Survey of Illinois Law for the Year 1942-1943
SURVEY OF ILLINOIS LAW FOR THE YEAR 1942-1943*

I. BUSINESS ORGANIZATIONS

CORPORATIONS

Despite the frequent criticisms of the rationale for such a view, the Illinois courts continue to adhere rigidly to the doctrine that a charitable corporation cannot be held liable for the negligence of its agents, even though the corporation may have obtained public liability insurance to protect it from any loss which might arise thereby,¹ or has been paid by the injured party for its services.² Repudiated in England³ and losing ground in this country,⁴ it is to be hoped that the incorporated charity which "does good in the wrong way"⁵ may yet be called to account.

Scattered through the provisions of the Illinois Business Corporations Act appears the statement that changes in corporate structure, registered office, registered agent and the like shall become effective "upon the filing of such statement by the Secretary of State,"⁶ although the statute also pro-

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¹ Myers v. Young Men's Christian Assoc. of Quincy, 316 Ill. App. 177, 44 N.E. (2d) 755 (1942), noted in 21 CHICAGO-KENT LAW REVIEW 256, 10 U of Chi. L. Rev. 211.
⁴ See the exhaustive treatment of the subject by Rutledge, J., now Justice of the United States Supreme Court, in President and Dir. of Georgetown College v. Hughes, 130 F. (2d) 810 (1942), particularly pp. 817-22.
⁵ 130 F. (2d) 810 at 828.
⁶ See, for example, Ill. Rev. Stat. 1943, Ch. 32, §157.12.
vides that the duplicate original of the document in question should subsequently be recorded in the appropriate county. While the statutory language would seem to resolve any doubts on the subject, it was held in In re National Mills, Inc., that any such change is ineffective as to third persons until notoriety is given to that fact by both filing with the Secretary of State and also by recording. A corporate chattel mortgage executed and recorded in the county in which the corporation maintained its registered office was, therefore, deemed valid even though, prior to execution, the corporation had filed notice of change of registered office with the Secretary of State, since recording of the notice of change did not occur until after the chattel mortgagee's rights had otherwise been established.

The business of selling corporate securities in Illinois has long been subject to the provisions of the so-called "Blue Sky" Act, under which the seller of Class D securities, sold in violation of the provisions thereof, may be compelled to reimburse the purchaser for the price paid. The adoption of the federal Securities Exchange Act of 1934 inevitably produced the question as to whether or not the federal statute superseded the several state laws governing security distribution, but it was decided in Crosby v. Weil, at least so far as intrastate sales are concerned, that the more stringent provisions of the local statute had not been superseded. The fact that the securities were delivered by United States mail was held insufficient to convert the transaction into one of interstate commerce.

7 See, for example, Ill. Rev. Stat. 1943, Ch. 32, §157.15.
8 Sub nom. VanAusdall v. McCann, 133 F. (2d) 604 (1943), noted in 21 CHICAGO-KENT LAW REVIEW 259.
9 Ill. Rev. Stat. 1943, Ch. 95, §4, requires that the chattel mortgage, to possess validity against creditors, must be recorded with the recorder of the county "in which the mortgagor shall reside at the time when the instrument is executed and recorded." A subsequent removal does not affect the lien thus acquired: Haugen v. Holmes, 314 Ill. App. 165, 41 N.E. (2d) 109 (1942).
10 Ill. Rev. Stat. 1943, Ch. 121 1/2, §96 et seq.
11 Ill. Rev. Stat. 1943, Ch. 121 1/2, §132(1).
13 U. S. Constitution, Art. VI, states: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the . . . Laws of any State to the Contrary notwithstanding."
14 382 Ill. 538, 49 N.E. (2d) 386 (1943).
Upon the insolvency of a corporation and the appointment of a receiver, confusion is likely to arise over the question of whether such receiver becomes vested with title to the corporate assets including choses in action or is merely the custodian thereof for the purpose of collecting the proceeds. If he is a general equity receiver, title to such claims remains in the corporation hence actions thereon should be brought in the corporate name, and derivative suits to enforce such claims may be, under proper circumstances, conducted by the shareholders. It was held in McIlvaine v. City National Bank and Trust Company of Chicago, however, that a receiver of an insolvent state bank appointed by the Auditor of Public Accounts pursuant to Section 11 of the Banking Act acquires title to the assets thereof, including all causes of action belonging to the banking corporation, hence a representative suit by a shareholder to enforce a claim for good will, transferred prior to insolvency supposedly without consideration, was deemed improper. The court indicated that if such litigation were to be permitted, it could only be allowed after demand upon the Auditor to direct the receiver to bring suit and his failure or refusal so to do. A claim that Section 11 was unconstitutional as depriving the shareholder of a property right without due process was likewise rejected on the ground that the power to maintain a derivative suit was a privilege accorded to prevent a failure of justice rather than a property right.

While it had been held that an Illinois corporation, dissolved for failure to comply with statutory requirements, could not file a voluntary petition for reorganization in the federal courts, the issue presented in In re Peer Manor Building Corporation was novel. It appeared therein that a plan of extension had been worked out in 1937 under Sec-

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15 Farwell v. Great Western Tel. Co., 161 Ill. 522, 44 N.E. 891 (1896); Heffron v. Gage, 149 Ill. 182, 36 N.E. 569 (1894).
18 In Golden v. Cervenka, 278 Ill. 409, 116 N.E. 273 (1917), such a claim had been sustained as to creditors of an insolvent bank.
tion 77B of the Bankruptcy Act\textsuperscript{21} extending the maturity date of the corporate indebtedness until 1941. Upon default under the plan, the indenture trustee filed an involuntary petition for reorganization under Chapter X of the Bankruptcy Act.\textsuperscript{22} One of the bondholders objected to such petition on the ground that corporate existence had been ended by decree over seven years prior thereto, hence there was no organization available to be reorganized. The majority of the court, following the earlier view, held that since more than two years had elapsed from the date of the decree\textsuperscript{23} the corporation was defunct for all purposes and hence reorganization proceedings were improper. The dissenting judge, however, felt that the earlier decision was controlling only as to voluntary proceedings and that the rights of corporate creditors should not be barred by the failure of the corporate officials to preserve corporate existence. If the decree of dissolution could not be vacated, the use of foreclosure proceedings would seem to be the only way out of the impasse.\textsuperscript{24}

Though the record owner of shares in an insolvent bank is, without question, subject to the superadded constitutional liability some doubt has been expressed as to the liability of one who held shares in a holding company owning such bank stock,\textsuperscript{25} or who was the beneficial owner thereof but did not appear as a holder of record. Recovery against the former was denied in \textit{Joseph v. Bates}\textsuperscript{26} where it appeared the holding company shareholder held such stock merely as the nominee for another, but was granted in \textit{Reconstruction Finance Corporation v. Barrett}\textsuperscript{27} against the beneficial owner whose connection with the closed bank did not appear of record but had to be deduced from extrinsic facts. The latter's claim that suit and judgment against the record owner, followed by compromise thereof, operated as a bar

\textsuperscript{21} 11 U. S. C. A. § 207.
\textsuperscript{22} 11 U. S. C. A. § 501 et seq.
\textsuperscript{23} Ill. Rev. Stat. 1943, Ch. 32, § 157.94.
\textsuperscript{24} On this point see \textit{Markus v. Chicago Title & Trust Co.}, 373 Ill. 557, 27 N.E. (2d) 463 (1940).
\textsuperscript{26} 133 F. (2d) 457 (1943). Evans, J., wrote a dissenting opinion.
\textsuperscript{27} 131 F. (2d) 745 (1942).
was rejected on the theory that the liabilities were separate though only one satisfaction would be permitted.

But slight amendment has been made to the Business Corporation Act by the Sixty-third General Assembly. Such alteration as has occurred deals with license fees payable by foreign corporations permitted to do business in this state or the right of merger or consolidation between domestic and foreign corporations. A wholly new statutory regulation has, however, been devised for currency exchanges, while the former act dealing with corporations not for profit has been replaced with an entirely new code which is expressly made applicable to existing corporations of that character.

PARTNERSHIP

Mining partnerships are not at all new in Illinois, but litigated cases involving them are infrequent. In the case of *Kinne v. Duncan*, the court found that a mining partnership arose when Duncan, owner of an oil lease, assigned a one-half interest therein to one Borton upon the understanding that the lease should be developed with Duncan doing the drilling. Subsequently Borton assigned his interest to others, and they, as well as Duncan, set aside specified sums of money in "oil runs" to certain finance companies. Later, Duncan filed a claim for an oil and gas lien pursuant to statute and also asserted a like lien against the interests of the other persons holding interests under the lease on the theory that the arrangement constituted a mining partnership. His contention was sustained, the court using the language of *Harris v. Young* in summing up the relationship.

A further controversy therein involved the rights of the several partners to a lien on the total amount of oil produced. It was claimed that certain "division" orders, both as to Duncan's share of the oil produced and others given to fi-

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33 383 Ill. 110, 48 N.E. (2d) 375 (1943), modifying 315 Ill. App. 577, 43 N.E. (2d) 425 (1942).
34 Ill. Rev. Stat. 1943, Ch. 82, § 71 et seq.
35 298 Ill. 319, 131 N.E. 670 (1921).
nance companies as repayment of loans, constituted a division of the property or the product so that each partner owned his share in severalty, hence no partnership lien could attach upon either the property or the product actually divided. The court, however, found that the "division" orders were a temporary device, so that, when Duncan asserted his lien and the court appointed a receiver, the division stopped and the proceeds again became the joint property of the partners. The construction liens of material men who had worked at Duncan's request were, however, given priority.

LABOR LAW

The labor cases decided by the Illinois courts during the period covered by this survey have dealt largely with internal union matters rather than with the employer-employee relationship. In Fichter v. Milk Wagon Drivers' Union, Local 753,\(^36\) for example, there was involved the right of a union member to disability benefits under the union by-laws. Fichter had become a member of the union in 1922. In 1928 he sustained a permanent injury as the result of an accident which occurred while he was driving a milk wagon on duty. At that time the by-laws of the defendant union provided that: "A sick benefit shall be paid to members in good standing of twenty dollars ($20.00) per week . . . As soon as 90 days of benefit has been paid a member, if he is still sick his dues stop and he draws two ($2.00) dollars per week extra for his wife and each child under 16 years."\(^37\) There was no time limitation on the payments. In 1935 the union amended its by-laws by which payments to a wife and minor child were omitted and the number of weekly benefits to any one member was limited. When this by-law became effective, the union notified plaintiff that they would carry him for ninety-two additional weeks at twenty dollars per week instead of the amount he had been receiving. Plaintiff made no reply to the notice but accepted the money tendered. After the termination of that period he filed suit alleging that under the earlier by-laws he was entitled to receive the larger payment indefinitely and that the amendment was

\(^{36}\) 382 Ill. 91, 46 N.E. (2d) 921 (1943), reversing 312 Ill. App. 40, 37 N.E. (2d) 919 (1941).

\(^{37}\) 382 Ill. 91 at 93, 46 N.E. (2d) 921 at 922.
not binding on him. Characterizing the action of the union as "repudiation pure and simple," the court held that once Fichter's rights had become vested, the change in the by-laws could not affect those rights. The acceptance of the lesser sum during the ninety-two week period was held not to operate to cancel the original obligation of the union since the acceptance was without consideration.

Applying the same tests as are applied to insurance company cases and other cases of like nature, the court in Tesk v. Sagerstrom held that a union which had accepted dues payments regularly, although paid after the due date, could not take the position that a member who was fully paid up at the time of his death was not a member in good standing. It consequently held that the member's widow was entitled to full death benefits under the union by-laws in spite of the fact that one of the by-laws provided such benefits would be paid only if the member had been "continuously in good standing" through prompt payment of dues for one year previous to death, which was not the case here.

Specific performance of an agreement as to seniority rights was denied in Carver v. Brien because the employer was not a party to the agreement and had not evidenced its position thereon. The agreement had been made by the union employees working in the yard shops of three separate railroads. As a result of an operational consolidation, all of the work of one railroad shop and most of that of the second had been transferred to the third. An attempt to preserve seniority rights by dovetailing was contemplated by the agreement. With specific performance denied, the plaintiffs were thus left to their action for damages, which may be more illusory than real.

Because Almon v. American Carloading Corporation

38 382 Ill. 91 at 95, 46 N.E. (2d) 921 at 923.
40 317 Ill. App. 231, 46 N.E. (2d) 131 (1942).
41 315 Ill. App. 643, 43 N.E. (2d) 597 (1942), noted in 37 Ill. L. Rev. 456.
42 As to the other employees involved in the transfer, the railroad involved had put the consolidated rosters into effect as soon as they were agreed upon by the parties, hence there seems to be little justification for the court's position on this point.
was reversed by the Supreme Court on another ground,\(^4\) the Appellate Court's statement therein that a union is a legal entity lost much of its original force. However, the proposition was restated by the same court in *Maywood Farms Company v. Milk Wagon Drivers' Union of Chicago, Local 753.*\(^5\) The court said it was error not to hold the union, along with certain of its officials, on an order to show cause why it should not be held in contempt for violating an injunction against it. The roots are thus spreading. In the same case, the recognized principle\(^6\) that extreme violence may justify an injunction prohibiting all picketing, in spite of the protection afforded to free speech by the federal constitution,\(^7\) was applied where the violence had even included shooting.

**Workmen's Compensation**

In the case of *Hilberg v. Industrial Commission*\(^8\) the Supreme Court had occasion to construe the 1939 amendment to the Workmen's Compensation Act\(^9\) dealing with the time within which claims for compensation should be filed. The court there held that the phrase "within one year" referred to the year in which the employee could file an application for compensation for the injury, and that the amendment was designed to make specific the time beyond which the employer would not be liable for death resulting from an accident.\(^5\) To accomplish that intent, it was held that the act must mean that death resulting from accident must occur within one year from the date of the accident or

\(^{44}\) 380 Ill. 524, 44 N.E. (2d) 592 (1942), noted in 21 *Chicago-Kent Law Review* 186.

\(^{45}\) 316 Ill. App. 47, 43 N.E. (2d) 700 (1942).


\(^{47}\) See American Federation of Labor v. Swing, 312 U. S. 321, 61 S. Ct. 568, 85 L. Ed. 855 (1941), and related cases.

\(^{48}\) 380 Ill. 102, 43 N.E. (2d) 671 (1942), noted in 21 *Chicago-Kent Law Review* 204.

\(^{49}\) Laws 1933, p. 601; Ill. Rev. Stat. 1943, Ch. 48, § 161, which reads in part: "Provided, that in any case, unless application for compensation is filed with the Industrial Commission within one year after the date of the accident, where no compensation has been paid, or within one year after the date of the last payment of compensation, where any has been paid, the right to file such application shall be barred; Provided, further, that if the accidental injury results in death within said year, application for compensation for death may be filed with the Industrial Commission within one year after the date of death, but not thereafter."

\(^{50}\) The earlier view is illustrated by Burke v. Industrial Commission, 368 Ill. 554, 15 N.E. (2d) 305, 119 A. L. R. 1152 (1938).
from the date of the last payment of compensation and that application for compensation must be made within one year from the date of death.

A case involving the meaning of "arising out of" employment and also of "special hazard" was furnished in Permanent Construction Company v. Industrial Commission wherein the Supreme Court, on the special facts thereof, enlarged the employer's liability beyond previous Illinois decisions. It appeared therein that employees of the construction company were engaged in working on certain hospital grounds and were supplied with drinking water from a single water tap connected with the hospital waterworks system. These employees contracted typhoid fever when consuming contaminated water thus furnished. Liability of the employer was predicated upon the fact that the employer hired water boys who brought the water in buckets from the tap to the workmen. Had the water not been so carried, but had the workmen gone individually to the only water tap on the grounds and drank therefrom, it is submitted that the causative danger would have been one common to the neighborhood, hence the employer should not have been held. By supplying the water in the fashion presented, it was, however, held that the employer had created a special hazard for which liability attached.

Of special importance is the case of Thomson v. Industrial Commission where a watchman-employee of an interstate railroad, guarding and inspecting both interstate and intrastate cars, was severely injured by trespassers upon the employer's property. The Supreme Court held that he was entitled to compensation under the Illinois statute, despite the contention of the employer that the injured employee was comprehended within and subject to the provisions of the federal Employer's Liability Act, as amended in 1939, which would have excluded him from the operation of the state act. The opinion recognizes that in recent years the power of Congress to regulate industry, for the purpose of furthering interstate commerce, has been

51 380 Ill. 47, 43 N.E. (2d) 557 (1942), noted in 28 Wash. U. L. Q. 49.
52 380 Ill. 386, 44 N.E. (2d) 19 (1942), noted in 43 Col. L. Rev. 139.
greatly extended by judicial construction. But, said Justice Smith, "The extension of Federal control has not, however, destroyed the constitutional limitations on the power of Congress . . . Congress is still powerless to regulate matters which are wholly intrastate."

The court then proceeded to point out that the activity of the employee at the time of the injury was purely local, that the watchman was engaged in the prevention of a simple trespass on the right of way, and that his attempt to eject the trespassers did not closely or substantially affect interstate commerce. The decision, therefore, depends strongly upon this factual conclusion. Constitutional issues involved in the case are discussed elsewhere in this survey.

II. CONTRACTS

Three cases involving general principles of contract law decided during the past year are worthy of mention. Perhaps the most interesting of these was the decision in _Glenn v. McDavid_. The court there held that a claim might be allowed against the estate of a decedent, although the debt upon which the claim was based was barred by the statute of limitations, where the sole heir made a written promise to pay the debt. The case is novel in view of the fact that the decision necessarily involves a holding that the heir himself became liable by virtue of his promise. Apparently the only consideration for the promise was a moral obligation, and the moral obligation therein was not one which originally had been a legal one.

