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Survey of Illinois Law for the Year 1943-1944

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SURVEY OF ILLINOIS LAW FOR THE YEAR 1943-1944*

I. BUSINESS ORGANIZATIONS

CORPORATIONS

Separateness of identity between two corporations has been recognized as a necessary corollary to the entity theory of corporate existence even though both may have a common group of shareholders or one is but a subsidiary of the other.¹ That theory may, however, be carried too far according to the decision in Zehender & Factor, Inc. v. Murphy,² which held constitutional that section of the Unemployment Compensation Act ³ which purports to treat as one employing unit any two or more enterprises which fall under one control.⁴ Whatever the rule may be on other legal questions, the court indicated that to permit decentralization of business enterprises through a series of corporations so as to escape the burden of compensation assessments imposed by that statute was carrying the entity theory beyond its valid limits.⁵ A claim that the statute was discriminatory as well as indefinite was rejected. Adoption of the corporate form of doing business will not, therefore, serve as a means of avoiding liability for the unemployment compensation tax if control is, in fact,

¹ The present survey is not intended in any sense as a complete commentary upon, or annotation of, the cases decided by the Illinois courts during the past year, but is published rather for the purpose of calling attention merely to cases and developments believed significant and interesting. The period covered is that of the judicial year, embracing from 383 Ill. 300 to 386 Ill. 627; from 319 Ill. App. 255 to 323 Ill. App. 73; and from 135 F. (2d) 632 to 142 F. (2d) 568.
³ Ill. Rev. Stat. 1943, Ch. 48, §217 et seq.
⁴ Ibid., §218(e)(5).
⁵ Similar holdings on almost identical statutes in thirteen other states were noted by the court; 386 Ill. 258 at 265, 53 N. E. (2d) 944 at 948.
still vested in the hands of those who dominated the enterprise in the past.

Accommodation between the shareholder and the corporate management over the question of the former's right to inspect the books and records of his company has been made the subject of much legislative tinkering and not a little judicial attention. In an effort to prevent placing hindering obstacles in the path of the one but at the same time relieving the other of unnecessary burdensome investigations, a rule has been devised which entitles the shareholder to compel an inspection through the use of mandamus proceedings in addition to his right to collect a penalty for an improper denial of the privilege of inspection.\(^6\) The statute which sanctions both, however, places the limitation thereon that the inspection shall be "for any proper purpose," and that phrase has given rise to the question as to whether it is the burden of the shareholder to prove his purpose is a proper one or is rather upon the corporation and its officials to show some improper motive on his part. Resolution of that question was handed down in the case of *Morris v. Broadview, Inc.*,\(^7\) where it was held that the burden is on the shareholder even though that may cause him to undertake the duty of proving a negative. As the instances of improper probing into corporate records are few compared with the many cases in which the shareholder, through such examination, has discovered corroborative evidence of what was merely a suspicion of mismanagement the desirability of such a holding is open to question.

One reason which may have deterred the bringing of representative suits to enforce claims belonging to the corporation was the doubt that the successful shareholder would be reimbursed for the expense and effort involved. The decision in *Bingham v. Ditzler*\(^8\) will serve to remove such doubt for it recognizes the principle, long followed in other cases of similar character,\(^9\) that the party who, at his own expense, has main-

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\(^7\) 385 Ill. 228, 52 N. E. (2d) 769 (1944), noted in 22 CHICAGO-KENT LAW REVIEW 201, reversing 317 Ill. App. 436, 46 N. E. (2d) 174 (1943).

\(^8\) 320 Ill. App. 88, 49 N. E. (2d) 812 (1943), noted in 22 CHICAGO-KENT LAW REVIEW 159.

