore the burden of such amount and has not been relieved thereof nor reimbursed therefor and has not shifted such burden directly or indirectly through inclusion of such amount in the price of the tangible personal property sold by him or in any manner whatsoever; and that no understanding or agreement written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor or may shift the burden thereof; or (b) that he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof (2) who has not been relieved thereof nor reimbursed therefor, and has not shifted such burden directly or indirectly and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever.

In thus attempting to close the gates to windfalls, the legislature has done more since it would seem that if a vendor, having paid an illegal tax, has passed on his tax burden even contingently to a protesting purchaser, the chances of recovering to make the purchaser whole are slight.

Problems involving the application of the amended section to existing claims have already arisen. In Peoples Store of

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67 Ill. Rev. Stat. 1941, Ch. 120, § 440 et seq.
68 Ibid. § 445.
69 It provided simply that if it appeared that a tax payment had been erroneously made "whether as the result of a mistake of fact or an error of law," then the person who made the erroneous payment could obtain a tax credit or refund: Ill. Rev. Stat. 1939, Ch. 120, § 445. Under this section, it was held that the Director of Finance could be compelled by mandamus to issue a credit memorandum in a proper case: People v. McKibbin, 377 Ill. 22, 35 N.E. (2d) 321 (1941).
70 Ill. Rev. Stat. 1941, Ch. 120, § 445.
Roseland v. McKibbin\textsuperscript{71} it was held that it should apply to a case on appeal before the Supreme Court at the time the amendment went into effect. In \textit{People ex rel. Allied Bridge \\& Construction Company v. McKibbin},\textsuperscript{72} however, it was held that it did not apply where refund rights had already become vested in a claimant by an unappealed decree directing the issuance of a credit memorandum.

Section 1 of the act\textsuperscript{73} was also amended, following the decisions exempting contractors from the application of the act,\textsuperscript{74} so as to define a contractor’s function as a use. The amended portion reads:

"Use or consumption," in addition to its usual and popular meaning, shall be construed to include the employment of tangible personal property by persons engaged in service occupations (including construction contracting and other service occupations of like character), trades or professions, in the rendering of services, where as a necessary incident to the rendering of such service, transfer of all or a part of the tangible personal property employed in connection with the rendering of said services is made from the person engaged in the service occupation (including construction contracting and other service occupations of like character), trade or profession, to his customer or client.

In two cases\textsuperscript{75} the Circuit Court of Sangamon County upheld the application of the act to the proceeds of a transaction where title to personal property passed from the vendor to the purchaser outside of the State of Illinois.\textsuperscript{76} These cases have been docketed before the Supreme Court and the conclusion reached will be of greatest significance.

In other cases arising under the act, the Supreme Court has held (1) that the vendor of reconditioned auto parts was not performing a service and that the proceeds of his sales were subject to tax;\textsuperscript{77} (2) that fur repairmen, on the

\textsuperscript{71} 379 Ill. 148, 39 N.E. (2d) 995 (1942).
\textsuperscript{72} 380 Ill. 63, 43 N.E. (2d) 550 (1942).
\textsuperscript{73} Ill. Rev. Stat. 1941, Ch. 120, § 440.
\textsuperscript{74} See Herlihy Mid-Continent Co. v. Nudelman, 367 Ill. 600, 12 N.E. (2d) 638 (1938), and Material Service Corp. v. McKibbin, Circuit Court of Cook County, Feb. 14, 1941, C. C. H. Illinois Taxation, Vol. 2, § 68-012, affirmed as to this point, 380 Ill. 226, 43 N.E. (2d) 939 (1942), not in the period of this survey.
\textsuperscript{76} The act imposes a tax on those engaged in selling tangible personal property at retail in this state: Ill. Rev. Stat. 1941, Ch. 120, § 441.
\textsuperscript{77} Warshawsky & Co. v. Department of Finance, 377 Ill. 165, 36 N.E. (2d) 233 (1941).
other hand, are engaged in a service occupation and that
the proceeds of their work, including the sale of the fur
used in repairs, are not subject to tax; 78 (3) that it is in-
cumbent upon the department to make a reassessment
within a reasonable time after the taxpayer's return has
been filed in order to impose an additional burden on the
taxpayer; 79 and (4) that the failure to file a return is a
misdemeanor within the meaning of the act regardless of
of the intention of the taxpayer in so failing to file. 80