The Supreme Court in the case of _Soelzer v. Soelzer_ passed upon the enforceability of an agreement to adopt. In this case the child was obtained from a foundling home and a formal written "Agreement of Adoption" was executed by the home but not by the adopting parents. The child was received into the home and was treated as a daughter by the adopting parents. The Supreme Court held that the principle, applicable to contracts generally, that a party may

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54 380 Ill. 386 at 392, 44 N.E. (2d) 19 at 22.
1 316 Ill. App. 130, 44 N.E. (2d) 84 (1942).
2 A more complete discussion of this case appears in 21 CHICAGO-KENT LAW REVIEW 188.
3 382 Ill. 393, 47 N.E. (2d) 458 (1943).
become bound by a written contract through his conduct even though he had not signed it, is applicable to contracts to adopt. Specific performance of the contract was granted, in the sense that the child was decreed to be an heir of the adopting parents.4

A third decision worth noting is that of the Circuit Court of Appeals in Roe v. Sears, Roebuck & Co.,5 in which it appeared that Roe, an attorney, had been employed by defendant to recover federal floor and processing taxes. Roe's compensation was entirely contingent upon his success in recovering the taxes paid. He died two years before the statute imposing the taxes was declared unconstitutional. In view of the fact that the defendant subsequently recovered large sums of money, the court held that his representative was entitled to judgment. The decision seems extraordinary since the suit was based upon the contract and was not merely a claim for the fair value of services rendered. The result appears to do violence to the "entire contract" rule.6

NEGOTIABLE INSTRUMENTS

While it is generally well settled, and perhaps particularly so in Illinois,7 that a reference to security contained in a negotiable instrument will not destroy its negotiability, nevertheless the decision in Abingdon Bank & Trust Company v. Shipplett-Moloney Company8 seems to expand the possibility of comprehensive reference without damaging the aspect of negotiability. The occasion for the opinion was the determination of the negotiability of a note which is here given in full.9 Both parties to the litigation came to issue upon two questions, one as to certainty of time of payment

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4 See Winkelmann v. Winkelmann, 345 Ill. 566, 178 N.E. 118 (1931), and note thereon in 11 CHICAGO-KENT REVIEW 307.
5 132 F. (2d) 829 (1943).
6 Since the trial court had ruled against the plaintiff on motion for summary judgment, the case was sent back for trial. Other issues which might become important on a trial of the case are discussed in 21 CHICAGO-KENT LAW REVIEW 337.
7 Hunter v. Clarke, 184 Ill. 158, 56 N.E. 297 (1900); Read v. Kerr, 249 Ill. App. 493 (1928).
8 316 Ill. App. 79, 43 N.E. (2d) 857 (1942).
9 The note in question read in part as follows:

"$700.00
Abingdon, Illinois
May 1, 1928
One yr. four months after date for value received, I (we) promise to pay to Shipplett-Moloney Co., or order Seven Hundred Dollars at the First National Bank, Abingdon, Illinois, with interest at seven per cent per annum from date until paid."
and one as to certainty of amount, but ultimately stood on the latter point. It was urged that, by reason of paragraph two of the note containing an option under the "insecurity" clause, the amount which might be sued for was not stated and therefore extrinsic evidence would be required to determine the sum due. The court, however, pointed out that reference to the "balance remaining unpaid" in such paragraph could have no effect upon the amount of the promise in, or the amount unpaid on, the note as sued upon. Although the note could be put in default by the exercise of the option, thereby accelerating maturity, such act would in no way change or make uncertain the amount promised to be paid or the amount due and unpaid at the time of suit. The amount promised to be paid was fixed by the instrument, hence it was negotiable. The further reference to a second note would, in no way, affect the court's conclusion. While the case is perhaps only a repetition of what has been said before, the recitals in the second paragraph did, apparently, seem to the losing litigant to provide for more apparent uncertainty than usually appears in notes of this character.

Reference is made elsewhere to the decision in *Joseph v. Carter* dealing with the question of reviving the obligation of a negotiable instrument otherwise barred by the statute of limitations. A statement in the note permitting the holder bank "to apply . . . all property . . . of the undersigned" toward the satisfaction thereof was held insufficient to revive the husband's debt, even though, within the statu-

"This note (with 1 others) is given for John Deere Tractor and I hereby agree that title thereto, and to all repairs and extra parts furnished therefor, shall remain in the payee, owner or holder of this note until this and all other notes given therefor shall have been paid in money. If at any time he shall deem himself insecure, or if said property or any part thereof is levied upon, or the undersigned attempts to sell or remove the same, then the owner or holder thereof may declare this and every other such note due, and may take possession of said property, and sell the same at public or private sale, with or without notice, pay all expenses incurred thereby and apply the net proceeds on this and other notes given for the purchase price thereof. In consideration of the use of said property, I agree to pay any balance remaining unpaid on this or any other such note after the net proceeds of such sale are applied, and if said property, or any part thereof, shall be lost, damaged or destroyed I shall not on that account be entitled to a rescission of this contract or abatement in price. . . ."

10 See post, p. 42.

tory period, the payee did apply property of the wife, co-maker of the note, toward partial satisfaction.

One slight change in the Negotiable Instruments Act was made during the recent session. It permits the drawee bank to which a check is presented to wait until the end of the next business day following the day of presentation before deciding whether or not to pay the same.\textsuperscript{12}

SALES

Of novelty only from a factual point of view is the case of \textit{Jones v. Jos. Greenspon's Son Pipe Corporation}.\textsuperscript{13} The court there held that, by reason of a conditional sales contract, title to certain casing pipe for lining an oil well remained in the seller even though the piping had been embedded and cemented into the hole of an oil well with one hundred sacks of cement! Default by the vendee in payment of the note, particularly since the same contained a clear provision entitling the vendor to enter the premises and remove the property, was held to justify the vendor's conduct in so doing. Although the vendor had to blast the well in order to regain the property, it was held still to be within the right conferred by the conditional sales contract.

Construction and application was given to the Illinois Bulk Sales Act\textsuperscript{14} in the federal court decision in \textit{United States v. Goldblatt Brothers, Incorporated}.\textsuperscript{15} It appeared therein that, at the time the vendee purchased a business in bulk, the vendor furnished a list of creditors, all of whom were properly notified. Omitted from the list of creditors was the United States government to whom vendor owed certain income and social security taxes. The vendee was aware of the probable federal tax liability but gave no notice to the government on the theory it was not a creditor of the class contemplated by the statute. In upholding the claim of the government, the federal court held that the language of the Illinois act was sufficiently broad to include creditors of every class without limitation and was not restricted to

\textsuperscript{12} Laws 1943, p.-, H.B. No. 744; Ill. Rev. Stat. 1943, Ch. 98, § 207a.
\textsuperscript{13} 381 Ill. 615, 46 N.E. (2d) 67 (1943), reversing 313 Ill. App. 651, 40 N.E. (2d) 561 (1942).
\textsuperscript{14} Ill. Rev. Stat. 1943, Ch. 121\textsuperscript{1/2}, § 78 et seq.
\textsuperscript{15} 128 F. (2d) 576 (1942). Major, J., wrote a dissenting opinion.
those whose claims were liquidated as to amount. Dissent
was noted\(^{16}\) on the ground that the tax claim was contingent
and unliquidated until assessment was made upon a return
not due until the 15th of March following the sale, hence the
liability could not be said to be an "amount owing" as that
term was used in the statute.\(^{17}\) It would seem that there is
merit in such contention.

QUASI CONTRACTS

One case decided during the past year raised an inter-
esting question concerning the nature of quasi contractual
liability.\(^{18}\) It appeared therein that one Hancock, a civil
engineer, rendered professional services to the defendant
village in connection with the proposed construction of a
sewerage system. The proposed improvement was to be
made pursuant to the statutory authority of Section 62 of the
Cities and Villages Act.\(^{19}\) The statute provided for referen-
dum to the voters if a petition was filed in apt time. The
vote taken was adverse to the proposed plan and the village
therefore abandoned it. Hancock then sought to recover the
fair and reasonable value of his services. The village de-
fended on the ground that its debt liability already exceeded
the constitutional limitation of five per cent. of the value of
the taxable property,\(^{20}\) hence the contract under which
Hancock claimed was illegal. Plaintiff insisted that, since
the liability of the village did not arise out of contract but
was based on an obligation to make restitution imposed by
law, it was not within the constitutional limitation. The court
distinguished contract, tort, and quasi contractual liability
and held that although Hancock's claim did not arise out of
contract it was not involuntary as would be the case of tort
liability, hence recovery was denied. The decision follows
that of the Supreme Court of the United States in City of
Litchfield v. Ballou.\(^{21}\) The result seems justified in view of

\(^{16}\) In support thereof, the dissenting judge cited Superior Plating Works v. Art
Metal Crafts Co., 218 Ill. App. 148 (1920); Lawndale S. & D. Co. v. West Side
T. & S. Bk, 207 Ill. App. 3 (1917).
\(^{17}\) Ill. Rev. Stat. 1943, Ch. 121\(\frac{1}{2}\), § 78.
\(^{19}\) Ill. Rev. Stat. 1943, Ch. 24, §§ 62-1 to 62-12.
\(^{20}\) Ill. Const. 1870, Art. IX, § 12.
\(^{21}\) 114 U. S. 190, 5 S. Ct. 820, 29 L. Ed. 132 (1885).
the public policy involved in the imposition of debt limitations upon municipal corporations such as the one here in question.

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

The surprising decision in Werner v. Illinois Central Railroad Company,\(^1\) which limited the city courts to the trial of civil causes arising in the city, apparently motivated the legislature to amend the statute fixing the jurisdiction of such courts.\(^2\) They are now declared to possess true concurrent jurisdiction with the circuit courts, even to the point of trying felony cases which may be certified to them for disposition. They have also been given jurisdiction over petitions, by residents, for change of name.\(^3\)

Comment is made elsewhere\(^4\) of an unsuccessful attempt to make the former action of trover available to recover damages for the appropriation of a list of customers' names and addresses. The expansion of existing legal remedies was deemed not to be within the province of the courts at this late date, even though such remedies had been originally developed there. The scope of judicial action in statutory proceedings, however, may be as broad or as narrow as the legislature may fix, within constitutional limits. In the case of proceedings to revoke a license granted under the Dental Practice Act,\(^5\) the court's power is expressly ex-

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4 See post, p. 74.
tended to cover review of questions of law or fact subject to the limitation that such questions be adequately preserved by a motion for rehearing filed with the administrative body. Since the scope of this statutory certiorari proceeding is quite broad, the Supreme Court held in *Dubin v. Department of Registration and Education* that the trial court must indicate, in its judgment, some one or more of the grounds assigned in such motion as the basis for quashing the writ or the return thereon. This was deemed essential as otherwise jurisdiction might appear to be lacking, since without this it could seem as though the trial court passed on the matter by way of trial de novo, a method clearly not intended.

**REMEDIES IN EQUITY**

Two of the three cases on the use of equitable remedies deemed important to mention in this year's survey merely reinforce traditional views on frequently recurring problems. A persistent effort has been made through the years to induce the courts to extend the remedy of injunction to cases of libel and slander. A steadfast refusal has been the result in most states where the situation is unaffected by statutory provisions. In *Gariepy v. Springer* the plaintiff, a lawyer, sought relief against the circulation of allegedly false and scandalous matter which he claimed defendant was sending to plaintiff's clients, friends, and associates. The complaint alleged malice and that the acts of the defendant were directly and seriously injurious to the plaintiff's practice. The Appellate Court held that equity would not enjoin the threatened publication of a libel, except in cases involving conspiracy, intimidation or coercion. The case does not discuss the basis for these exceptions but relies upon the authoritative texts for the rule. The rule has been said to be founded on traditional views as to freedom of speech and the desirability of having a jury determine the issues in these cases. The unfortunate fact is that the

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7 380 Ill. 57, 43 N.E. (2d) 554 (1942).  
8 318 Ill. App. 523, 48 N.E. (2d) 572 (1943).  
10 Pound, Equitable Relief Against Defamation and Injuries to Personality, 29 Harv. L. Rev. 640 (1916).
remedy at law in libel and slander cases is usually grossly inadequate. This consideration raises the question whether a careful weighing of values might not indicate the desirability of relaxing so strict a rule in some cases.

The problems arising out of the attempted use of equitable remedies to enforce the criminal law were considered by the Appellate Court in *People ex rel. Barrett v. Fritz.* In this case the Attorney General filed a complaint against more than thirteen hundred persons who were allegedly violating the gambling laws of the state in various ways. Injunctive relief was asked against three groups of defendants, to-wit: persons who were associated with horse-racing in various ways; persons who operated gambling houses and establishments; and persons who operated slot machines and similar devices. The complaint was filed in the Circuit Court of St. Clair County but the defendants named in the first two groups were drawn from all parts of the state. The activities of these defendants were alleged to constitute public nuisances. The chancellor granted injunctive relief, but this decree was reversed and the cause was remanded with directions to dismiss the complaint. The Appellate Court remarked that the Civil Practice Act had not abolished underlying principles of equity practice, but instead had recognized marked divisions between law and equity. The "public nuisance" theory could not support a decree, since it was merely the activities of the several defendants and not the use of specific property which was involved. Moreover, the complaint was held to be multifarious inasmuch as no conspiracy was alleged to exist between the various classes of defendants.

The court also relied upon the old principle that equity will not take jurisdiction to enforce the criminal law. It may enjoin where the fact that the acts threatened constitute a crime is merely incidental, but equity jurisdiction must exist independently. The court believed the remedy at law to be adequate and said that the mere fact that it cost time, money, or effort to enforce the criminal law would not support a claim that adequate relief could not be granted at law. The court further held that the possibility that many

persons will be likely to violate the law and many suits will thus be required to enforce it was not enough to warrant relief by injunction.\(^\text{12}\)

The third case, that of *Campbell v. Campbell*,\(^\text{13}\) involved a rather unusual application of the remedy of sequestration. The will therein concerned bequeathed property to the testator’s widow for life and upon her death to the testator’s brothers and sisters “then living,” the remaindermen to have an interest only in the proceeds from a sale of the property after the death of the widow. The widow renounced the will and filed a complaint to partition wherein she requested the appointment of a trustee to hold and manage the proceeds of sale for the contingent remaindermen. On appeal, the Supreme Court held that the remainders were contingent and denied partition inasmuch as the remaindermen had no interest in the property but only in the proceeds. The court therefore directed that a trustee be appointed to hold one-half of the property or its proceeds and to manage the same until the death of the widow. The case is also of interest on the question of the acceleration of remainders upon renunciation of the will by the surviving spouse.\(^\text{14}\)

Use of the writ of ne exeat in connection with divorce proceedings depends solely upon statutory authority rather than on general equitable principles.\(^\text{15}\) As a consequence, full compliance with statutory requirements is essential according to *Andersen v. Andersen*,\(^\text{16}\) which quashed such a writ when it appeared that the plaintiff, with judicial permission, had merely filed a personal bond of limited amount without sureties. The discretion granted the chancellor in the case of taking bond upon the issuance of an injunction\(^\text{17}\) was found to be lacking in case of ne exeat writs, and the statute relative thereto was treated as being mandatory in its nature.

One legislative change in the law may be mentioned.

\(^\text{12}\) On this point, the court relied upon *People v. Universal Chiropractors’ Ass’n*, 302 Ill. 228, 134 N.E. 4 (1922).
\(^\text{13}\) 380 Ill. 22, 42 N.E. (2d) 547 (1942).
\(^\text{14}\) See a capable discussion on this and other points involved in the case in 37 Ill. L. Rev. 277.
\(^\text{15}\) Ill. Rev. Stat. 1943, Ch. 97, § 1.
\(^\text{16}\) 315 Ill. App. 360, 43 N.E. (2d) 176 (1942), noted in 21 CHICAGO-KENT LAW REVIEW 123.
\(^\text{17}\) Ill. Rev. Stat. 1943, Ch. 69, § 9.
The statute dealing with the issuance of injunctions has been amended by deleting the language which purported to confer power on a master in chancery to issue the same or to approve an injunction bond. By so doing, the legislature took cognizance of the decision in *Bottom v. City of Edwardsville* which had declared Section 2 of the statute unconstitutional as being an attempt to confer judicial power on a ministerial officer.

**PREPARATION OF PLEADINGS**

Three decisions concerning venue or the manner of acquiring jurisdiction over the defendant are of significance. Reliance was placed, in *Consolidated Gasoline Company v. Lexow* on Section 7 of the Civil Practice Act to justify plaintiff's action in bringing suit in St. Clair County to reform a written lease even though all the defendants resided in Madison County. A motion to dismiss for lack of jurisdiction was held to admit the truth of plaintiff's allegation that the lease transaction had occurred partly in St. Clair and partly in Madison County, hence established the fact that proper venue existed. The argument that it was physically and legally impossible for a lease, or any other contract, to be made partly in one county and partly in another, since until full execution and delivery the document was nugatory, was rejected. A common sense, rather than a legal, definition has thus been given to the words "some part thereof" as found in the venue provision.

Jurisdiction over a non-resident motorist, in causes growing out of his use of the highways of this state, may be obtained in the manner provided by Section 20a of the Motor Vehicles Act. Though it was held in an earlier case that such provision applied to corporate users as well as individ-

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19 308 Ill. 63, 139 N.E. 5 (1923).
21 Ill. Rev. Stat. 1943, Ch. 110, § 131, directs that every civil action shall be commenced in the county "... in which the transaction or some part thereof occurred out of which the cause of action arose."
22 The court found that the motion actually conferred jurisdiction over the parties because signed by the attorney for the defendants instead of being pleaded in person. See Pratt v. Harris, 295 Ill. 504, 129 N.E. 277 (1920); McGuire v. Outdoor Life Pub. Co., 311 Ill. App. 267, 35 N.E. (2d) 817 (1941).
no interpretation had been given in this state to the words "use and operation . . . over the highways" prior to the decision in *Brauer Machine and Supply Company v. Parkhill Truck Company.*\(^{25}\) It was held therein that service could only be had in the manner provided by statute if the cause of action grew out of conduct, or omission thereof, actually occurring on the highway, hence an attempt to secure jurisdiction in a case involving negligence in unloading a motor vehicle at rest on private property was held improper. The mere fact that the state highway had been used by the non-resident in bringing the loaded truck to the place of unloading was held to be of no consequence.