\(^9\) As to trusts, see Abend v. Endowment Fund Commission, 174 Ill. 96, 50 N. E. 1052 (1897); in will cases, see Emmert v. Hill, 226 Ill. App. 1 (1922), cert. denied 226 Ill. App. xx; in partition, see Ill. Rev. Stat. 1943, Ch. 106, §40.
tained a successful suit for the preservation, protection, or increase of a common fund should be reimbursed for his labor. The fact that his own participation in the fund is so minute that he will personally gain little from the augmentation thereof is insufficient to defeat his right to seek compensation. The holding in that case, however, suggests that the burden of such expense, while chargeable against the fund, ought properly be borne by those found guilty of such wrongdoing as to make litigation necessary. Under the present Business Corporation Act, the liability of the guilty directors appears limited to restoring the loss caused to the corporation. Amendment of that statute to include the cost of such representative litigation as an item of damage collectible from such directors might seem desirable.

In an effort to work out the difficult problems produced, during the recent depression, by wholesale defaults in mortgage bond issues many different forms of reorganization plans were developed. Some of them contemplated eventual liquidation of the mortgaged premises by liquidating trustees for the benefit of participating certificate holders. Others were constructed around new corporations organized to take over the distressed properties and to continue their operation but having management, for a period of time, in the hands of voting trustees under stock voting trusts. Each form possessed advantages, but each likewise had certain inherent weaknesses. One weakness in the latter form is demonstrated in the litigation begun in Nelson v. Amling by voting trustees of the stock of such a corporation seeking a construction of the terms of the voting trust agreement that would permit them to approve a transfer of the corporate assets to a liquidation trust. The objective of such suit was to make a change in the form of the enterprise in order to avoid the heavy taxes and burdensome administrative details attendant upon the corporate form of doing business. While the trial court looked favorably on that proposal, the decree was reversed when the Appellate Court for the First District concluded that the entire purpose

of the adoption of the corporate plan for reorganization was to secure continuity of operation rather than liquidation, hence held that the powers of the voting trustees were limited in that regard. A shift from one plan to the other,\textsuperscript{13} even though eminently desirable, is not possible unless with the consent of the beneficiaries.

As liquidation of closed state banks progresses there is likelihood that shareholders who have paid their superadded liability may become entitled to refunds of amounts overpaid, particularly where the assets of the closed bank have proved to be reasonably sound and have provided a source of funds for distribution to depositors and other creditors. The decision in the earlier case of \textit{Heine v. Degen}\textsuperscript{14} tended to indicate that any question of refund would have to wait until all such creditors had been paid in full. That holding, however, has been negated by the action of the Illinois Supreme Court in \textit{Holderman v. Moore State Bank}\textsuperscript{15}, where it was pointed out that a shareholder was entitled to refund as soon as the claims of only those creditors who became such during his period of stock ownership had been satisfied in full. It was deemed a matter of no significance that other creditors remained unpaid. That part of such satisfaction took the form of distributions made by the receiver of the closed bank drawn from its general assets was also accounted immaterial. Although such holding may be just as between the shareholder and his particular creditors, it does not take into account the doctrine of marshalling of assets which might have been invoked by the other unpaid creditors of the bank. Had they protested, it is possible that an early refund of overpayments might be indirectly prevented.\textsuperscript{16}

The average stock transfer agent will refuse to approve a transfer of corporate shares unless the endorsed certificate bears a guaranteed signature. The effect and significance of such guarantee was brought into consideration in \textit{Mudge v.}\textsuperscript{17}

\textsuperscript{13} The converse of the instant case was attempted in \textit{In re Wedgewood Hotel Co.}, 125 F. (2d) 327 (1942), but the proposal to change from a liquidation trust into a corporation was likewise rejected.

\textsuperscript{14} 362 Ill. 357, 199 N. E. 832 (1936).

\textsuperscript{15} 383 Ill. 534, 50 N. E. (2d) 741 (1943), noted in 22 \textit{CHICAGO-KENT LAW REVIEW} 216.