One case of general interest might be added, that of City
of Chicago v. McCausland. 81 There the city had filed a peti-
tion on February 17, 1926, directed toward ascertaining the
just compensation for property to be taken in widening a
street. The verified report of the commissioners was filed
on May 26, 1926, specifying the amount of money to be paid.
Final judgment was entered on June 30, 1929. General taxes
for 1927, 1928 and 1929 were levied and assessed against
the property. On January 27, 1936, the amount fixed as just
compensation was deposited with the county treasurer. He,
however, refused to turn over the full amount to the prop-
erty owner, taking the position that the amount of the unpaid
taxes should be deducted from the award. In a suit to
determine this issue the court held that, when money is
paid under an award, "the title acquired relates back to
the time when the commissioners made their report," 82
consequently the tax liens could not be transferred to the
amount awarded.

TRADE REGULATIONS

Acting under the doctrine of Erie Railroad Co. v. Tomp-
kins, 83 the federal circuit court of appeals, in Addresso-
graph-Multigraph Corp. v. American Expansion Bolt & Man-

78 Mahon v. Nudelman, 377 Ill. 331, 36 N.E. (2d) 550 (1941), noted in 30 Ill. B. J.
214.
79 Feldstein v. Department of Finance, 377 Ill. 396, 36 N.E. (2d) 557 (1941).
80 People v. Player, 377 Ill. 417, 36 N.E. (2d) 729 (1941).
81 379 Ill. 602, 41 N.E. (2d) 745 (1942), noted in 20 CHICAGO-KENT LAW REVIEW
359.
82 379 Ill. 602 at 606, 41 N.E. (2d) 745 at 748.
83 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487 (1938).
ufacturing Company, applied the law of Illinois as previously announced in two appellate court decisions with a resulting denial of recovery to the plaintiff who had charged the defendant with unfair competition. It appeared therein that the plaintiff had, at great expense, developed a system of "addressing and writing of various data on many business forms in a mechanical manner rather than manually." Its chief source of profit resulted from the sale of its address plates rather than from the machines in which they were used. In fact, without the profits derived from the plates, it could not afford the expense of maintenance and expansion of its business system. After the expiration of the plaintiff's patents, defendant manufactured and sold to users of the plaintiff's machines certain address cards intended solely for use in connection with the plaintiff's machines. Not being burdened with the expense of making the machines, the defendant could produce and sell its cards at less cost than the plaintiff. To increase its sales it accordingly told customers of the plaintiff that the latter was a monopolistic organization charging monopolistic prices. On this state of facts recovery was denied. The court found no intentional "palming off" within the narrow Illinois rule nor did it find any unfair competition. It is true that unfair competition existed under the doctrine announced by the United States Supreme Court in the Associated Press Case, but the Illinois Appellate Court had declined to follow that decision, so the court in the instant case felt constrained to apply the local rule.

By House Bill 173, approved July 17, 1941, the legislature has provided that it shall be unlawful to "conduct or transact business in this State under an assumed name, or under any designation, name or style, corporate or otherwise, other than the real name or names of the individual or in-

86 124 F. (2d) 706 at 707.
87 See cases cited in note 85 ante, followed in Rytex Co. v. Ryan, 126 F. (2d) 952 (1942).
individuals conducting or transacting such business” unless an appropriate certificate is filed setting forth the name under which the business is to be conducted and the names of the individuals conducting it. These requirements do not apply to foreign or domestic corporations, nor to trusts where the title to the trust property is vested in the trustee who carries on the business in his name, nor to partnerships where the partnership name includes the true, real name of such person or persons transacting the business of the partnership. Violation of the act constitutes a misdemeanor, and each day of continued violation is considered a separate offense which may result in a fine of $25 to $100 and a jail sentence of from ten to thirty days.

VIII. TORTS

In the field of libel and slander, the case of Kulesza v. Chicago Daily News, Inc., is worthy of comment. That case grew out of an article published in the defendant’s newspaper which commented upon a meeting of persons purportedly interested in a patent infringement suit held for the purpose of soliciting funds with which to further prosecute that suit. The article commented upon the history of the unsuccessful litigation and, by implication, warned investors that they would probably lose their money. The court upheld the right of the newspaper to so comment because the conduct of the litigation and the campaign for the solicitation of money were matters of public interest and concern, and were, therefore, “legitimate subjects of criticism and comment by a newspaper, so long as it does so fairly and with an honest purpose.”