Mistaken identity led the trial court into error, in *Reisman v. Central Manufacturing District Bank,*\(^{26}\) when a decree fixing a stockholder's liability was predicated upon service of summons upon one having the same name as, but not in fact, the defendant stockholder. When the error was discovered some five years later, an attempt to bring in the real defendant was contested on the ground that no authority existed, at that late date, to permit the issuance of alias or pluries summons or to vacate the earlier decree. It was held, however, that the decision in *Trupp v. First Englewood State Bank*\(^{27}\) was not applicable to the situation presented; that jurisdiction might be restored by stipulation to vacate the original decree;\(^{28}\) and that, until process had been served on the real defendant, alias and pluries summons might be issued as required. The tactics of the real defendant were criticised as an endeavor to create a fiction by which the real owner of the stock would, on a pure technicality, be relieved from a liability that he did not disavow.

Nothing of significance has been decided on the subject of the content to be given to the complaint or answer. It


\(^{25}\) 318 Ill. App. 56, 47 N.E. (2d) 521 (1943), affirmed 383 Ill. 569, 50 N.E. (2d) 836 (1943).

\(^{26}\) 316 Ill. App. 371, 45 N.E. (2d) 90 (1942).

\(^{27}\) 307 Ill. App. 258, 30 N.E. (2d) 198 (1940), noted in 20 Chicago-Kent Law Review 68.

\(^{28}\) It appeared that such a stipulation was entered into between the plaintiff's attorney and the person originally served with summons consenting to the vacation of the original erroneous decree. See Humphreyville v. Culver, Page, Hoyne & Co., 73 Ill. 465 (1874).
should be remembered, however, that the function of a counterclaim, like the former cross-bill in equity, \(^2\) is essentially offensive in nature, hence it should be used only where the defendant seeks affirmative relief of some sort. If defendant merely desires to defeat the plaintiff's cause of action, the defensive answer will suffice. A defendant seeking a different construction of a will than that sought by the plaintiff should, according to Warren v. McRoberts, \(^3\) use a counterclaim, though it was there held to be harmless error to strike a counterclaim when the court found that the construction desired by defendant was not legally proper.

Motion practice now seems to be fairly well understood, judging from the absence of decisions commenting on the use of the code substitute for the demurrer. Notice may be made, however, of the decision in People, for Use of Pope County, v. Shetler\(^1\) wherein the defendant moved to dismiss the complaint on the ground that there was another action pending in the same court involving the same parties and the same subject matter. His motion apparently failed to refer to such other cause by case number, docket and page number, or other identifying factors, and no affidavit was annexed to the motion supplying such particulars. \(^2\) It was, therefore, held error to grant such motion, apparently on the theory that without such information the trial court could not be expected to take judicial notice of its own records. At about the same time, the Illinois Supreme Court, in Blyman v. Shelby Loan & Trust Company, \(^3\) specifically took judicial notice of the pendency of another cause before it as reason for refusing to consolidate the appeals in two other cases. Since one or the other of these decisions is necessarily erroneous, the better view would seem to be that followed by the Supreme Court. \(^4\)

Where error does occur in the drafting of pleadings, the practitioner is usually able to avoid the effect thereof by

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\(^2\) Daly v. Daly, 299 Ill. 268, 132 N.E. 495 (1921).
\(^3\) 315 Ill. App. 499, 43 N.E. (2d) 401 (1942).
\(^1\) 318 Ill. App. 279, 47 N.E. (2d) 732 (1943).
\(^2\) See Ill. Rev. Stat. 1943, Ch. 110 § 172(1), for the use of affidavits to supply information not of record.
\(^3\) 382 Ill. 415, 47 N.E. (2d) 706 (1943).
amendment. He should, however, recognize the limitations placed on the right to amend by two recent decisions. While Section 46(2) of the Civil Practice Act was enacted for the purpose of permitting plaintiff to amend a complaint so as to more correctly state the cause of action intended to be asserted without being faced with the defense of the statute of limitations, such right to amend was qualified by the decision in Mann v. City of Chicago and held to be inapplicable where the amendment, filed after the statute had run, sought to add an additional party plaintiff. No quarrel with the decision would exist if the additional party so sought to be added was attempting to assert an independent, though related, claim to that set forth in the original complaint. Its application to the facts therein set forth, however, seems erroneous since the additional party was a joint owner of the demand originally asserted, hence should have been accorded the benefit of Section 26 of the Act. Section 46(2) also purports to authorize wide latitude in permitting amendment both before and after trial, and even after judgment, in order that controversies might be speedily and finally determined on the merits. A most decided limitation was placed thereon, however, by the decision in Bollaert v. Kankakee Tile & Brick Company which holds that amendment after judgment in the trial court is possible only if accomplished before jurisdiction of the cause is lost by the filing of notice of appeal, even though the purpose of the amendment is to make the pleadings conform to the proof. Earlier decisions treating other parts of the same section as unconstitutional would tend to indicate that inherent weakness is present in that part thereof which permits amendment in the reviewing court after appeal has been taken. Amendment, then, to be effective should occur before judgment.

37 Ill. Rev. Stat. 1943, Ch. 110, § 150, permits the adding of new parties, or dropping of misjoined parties, at any stage of the case “as the ends of justice may require.”
38 317 Ill. App. 120, 45 N.E. (2d) 506 (1942), noted in 21 CHICAGO-KENT LAW REVIEW 244.
40 If presented in apt time, the rule would still seem to be that the granting of the right to amend is discretionary, and upon review such discretion will not be disturbed except in cases of clear abuse: McGlaughlin v. Pickerel, 381 Ill. 574, 46 N.E. (2d) 368 (1943).
Comment appears elsewhere on the action of the Supreme Court declaring unconstitutional the recent amendment regarding waiver of trial by jury in criminal cases.\textsuperscript{41} If such statute was improper because, by it, the legislature invaded the province of the courts, it would be expected that the same result would have been achieved when the court was asked to pass on the validity of Section 64(1) of the Civil Practice Act\textsuperscript{42} purporting to regulate trial by jury in civil cases. It was, nevertheless, held differently, in Stephens v. Kasten,\textsuperscript{43} where the court sustained the statute but decided that the action of the trial judge in rejecting defendant's belated\textsuperscript{44} demand for trial by jury was an abuse of discretion. Of somewhat similar nature was the decision in Gariepy v. Springer\textsuperscript{45} wherein defendant's demand was not made until plaintiff was given leave to amend his equity proceeding by adding a count in law. The trial court had there deemed the request came too late on the theory that since defendant knew, at the time of filing appearance, that plaintiff might ask for and obtain leave to file additional counts he should have then made the demand even though the status of the litigation would not then have warranted it. It was held that the court should have granted defendant time to file a jury demand when permitting plaintiff to amend his complaint.

A proceeding to contest an election, being neither a suit at law nor a proceeding in chancery, is \textit{sui generis}, though at one time it was provided that the case should be treated as one in chancery.\textsuperscript{46} The present statute, adopted in 1935, provides that evidence may be taken therein "in the same manner and upon like notice as in other civil cases."\textsuperscript{47} It was, therefore, held in Flake v. Pretzel\textsuperscript{48} that the hearing

\textsuperscript{41} See post, p. 39.
\textsuperscript{42} Ill. Rev. Stat. 1943, Ch. 110, § 188(1).
\textsuperscript{43} 323 Ill. 127, 48 N.E. (2d) 509 (1943).
\textsuperscript{44} It appeared that the defense was originally undertaken by the attorneys for defendant's insurer who neglected to demand a jury trial at time of filing appearance. Later, defendant through counsel of his own choosing sought to amend his defensive pleadings and then moved for an extension of time in which to file a jury demand.
\textsuperscript{45} 318 Ill. App. 523, 48 N.E. (2d) 572 (1943).
\textsuperscript{46} Cahill Ill. Rev. Stat. 1933, Ch. 46, § 128.
\textsuperscript{47} Ill. Rev. Stat. 1943, Ch. 46, § 23-22.
\textsuperscript{48} 381 Ill. 498, 46 N.E. (2d) 375 (1943).
must be conducted by the court, and reference of the cause to a master in chancery or special commissioner to take testimony and render a report would be a violation of the litigant's rights. Though a special commission may issue to count the ballots, it was deemed essential that the judge preside over the hearing in order to give such election contests the preferential and expeditious treatment that is required by law.

The plaintiff's ability to force the trial court to order a nonsuit by deliberately absenting himself from trial was involved in *Flasisig v. Newman* where it was held that his failure to comply with Section 52 of the Civil Practice Act justified the court in entering a judgment on the merits in favor of the defendant. Though the statute merely purports to regulate the plaintiff's conduct when applying for voluntary dismissal without prejudice, the court seemed to feel the same rule should be applied when plaintiff deliberately stays away so as not to be compelled to seek such relief. Similar force was given, in *Marks v. Thos. Cook & Sons-Wagon-Lits, Incorporated*, to an order of a Federal district court entered pursuant to Rule 12(e) of that court dismissing a suit for plaintiff's disregard of an order directing the filing of a bill of particulars. Holding that under the rules thereof the order of dismissal was an adjudication on the merits of the case, the local court concluded that no further litigation could be maintained on the same cause of action even though, in fact, no trial of the merits had been granted. The litigant who chooses the forum for the trial of his case must, then, be expected to prosecute the same effectively therein or stand to lose his claim.

An evidence question of some interest arose in the case of *People v. Wells* wherein the defendant was charged with the forgery of a check. The prosecution introduced in evi-

49 Talbott v. Thompson, 350 Ill. 86, 182 N.E. 784 (1932).
51 317 Ill. App. 635, 47 N.E. (2d) 527 (1943), noted in 21 CHICAGO-KENT LAW REVIEW 348.
52 Ill. Rev. Stat. 1943, Ch. 110, § 176.
54 28 U. S. C. A. following § 723c.
56 380 Ill. 347, 44 N.E. (2d) 32 (1942).
dence, over defendant's objection, certain photographs made on a recordak machine of other checks purported to have been forged by the defendant at or about the time of the forgery charged in the indictment. Such proof was offered to show the criminal intention in making and issuing the check in question. Although recordak machines have been in constant use for a considerable period of time, particularly in banking circles, it was held that their products were inadmissible as being secondary rather than primary evidence. Had it been shown that the original checks were unobtainable, the photographic copies would, of course, have been admissible provided sufficient foundation was laid. The court was, no doubt, right in applying old rules to new processes, but the practical and accurate records made by such machines have made it possible for modern business to bring its "shop books" up to date. It would seem time, then, for the legislature to amend the evidence rules to conform to current practices. Such, at least, is the case in the federal courts where evidence of this character is treated as being primary rather than secondary. A step has been made in that direction, for a recent statute enacted in Illinois permits public officials to keep their public records in such fashion.

Constitutional guarantees against illegal search and seizure were the deciding factor in People v. Martin where it was held to be error to permit witnesses to testify, over objection, as to information learned by the prosecution as the result of such a search and seizure. It could well be argued that a distinction could be drawn between the illegally seized records and the direct testimony of witnesses whose existence and potential evidence was discovered as a result thereof. The court, however, made no such distinction but said that as the information was not learned from independent sources it could not be used as a basis for conviction.

But one change was made in the Evidence Act by the legislature. The period of notice required for the taking of

60 382 Ill. 192, 46 N.E. (2d) 997 (1943), noted in 21 Chicago-Kent Law Review 345.
depositions depends somewhat upon the distance between the place of holding court and the place of taking the deposition. One additional day's notice was heretofore required for each fifty miles, but the speed of modern travel is recognized in an amendment making the extra allowance necessary only for every four hundred miles.

According to common law principles, only one judgment could be pronounced in a law action even though the plaintiff's declaration may have presented several claims. Modification of this concept was provided by Section 50(1) of the Civil Practice Act which permits more than one judgment where required by the necessities of the case. A too literal reading of this section, however, appears to have lead the court, in Shaw v. Courtney, into the error of sanctioning the apportionment of damages and the imposition of separate judgments against several defendants joined as joint tort-feasors. It would seem as though the legislative purpose was to permit the use of separate judgments only when the plaintiff presented truly separate, though related, demands against the several defendants.

Where a decretal order is to be drafted after the trial judge has orally indicated his decision, it is customary for the attorney preparing the same to submit a copy thereof to his opponent with notice of motion giving the time at which the original will be presented for signature. It was held, in Mecartney v. Hale, that such notice need not comply with rule of court as to time and manner of service, particularly where the order conforms to the judge's announcement as to the disposition of the cause. The notice referred to in the rule was deemed to be necessary only when a hearing of some kind was sought.

By abolishing terms of court and substituting a thirty-day period from date of judgment before finality attaches thereto, the legislature probably intended to alleviate the

64 Ill. Rev. Stat. 1943, Ch. 110, § 174(1).
65 317 Ill. App. 422, 46 N.E. (2d) 170 (1943), noted in 21 CHICAGO-KENT LAW REVIEW 249.
67 Ill. Rev. Stat. 1943, Ch. 77, § 82.
harshness of the rule found in *Cramer v. Illinois Commercial Men’s Association* and similar cases. By abolishing the writ of error coram nobis and substituting a motion in lieu thereof, the legislature probably intended to simplify the method by which the trial court might correct its own errors of fact in rendering judgment. The confusion generated by such amendments, however, has not yet been allayed. Though held inapplicable to secure review of decrees in chancery, a motion of the type prescribed was given the effect of a complaint in chancery in *Nikola v. Campus Towers Apartment Building Corporation*. A simple petition to vacate a judgment, such as would be used during the thirty-day period, was likewise held sufficient, in *Jerome v. 5019-21 Quincy Street Building Corporation*, to secure relief after the thirty-day period had expired from a default judgment erroneously entered because the sheriff failed to return the summons in apt time. A dissent thereto was noted on the ground that the error was one appearing on the face of the record and, presumably, known to the trial court so not one which could be raised by such a motion but which could be corrected only by appeal.

**DAMAGES**

The much litigated case of *Ritter v. Ritter* has reached an end. It had involved the question of the right of a successful plaintiff to maintain a subsequent action to recover, as damages, the fees paid to his attorney for the conduct of the prior suit. The Supreme Court, following an exhaustive review of the cases bearing on the subject, has now concluded that it is better that the defendant should be permitted to present any defense he may have or should deem

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68 260 Ill. 516, 103 N.E. 459 (1913).
69 Ill. Rev. Stat. 1943, Ch. 110, § 196.
70 Frank v. Salomon, 376 Ill. 439, 34 N.E. (2d) 424 (1941), noted in 19 CHICAGO-KENT LAW REVIEW 372.
71 303 Ill. App. 516, 25 N.E. (2d) 582 (1940), noted in 19 CHICAGO-KENT LAW REVIEW 61.
72 317 Ill. App. 335, 45 N.E. (2d) 878 (1943).
expedient rather than to be compelled to abandon the same to avoid the risk of subjecting himself to a second suit based upon his alleged wrongful conduct in interposing such defense. The defendant's willful, malicious, fraudulent, or intentional conduct in so doing will not, therefore, expose him to further liability. Since the adoption of the Civil Practice Act, however, such conduct will not go unpunished for, by the provisions of Section 41 thereof, the interposition of defenses "made without reasonable cause" may subject the party to the payment of such "reasonable expenses" as may be incurred by the other party in disproving the same. It has been suggested that "reasonable expenses" should include attorney's fees as well as other costs, and should be taxed in the initial litigation rather than in a separate suit.

Though breach of contract may induce a loss of anticipated profits, recovery thereof is denied if the claim be regarded as too remote, contingent, or speculative, since such is regarded as not in the contemplation of the parties. An unusual application was given to this rule in *Hippard Coal Company v. Illinois Power & Light Corporation* wherein a power consumer claimed damages from a public utility on the ground the latter had failed to deliver electrical energy of sufficient voltage to operate the mining machinery adequately thereby causing a loss in production with a consequent loss of profits. Relying on analogies furnished by cases in which the defendant delayed delivery of machinery or failed to repair existing equipment promptly, the court came to the conclusion that the increase in cost of production and the decrease in volume of output, though supported by testimony, represented claims too speculative in nature hence were not recoverable. Impetus may have been given to the decision by the fact that the court could find no clear undertaking on the part of the utility to provide power of the specified voltage, but, with cost accounting what it is, it would seem as if the items presented were founded on fact and not merely on guesswork, hence should have been allowed as

76 Ill. Rev. Stat. 1943, Ch. 110, § 165.
77 See Illinois Civil Practice Act Annotated (Chicago, 1933), 88, and cases there cited.
78 Frazer v. Smith, 60 Ill. 145 (1871).
elements of damage, assuming that liability itself was established.

Under Section 40(4) of the Illinois Civil Practice Act a defendant may, if he so wishes, narrow the issues in litigation to the single question of the amount of damages by a pleading stating his desire to contest only thereon. According to the holding in Edwards v. Ely, the same result may be achieved by defendant's action at the trial in admitting liability or fault and questioning the extent of the damages. If he does so, then it is regarded as error to submit to the jury a form of verdict permitting a finding of not guilty. On the theory that for every invasion of a right the law grants at least nominal damages, such an admission by defendant would require a verdict of guilty, carrying with it the costs of suit, even though the plaintiff should be unable to convince the court or jury that substantial damages had been incurred. Any other result, the court indicated, would be "obviously inequitable."