\textsuperscript{16} For a further analysis of this point see note to \textit{Holderman v. Moore State Bank} in 22 \textit{CHICAGO-KENT LAW REVIEW} 216, particularly pp. 218-9.
Mitchell Hutchins & Company, Inc., where a brokerage house was sued as a converter on the theory that by unconditionally guaranteeing the signature of a trustee in whose name the shares were registered it had aided the trustee to convert the shares to his own use. The court held that in the absence of actual knowledge of the trustee's lack of authority and also of his purpose to convert such shares, the brokerage firm was not liable to the beneficiaries of the trust. Such holding was predicated on the theory that the exemption now provided by Section 3 of the Uniform Fiduciaries Act, although not applicable because enacted after the transaction there involved, represented a codification of an established public policy existing prior to its enactment which would serve to protect persons dealing with the fiduciary unless they possessed actual knowledge of his wrongful purpose. Had the action on the guarantee been brought by the corporation whose shares were involved, assuming some damage could be shown, a different result might have followed.

An exemption is provided by Section 5(1) of the so-called "Blue Sky law" whereby the sale of corporate securities by a vendor who is a bona fide owner thereof and who sells for his own account is not subject to the provisions of that statute. Under a former statute such sales were exempted only if they represented isolated transactions, but that limitation was not carried over into the current revision so that the offering of even a large block of shares to many different purchasers would appear to be exempted if made by the owner for his own account. A seemingly new limitation appears to have been read into the text of the law by the Appellate Court decision in Scully v. DeMet which denied recognition to the exemption when it appeared that the vendor made the sales through

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17 322 Ill. App. 409, 54 N. E. (2d) 708 (1944), noted post p. 99. It is understood that leave to appeal has been denied.
18 Ill. Rev. Stat. 1943, Ch. 98, §236.
20 Ill. Rev. Stat. 1943, Ch. 121½, §100(1).
22 323 Ill. App. 74, 55 N. E. (2d) 101 (1944). It is understood that leave to appeal was denied, but a petition to reconsider such ruling and grant leave to appeal is said to have been filed in the Illinois Supreme Court by persons not connected with the litigation but seeking to serve as amici curiae. No ruling on such petition has, as yet, been announced.
licensed brokers to the public at large. The court seemed to feel that exempted sales should be limited to private offerings as, for example, to institutional investors who could conduct their own investigation before purchasing rather than to indiscriminate offerings to members of the general public who would be apt to rely on the assurance, impliedly conveyed from the fact that the sale was through a licensed broker, that the securities were qualified ones.

Although technically involving a problem of the rights of a creditor, the decision of the United States Circuit Court of Appeals for the Seventh Circuit in *Molner v. South Chicago Savings Bank* 23 has significance as it affects the qualifications required of a director in an Illinois state bank. By statute in this state such director is required to own and deposit shares of stock in the bank of which he is a director.24 Upon ceasing to be the owner thereof, he becomes disqualified to act and his office becomes vacant. The obvious purpose of such statute was to provide some method of protection to those who do business with the bank and to insure, at least to some slight degree, that the director would perform his duties faithfully. Despite the purpose of such statute, it was held that the shares so deposited by a bank director might be reached by garnishment at the instance of his individual creditors thus depriving the bank not only of the director's services but also of the protection thus afforded.

Opposition to branch banking, evidenced by statutory prohibition thereof,25 has been made the basis of preventing foreign national banks from obtaining license to accept or execute trusts in this state according to the decision of *Boatmen's National Bank of St. Louis v. Hughes*.26 The bank concerned in that case first sought a license to do business in Illinois as a foreign corporation27 and then hoped to gain the benefits of the provision of the federal statute which grants to national banks the same power to act in any fiduciary capacity as is enjoyed by state banks and trust companies

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23 138 F. (2d) 201 (1943), noted in 22 CHICAGO-KENT LAW REVIEW 213 and 22 N. Car. L. Rev. 57. Major, C. J., wrote a dissenting opinion.
25 Ibid., Ch. 16½, §9.
26 385 Ill. 431, 53 N. E. (2d) 403 (1944).
with which it might come into competition. Its attempt to compel the issuance of such license on original proceedings for mandamus failed when the Illinois Supreme Court denied the writ. The court indicated that application could have been rejected because (1) the name of the foreign corporation included the term "Bank" forbidden by one section of the Business Corporation Act and failed to include the word "Trust" required by another section; and (2) the purpose of the provision in the federal law was merely to place the national bank on an equal competitive basis with state banks in the state in which the national bank was situated. A more serious obstacle, however, was found to exist in the Illinois statutory provision prohibiting branch banking. Since the foreign corporation was planning to maintain a branch office in this state, even though for the limited purpose of accepting and executing trusts here, it was treated as preparing to engage in the banking business through such branch office in a manner which would clearly be forbidden to a domestic corporation. Apparently the only solution would be for the foreign corporation to organize a domestic subsidiary.