An interesting opinion on the doctrine of family discipline was filed by the Appellate Court for the First District in the case of Drake v. Thomas, in which the court held that the

90 The certificate must be filed in the County Clerk's office in the county in which the business is to be conducted or transacted.
1 311 Ill. App. 117, 35 N.E. (2d) 517 (1941).
2 311 Ill. App. 117 at 123, 35 N.E. (2d) 517 at 520.
3 310 Ill. App. 57, 33 N.E. (2d) 889 (1941).
authority of a teacher over a pupil is a delegation of parental authority, saying:

The authority of a teacher over a pupil is a delegation of parental authority, and where the teacher inflicts corporal punishment on a pupil, and he is not actuated by malice and the punishment is not excessive or wanton, the teacher is not liable. ⁴

The court further held that the exclusion from evidence of a note from the parent to the teacher requesting the latter to correct the child was improper as such letter was an express delegation of parental authority to the teacher to do what could be done by way of correction.

The case of *Citizens National Bank v. Joseph Kesl & Sons Company*⁵ sustains the right of a mortgagee to sue in trespass where soil is removed without permission from the mortgaged premises. It was there pointed out that the mortgagor could maintain an action of trespass quare clausum fregit and recover the value of the soil removed in its severed condition, and that the mortgagee also might maintain an action against the third person for impairment of the mortgage security, but that the recovery of the mortgagee would be limited to the amount by which the wrongful acts had impaired the mortgage security. It appeared, however, that there had been an assignment of the mortgagor's cause of action to the mortgagee which, therefore, entitled the mortgagee to recover the entire damage done where otherwise he might have recovered only nominal damages.

In the case of *Racine Fuel Company v. O. A. Rawlins*,⁶ a case brought on the theory of fraud and deceit, the court held that conduct may amount to a representation. The court pointed out, however, that this did not restrict the rule that fraud is not presumed, but must be proven by clear and convincing evidence and is not proved by mere suspicion. Conduct amounting to a representation was defined as "any conduct capable of being turned into a statement of fact," and, to be actionable, it was pointed out, it would be suffi-

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⁴ 310 Ill. App. 57 at 63, 33 N.E. (2d) 889 at 891.
⁵ 378 Ill. 428, 38 N.E. (2d) 734 (1942), noted in 20 CHICAGO-KENT LAW REVIEW 177, affirming 308 Ill. App. 273, 33 N.E. (2d) 133 (1941).
⁷ 377 Ill. 375 at 380, 36 N.E. (2d) 710 at 712.
cient if the proof showed such acts as would mislead a reasonably cautious and prudent man in regard to the existence of a fact forming a basis of or contributing to an inducement to some change of position by him. In the instant case, however, mere silence upon receipt of an invoice was held not to amount to a representation that the purchaser intended to pay the market price of certain coal, when, in fact, he had no such intention, particularly since the coal was delivered to the purchaser on order solicited by the vendor's agent.

Another case dealing with fraud and deceit is that of Malnick v. Rosenthal. Plaintiffs therein were builders and the defendant was the seller of unimproved real estate from whom the plaintiffs had purchased a one-half interest in certain parcels of land, giving notes for a part of the purchase price. Suit was brought to enjoin the transfer of these notes and for the recission and cancellation of the contract on the ground that the plaintiffs had been induced to enter into the contract by reason of fraudulent misrepresentations made by the defendant. The misrepresentations were: (1) the defendant had stated that all public improvements on the land had been paid for; (2) that defendant had made arrangements with local authorities for the release of tax liens; and (3) that he had arranged with local authorities for a lowering of building restrictions. The court cited with approval the decisions in Bundesen v. Lewis and Dickinson v. Dickinson, cases based on almost parallel facts, and said:

A party in possession of his mental faculties is not justified in relying on representations made, when he has ample opportunity to ascertain the truth of the representations before he acts. When he is afforded the opportunity of knowing the truth of the representations, he is chargeable with knowledge. If one does not avail himself of the means of knowledge open to him, he cannot be heard to say he was deceived by misrepresentations.