**APPEAL AND APPELLATE PROCEDURE**

Direct appeal to the Illinois Supreme Court is permissible in cases in which the validity of a municipal ordinance is involved and in which the trial judge certifies that in his opinion the public interest so requires. Upon superficial reading of the pertinent statute, it would seem that not only must validity of an ordinance be involved but that, in addition, a judicial certificate that "public interest" is concerned is required to support direct appeal. It was held, in City of Bloomington v. Wirrick, however, that such requirement is divisible, no certificate being necessary where constitutional questions have been properly raised, but required where the ordinance is attacked on other grounds. Objection to a belated attempt to file such a certificate was,  

80 Ill. Rev. Stat. 1943, Ch. 110, § 164(4).
81 317 Ill. App. 599, 47 N.E. (2d) 344 (1943).
83 317 Ill. App. 599 at 606, 47 N.E. (2d) 344 at 347.
84 Ill. Rev. Stat. 1943, Ch. 110, § 199(1).
85 381 Ill. 347, 45 N.E. (2d) 852 (1943).
86 Where required, it must be filed in the Supreme Court within the time for filing the record: First Nat. Bank of Woodlawn v. Watkins, 370 Ill. 445, 19 N.E. (2d) 336 (1939).
therefore, rejected since the case was one in which no cer-
tificate was required. Earlier cases 87 were distinguished on
the ground that the questions there involved concerned inter-
pretation rather than validity of ordinances.

Though the right to combine several claims in one pro-
ceeding is conferred by statute, 88 the fact of such a combi-
nation has in no way enlarged the jurisdiction of the review-
ing courts, according to Borman v. Oetzell, 89 so the prac-
titioner must be careful to prosecute separate appeals if, by
chance, a different method of review applies to each of the
separate demands so joined. The court also indicated therein
that, since the original record could not be in two places at
one time, a separate record or a certified copy thereof should
be obtained for use in each of the appropriate reviewing
courts. As the separate claims might lead to separate judg-
ments in the trial court, 90 the practitioner should also be
careful to see that the time of appeal does not run on one
of the claims, even though the trial court may have reserved
jurisdiction over the others.

The conclusiveness of the order of the Appellate Court
on an appeal from an order granting a temporary injunc-
tion is vouchsafed by Section 78 of the Civil Practice Act 91
which expressly states that: “No appeal shall be taken from
the order entered by said Appellate Court on any such ap-
peal.” An attempt to confer jurisdiction on the Supreme
Court by granting leave to appeal was, therefore, held im-
provident in Naprawa v. Chicago Flat Janitors’ Union, Local
No. 1. 92

Care should be observed in drafting the notice of appeal
required by Section 74 of the Civil Practice Act 93 in order
that the reviewing court may see it has jurisdiction to enter-
tain the cause. It should, generally, show that the order ap-
pealed from is a final order, but in Luner v. Gelles 94 it was

87 City of Litchfield v. Hart, 372 Ill. 457, 24 N.E. (2d) 345 (1939); Village of Lake
Zurich v. Deschauer, 310 Ill. 209, 141 N.E. 761 (1923).
89 382 Ill. 110, 46 N.E. (2d) 914 (1943), noted in 21 CHICAGO-KENT LAW REVIEW 332.
90 Ill. Rev. Stat. 1943, Ch. 110, § 174(1).
92 382 Ill. 124, 46 N.E. (2d) 27 (1943).
93 Ill. Rev. Stat. 1943, Ch. 110, § 198.
94 314 Ill. App. 659, 42 N.E. (2d) 313 (1942), noted in 21 CHICAGO-KENT LAW
REVIEW 97.
held that a notice of appeal stating that review was sought of an order denying a motion for a new trial was sufficient, despite the fact that such an order is not subject to review, because the court considered that appellant's obvious intention was to appeal from the final judgment rendered subsequent to the denial of such motion. Liberal construction was deemed necessary to avoid dismissing an appeal for error of such trivial nature. Of similar effect is Doner v. Phoenix Joint Stock Land Bank of Kansas City where it was held that the appeal was taken from the order dismissing the suit rather than from the earlier order striking the plaintiff's complaint. Though plaintiff neither asked for leave to amend nor signified an election to stand by his complaint, he was treated as though he had chosen the latter alternative thereby creating a specific issue before the reviewing court.

A lawyer who had been found disqualified, by reason of interest, from representing the parties to a pending case was denied the right to appeal from the order restraining him from service as such attorney, in Almon v. American Carloading Corporation. The decision was predicated on the grounds that such order was not a final order within the meaning of Section 77, nor an interlocutory one within Section 78 of the Civil Practice Act, and also because he was deemed to lack such an interest in the merits of the proceeding as would be required to support an appeal.

The finality of the order appealed from was also involved in Walters v. Mercantile National Bank of Chicago, wherein it was held that no appeal would lie from a decree which construed one paragraph of a will but reserved jurisdiction of the cause for the purpose of construing other paragraphs thereof upon which the parties were at issue. Despite the fact that Section 50 of the Civil Practice Act purports to authorize the trial court to enter several separate judgments or decrees where necessary, the court held such liberality did not extend to the point of sanctioning piecemeal

95 381 Ill. 106, 45 N.E. (2d) 20 (1942).
98 380 Ill. 477, 44 N.E. (2d) 429 (1942).
disposition of a cause since litigation might thereby be prolonged indefinitely. Inasmuch as the issues concerning other portions of the will had already been settled, the court's position might be regarded as a reasonable one. It should be noted, however, that under the prior practice successive decrees in will construction cases were not unusual. The decision might, therefore, be regarded as an unfortunate one if it was intended to prevent any appeal until all questions of construction had arisen and had been determined, or was treated as making the first decree res adjudicata on all questions regardless whether known or unknown at the time thereof.

The period in which an appeal may be taken begins to run "from the entry of the order, decree, judgment or other determination complained of," according to Section 76(1) of the Civil Practice Act. Just what constituted "entry" of the order was the point involved in Snook v. Shaw where the court determined that, insofar as equity decrees are concerned, entry does not occur until the decree is drawn up in written form, is approved and signed by the court and enrolled, hence an appeal within the allotted period from that date was taken in apt time. In thus carrying forward what was the recognized equity practice prior to the adoption of the Civil Practice Act, the court is indirectly hinting that the term "entry" as applied to law judgments will probably be given its earlier connotation, to-wit: effective as soon as orally uttered by the judge.

A question arose, in Lukas v. Lukas, as to whether or not the trial court had jurisdiction, after expiration of the time allowed by rule of court, to grant an extension of time for the purpose of preparing and filing the transcript of pro-

2 Ill. Rev. Stat. 1943, Ch. 110, § 200(1).
4 Hughes v. Washington, 65 Ill. 245 (1872); Horn v. Horn, 234 Ill. 268, 84 N.E. 904 (1908).
5 Chicago Great Western R. Co. v. Ashelford, 268 Ill. 87, 108 N.E. 761 (1915).
6 381 Ill. 429, 45 N.E. (2d) 869 (1949), noted in 21 CHICAGO-KENT LAW REVIEW 247. Wilson, J., dissented without opinion.
7 Ill. Rev. Stat. 1943, Ch. 110, § 259.36, fixes a fifty-day period after notice of appeal in which to file the report of proceedings.
ceedings. Holding that a nunc pro tunc order granting such extension, entered one week after the fifty-day period had expired, was invalid, the Supreme Court laid emphasis on the fact that orders granting extensions must, by reason of language contained in the rule, be entered before the allotted period has expired. It further held that the mere presentation of such report to the judge was not enough but that the same must be filed in the trial court if it is to become a part of the record.

Attention was called last year to the seemingly harsh decision by the Appellate Court in Swain v. Hoberg concerning the manner of presenting the essential data which should be contained in an appellate brief. The Supreme Court, reversing such decision, has now indicated that while formal compliance with the rule of court on that point is not difficult and should be observed, the penalty of dismissing the appeal for an infraction thereof is too severe. Presumably, the litigant hereafter will be subjected to an order striking his brief from the file unless the same wholly fails to inform the reviewing court as to the issues before it, in which case affirmance pro forma might be proper.

A motion to dismiss the appeal in People v. Barrett because appellant had filed no brief therein was denied when it appeared that such case reached the reviewing court upon petition for leave to appeal. Since the content of such petition is similar to that of a brief, it was held that no additional brief was necessary though the court thought that appellant might have conveienced it more by the filing of a formal brief.

Statements have appeared in a number of earlier cases to the effect that it is not proper appellate practice merely to refer in the brief to the questioned instructions by number, but that they should be set out in full therein. The Appellate Court for the First District, in Crisler v. Zahart,

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8 312 Ill. App. 610, 38 N.E. (2d) 966 (1942), noted in 20 CHICAGO-KENT LAW REVIEW 264.
9 Swain v. Hoberg, 380 Ill. 442, 44 N.E. (2d) 38 (1942).
11 383 Ill. 207, 46 N.E. (2d) 928 (1943).
12 Compare Ill. Rev. Stat. 1943, Ch. 110, § 259.29 with § 259.39.
13 See Zorger v. Hillman's, 287 Ill. App. 357, 4 N.E. (2d) 900 (1936), and cases there cited.
has now unanimously\textsuperscript{15} repudiated such statements and approves the view that reference to such instructions in the abstract of record is sufficient, so long as the error complained of be sufficiently pointed out in the brief.

**ENFORCEMENT OF JUDGMENTS**

A number of interesting problems came before the courts of Illinois during the past year dealing with the scope of the judgment order and the methods by which same may be made enforceable. For example, it is hoped that some light through the tangle created by the four-to-two decision in *Blakeslee's Storage Warehouses v. City of Chicago*,\textsuperscript{16} regarding interest on a judgment, may have been provided by the decision in *People ex rel. 1111 North La Salle Corporation v. City of Chicago*.\textsuperscript{17} It was there held that the claim for interest was an integral part of the judgment and was not barred from collection prior to the time when enforcement of the judgment itself was barred.\textsuperscript{18} The exceptional rule of the Blakeslee case was minimized by holding that the shorter statute of limitations would apply only where the principal amount of the judgment had been paid prior to the time when suit was instituted to collect the statutory interest thereon.\textsuperscript{19}

While the use of the action of garnishment has been limited, by *Ancateau v. Commercial Casualty Insurance Company*,\textsuperscript{20} to cases wherein the judgment is final,\textsuperscript{21} it has been expanded in another direction. In 1935, the legislature amended the statute to provide that attachment and garnishment proceedings might cover "a money claim, whether

\textsuperscript{15} The opinion appears to have been submitted to the judges of the other divisions of that court, who noted special concurrence therein. See 318 Ill. App. 220 at 223, 47 N.E. (2d) 542 at 544.
\textsuperscript{16} 369 Ill. 480, 17 N.E. (2d) 1 (1938), noted in 17 *CHICAGO-KENT LAW REVIEW* 189 and 18 *CHICAGO-KENT LAW REVIEW* 69.
\textsuperscript{17} 316 Ill. App. 66, 43 N.E. (2d) 691 (1942), noted in 21 *CHICAGO-KENT LAW REVIEW* 197.
\textsuperscript{18} Ill. Rev. Stat. 1943, Ch. 77, § 7, directs that every execution issued upon a judgment shall direct the collection of interest thereon.
\textsuperscript{19} Ill. Rev. Stat. 1943, Ch. 77, § 7, was recently amended to change the rate of interest from six per centum to five per centum: Laws 1943, p.—., H.B. No. 186.
\textsuperscript{20} 318 Ill. App. 553, 48 N.E. (2d) 440 (1943), noted post, p. 82.
\textsuperscript{21} The fact that an appeal was pending on the original judgment, even though the same did not operate as a supersedeas, was held sufficient to make the garnishment action therein premature despite the fact that the judgment creditor could have used execution to reach the judgment debtor's assets.
liquidated or unliquidated, and whether sounding in contract or tort. Such extension induced the court, in *Dunham v. Kauffman*, to hold that attachment and garnishment were now available as adjuncts to an equitable proceeding provided the same involved a "money claim." In so holding, the court negatived earlier cases which had held that an equitable attachment proceeding could not be maintained since, until judgment had been rendered and execution had been returned unsatisfied, the creditor had failed to demonstrate the inadequacy of his legal remedy.

In *Barrett v. Daly* the court decided that the 1941 amendment to Section 73 of the Civil Practice Act, providing for the use of citation proceedings in all courts of record, did not supersede Section 49 of the Chancery Act, but rather created an additional remedy for the enforcement of judgments. As a consequence, the judgment creditor is now provided with a choice of remedies against a debtor who has undertaken to conceal his assets, since he may pursue the newer citation method or use the older creditor's bill.

Challenge was directed, in *Bank of Edwardsville v. Raffaelle*, to the constitutionality of Section 14 of the Civil Practice Act which authorizes constructive service of process on a non-resident defendant in an action to revive a judgment or decree. It was claimed that such a proceeding was as much a personal action as the original case in which the judgment had been pronounced, hence constructive service of process on a person resident at the time of the original suit and personally served therein but who had since left the state was null and void. Deciding that a scire facias proceeding does not determine the obligations of defendant to plaintiff but rather raises issues as to whether an original

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23 319 Ill. App. 229, 48 N.E. (2d) 777 (1943), noted post, p. 80. Matchett, P. J., wrote a dissenting opinion.
24 See, for example, Miller v. Davidson, 8 Ill. (3 Gil.) 518 (1846); Phelps v. Foster, 18 Ill. 309 (1857).
26 Ill. Rev. Stat. 1943, Ch. 110, § 197.
28 381 Ill. 466, 45 N.E. (2d) 651 (1943).
judgment was rendered or, if rendered, has since been satisfied, and is, therefore, really a continuation of the prior action, the court concluded the section in question was not violative of either the state or the federal constitutions.\(^{30}\)

Dictum in *Bickerdike v. Allen*\(^{31}\) to the effect that a scire facias proceeding was an action in personam was repudiated.

The case of *Ingalls v. Raklios*\(^{32}\) was again before the reviewing court. This time the judgment creditor was appealing from an order which refused to find that the word “malice” as used in the finding was equivalent to a finding that “malice was the gist of the action.” The Supreme Court had previously held that the judgment would not support a capias.\(^{33}\) It was now held that, inasmuch as three years had elapsed since the original judgment was entered and no written memorandum existed to justify alteration, the original judgment order would have to stand.

 Relief from a commitment order for contempt of court in refusing to account for trust funds was granted by the trial judge over a year after the contemnor had been imprisoned. An effort to compel the judge to vacate such release order failed in *People ex rel. Meier v. Lewe*,\(^{34}\) wherein the petitioning creditor claimed that, since the order of release was a modification of the original order finding a contempt of court, the trial judge had lost jurisdiction of the cause. It was, however, held that the release order was a new proceeding based on a separate hearing and not merely a modification of the original decision, hence well within the jurisdiction of the court. If this were not so, the court said, there would be “no court and no method by which one incarcerated for contempt of court . . . could ever hope to obtain his freedom. . . . Such a situation would amount to life imprisonment for debt, which is contrary to the genius of our form of government.”\(^{35}\)

The court also took occasion

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\(^{30}\) In general, see Collin County Nat. Bank v. Hughes, 155 F. 389 (1907).

\(^{31}\) 157 Ill. 95, 41 N.E. 740, 29 L. R. A. 782 (1895).

\(^{32}\) 318 Ill. App. 129, 47 N.E. (2d) 365 (1943).


\(^{34}\) 380 Ill. 531, 44 N.E. (2d) 551 (1942).

\(^{35}\) 380 Ill. 531 at 538, 44 N.E. (2d) 551 at 555.
to point out that if any error occurred in granting release the same should be corrected by appeal. Mandamus against the trial judge to expunge his order was not, therefore, a proper method of review.

But one change in the statute law need be noticed. The wage-exemption granted by the Garnishment Act\(^3\) has been amended so as to provide a clear exemption of twenty dollars per week exclusive of all pay-roll deductions in the form of taxes.\(^3\)

IV. CRIMINAL LAW AND PROCEDURE

The statute relating to the commitment and detention of criminal sexual psychopathic persons\(^1\) was held to be a constitutional exercise of the police power in People v. Sims\(^2\) despite the defendant's contention that the same was invalid (1) because discriminatory in dividing sexual psychopaths into two groups, i.e. those charged with criminal acts and those not so charged; (2) because it permitted the disclosure of other crimes, hence violated defendant's right to an impartial trial; and (3) because the use of the psychiatric report upon the defendant's condition violated his right to the confrontation and cross-examination of the witnesses against him. The first argument was disposed of on the ground that the basis of classification was a reasonable one. The second, on the ground that the proceeding for commitment was not a criminal trial in the ordinary sense but rather was akin to an inquiry into sanity before trial on an indictment.\(^3\) The third point was rejected in the particular case since defendant had not preserved a transcript of the evidence, hence the court had no way of knowing if error had been committed in that regard. The statute does provide for personal examination of the accused by two qualified psychiatrists and also requires them to file a report in writing of the result of their examination together with their conclusions and recommendations. While the finding must be made by a jury, such report would undoubtedly carry considerable weight with


\(^1\) Ill. Rev. Stat. 1943, Ch. 38, §§ 820-5.

\(^2\) 382 Ill. 472, 47 N.E. (2d) 703 (1943).

\(^3\) Ill. Rev. Stat. 1943, Ch. 38, § 593. See also People v. Preston, 345 Ill. 11, 177 N. E. 761 (1931).
them, hence the statute would seem to violate constitutional guarantees of due process unless the right of cross-examination was, in fact, permitted.  

No other current decisions appear relating to the nature of crime, its definition, or manner of commission. The legislature has, however, enacted several statutes affecting the scope and content of criminal law. Thus the former statute relating to the prevention of diseases of livestock has been repealed and has been replaced by a new statute containing penalties. The discrimination against female employees, by paying an unequal wage for equal work, has been made criminal. A second or subsequent conviction for driving a motor vehicle without the owner's consent now carries additional penalties. One who knowingly aids the escape or attempted escape of a person committed to any state correctional institution is declared guilty of a misdemeanor. The fraudulent sale of adulterated, reclaimed, or falsely-labelled lubricating oils is penalized, and the list of public nuisances has been expanded by the addition of certain types of offensive conduct growing out of the drilling or operation of oil wells.