The acquisition of jurisdiction over foreign corporations not licensed to do business within the state has been made to depend on the fact that such corporation has done business within the state. Ingenious attempts to avoid that implication have been devised. One such method was up for consideration in Pergl v. U. S. Axle Company where the foreign corporation relied on the point that its only connection with

29 Ill. Const. 1870, Art. VI, §2.
31 Ibid., §157.9.
33 Trust business done by a bank has been treated as much like banking as receiving deposits and loaning funds: Watt v. Cecil, 368 Ill. 510, 15 N. E. (2d) 292 (1938).
34 If so licensed, jurisdiction may be readily acquired by reason of Ill. Rev. Stat. 1943, Ch. 32, §157.102, §157.109, and §157.111.
this state lay in the fact that it had on deposit in a warehouse here a quantity of its products which the warehouse owner was free to store or sell without prior approval. It was argued that such warehouse owner was not an agent of the foreign corporation for service of process on the latter but was merely its bailee. In an earlier Illinois case, that of The Thomas Manufacturing Company v. Thede,\textsuperscript{37} the mere deposit of goods in the state was regarded as insufficient to confer jurisdiction over the non-resident foreign corporation particularly since approval for the sale of such goods had to be obtained from the corporation in its home state. The validity of that holding has been shaken by the decision in the Pergl case for almost identical conduct was there held sufficient to support jurisdiction.

PRINCIPAL AND AGENT

Courts have applied the doctrine of respondeat superior to widely varying factual situations as each case must depend on its own peculiar facts. In Hogan v. City of Chicago\textsuperscript{38} the court applied that rule of vicarious liability to a municipal employer for the employee's use of his own car where it was expected that the employee would use such automobile about the master's business even though he was not employed to drive a car nor was any of the expense of its operation borne by the city. In that case the employee was a garbage collector who, after reporting for work at the ward office, was then sent to a designated loading point. Knowledge that the employee was using his car to reach the scene of actual labor together with the fact that he was conveying the foreman to that point was deemed sufficient to hold the municipality liable for an accident as a principal. Liability on the employer's part was, however, denied in Haynes v. Holman,\textsuperscript{39} where an automobile salesman, driving his own car, was taking a prospective customer to the employer's salesroom to pick up a water pump, as the evidence disclosed that the employee was hired solely to sell cars on commission and the parts department was under the charge of another employee.

\textsuperscript{37} 186 Ill. App. 248 (1914).
\textsuperscript{38} 319 Ill. App. 531, 49 N. E. (2d) 861 (1943).
\textsuperscript{39} 319 Ill. App. 396, 49 N. E. (2d) 324 (1943).
Mention was made last year of the question of the liability of an infant principal for the negligence of his companion while driving the infant's car with the latter's permission. Notice was taken at that time that although the infant could not be held on any agency theory there was the possibility that liability could attach if it were found that the minor was exercising control over the driver at the time so that the driver's negligence might be imputed to the infant.

Upon a new trial of that case on amended pleadings, pursuant to mandate, it was held in Palmer v. Miller that a judgment against the infant on the suggested theory should be upheld.

The line between the agent or employee on the one hand and the independent contractor on the other is often hard to draw. There has also been indication in the past that those who might be called independent contractors for most purposes will be treated as agents or employees for purpose of computing unemployment compensation taxes. Somewhat startling, therefore, is the decision of the majority of the Illinois Supreme Court in Ozark Minerals Company v. Murphy which holds that persons under contract to furnish silica to be mined on the land of, and with tools furnished by, the "employer" are to be classed as independent contractors because (1) compensation was payable on the basis of the number of tons of accepted product, (2) the "employees" were under no duty to furnish any given amount, and (3) were free to work for others if they wished. If the purpose of the statute is to provide benefits to all workers whose security might be affected by unemployment, the holding therein seems to open a door to escape from the burdens of such tax which might seriously disrupt the whole legislative purpose.