The court called attention to the fact that, in this case, the plaintiffs were engaged in the building construction business, and that the truth or falsity of each of the representations complained of was readily ascertainable by them, and

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9 368 Ill. 623, 15 N.E. (2d) 520 (1938).
10 305 Ill. 521, 137 N.E. 468 (1922).
11 313 Ill. App. 249 at 255, 39 N.E. (2d) 767 at 769.
that it did not appear that the plaintiffs had made any effort to determine the truth for themselves.

A nuisance case worthy of mention is *Menolascino v. Superior Felt & Bedding Company*,\(^{12}\) in which the court held that, in an action to recover damages for injuries to her lungs caused by the discharge of cotton lint over the neighborhood by the defendant's mattress factory, the contributory negligence of the plaintiff in living close by the factory and also whether the defendant was negligent or careful, were not issues in the case. Being an action for damages based on a nuisance, the court properly held that questions of negligence and contributory negligence were not involved. The court also reiterated the doctrine that there is no prescriptive right to commit a nuisance and stated that it was immaterial to the case at bar that the defendant had located first in the neighborhood and that the plaintiff had later moved to a house across the street from the factory, for the plaintiff was under no duty to move to avoid such injuries.

In the course of a year a good many cases involving negligence arise, most of which offer no new principles. A few negligence cases, however, deserve comment. Thus, a question of contributory negligence was presented in the case of *Blachek v. City Ice & Fuel Company*,\(^{13}\) and turned upon the issue of whether or not the parking of an automobile upon a highway without lights by the plaintiff's intestate could be considered as contributory negligence. The court held that such parking was not, in and of itself, contributory negligence saying:

The rule is that negligence and contributory negligence are questions of fact for the jury. They become questions of law only when the evidence is so clearly insufficient to establish negligence or due care that all reasonable minds would reach the conclusion that there was no negligence or that there was contributory negligence . . . We also agree with the plaintiff's contention that the mere parking of an automobile upon the highway without any light is not of itself negligence and that all the facts and circumstances must be taken into consideration to determine whether defendants were negligent and whether plaintiff's intestate was in the exercise of due care.\(^{14}\)

\(^{12}\) 313 Ill. App. 557, 40 N.E. (2d) 813 (1942).
\(^{13}\) 311 Ill. App. 1, 35 N.E. (2d) 416 (1941).
\(^{14}\) 311 Ill. App. 1 at 13, 35 N.E. (2d) 416 at 422.
The doctrine of res ipsa loquitur was relied on by the plaintiff in the case of Halowatsky v. Central Greyhound Lines, Inc.\textsuperscript{15} Plaintiff therein was a passenger on a bus and was injured when the moving bus fell through the pavement while proceeding through a city. The evidence established that a broken sewer had caused the underlying sand and soil to be washed away thus causing the pavement to collapse under the weight of the bus. It was the contention of the plaintiff that a prima facie case of negligence against the defendant carrier was made out by showing that she was a passenger at the time of the injury. It was held, however, that the doctrine of res ipsa loquitur did not apply because all the instrumentalities contributing to the accident were not under the carrier's control. It was pointed out that the carrier had no control over the sewer or the street, and that there was no causal connection between the alleged excessive speed of the bus and the accident which caused plaintiff's injuries.

Kosicki v. S. A. Healy Company\textsuperscript{16} involved the negligent use of explosives and combustibles and required a construction of Section 19 of the act creating the Sanitary District of Chicago.\textsuperscript{17} The action was brought against an independent contractor, employed by the Sanitary District to construct a sewer, and sought to enforce the common law liability of such contractor for the negligent use of explosives resulting in injury to property. The act had created a statutory remedy against the Sanitary District in favor of a property owner injured through the construction of improvements. The court held that the remedy given by the statute was not exclusive, hence permitted recovery against the contractor.

In Edwards v. Hill-Thomas Lime & Cement Company,\textsuperscript{18} a case involving contributory negligence, the trial court had instructed the jury, in substance, that no greater degree of care was required of the plaintiff than an ordinarily prudent