As is usually the case, the work of the courts dealt principally with procedural matters. Thus, upon the return of an indictment by the grand jury, the statute directs that the judge shall order the clerk of the court "to copy such indictment . . . upon the records of such court" so that, in case of loss or destruction, the copy may serve as prima facie proof of the contents thereof. While the statute does not prescribe the precise record book to be used, it is usually the practice of the clerk to enter the same in a record of criminal proceedings. For this reason, the defendant in People v. Grizzle.

4 In civil lunacy proceedings heard before a jury, the statute expressly declares that the rights of the person involved "shall be the same as those of any defendant in a civil suit." See Ill. Rev. Stat. 1943, Ch. 91½, § 5.
13 381 Ill. 278, 44 N.E. (2d) 917 (1942), conviction reversed on other grounds.
claimed his conviction was erroneous inasmuch as the clerk had, inadvertently or otherwise, entered the record of the return of the indictment among the chancery records of the court. His highly technical objection was met by the statement that the record book, however it may be designated, was one of the records of the court hence the entry therein was sufficient to support the subsequent proceedings. Likewise unavailing was the contention, made in People v. Hannon,\textsuperscript{14} that the defendant's right to trial within four months after demand made\textsuperscript{15} had been violated because he had been placed on trial one day after the four-month period had expired. Upon ascertaining that the last day of the period fell upon Sunday, the court invoked the provisions of the statute providing that in computing time the first day shall be excluded and the last day included "unless the last day is Sunday . . . and then it shall also be excluded,"\textsuperscript{16} and found no error.

The right to waive trial by jury in criminal cases has experienced an unusual history in this state. Originally denied on the ground that the constitutional method required trial by jury,\textsuperscript{17} this view yielded, in 1930, to the concept that trial by jury was not an integral part of the structure of government but was, rather, a privilege of the defendant.\textsuperscript{18} The exercise or waiver of such privilege, however, was deemed a matter of some concern to the prosecution hence, in 1932, it was held that trial by the court without a jury could occur only if the state joined in such waiver.\textsuperscript{19} The absence of logic in such a view probably influenced the legislature, in 1941, to enact a brief statute vesting the privilege exclusively in the hands of the defendant.\textsuperscript{20} By its decision in People v. Scott,\textsuperscript{21} the Supreme Court has now declared such statute unconstitutional as an attempted invasion of the powers of the judiciary by a co-ordinate branch of the state government. By so doing it has, whether wisely or not, re-

\textsuperscript{14} 381 Ill. 206, 44 N.E. (2d) 923 (1942), conviction reversed on other grounds.
\textsuperscript{15} Ill. Rev. Stat. 1943, Ch. 38, § 748.
\textsuperscript{16} Ill. Rev. Stat. 1943, Ch. 131, § 1.
\textsuperscript{17} Harris v. People, 128 Ill. 585, 21 N.E. 563 (1889).
\textsuperscript{18} People ex. rel. Swanson v. Fisher, 340 Ill. 250, 172 N.E. 722 (1930).
\textsuperscript{19} People v. Scornavache, 347 Ill. 403, 179 N.E. 909, 79 A. L. R. 553 (1932).
\textsuperscript{21} 383 Ill. 122, 48 N.E. (2d) 530 (1943).
stored the view of the earlier cases, hence waiver of trial by jury in criminal cases will require joint action by prosecution and defendant.

Punishment for the second offense is generally made more severe, but questions still arise as to just what constitutes a "second" offense within the meaning of the applicable statute. It became necessary, in *People v. Lund*,22 for the court to interpret Section 393 of the Criminal Code23 which provides for increased punishment in case of a second conviction for petty larceny by a person over the age of eighteen years. Particularly involved was the question as to whether the person had to be eighteen at the time of the second conviction, regardless of the age at the time of the prior offense, or whether the qualifying language applied to both the first and the second offense. In holding an indictment defective because it failed to allege that defendant was over eighteen at the time of the prior conviction, the court considered that the legislative purpose was to punish the confirmed recidivist more severely rather than to penalize a person by taking into consideration his petty transgressions and delinquencies committed during immaturity. In so holding, the court gave a logical extension to the effect of the decision last year in *People v. Klemick*.24

By its decision in *People v. Montana*,25 declaring the 1941 amendment to the Parole Act26 unconstitutional, the Supreme Court indicated that the so-called "recommendation" of the trial court fixing minimum and maximum limits on the penalty for crime was not objectionable as tending to make the sentence indefinite.27 It did, however, declare that administrative review and modification of such recommendation would be highly improper as calling for the exercise of judicial functions by a non-judicial body. In restoring the former statute to operation, the court is, though, really sanctioning the exercise by the Department of Public Welfare of powers greater than it possessed under the 1941 amendment

22 382 Ill. 213, 46 N.E. (2d) 929 (1943).
23 Ill. Rev. Stat. 1943, Ch. 38, § 393.
24 311 Ill. App. 508, 36 N.E. (2d) 848 (1941), noted in 21 CHICAGO-KENT LAW REVIEW 43.
25 380 Ill. 596, 44 N.E. (2d) 569 (1942), noted in 43 Col. L. Rev. 385.
27 People ex rel. Hinckley v. Pirfenbrink, 96 Ill. 68 (1879).
since it may, by a simple majority vote, accomplish what, by the terms thereof, required the approval of four out of five members. Further revision of the statute, effective July 1, 1943, now permits the court to fix minimum and maximum limits on the penalty and confines the power of the department to commute sentence to that of reducing the maximum, but not below the minimum, sentence so fixed.  

V. FAMILY LAW

While the Illinois Marriages Act provides that a female between 16 and 18 may secure a license to marry if the parent or guardian of such person shall give consent, it contains no statement as to the consequence of failure to obtain such consent. As applied to a marriage contracted in Illinois, it has been held that the mere omission of parental consent is not enough to warrant annulment since such provision is regarded as directory and not mandatory. A somewhat similar provision in Missouri was given a similar construction in Walker v. Walker, hence annulment was denied to a female resident of Illinois, between 17 and 18, who had gone to that state to be married and who predicated her action solely on the fact she was under 18 at the time and lacked parental consent. On the other hand, the quantum of proof necessary to establish the existence of a valid marriage has been made a matter of some doubt by the decision in Murrelle v. Industrial Commission in which the widow's positive assertion that she had been married before a justice of the peace at Waukegan, though lacking in details, was held sufficient to establish that fact, even though the county records were silent and some five justices, the county clerk, and three of his deputies gave negative testimony. In the
earlier case of *Brainard v. Brainard*\(^7\) almost identical negative testimony was held to justify a decision that a marriage ceremony had never, in fact, occurred despite the woman’s positive testimony, even more detailed, that one had been performed. Though findings of fact may vary in given cases, the incongruous holdings on almost parallel testimony should serve to warn that the safest proof of a marriage lies in a complete public record thereof.\(^8\)

The separate legal identity of the spouses and the independence of their individual property rights as against one another or against third persons has become generally well established since the adoption of the Married Women’s Acts.\(^9\) Occasionally, however, the concept that the family is to be regarded as a unity, so that the acts of one member should serve to bind the other, creeps into law.\(^10\) It was, perhaps, on that theory that the bank, in *Joseph v. Carter*,\(^11\) contended that the application of funds in its possession belonging to the wife toward the payment of a note signed by both husband and wife served to revive the husband’s obligation otherwise barred by the statute of limitations. This contention was, however, rejected as it was held that neither spouse, as such, is agent for the other hence the conduct of one in making or suffering part payment of the obligation in no way changed the other spouse’s liability. The ordinary rules as to joint obligees were, therefore, applied.\(^12\)

Marital misconduct of sufficient degree to warrant a divorce is also sufficient to support a decree for separate maintenance.\(^13\) The innocent spouse is, therefore, provided with a choice of remedies. Legislation designed to place limitations on the latter remedy in favor of the former has been declared unconstitutional.\(^14\) A judicial attempt to coerce the

\(^7\) 373 Ill. 459, 26 N.E. (2d) 856 (1940).

\(^8\) The statutory requirements are sufficiently broad, Ill. Rev. Stat. 1943, Ch. 89, §§ 9-14, but human failure to observe these mandates is the cause of the difficulty.


\(^12\) Kallenbach v. Dickinson, 100 Ill. 427, 39 Am. Rep. 47 (1881).


litigant into suing for absolute divorce rather than separate maintenance was likewise criticised in *Holmstedt v. Holmstedt*, the Supreme Court pointing out that the judge's personal views on the desirability of absolute divorce in preference to the more limited kind would have to yield to the pronounced public policy of the state evidenced by a choice of remedies.

The flurry of reform against "heart balm" litigation which originated in Indiana in 1935 and induced the Illinois legislature to enact a statute making it criminal to institute suits based upon alienation of affections, criminal conversation, or breach of promise to marry, or to name a correspondent in any divorce case, has been brought to a rather abrupt end by the decision in *People v. Mahumed*. In holding that the sections dealing with the naming of a correspondent were unconstitutional as not being sufficiently referred to in the title of the statute, the court has indirectly cast doubt upon the validity of the remaining sections since they appear open to the same criticism. In failing to observe a potential connection between the threat to name a person as correspondent in a divorce suit, thus exposing such individual to obliquity without chance of defense, and blackmail, the present court seems to be acting rather naively. By disposing of the case on that issue, however, it avoided for the present the more serious constitutional question growing out of the decision in *Ex parte Young*.

The awarding of alimony in divorce cases gave rise to three unusual decisions during the current year. In one, *Williams v. Williams*, the ex-husband attempted to compel his divorced wife to furnish an account of her

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15 383 Ill. 290, 49 N.E. (2d) 25 (1943).
17 381 Ill. 81, 44 N.E. (2d) 911 (1942). See note in 38 Ill. L. Rev. 94 on the current status of such legislation.
18 Ill. Rev. Stat. 1941, Ch. 38, §§ 246.3, 246.4, and 246.5.
19 The statute is said to be one "in relation to certain causes of action conducive to extortion and blackmail. . ." See Laws, 1935, p. 716.
21 An earlier court admitted the potency of the argument that to deny the correspondent the right to intervene would be apt to open the door to blackmail, but said the argument was one to be addressed to the legislature. See Leland v. Leland, 319 Ill. 426 at 432, 150 N.E. 270 at 272.
22 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908).
23 316 Ill. App. 6, 44 N.E. (2d) 63 (1942).
handling of moneys paid for alimony and the support of their children pursuant to decree. Though no charge of waste or misapplication of the funds was made, the petitioner sought to compel accounting on the theory that a trust relation existed requiring the keeping of accounts and the filing of reports showing receipts and disbursements. Failing to find precedent to support such a request, the majority of the court denied relief since neither the statute nor the decree contained any such requirement. Statutory provisions requiring bonds, verified reports, and accountings by guardians were held inapplicable to the situation. Upon rehearing, one judge dissented on the ground that since the law compelling a parent to support his children was settled, a correlative duty to protect the children from the dishonesty or extravagance of their custodian was imposed. He also pointed out that unless an accounting was ordered, it would be practically impossible for the petitioner to demonstrate waste or misapplication of the funds, hence such an allegation should not be regarded as essential. In another, Wright v. Wright, it was held that peaceful efforts made out of court to induce the defendant to pay alimony pursuant to the terms of a decree would not justify the allowance of attorney's fees even though petitioner had hired the services of a lawyer for that purpose. Court action, as by citation for contempt of court, was deemed essential to impose such additional liability.

Alimony has been declared not to be a "debt" dischargeable in bankruptcy at least so far as the ex-spouse who is obligated to pay the same is concerned. It would, therefore, seem to follow that the right to receive alimony could not be regarded as a "credit" or "asset" of the recipient. It was held in In re Fiorio, however, that alimony in gross, though payable under the terms of a divorce decree, was an asset of the person to whom it was payable hence passed to the

29 It may, for tax purposes, be treated as "income" subject to taxation. See 26 U.S.C.A. § 22(k).
30 128 F. (2d) 562 (1942), noted in 31 Ill. B. J. 251.
deed creditor's trustee in bankruptcy. While a lump-sum settlement may be regarded as a contractual obligation enforceable as such, it should be remembered that when the provisions of the settlement are incorporated in the decree, so as to be enforceable by contempt proceedings, such settlement is as open to revision as would be the customary provision for periodic payments. It would seem to follow, then, that to the extent such alimony remains unpaid it is contingent both in amount and likelihood of payment hence hardly capable of treatment as an "asset."

The rights and liabilities of infants also received consideration by the courts. Thus an unsigned agreement of adoption was specifically performed in Soelzer v. Soelzer upon a rather unusual set of facts. Most such agreements are oral in nature, but the existence of a written form of agreement signed by the foundling association, though not signed by the alleged adopting parent, was held to be sufficient evidence of the contract when supported by evidence of declarations that adoption had occurred, the making of a will subsequently destroyed referring to the child as "my daughter," and a record of over forty years of intimate family association. The argument that the written memorandum was merely evidence of an offer to permit adoption acceptable within a period of sixty days but never in fact accepted, was disposed of on the ground that long acquiescence and overt acts may demonstrate acceptance as effectively as would attaching a signature.

Some clarification of the problem of the tort liability of a minor was also provided by Palmer v. Miller which defeated an attempt to hold an infant possessor of an automobile for the negligence of his companion who was driving the car with the infant's permission. Since liability in such a situation must rest upon the doctrine of respondeat superior, the court concluded that, as the infant could not create a binding agency relationship, the negligence of the driver could not be imputed to him. Left undetermined, since not

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34 382 Ill. 393, 47 N.E. (2d) 458 (1943).
present under the facts of the case, was the question of the responsibility of a minor riding in the car at the time of the accident and exercising control over the driver so that the latter's negligence might be imputable to the former.\textsuperscript{38}

VI. PROPERTY

REAL PROPERTY

Apparently there is no end to the possibility of employing such original terminology in a deed or a devise so as to call for the application of the rule in Shelley's case in order to determine the extent of the interest taken by the grantee or devisee. In \textit{Porter v. Cutler},\textsuperscript{1} for example, the devise read: "I will, devise and bequeath unto my daughter, Flora Cashman . . . To have and to hold unto the said Flora Cashman for and during the term of her natural life, the remainder to the heirs of the said Flora Cashman living at the death of the said Flora Cashman." In an action for partition brought by the heirs of Flora Cashman against the defendant who, after several mesne conveyances, had purchased the property following foreclosure of a mortgage executed by the named devisee, the Supreme Court held the devise created a fee simple title in the devisee. The court stated that while it had held that a somewhat similar devise created only a life estate, because either the date at which the heirs of the life tenant were to be determined was such that it could not designate the whole line of inheritable succession\textsuperscript{2} or else the limitation on the words "heirs of the body" showed a plain intention on the part of the testator to use them as words of purchase rather than words of limitation,\textsuperscript{3} still in the devise in question the words "heirs of the said Flora Cashman living at the death of the said Flora Cashman" included all the persons upon whom the law would in the first instance cast inheritance upon the death of the named person, hence a fee simple title passed.

In another case, that of \textit{Lydick v. Tate},\textsuperscript{4} the testator's

\textsuperscript{38} On this point, see Wilson v. Moudy, 22 Tenn. App. 356, 123 S.W. (2d) 828 (1939).
\textsuperscript{1} 380 Ill. 215, 43 N.E. (2d) 929 (1942), noted in 31 Ill. B. J. 286, 37 Ill. L. Rev. 369.
\textsuperscript{2} Churchill v. Marr, 300 Ill. 302, 133 N.E. 335 (1921).
\textsuperscript{3} Bunn v. Butler, 300 Ill. 269, 133 N.E. 246 (1921).
\textsuperscript{4} 380 Ill. 616, 44 N.E. (2d) 583 (1942), noted in 43 Col. L. Rev. 398, 31 Ill. B. J. pp. 236 and 324, and 10 U. of Chi. L. Rev. 344.
will provided that: "I give, devise and bequeath to Ellen Tate my beloved daughter during her widowhood . . . to have and to hold for and during her natural life, and at her death or remarriage the said land shall descend to her heirs." She remarried before the testator's death, but did survive him. By her will she purported to devise the property thus acquired to two of her sons who survived her. Upon her death, the heirs of a deceased son of the named devisee claimed an interest in the property contending that Ellen's remarriage terminated her life estate or prevented it from ever becoming vested, so that, as a consequence, an interest in the property fell to their deceased parent. The Supreme Court in affirming a decree dismissing such contention, however, held that the rule in Shelley's case applied. The court recognized that while it is true, for the purpose of ascertaining the effect and operation of a will, the same must be regarded as speaking from the date of the death of the testator, yet for the purpose of ascertaining the testator's intention a will must necessarily be considered as of the date of its execution. It therefore concluded that the testator had not intended that Ellen would remarry before his death as he was eighty-two years of age at the time of making the will, but that it was not necessary that the precedent life estate become vested in the first taker in order to bring a devise within the rule in Shelley's case.

The extent of the interest in land acquired by a public or quasi-public corporation upon condemnation was involved in three cases. In one of them, Sanitary District of Chicago v. Manasse, the question arose as to whether the Sanitary District, which by statute may acquire property in that fashion and is authorized to dispose of the same when no longer required, could convey a fee simple title thereto. It was held that it could since its authority was not limited to merely acquiring an easement for right of way as is the case with railroads. In Farmers Grain & Supply Company of Warsaw v. Toledo, Peoria & Western Railroad and also in Cleve-

5 Levings v. Wood, 339 Ill. 11, 170 N.E. 787 (1930).
6 Knight v. Knight, 367 Ill. 616, 12 N.E. (2d) 649 (1938).
7 380 Ill. 27, 42 N.E. (2d) 543 (1942), noted in 10 U. of Chi. L. Rev. 91, 8 J. Marsh. L. Q. 119.
10 316 Ill. App. 116, 44 N.E. (2d) 77 (1942), noted post, p. 92.
land, Cincinnati, Chicago & St. Louis Railway Company v. Central Illinois Public Service Company, however, the court held that because a railroad does not usually own its right of way in fee simple, but has only an easement therein, it cannot prevent a stranger from constructing fixtures over and across the right of way so long as the latter provides the minimum clearance over the tracks which is demanded by the Illinois Commerce Commission.