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42 323 Ill. App. 528, 56 N. E. (2d) 447 (1944).

43 See Peasley v. Murphy, 381 Ill. 187, 44 N. E. (2d) 876, 143 A. L. R. 414 (1942). Notice has also been made, ante p. 1, of the decision in Zehender & Factor, Inc., v. Murphy, 386 Ill. 258, 53 N. E. (2d) 944 (1944), where a similar disregard of usual concepts has been made on another problem involving unemployment taxes.

44 384 Ill. 94, 51 N. E. (2d) 197 (1943). Murphy, J., wrote a concurring opinion, while Thompson, J., wrote a vigorous dissent.

Although many cases involving questions concerning the right to workmen’s compensation reached the courts during the past year, it is noteworthy that none of them involved unusual principles of law, most such cases turning upon disputed questions of fact. The same observation is true as to the subject of partnership and other forms of unincorporated business association.

II. CONTRACTS

General principles of contract law are seldom made the basis of appellate comment or change for, like the doctrines of property law, such principles have come to possess a well-understood and almost inflexible meaning. On the surface, therefore, there would seem to be nothing new in the decision of the United States Circuit Court of Appeals for the Seventh Circuit in Bryan v. Creaves which holds that a release given one joint tort feasor operates to release others even though language therein expressly attempted to reserve rights against such others. Had the question involved the release of liability of a joint contract debtor, the express reservation would probably have been construed so as to make the document into a covenant not to sue in order to carry out the true intent of the parties. Whether there is validity in drawing such distinction between releases given in tort situations and those used where a joint debt is involved is, however, a matter of some question for it has been argued that there should be no difference between the two cases.

Equally fundamental would seem to be the right of a contracting party to assign the benefits of a non-personal contract. Two of the divisions of the Appellate Court for the First District, though, are in conflict over the ability of a beneficiary under the so-called “industrial” life insurance policy, after death of the insured, to assign or pledge the benefits of the policy as security for the payment of the funeral expenses incurred in burying the insured. Such conflict seems to have arisen by reason of certain clauses customarily found in policies of that type purporting to deny

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1 138 F. (2d) 377 (1943), noted in 32 Ill. B. J. 351.
2 Parmelee v. Lawrence, 44 Ill. 405 (1867).
3 See note on Bryan v. Creaves in 32 Ill. B. J. 351, particularly 352-3.
the right to make an assignment and also permitting the com-
pany to facilitate payment by paying the proceeds to any
one of a given class of persons. The First Division, in Stan-
ard Discount Company v. Metropolitan Life Insurance Com-
pany, and also in Morticians' Acceptance Company v. Metrop-
olitan Life Insurance Company, have indicated that the
rights of the beneficiary are vested upon death of the in-
sured and, being property, may be freely assigned despite such
clauses. The Third Division, on the other hand, has been
equally emphatic that the proceeds of the policy are non-
assignable. Clarification of the issue by the Illinois Supreme
Court is anticipated.

War-time restrictions and regulations affect many busi-
ness contracts, but whether such regulations make a given
contract impossible of performance is not an easy question
to answer. One application of the doctrine of impossibility
of performance was requested by a tenant, in Deibler v. Ber-
nard Brothers, Incorporated, when it was urged that
federal regulations concerning the sale of automobiles had so
adversely affected the tenant's use of the demised premises as
to justify the conclusion that the lease had been terminated
by operation of law thereby relieving him of liability for the
rent reserved. Although the leased premises had been used
as a showroom for the sale of new automobiles, the lease it-
self was silent as to any restrictive covenant limiting the
same to that type of business, consequently the court held
that the tenant was free to utilize the premises for any lawful
purpose and the lease was not cancelled by the acts of admin-
istrative officials of the federal government. Had the lease
been so limited, or had the rental been calculated on the