\begin{itemize}
\item \textsuperscript{15} 311 Ill. App. 127, 35 N.E. (2d) 541 (1941).
\item \textsuperscript{16} 312 Ill. App. 307, 38 N.E. (2d) 525 (1941), affirmed in 380 Ill. 298, 44 N.E. (2d) 27 (1942), not in the period of this survey.
\item \textsuperscript{17} Ill. Rev. Stat. 1941, Ch. 42, § 339.
\item \textsuperscript{18} 378 Ill. 180, 37 N.E. (2d) 801 (1941), reversing 309 Ill. App. 168, 32 N.E. (2d) 945 (1941).
\end{itemize}
person would exercise "in the situation in which the plaintiff was placed as shown by the evidence." This instruction was held erroneous for the reason that it entirely ignored the question, an issue in the case, as to whether or not the plaintiff was guilty of contributory negligence in placing himself in the situation referred to in the instruction. Thus, it is shown, an ordinarily acceptable definition of the standard of care required of a person may be altered by the issue of contributory negligence. The vice in the instruction lay in assuming that the plaintiff was not guilty of any carelessness in being in the position in which he found himself at the time of the injury.

Another negligence case, that of Kuzminski v. Waser, caused the court to define the degree of care that a motorist owes to children playing in the street. The court stated:
A person operating a motor vehicle along the streets of a city is bound to recognize the fact that children will be found playing in the street and that they may sometimes attempt to cross the street unmindful of its dangers, and the driver owes the children the duty of reasonable and ordinary care under the circumstances.

In Bartolucci v. Falleti the court defined wilful and wanton conduct by saying:
In order that one may be held guilty of wilful or wanton conduct, it must be shown that he was conscious of his conduct, and conscious, from his knowledge of existing conditions, that injury would likely or probably result from his conduct, and that with reckless indifference to consequences he consciously and intentionally did some wrongful act or omitted some known duty which produced the injurious result.

Following such definition, it became necessary for the court to hold that where the defendant was descending a hill with his car, in which the plaintiff was riding as a guest, and a wheel came off because the bolts sheared through, thus causing the car to turn over, there being no showing that the defendant knew of the unsafe condition of the car or by the exercise of reasonable care could have known of it, the conduct of the defendant did not meet the definition. The decision is entirely consistent with the established doctrine that

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20 314 Ill. App. 438 at 454, 41 N.E. (2d) 1008 at 1015.
22 314 Ill. App. 551 at 558, 41 N.E. (2d) 777 at 780.
one who invites another to ride with him does not guarantee to the guest a sound automobile, but that his duty extends only to refraining from increasing the danger which the guest assumes upon entering the automobile, or from adding a new danger.

An interesting case on the degree of care required of exhibitors and showmen in providing proper seating space for paid customers is to be found in Wickstrom v. Ringling Brothers, Barnum & Bailey Combined Shows, Incorporated,\textsuperscript{23} which held that proof that the seats provided were of the standard type used by circuses would not prove ordinary and reasonable care under the circumstances surrounding that case. The question was, properly, whether the defendant had used reasonable care to provide proper seating. Further, the testimony of a park employee, as an expert witness, that he had inspected and approved the seating, was properly excluded because it was not shown that he was guided by any ordinance, code or specifications.

One case on proximate causation merits discussion. In Briske v. Village of Burnham,\textsuperscript{24} the village had vacated a portion of a public street located therein, following which a heavy barrier had been erected across the street to close off the vacated portion. There was evidence tending to show that the village was negligent in not placing warning signs along the used portion of the street to warn motorists that they were approaching the barricade. The evidence also established that the driver of the automobile in which the plaintiff was riding was negligent in not seeing the barricade in time to stop the car and prevent it from crashing thereon. The plaintiff relied on the theory of concurrent negligence to establish the liability of the village. The circuit court overruled defendant's motion for a directed verdict, but such decision was reversed by the appellate court.\textsuperscript{25} The Supreme Court, in affirming the judgment dismissing the suit, said:

If a negligent act or omission does nothing more than furnish a condition making an injury possible, and such condition, by the subsequent independent act of a third person, causes an injury, the two acts are not

\textsuperscript{23} 313 Ill. App. 640, 40 N.E. (2d) 585 (1942).
\textsuperscript{24} 379 Ill. 193, 39 N.E. (2d) 976 (1942).
\textsuperscript{25} 308 Ill. App. 531, 32 N.E. (2d) 349 (1941).
concurrent and the existence of the condition is not the proximate cause of the injury.\textsuperscript{26}

Inasmuch as the negligent act of the driver of the car was the intervening and efficient cause of the accident, it broke the causal connection between the negligence of the village and the resultant injury.

\textsuperscript{26} 379 Ill. 193 at 199, 39 N.E. (2d) 976 at 979.