It again became necessary for the court to remind the property owner that he may not, by a conveyance to himself and another, expect to create a valid joint tenancy. Argument in Porter v. Porter that the clear intention of the grantor should be regarded as controlling was rejected as inconsistent with fundamental principles of law.

Little of significance has been decided concerning the rights of landlord and tenant. In the case of Hollywood Building Corporation v. Greenview Amusement Company it appeared that defendant had been occupying plaintiff's theater under a fifteen-year lease. By Section 1 of Article IV of the lease defendant was required to comply with all health and police regulations to the extent of making changes, structural or otherwise, costing not to exceed $1,000 in any one year or a total of $10,000 for the complete term. Included with the demised premises was a street canopy and sign which extended fourteen feet from the building to the edge of the then sidewalk. During the period of the lease, the municipality widened the public street on which the theater fronted by reducing the width of the sidewalk. As a consequence, the canopy and sign thereafter extended beyond the sidewalk and over the roadbed by some six feet. The pertinent municipal ordinance required that no sign or canopy erected prior to a street widening should extend more than three feet beyond the new curb. On the question as to whether the defendant's refusal to remodel the canopy constituted a default justifying suit for possession of the demised premises,
the court held that the changes required by the widening came within the words "structural or otherwise" as contained in the lease.

The nature of war-time emergency is reflected in certain amendments to the statutory property law of this state made by the recent session of the legislature. Thus conveyances made by persons in the armed services may now be acknowledged before any commissioned officer, and persons relying on a duly recorded power of attorney given by a service man are not required to ascertain whether he be then living unless prior thereto written revocation of such power has been recorded. A new statute regulates the termination of powers of appointment, and the provision against accumulations has been made expressly inapplicable to the creation of trusts for the perpetual care of burial places.

SECURITY TRANSACTIONS

The usual form of mortgage on improved property contains a covenant requiring the mortgagor to insure the premises for the benefit of the mortgagee, in which case the proceeds of such insurance are available for the benefit of the mortgagor, in case loss arises, by way of rehabilitating the premises or by reducing the mortgage indebtedness. The interest of the mortgagee, however, is a separate one which he may insure if he so sees fit. If he should so insure, a question might well arise as to whether the proceeds could then inure to the benefit of the mortgagor as by way of discharge of the debt. Such, in fact, was the case of LeDoux v. Dettmering where it was held that the mortgagor's refusal to insure, pursuant to covenant, should deny him the right to claim satisfaction of the mortgage when the mortgagee later collected the proceeds of insurance taken out at the mortgagee's own expense. The claim that the insurance company would not lose anything by insuring the

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20 See note on this point in 21 CHICAGO-KENT LAW REVIEW 265.
21 Fergus v. Wilmarth, 117 Ill. 542, 7 N.E. 508 (1886).
22 316 Ill. App. 98, 43 N.E. (2d) 862 (1942), noted in 31 Ill. B. J. 331.
mortgagee's interest, since upon payment of the loss it would step into his position as holder of the mortgage, was held to be beside the point.

Much has been written upon the right to a deficiency decree upon mortgage foreclosure as well as the enforcement thereof, but the Illinois Supreme Court held for the first time, this year, in the case of Johnson v. Zahn that such decree cannot be used as the basis of levy upon, and sale of, the mortgagor's statutory right of redemption in the mortgage premises. It may, therefore, only be used as the basis of reaching his interest in other property. For that matter, the holder of a deficiency judgment is limited to the right to secure satisfaction thereof from the unpaid proceeds of a condemnation of part of the mortgaged premises according to the holding in City of Chicago v. Salinger. The fact that the mortgagee decree-creditor had purchased the balance of the premises at his own sale and later perfected title thereto was held insufficient to give him the right to the entire condemnation proceeds since the prior eminent domain suit had relieved the part taken from the lien of the mortgage and no interest therein passed under the foreclosure decree and sale. Had foreclosure preceded condemnation, the result could well have been just the opposite.

Echoes of dissatisfaction by individual bondholders with the work done by reorganization committees can be found in Chicago Trust Company v. Dorchester Terrace Building Corporation in which a bondholder petitioned to compel an assignment of her aliquot portion of a deficiency judgment, rendered in favor of the trustee for the benefit of the bondholders, so that she might effectuate a redemption from the foreclosure sale as a judgment creditor. Admitting that there was no decision justifying such relief, the bondholder

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24 317 Ill. App. 542, 47 N.E. (2d) 725 (1943), noted post, p. 94.
25 Wadelski v. 16th Ward Bldg. & Loan Ass'n, 276 Ill. App. 74 (1934).
26 317 Ill. App. 293, 45 N.E. (2d) 1001 (1943).
27 It appeared that the premises had been sold to a stranger for the meager sum of $2450, which amount was insufficient to cover the expenses of the foreclosure leaving nothing to apply on the principal debt for which an aggregate deficiency judgment in the amount of $223,375.13 had been rendered.
28 The court distinguished Nudelman v. Carlson, 375 Ill. 577, 32 N.E. (2d) 142 (1941), on the ground that the redemption there made was predicated upon a
claimed that equity should devise one for her benefit. In rejecting such petition as being based upon a desire to secure special benefit for herself rather than for the benefit of all the bondholders, the court indicated that the remedy, if one existed, lay in compelling the trustee to perform its duty. To permit fractional assignment of the deficiency judgment, the court said, would have created an intolerable situation.

While Section 30 of the Judgments and Decrees Act requires that the holder of a certificate of sale under mortgage foreclosure must secure a deed within five years from the expiration of the time of redemption, it says nothing about the time of recording such deed. It was, therefore, held in Miller v. Bullington that a master's deed issued in apt time was valid even though not placed of record until four years after the time when, according to such statute, it would have been too late to secure such a deed. Possession by the purchaser holding the unrecorded deed was treated as sufficient notice to the world of his rights thereunder.

The right of a sub-contractor to a mechanics' lien for form work used in concrete construction was before the court in Douglas Lumber Company v. Chicago Home for Incurables, in which case the court upheld the lien claim against the contention that Section 21 of the Mechanics' Lien Act was unconstitutional as being vague, indefinite, and discriminatory. The further contention that the prime contract was illegal because made with an unlicensed general contractor, hence furnished no valid basis for a lien, was rejected insofar as the sub-contractor was concerned since there was no showing that it either actually or constructively knew of the purported illegality. The court intimated that even had the sub-contractor been unlicensed the same result would have been achieved, since it regarded the violation of the licensing provision as a matter between the municipality and the sub-contractor rather than one of public policy de-

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30 381 Ill. 238, 44 N.E. (2d) 850 (1942).
31 380 Ill. 87, 43 N.E. (2d) 535 (1942), noted in 21 Chicago-Kent Law Review 199.
signed to render contracts in violation thereof absolutely void. Though such intimation was purely dictum, the attitude expressed would hardly seem to stand analysis.  

Trust receipt financing is a relatively new device in Illinois, the uniform statute on the subject having been adopted as late as 1935. Questions as to priority of lien have arisen thereunder, but the clearest exposition of the rights of the creditor advancing funds on trust receipt had to await the decision in *Donn v. Auto Dealers Investment Company*. It appeared therein that two lenders, not knowing of the existence of the other, had loaned funds on the same automobile each taking a trust receipt thereon. When a dispute arose as to priority of lien, one contended that the earlier filing of notice of intention to engage in trust receipt transactions was sufficient to give him priority, while the other contended that the time of actual advancement of funds was controlling in determining priority of lien. It was held that the purpose of the filing of a statement of intention was to give warning of an inchoate security interest in the property which would, upon the actual extension of credit, become choate and relate back to the date of such filing. As a consequence, priority of lien was accorded to the person who first filed the required statement of intention.

The legislature responded to the decision in *Corn Exchange National Bank & Trust Company v. Klauder*, which declared the assignment of open accounts receivable invalid as to creditors of the assignor when no notice of the fact of assignment had been given, by providing a new statute expressly declaring such assignments valid and providing for priority in point of time. The suggestion that some form of recording system would be desirable was disregarded.

33 See 21 CHICAGO-KENT LAW REVIEW 199, particularly p. 201 and cases there cited.
34 Ill. Rev. Stat. 1943, Ch. 121 1/2, §§ 166-87.
35 See, for example, Middleton v. Commercial Inv. Corp., 301 Ill. App. 242, 22 N.E. (2d) 723 (1939).
36 318 Ill. App. 95, 47 N.E. (2d) 568 (1943), noted post, p. 99.
37 Ill. Rev. Stat. 1943, Ch. 121 1/2, § 178.
40 See 21 CHICAGO-KENT LAW REVIEW 255, particularly notes 16-18.
The most important development in trust law this year is the enactment by the legislature of the Common Trust Fund Act. The statute represents an effort to solve one of the difficult investment problems of the corporate trustee. It has become increasingly difficult to find desirable investments for smaller trusts, due largely to changes in methods of financing brought about by depression and war. Courts have been reluctant to permit trustees, without special authorization by the settlor, to mingle funds of different trusts or to create investment pools. Valuation and liquidation difficulties were responsible in large part for this reluctance.

The present statute applies alike to trusts created before and those created after its effective date. In substance the act permits any corporate fiduciary to establish, maintain and administer one or more common trust funds, and to invest funds which it holds for investment as fiduciary in such common trust funds unless such investment is forbidden by the trust instrument or some amendment thereto. The power to invest is subject to the qualification that the funds so held for investment can be properly invested in the investments which are to become part of the common trust fund. Where there is a co-trustee, his consent to the investment is required and the act authorizes him to consent.

A common trust fund is defined by the act as "a fund maintained by a bank or trust company exclusively for the collective investment and reinvestment of moneys contributed thereto by the bank or trust company in its capacity as a fiduciary or co-fiduciary." Every such plan must be established and administered according to the terms of a written plan which shall set forth: (1) the manner in which the fund is to be operated, (2) the investment powers of the corporate fiduciary, including the character and kind of investments which may be purchased, (3) the allocation and

44 Ibid.
45 Laws 1943, p.—, H.B. No. 413; Ill. Rev. Stat. 1943, Ch. 16½, § 58(c).
apportionment of income, profits and losses, (4) the terms of admission or withdrawal of investments or participations, (5) provisions for auditing and settling accounts, (6) the methods of valuation to be used, (7) provisions for the termination of the fund, and (8) other matters necessary or proper to define clearly the rights of participants. A copy of the plan is required to be available at all reasonable times for the inspection of any person having an interest.48

Other provisions deal in detail with the administration and management of such funds. Audits are required at least once each year and no corporate trustee may charge a special fee to any participating trust in addition to its regular compensation.47 Under the act, no participating interest is negotiable or assignable, nor can any participating trust have any interest in any particular asset.48

The case law of trusts has not shown any extraordinary development during the year. In National Casualty Company v. Caswell49 the Appellate Court decided that a dealer in investment securities who purchased a certificate of deposit in good faith from a trustee, which certificate was endorsed by the trustee in his fiduciary capacity, and who paid the trustee by a check to the order of the trustee individually, was not liable even though the trustee subsequently misappropriated the proceeds. The decision was based on Section 2 of the Fiduciary Obligations Act.50

The late economic depression is still producing litigation concerning the acts of trustees. One such case appeared in the Appellate Court during the year. In Hatfield v. First National Bank of Danville,51 the court refused to hold a successor trustee liable for losses by its predecessor in retaining bank stock received as part of the original res. The court said: "A wisdom developed after an event and having it and its consequences as its direct source, is a standard no man should be judged by."52

A third case containing a point of interest is that of

52 317 Ill. App. 169 at 178, 46 N.E. (2d) 94 at 99.
Williams v. Northern Trust Company in which the Northern Trust Company, as trustee, executed a contract for the sale of land to the plaintiff. By the terms of the contract, the earnest money was held in escrow by the Northern Trust Company. In a suit to recover the earnest money, the defendant trustee contended that the plaintiff-buyer had breached the contract. The court recognized the dual capacity of the Northern Trust Company, as bank and as trustee, so far as to allow it, in its capacity as bank, to maintain a counterclaim in the nature of interpleader. Courts ordinarily have refused to recognize the departments of banks as separate entities, but in most such cases the problem has arisen in connection with the buying or selling of assets between the trust and the commercial departments, or the deposit of trust money in the commercial department. For the purpose of this interpleader, however, the two departments were seemingly regarded as separate entities without any full discussion of the point.

Perhaps still another case should be mentioned. In Jackson v. Pillsbury, the Supreme Court held that a trust which provided for a division of the trust res among named beneficiaries upon the death of the life beneficiary but did not direct the trustee to convey, became passive upon the death of the life beneficiary and was, therefore, executed by the Statute of Uses.

WILLS AND ADMINISTRATION

During the past year cases involving the construction of wills have been numerous, but for the most part such cases are without general interest. Some new points, however, have been established concerning the administration of estates. For example, the Illinois Supreme Court, in Masin v. Bassford, upheld the validity of Section 90 of the Probate Act which reduces the time within which an interested person may file a suit to contest a domestic or foreign will. The court pointed out that will contest cases

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54 380 Ill. 554, 44 N.E. (2d) 537 (1942).
55 See comment on the case in 37 Ill. L. Rev. 367 for a suggested distinction between apparently conflicting cases on this point.
56 381 Ill. 569, 46 N.E. (2d) 366 (1943).
are statutory proceedings; that the right of contest is not a
vested right; hence the period within which the privilege
might be exercised is properly subject to statutory change
and regulation. The elimination of the provision found in
the former act, giving to "infants and non compositi
mentis, the like period after the removal of their respective disabili-
ties," was also regarded as being wholly within legislative
power.

The same court, in In re Estate of Blyman, rejected
the contention that a court of this state having probate jurisdic-
tion is without power to set aside its order, after thirty
days have elapsed, denying probate to a will because of the
discovery of a later will, particularly when the later will
is subsequently determined to be spurious. While the court
conceded that an order allowing or disallowing probate is
a final and conclusive one unless reversed on appeal, it
held such rule inapplicable to the situation presented in that
case since no conclusive order could be entered upon the
earlier will until it had been finally determined whether or
not the same had been effectively revoked by the later pur-
ported will.

More light has been thrown upon the method of proving
an agreement to make mutual wills by the decision in Durbin
v. Durbin. The court there indicated that the mere fact
that the wills were identical in form and date of execution,
and that each testator left the entire estate to the other, did
not establish a presumption of an agreement to make mutual
wills, but such agreements must be established "by the clear-
est and most convincing evidence."

A matter of first impression is the decision in Lewis v. Hill where sale of real estate by a conservator of the estate
of an incompetent person, which land had previously been
made the subject of a specific devise in a will made by the
ward before becoming incompetent, was held not to adeem
the specific devise. It should be noted, however, that the
proceeds of sale were traceable and no part thereof had been

59 382 Ill. 520, 47 N.E. (2d) 710 (1943).
60 In re Matter of Storey, 120 Ill. 244, 11 N.E. 209 (1887).
61 315 Ill. App. 238, 42 N.E. (2d) 964 (1942).
62 315 Ill. App. 238 at 241, 42 N.E. (2d) 964 at 966.
63 317 Ill. App. 531, 47 N.E. (2d) 127 (1943).
used for the support of the ward, so the court had no diffi-
culty in holding that such proceeds in the hands of the execu-
tor-conservator were impressed with a trust and upon dis-
tribution should be paid to the specific devisee.

Of considerable importance is the case of In re Estate of
Muldoon in which it was decided that executors are entitled
to take credit for the payment of general taxes upon real
estate owned by the deceased even though the same were
not due and payable, according to statute, until some time
after the death of the testator.

An unusual decision was rendered in In re Estate of
Schultz wherein it was held necessary that the local court
follow the law of the foreign domicile of the testator as to
legacies to charity even though the personalty bequeathed
was located here, no probate proceedings had been under-
taken elsewhere than in Illinois, and the charity-beneficiary
was an Illinois corporation. The case is chiefly interesting
for the strained construction placed by the court upon the
facts as to domicile in determining that decedent was a
resident of California. Upon such finding it was held neces-
sary to apply the law of that state, resulting in a declaration
that the legacy to the local charity was, at least in part,
illegal.

The Illinois Supreme Court has also indicated, through
its decision in In re Elkerton's Estate, that the former rule
making it unnecessary for the witnesses to a will to sign in
the presence of each other still continues and is in no way
changed by Section 43 of the Probate Act. Earlier decis-
ions on the subject may, therefore, still be regarded as law.

It was only to be expected that a few years of experience
in the operation of the 1939 revision of the Probate Act would
demonstrate the need for certain amendments. Fourteen such
amendments were made during the recent session of the
legislature. A more complete discussion of these amendments

64 315 Ill. App. 109, 42 N.E. (2d) 306 (1942), noted in 21 CHICAGO-KENT LAW
Review 119.
65 316 Ill. App. 540, 45 N.E. (2d) 577 (1942), noted in 21 CHICAGO-KENT LAW
Review 268. Hebel, J., dissented. Leave to appeal has been granted: 320 Ill. App.,
p. 1, and it is understood that the Supreme Court has reversed the decision of the
Appellate Court though the opinion has not yet been reported. See 32 Ill. B.J. 84.
66 380 Ill. 394, 44 N.E. (2d) 148 (1942), noted in 31 Ill. B.J. 363.
may be found elsewhere so only a brief summary is here provided. Section 194, which fixes the "claim date," has been enlarged to permit the court to fix a new claim date not later than four months after the date of letters. The age requirement for capacity to make a will has been reduced, as to males, and is now eighteen. The repeal of former Chapter 85 entitled Lunatics and the substitution of a new Mental Health Act necessitated change in Sections 113, 127, and 128 of the Probate Act in order to harmonize the same with the new statute. The donee of a power of appointment has been authorized to release the power, in the manner provided, so that the donee may get the benefit of the federal law relating to the subject. Assistance in the probate of wills is provided by an amendment authorizing the use of handwriting proof in cases of witnesses in the military or naval services, provided the witness is outside the continental United States. Administration is made unnecessary where the minor's estate is fully $500, rather than under that amount as was heretofore the case. Public sale of real estate under order of the Probate Court was heretofore to be conducted between certain hours of "central standard time." While the hourly period is continued, the requirement that it be "central standard time" has been eliminated. Substantial revision has occurred in Sections 117, 118a, 122, 140, 152 and 310 of the Probate Act, and a new Section 146a has been added, but these deal with technical changes for which a fuller explanation may be found elsewhere. The method formerly provided for ex-

68 See James, New Probate and Trust Legislation, 32 Ill. B.J. 12.
71 Ill. Rev. Stat. 1941, Ch. 85, § 1 et seq., repealed by Laws 1943, p.—, H.B. No. 316.
77 Ill. Rev. Stat. 1941, Ch. 3, § 480.
81 See James, New Probate and Trust Legislation, 32 Ill. B.J. 12.
tinguishing an outstanding inchoate dower interest has been repealed and a new method established in lieu thereof.

One further clarifying amendment may also be noted. The so-called "conformity clause" in the Probate Act, by which proceedings thereunder were to be conducted in accordance with the Civil Practice Act, has been amended so as to leave no doubt that such is not the case where the sale or mortgage of real estate by an executor, administrator, guardian, or conservator is involved. Procedure in such cases is to be conducted in accordance with the special provisions of the Probate Act.

VII. Public Law

Constitutional Law

Several cases of interest involving constitutional questions were decided during the year, although none of these cases are of far-reaching importance. One involved the legal position, as a state instrumentality, of the University of Illinois. The litigation grew out of a dispute between the Board of Trustees of the university and the Attorney General over the question of whether the latter, as chief law officer of the state, was the sole legal representative of the university. The Board of Trustees had never authorized the Attorney General to represent it but had, for several years, employed a member of the law faculty as University Counsel and another employee as his assistant. The Attorney General directed the Auditor of Public Accounts to cease issuing salary warrants for these positions. Such conduct resulted in an original petition for mandamus, brought in the Supreme Court by the university trustees, to compel the payment of the salaries. The court reviewed the organization of the university and its legislative history and decided that the university was a public corporation possessing the absolute power, under existing legislation, to do everything necessary in the management, operation and administration of the uni-

83 Ill. Rev. Stat. 1941, Ch. 3, § 189, and Ch. 77, § 14a.
1 People v. Barrett, 382 Ill. 321, 46 N.E. (2d) 951 (1943).
versity as an educational institution. It was pointed out that the position of the university among public corporations is unique in that it is organized but for one specific purpose. It has no employees, since all those who act for it are employees of the state. Further, it can own no property in its own right but must hold only as trustee for the state. In view of its status, the Supreme Court ruled that the university and its trustees were entitled to be represented by counsel of their own choice, hence the Attorney General had no right to do so by virtue of his office. The victory of the trustees was limited to that principle, however, for the court refused to order the salaries paid since there had been no appropriation by the legislature for either a University Counsel or an assistant.

An interesting point regarding due process and the jurisdiction of courts was decided in Bank of Edwardsville v. Raffaelle, in which case scire facias proceedings were brought to revive a judgment. The defendant had ceased to be domiciled in Illinois so resort was had to constructive service by publication. Defendant filed a special appearance and contended that the court was without jurisdiction since the proceeding was one in personam, hence to permit the revival of judgment in that way would violate due process. The court decided that scire facias proceedings did not constitute a new suit against the defendant to secure an in personam judgment. Bickerdike v. Allen was discussed. In this early case, it was held that domicile within the state was prima facie sufficient to authorize constructive service by publication where the defendant's whereabouts within the state were unknown. In each case, the defendant was deemed to have had requisite notice and sufficient opportunity to be heard. The opinion in the Raffaelle case avoids placing scire facias proceedings to revive a judgment categorically under the "in rem" or "in personam" label. The result as to due process seems justified on the ground that it is not unreasonable to require the defendant to know the status of an unsatisfied judgment against him.

Trading in grain futures, once regarded as illegal gambling in Illinois, received the judicial blessing of validity in

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2 381 Ill. 486, 45 N.E. (2d) 651 (1943).
3 137 Ill. 95, 41 N.E. 740, 29 L.R.A. 782 (1895).
Albers v. Lamson. 4 Section 132 of the Criminal Code, 5 making gambling illegal, was amended in 1913 to render the section inapplicable to transactions on a regularly organized board of trade or commercial stock exchange. This amendment was held void as being unreasonably discriminatory in Miller v. Sincere. 6 In 1935, the section, as amended, was re-enacted. In the present litigation, a bank sought to recover bonds wrongfully used as margin by its president in his grain trading operations on the ground that such transactions were unlawful gambling. The court took note of the fact that the legislature had legalized betting on horse-racing when carried on in a particular way. It also noted that extensive federal control is exerted over boards of trade and exchanges. In view of these facts, it was decided that public policy had changed and that the objections to the statute which had been advanced in the Miller case were no longer valid.

The Illinois Supreme Court, in Thomson v. Industrial Commission, 7 discussed the power of Congress to extend the Federal Employers’ Liability Act to employees other than those engaged in interstate commerce. The patrolman there, employed by an interstate carrier, was assaulted by trespassers while in the discharge of his duties policing and inspecting the railroad yards with respect to both interstate and local traffic. The carrier contended that the employee was subject to the provisions of the federal statute which had been amended in 1939 so as to broaden its effect in an effort to avoid some of the difficulties which had arisen under earlier decisions. 8 Such cases had held that the act did not apply unless, at the time of injury, the employee was actually engaged in interstate commerce. The Illinois court, relying on National Labor Relations Board v. Jones & Laughlin Steel Corporation, 9 said the Congress was without power to extend the act to all employees of interstate carriers without

4 380 Ill. 35, 42 N.E. (2d) 627 (1942).
6 273 Ill. 194, 112 N.E. 664 (1916).
7 380 Ill. 386, 44 N.E. (2d) 19 (1942), noted in 43 Col. L. Rev. 139.
8 After amendment, the statute read: “Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.” See 45 U.S.C.A. § 51.
9 301 U. S. 1, 57 S. Ct. 615, 81 L. Ed. 893 (1937).
regard to the character of their duties, although the court admitted that the statute could be extended to apply to those whose activities closely and substantially affected interstate commerce. The conclusion that Congress cannot place all employees of interstate carriers under federal regulation seems open to serious doubts. In fact, courts in other states have reached directly contrary conclusions as to the application of the 1939 amendment. The subject, therefore, awaits clarification by the federal Supreme Court.

Other cases involving constitutional issues, decided during the year, may be here briefly noted although discussed elsewhere in this survey. In Stephens v. Kasten the provisions of the Civil Practice Act requiring a demand in writing for jury trial, by plaintiff at time of commencing suit and by defendant at the time of filing appearance, on penalty of waiver, were sustained as constitutional. In People v. Montana the doctrine of separation of powers was deemed to require a holding that the provision for advisory maximum and minimum sentences in criminal cases was unconstitutional as vesting judicial power in an administrative body. The regulation of advertising on motor vehicles operating on boulevards was considered in Chicago Park District v. Canfield, but the ordinance there considered was rejected as establishing an arbitrary and unreasonable classification. Still another case, that of City of Bloomington v. Wirrick, upheld the power of a municipality to install parking meters.

CONFLICT OF LAWS

But two cases involving problems of conflict of laws were noted during the year. Both of these cases are discussed elsewhere in this survey. In one, the statute of limitations question was too clear to require discussion. In the other, it is understood that a somewhat extraordinary decision of the Appellate Court as to domicile has since been reversed by the Supreme Court.

10 383 Ill. 127, 48 N.E. (2d) 508 (1943).
11 380 Ill. 596, 44 N.E. (2d) 569 (1942), noted in 43 Col. L. Rev. 385.
12 382 Ill. 218, 47 N.E. (2d) 61 (1943).
13 381 Ill. 347, 45 N.E. (2d) 852 (1943).
14 Glenn v. McDavid, 316 Ill. App. 130, 44 N.E. (2d) 84 (1942), noted in 21 CHICAGO-KENT LAW REVIEW 188.
15 In re Estate of Schultz, 316 Ill. App. 540, 45 N.E. (2d) 557 (1942), noted in 21 CHICAGO-KENT LAW REVIEW 288. For note of reversal, see 32 Ill. B.J. 84.
MUNICIPAL CORPORATIONS

Several interesting cases arose involving the liability of municipalities to firemen and policemen under "minimum salary" statutes. One such case was that of George v. City of Danville in which it appeared that upon the passage of such a statute the city, being short of funds, proposed discharging twenty-five members of the fire department. To prevent this, the firemen agreed to accept a lesser salary in consideration that none would be discharged but that each would have less work to do. After this arrangement had been in force for several years, the firemen repudiated the agreement and sought to recover the difference between the actual salary paid and that required by the minimum wage law. It was held that the contract was void as against public policy, hence the plaintiffs were entitled to recover.

A like case, that of Kennedy v. City of Joliet, involved the same type of contract except that in addition to the salary reduction the city provided for a systematic, rotating, thirty-day enforced lay-off period without pay in each year. The trial court held the arrangement improper and allowed the plaintiffs a recovery for this lay-off period also. The Supreme Court, while holding the contract void insofar as it called for the waiving of the minimum pay requirement, nevertheless denied recovery for the lay-off period since the municipality had power to suspend firemen and policemen for short periods without violating the Civil Service Act. In Anderson v. City of Jacksonville, another case of this type, the city contended that since the plaintiffs were police officers, as opposed to mere employees, their salaries could not be increased during their terms of office.

17 315 Ill. App. 17, 42 N.E. (2d) 300 (1942).
18 The Illinois Supreme Court has since affirmed the decision, 383 Ill. 454, 50 N.E. (2d) 467 (1943), not in the period of this survey. Smith, J., wrote a dissenting opinion predicated on the basis that plaintiffs were guilty of a fraud both on the city and also on its inhabitants and should not be allowed to retain the benefits of the contract and repudiate its burdens. A note on the Supreme Court decision, in 11 Geo. Wash. L. Rev. 390, appears to have been based on a report of the decision furnished in 11 Law Week 2448 which printed only the dissent. The writer of the note, as a consequence, confuses the dissenting opinion as being the controlling one.
19 380 Ill. 15, 41 N.E. (2d) 957 (1942).
21 380 Ill. 44, 41 N.E. (2d) 856 (1942).
This argument was also rejected and the plaintiffs were allowed to recover the minimum salary. In Bengson v. City of Kewanee, however, an action of mandamus to compel payment of the statutory minimum salary was denied on the ground that mandamus was not the proper remedy to collect the debt from the city at least until the amount thereof had first been rendered certain by other procedure.

Although several zoning cases arose during the past year, the court adhered to its former position that it would not act as a zoning commission and, so long as the zoning ordinance was not arbitrary and did not involve a clear abuse of discretion, the provisions therein were upheld. In Zadworny v. City of Chicago, a bill in equity by an apartment house owner to enjoin the erection of stores in his block as permitted by a change in the "use" from apartment to commercial purposes, the gravamen of the complaint was that an unreasonable depreciation in values would result. Finding that the reasonableness of the amendatory ordinance was "fairly debatable," the court declined to interfere.

Exercise of the licensing power was upheld in two instances. In Keig Stevens Baking Company v. City of Savannah a small annual license fee charged on motor vehicles used in delivering food within the city, though operated from without the municipal area, was deemed a valid regulatory measure and not a revenue act. The court held that the fee charged was not so excessive as to show, on its face, that it was nonregulatory or unreasonable in relation to the cost of licensing and inspection. The case of City of Chicago v. Michalowski raised the question as to whether or not the municipality could prosecute the defendant for moving a dead human body without a license contrary to city ordinance. The defendant urged that as the state had required defendant to secure a license to act as a funeral director it had

22 380 Ill. 244, 43 N.E. (2d) 951 (1942).
23 Burkholder v. City of Sterling, 381 Ill. 564, 46 N.E. (2d) 45 (1943); Avery v. Village of La Grange, 381 Ill. 432, 45 N.E. (2d) 647 (1943); Neff v. City of Springfield, 380 Ill. 275, 43 N.E. (2d) 947 (1942).
24 380 Ill. 470, 44 N.E. (2d) 426 (1942).
25 380 Ill. 303, 44 N.E. (2d) 23 (1942).
26 This point, on a similar ordinance, had been before the court in American Baking Co. v. City of Wilmington, 370 Ill. 400, 19 N.E. (2d) 172 (1939), but was there determined on the pleadings.
27 318 Ill. App. 533, 48 N.E. (2d) 541 (1943).
pre-empted the field to the exclusion of the municipality. The court decided, however, that a city might regulate an occupation already subject to statutory regulation so long as the municipal ordinance was not inconsistent with, or repugnant to, the statute.

Traffic regulation was dealt with in two instances. The validity of an ordinance providing for paid parking meters was before the court in *City of Bloomington v. Wirrick*, but was there upheld under the general powers given to municipalities to regulate the use of streets and also to regulate traffic. The court noted, in passing, that no question was raised as to the reasonableness of the charge made. Another ordinance had at one time prohibited the driving of vehicles displaying advertising matter along the parkways and boulevards within the municipal area. It was earlier held invalid for indefiniteness. After amendment designed to cure such objection, the same was again before the court in *Chicago Park District v. Canfield* wherein it appeared that the ordinance exempted taxicabs and common carriers from its application. This time it was held invalid as involving an unwarranted classification not predicated on any reasonable grounds, hence was discriminatory.

Mention has been made elsewhere of the case of *Hancock v. Village of Hazel Crest* dealing with municipal debt limitation, wherein it was held that such limits apply not only to contract claims but also to obligations imposed by law of quasi contractual nature.

The sufficiency of service of notice, required by statute as a condition precedent to the maintenance of a personal injury action against a city, was involved in *Lutsch v. City of Chicago*. The court held that even though the copy of such notice left with the city clerk and the corporation counsel was unsigned still, so long as the original receipted by those officers at the time of service was available and was signed

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28 381 Ill. 347, 45 N.E. (2d) 852 (1942), noted in 31 Ill. B.J. 218.
31 382 Ill. 218, 47 N.E. (2d) 61 (1943). Wilson, J., dissented without opinion.
34 318 Ill. App. 156, 47 N.E. (2d) 545 (1943).
by the plaintiff's attorney, the statutory requirements were satisfied. The statute was deemed to be in derogation of the common law, hence had to be strictly construed against the city. As a consequence, the court concluded the word "file," as used therein, had the same sense as "serve" as understood by legal circles. The case shows, at least on this point, a more realistic and liberal attitude by the court than has been manifested previously.

Extensive amendment of the Cities and Villages Act occurred during the recent session of the legislature. No attempt is made to comment on all such changes. Of principal significance to Chicagoans, however, is the fact that municipal liability has been declared for injuries caused by a motor vehicle operated by a policeman in the performance of his duties. Pension fund and annuity fund provisions have also been expanded to take in the smaller municipalities of the state.

PUBLIC UTILITIES

The cases worth mentioning involving questions of public utility law which may have arisen in the last year are all transportation cases. Perhaps the most important in the decision of the Illinois Supreme Court is Chicago & West Towns Railways, Inc. v. Illinois Commerce Commission wherein the court took occasion to announce that the theory of public utility regulation in Illinois is one of regulated monopoly. The case concerned the authority of the Commerce Commission to grant a certificate of public convenience and necessity to operate a bus line without first giving existing carriers operating over the same route an opportunity to furnish the proposed service if they so desired. It was held, under such theory, that the Commission possessed no such authority. A dissent was noted on the ground that the certificate should be denied and existing carriers be given an opportunity to meet public convenience and necessity only

36 See Laws 1943, p.—, S.B. No. 286; Ill. Rev. Stat. 1943, Ch. 24, §§ 892-904b as to policemen, and Laws 1943, p.—, H.B. 239; Ill. Rev. Stat. 1943, Ch. 24, § § 918-930 as to firemen. A whole new law as to firemen's annuity and benefit funds in municipalities between 10,000 and 100,000 population was also enacted. See Laws 1943, p.—, H.B. No. 493; Ill. Rev. Stat. 1943, Ch. 24, §944.66 et seq.
37 383 Ill. 20, 48 N.E. (2d) 320 (1943). Thompson, J., wrote a dissenting opinion.
where there was no showing that the public interest would be better served by a new and competing service.

In another case, the power of the Commission to require a railroad to install water coolers with paper drinking cups in all cabooses in service in Illinois was upheld. The court ruled that such an order does not unduly burden interstate commerce under the theory of Wilson v. The Black Bird Creek Marsh Company and Cooley v. Board of Wardens of the Port of Philadelphia. It was also decided that there was no inconsistency between the Health and Safety Act, granting to the Industrial Commission exclusive jurisdiction over matters relating to the health and safety of employees, and the provisions of the Public Utilities Act authorizing the Commerce Commission to require the adoption by such utilities of health and safety measures for the benefit of employees and the public.

An interesting problem was presented by the action of the New York Central Railroad Company in eliminating a portion of the City of Bloomington from its switching district, thus causing industries in the eliminated section to be subjected to the higher line-haul rate. The Commerce Commission approved the change, but this was held improper. Against the contention that the court should not substitute its judgment for that of the Commission, the court said that where the facts are undisputed "their effect, under the Public Utilities Act, becomes a matter of law, upon which the court, upon review, may reach an independent conclusion."

In another case involving the issuance of a certificate of public convenience and necessity to operate busses, a procedural question of some importance was decided. In that case the problem arose as to whether or not the Commerce Commission should have ordered the consolidation of cases arising from petitions filed by competing carriers to be allowed to operate over the same route. It was held that the grant-

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89 2 Pet. 245, 7 L. Ed. 412 (1829).
90 12 How. 299, 13 L. Ed. 996 (1851).
91 Ill. Rev. Stat. 1943, Ch. 48, § 137.1 et seq.
92 Ibid., Ch. 111-2/3, § 61.
93 12 How. 299, 13 L. Ed. 996 (1851).
94 Ibid., Ch. 111-2/3, § 61.
95 Alton R. Co. v. Illinois Commerce Commission, 382 Ill. 478, 48 N.E. (2d) 381 (1943).
96 Ibid., Ch. 111-2/3, § 61.
98 Illinois Commerce Commission, 383 Ill. 57, 48 N.E. (2d) 341 (1943).
ing or refusing of a motion to consolidate rested in the sound discretion of the Commission. The court said that there was no reason why this rule, applied by courts to motions for consolidation, should not be applicable to administrative bodies clothed with quasi-judicial functions. The Commission's decision, hence, is final unless it has clearly abused its discretion. The test of a proper consolidation is that prevailing in equity and depends on the subject matter, rather than upon the parties as is the case in an action at law.

TAXATION

The most interesting tax point decided during the period of this survey was involved in the bankruptcy proceeding of United States v. Reese 46 where a claim of the State of Illinois, based on a real estate tax lien, conflicted with one by the United States government for past due income taxes. The claim of the state covered the real estate taxes for 1930-1931 and rested upon a statute which provides that taxes shall be a first and prior lien "from and including the first day of April in the year in which the taxes are levied until...paid." 47 The amount of the tax for the years in question was not fixed until December 28, 1931, and February 5, 1933, respectively. In the meantime, the claims of the federal government for income taxes for prior years were merged in an assessment filed by the Collector of Internal Revenue on December 7, 1931. It was held that the claim of the federal government should take priority over the tax lien of the state. The court did not, however, rest its decision clearly on the federal statute giving to the federal government priority over all other claims, 48 nor on the proposition that the lien of the state was not perfected until the amount of the tax became certain, though both points were mentioned. The court finally concluded that, by virtue of the taxing power of the United States and legislation enacted in pursuance thereof, the government's lien "made specific by being of record, takes priority over an existing inchoate lien not liquidated or fixed in amount until after the government's lien attached." 49

47 Ill. Rev. Stat. 1943, Ch. 120, § 697.
49 131 F. (2d) 466 at 470.
In connection with that case, reference should be made to In re Estate of Muldoon\textsuperscript{50} where it was held that a testator's liability for real estate taxes became fixed on April 1\textsuperscript{st}, prior to his death in August of the same year, so that the executor could properly take credit for the payment of such tax despite the objection by certain legatees that, as the taxes had not become due and payable until after testator's death, they could not be regarded as a personal liability of the decedent.

In two cases\textsuperscript{51} arising under the Retailers' Occupation Tax Act,\textsuperscript{52} the court made it plain that if a review of the findings of the Department of Finance\textsuperscript{53} is not sought by certiorari, the taxpayer cannot later raise, in an independent court proceeding, any questions of law or fact "except those going to the jurisdiction of the department over the subject matter or the person."\textsuperscript{54} As a consequence, the court refused to consider a claim by a taxpayer that the notice of assessment was made against a partnership, of which defendant was a member, and not against him as an individual, and said "the manner in which the business was being conducted . . . was an issue of fact before the Department and was determined by it."\textsuperscript{55}

The case of Svithiod Singing Club v. McKibbin\textsuperscript{56} is also of vast importance in the interpretation of the same act. It was therein held, in substance, that a social club, organized as a non-profit corporation, which served food and drink to its members but not to the general public was not subject to tax by reason of such service. The court felt that the particular club had as its primary object "the promotion of social intercourse" among its members and the "advancement of the social arts and sciences." The selling of food and drink was regarded as simply an incident to these primary objects, so the club was not engaged in the business of selling

\textsuperscript{50} 315 Ill. App. 109, 42 N.E. (2d) 306 (1942), noted in 21 CHICAGO-KENT LAW REVIEW 119.
\textsuperscript{51} Department of Finance v. Sinclair, 382 Ill. 118, 46 N.E. (2d) 20 (1943); Department of Finance v. Kilbane, 381 Ill. 117, 44 N.E. (2d) 868 (1942).
\textsuperscript{52} Ill. Rev. Stat. 1943, Ch. 120, § 440 et seq.
\textsuperscript{53} Now the Department of Revenue: Ill. Rev. Stat. 1943, Ch. 120, § 440a.
\textsuperscript{54} 381 Ill. 117 at 119, 44 N.E. (2d) 868 at 870.
\textsuperscript{55} 382 Ill. 118 at 119, 46 N.E. (2d) 20 at 21.
\textsuperscript{56} 381 Ill. 194, 44 N.E. (2d) 904 (1942), noted in 38 Ill. L. Rev. 107.
tangible personal property at retail as defined in Section 2 of the act.\textsuperscript{57} The court made it perfectly plain, however, that a so-called "social" club might well be taxable if it developed that the selling of food, merely incidental in the instant case, became the primary concern thereof.

In \textit{Material Service Corporation v. McKibbin}\textsuperscript{58} the court held that, prior to the 1941 amendment of the Retailers’ Occupation Tax Act, construction contractors and materialmen were not subject to the provisions thereof and were engaged in performing a service rather than in the business of selling tangible personal property at retail. The court reasoned that as the contractor did not “use” the materials, as meant by the law, the materialman could not be regarded as selling the same at retail for use and consumption. Since the amendment, however, the transactions of materialmen are taxable transactions.\textsuperscript{59}

An amendment enacted by the legislature at its recent session, effective July 1, 1943, makes taxable the mere solicitation of retail sales in this state.\textsuperscript{60} The amendment was undoubtedly the result of the outcome of a series of cases, three of which were not finally disposed of by the Supreme Court until later than the period of this survey. In the first of these cases, \textit{Standard Oil Company v. Department of Finance},\textsuperscript{61} it was held that, under the 1941 amendment,\textsuperscript{62} the mere passage of title to personal property outside the state did not operate to relieve the transaction from tax where all other activities connected with the sale occurred in Illinois. In the other cases,\textsuperscript{63} it was held in substance that an out-of-state vendor who did nothing more than solicit orders in the state was not engaged in taxable transactions. In each case, however, the property sold was located out of the state, title passed outside thereof, and all orders were accepted outside

\textsuperscript{57} Ill. Rev. Stat. 1943, Ch. 120, § 441.
\textsuperscript{58} 380 Ill. 226, 43 N.E. (2d) 939 (1942).
\textsuperscript{59} Laws 1941, I, p. 1079; Ill. Rev. Stat. 1943, Ch. 120, § 440.
\textsuperscript{60} Laws 1943, p.–, S.B. No. 512; Ill. Rev. Stat. 1943, Ch. 120, §440b.
\textsuperscript{61} 383 Ill. 136, 48 N.E. (2d) 514 (1943).
\textsuperscript{62} Ill. Rev. Stat. 1941, Ch. 120, § 441.
\textsuperscript{63} Allis-Chalmers Co. v. Wright, 383 Ill. 363, 50 N.E. (2d) 508 (1943); Ayrshire Corp. v. Nudelman, 383 Ill. 345, 50 N.E. (2d) 509 (1943); Ex-Cell-O Corp. v. McKibbin, 383 Ill. 316, 50 N.E. (2d) 505 (1943). Rehearings were denied in all three cases on September 15, 1943.
of Illinois. The factual situations therein were thus radically different from that in the Standard Oil case. The present amendment would now purport to make all such transactions constitute taxable activity.\textsuperscript{64}

In \textit{People's Drug Shop, Inc., v. Moysey},\textsuperscript{65} the Appellate Court properly held that a retailer could not, as a matter of law, pass the occupational tax on to a purchaser. The tax is not a "sales" tax but is rather one on the privilege of engaging in a retail business, even though the \textit{measurement} of the tax is determined by the gross sales. That, however, does not change its character, so whether or not the retailer may pass the tax on to the purchaser, either as a separate item or as a hidden one, is a matter of private contract between them. He cannot pass off the same on the consumer as a true tax.

Several cases have arisen in the general property tax field. The rule of \textit{Mobile & Ohio Railroad Company v. State Tax Commission}\textsuperscript{66} was utilized in two recent cases\textsuperscript{67} wherein the court held that the Tax Commission, after allocating a portion of the total value of the railroad's property within the state to a particular county and after determining the average equalized assessed value of property throughout the state, could not apply a higher equalizing factor in the particular county because that figure happened to be one used there by other assessing authorities. It has, therefore, been definitely established that railroads are to be taxed uniformly throughout the state at the average equalized assessed value regardless of the fact that, in any given county, the equalizing factor may be higher or lower.

An attempt was made, in \textit{People ex rel. Schreiner v. Courtney},\textsuperscript{68} to put a stop to the common practice of transferring property burdened with delinquent taxes from one owner to another through the device of a tax foreclosure suit, particularly where the amount realized for back taxes was less than that due and the property was in fact worth sub-

\textsuperscript{64} Laws 1943, p.-, S. B. No. 512; Ill. Rev. Stat. 1943, Ch. 120, §440b. The amendment is detailed and covers the fact situations minutely.
\textsuperscript{65} 317 Ill. App. 370, 45 N.E. (2d) 978 (1943).
\textsuperscript{66} 374 Ill. 75, 28 N.E. (2d) 100 (1940).
\textsuperscript{67} People v. Chicago, M., St. P. & R. Co., 381 Ill. 58, 44 N.E. (2d) 566 (1942); People v. Chicago, B. & Q. R. Co., 381 Ill. 374, 45 N.E. (2d) 633 (1943).
\textsuperscript{68} 380 Ill. 171, 43 N.E. (2d) 982 (1942).
The litigant failed to allege collusion on the part of the public officials, so the court concluded that, absent such charge, the parties had engaged in no unlawful activity hence refused to permit suit to recover the difference between that bid at the foreclosure sale and the amount actually due.70

Two cases concerning school districts deserve mention. In the first, that of School District No. 88 v. Kooper,71 it was held that a school district organized under general law may sue in its own name, pursuant to Section 275 of the Revenue Act,72 to recover the school's portion of delinquent taxes. The claim had been advanced that suit under that section was limited to school districts organized under special acts of the General Assembly. In the other case, that of People ex rel. Hagler v. Chicago, Burlington & Quincy Railroad Company,73 the court intimated that Section 94f of the Schools Act74 was unconstitutional insofar as it attempted to permit the inclusion of an area already detached from a non-high school district. It decided the case, however, on the narrower ground that the levy should not, in any event, be proportionately greater in the detached area than in the remaining part of the district.75

The Public Utility Tax Act of 1935 was declared unconstitutional in City of Chicago v. Ames.76 Thereafter a taxpayer, in People ex rel. City of Highland Park v. McKibbin,77 who had made payment “under protest” but who had not

69 It appeared that the vendor acquired the property in 1937 when it had an assessed value of $13,974, and contracted to sell the property, in 1939, for $30,000 subject only to the 1940 taxes. At that time the delinquent taxes, from 1931 on, amounted to $16,245.09. Foreclosure proceedings were undertaken by the State’s Attorney on the assurance of a minimum bid of $5,500 which was the amount actually bid.

70 In another foreclosure case, that of People v. Anderson, 380 Ill. 158, 43 N.E. (2d) 997 (1942), the court applied the principle that mere inadequacy of price would not justify reversal of a decree approving the foreclosure sale. Its application was interesting since it appeared therein that certain lots having an estimated value of $300 each were sold for $1.00 each.

71 380 Ill. 68, 43 N.E. (2d) 542 (1942).

72 Ill. Rev. Stat. 1943, Ch. 120, § 756.

73 380 Ill. 120, 43 N.E. (2d) 989 (1942).

74 Ill. Rev. Stat. 1943, Ch. 122, § 102f.

75 The attempt there was to levy one-half of the proportionate liability on a bond issue in the detached area, while spreading the balance in the remaining area over a greater period of time. A currently disproportionate levy resulted.

76 365 Ill. 529, 7 N.E. (2d) 294 (1937).

77 380 Ill. 447, 44 N.E. (2d) 449 (1942), noted in 56 Harv. L. Rev. 881.
acted to prevent the transfer of the fund into the state treasury, sued to compel the issuance of a credit memorandum pursuant to Section 6 of that act which provided for the issuance of such a memorandum whenever taxes were paid under mistake of fact or of law. Holding that the case should be treated as one where taxes had been voluntarily paid, the court said that Section 6 fell with the balance of the statute since it could not be said that the legislature would have enacted it if the taxing sections, previously declared unconstitutional, had been eliminated from the start. As a consequence, the taxpayer failed to secure relief. The case is particularly important not only in relation to payments made under the Public Utility Tax Act but also for its warning to taxpayers who have in mind challenging the constitutionality of any taxing statute. Their only safeguard would seem to lie in paying the tax under protest and also in filing an injunction suit to preserve the identity of the fund.

TRADE REGULATION

Prior decisions of the Illinois Supreme Court have indicated an acceptance of the so-called "palming off" doctrine in cases of alleged unfair competition. Under that doctrine, the trade name or common-law trade mark of one person could not be protected from appropriation by another unless the latter was in competition with the former, for it was deemed there could be no property in the trade name or trade-mark apart from the business in which it was used.

Such rule was followed by the federal Circuit Court of Appeals in *Time, Incorporated v. Viobin Corporation* where defendant was engaged in selling a cereal product known as "Life of Wheat" under a label in which the words "of Wheat" were in considerably smaller type than the word "Life." The label was also printed in white block lettering against a red background so as to be similar to that used by plaintiff for its magazine named "Life." Injunctive relief was denied on the ground that no competition existed between plaintiff and defendant.

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78 Ill. Rev. Stat. 1935, Ch. 120, § 459.
80 128 F. (2d) 860 (1942), cert. den. 317 U.S. 673, 63 S. Ct. 78, 87 L. Ed. 50 (1942).
Shortly thereafter the Illinois Appellate Court, in *Lady Esther, Limited v. Lady Esther Corset Shoppe, Incorporated*, pointed out that the earlier Illinois cases had all involved situations where competition was in fact present so that, to warrant relief, an actual "palming off" was necessary. But such holdings, the court said, were far from saying that the courts would not grant injunctive relief where "the defendant's conduct is likely to cause confusion of the traders, so that the public believes or is likely to believe that the goods of the defendant are the goods of the plaintiff or that the plaintiff is in some way connected with or is a sponsor for the defendant." It accordingly granted plaintiff an injunction against defendant's use of the name "Lady Esther," saying that it was clear that the public might be deceived into thinking there was some connection between the parties. The fact that defendant had obtained a corporate charter authorizing the use of the name involved was held to be no defence.

The case seems to mark a departure in the Illinois law and one which seems well taken. Its consideration of the position of the buying public is certainly realistic. If the public is deceived by unfair practices, it is scarcely an answer to say that, since competition is absent, the deceit may continue.

VIII. TORTS

A grist of torts cases pass through the judicial mill every year, but few of them involve issues of real importance, since most turn upon disputed questions of fact. From the purely academic standpoint, however, the case of *Illinois Minerals Company v. McCarty* is worthy of note. In that case a confidential employee copied a list of the employer's customers without the employer's consent. Suit to recover damages in

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81 317 Ill. App. 451, 46 N.E. (2d) 165 (1943).
82 317 Ill. App. 451 at 455, 46 N.E. (2d) 165 at 168.
83 By reason of the doctrine in *Erie R. Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), the Illinois law would be applicable to suits for unfair competition. It was so recognized in the case of *Time, Inc. v. Viobin*. Had the decision in the Lady Esther case preceded the federal case, the Circuit Court of Appeals might have remanded that case for a determination of the effect of defendant's practices on the buying public.
1 318 Ill. App. 423, 48 N.E. (2d) 424 (1943).
trover was denied, since the defendant was held not to have committed an act of conversion. The case adheres strictly to the common law principle that only tangible personal property can be converted. Notice might also be made of *Johnson v. Turner*² wherein the issue of imputed negligence was raised but was held inapplicable since, before it can apply, the relationship of master and servant or principal and agent must exist. As the party involved was a minor, hence unable to make a binding contract essential for such relationship, the doctrine of imputed negligence could scarcely apply.³

Proximate causation was the principal question in *Merlo v. Public Service Company of Northern Illinois*,⁴ and required the court to draw distinctions between cause and condition. The utility was found not to be the cause of the injury even though it had negligently permitted live wires, insufficiently insulated, to sag so that contact could be made therewith by a negligently operated crane. The question, however, is by no means new and, in the last analysis, is one of "efficiency."

Another case of some significance is *Ryan v. Chicago & Northwestern Railway Company*⁵ in which a police officer, pursuing a culprit on a railroad right of way, was held to be rightfully upon the premises and entitled to defendant's performance of a duty to exercise reasonable care to refrain from injuring him. The officer was certainly not a trespasser as his duty required him to enter the premises. As a licensee, he would heretofore have recovered only had he shown that his injury was produced by defendant's wanton conduct.⁶ It is not clear whether the court is creating a new class of persons who, by reason of their entrance upon another's property acquire different rights than heretofore, or whether the conduct of the defendant's agents in the instant case is being

² 319 Ill. App. 265, 49 N.E. (2d) 297 (1943).
³ On this point see also the discussion of Palmer v. Miller, 380 Ill. 256, 43 N.E. (2d) 973 (1942), noted in 21 CHICAGO-KENT LAW REVIEW 195, 31 Ill. B.J. 355, and also noted ante, p. 45.
⁴ 381 Ill. 300, 45 N.E. (2d) 665 (1943), modifying 313 Ill. App. 57, 38 N.E. (2d) 986 (1942), noted in 37 Ill. L. Rev. 429.
assimilated to an active form of negligence akin to wantonness. If the former, the old classification between trespassers, licensees, and invitees must now open up to add a fourth group. If the latter, it would seem that police officers and firemen hereafter are no more likely to recover for an inactive negligent condition of the premises which causes injury than was heretofore the case.