5 321 Ill. App. 277, 53 N. E. (2d) 30 (1944). Leave to appeal has been
allowed.
(1944).
7 It is understood that leave to appeal has been granted in the Morticians'
Acceptance Co. case, and in the Lain case. A discussion of all three cases, in-
cluding other significant points involved therein, may be found in 22 CHICAGO-
KENT LAW REVIEW 269.
8 In general, see Richard "Effect of the Present War on Contracts," 18 CHI-
CAGO-KENT LAW REVIEW 164 (1940).
9 385 Ill. 610, 53 N. E. (2d) 450 (1944), affirming 319 Ill. App. 504, 48 N. E.
(2d) 422 (1943).
volume of, or profits arising from the conduct of, such business a much closer question would have been generated and might have produced a different result.\textsuperscript{10}

NEGOTIABLE INSTRUMENTS

An interesting question concerning the maturity date of a promissory note was presented by the unique facts of the case of \textit{In re Feldman's Estate}\textsuperscript{11} in which no small part of the difficulty was produced by the inept fashion in which the instrument was drafted.\textsuperscript{12} The note in question was dated March 1, 1931, but no demand for payment thereof was made until after the death of the maker, which occurred in 1941, when the legal representative of the payee presented a claim against the maker's estate. The executor objected to allowance of such claim on the ground that action on the note was barred by the statute of limitations for the note, being purportedly due "on or before date," would, under Section 7 of the Negotiable Instruments Act,\textsuperscript{13} be a demand note. The payee's representative, however, contended that a marginal notation on the instrument, which read "Due Mar. 1, 1939," made the document into a note payable at a fixed point of time, hence the limitation period had not expired when the claim was filed. On appeal from an order disallowing the claim, both in the county and the circuit court, the Appellate Court held that, inasmuch as ambiguity existed between the body of the note and the marginal memorandum thereon, the provision in the body was controlling\textsuperscript{14} and as a consequence the claim was properly denied as being stale. The Illinois Supreme Court granted leave to appeal and its decision, although technically not in the period of this survey, requires notice for it reversed all of the inferior holdings and directed allowance of the claim\textsuperscript{15} on the theory that while marginal

\textsuperscript{10} From an analogy to cases concerning leases for saloon purposes, however, it would seem that the tenant would have to stipulate for protection against a supervening illegality or impossibility of performance before being excused: Hoefeld v. Ozello, 290 Ill. 147, 125 N. E. 5 (1919); Imbeschied v. Lerner, 241 Mass. 199, 135 N. E. 219, 22 A. L. R. 819 (1922).


\textsuperscript{12} A complete understanding of the problem requires reproduction of the note. It is set out in facsimile in 387 Ill. 568 at 570, 56 N. E. (2d) 405 at 406.

\textsuperscript{13} Ill. Rev. Stat. 1943, Ch. 98, §27.

\textsuperscript{14} See authorities cited in 10 C. J. S., Bills and Notes, §44.

\textsuperscript{15} 387 Ill. 568, 56 N. E. (2d) 405 (1944), reversing 320 Ill. App. 243, 50 N. E. (2d) 766 (1943). Smith, C. J., and Murphy, J., dissented.
memoranda are not controlling over the words in the body of an instrument still they can be looked to in order to help resolve ambiguity appearing in the body of the note itself. That internal ambiguity was found to exist because the printed word "after" in the phrase "after date" had been deleted and, by the addition of written words, the note had been made to read "on or before date" as though it were the intention of the parties that the note might be payable even before any loan had been made! The strained effect that such construction would require induced the court to adopt, as the true maturity date, the day named in the marginal notation.

INSURANCE

Unusual circumstances surrounding the death of holders of life insurance policies while engaged in the armed forces of the United States will undoubtedly produce much litigation in the near future. Of contemporary and possible future value, therefore, is the decision in Bull v. Sun Life Assurance Company of Canada in which suit was based on a policy issued to a serviceman at the time he was a naval aviation cadet. The policy excluded coverage from death as a result "directly or indirectly, of service, travel or flight in any species of aircraft, as passenger or otherwise." The insured was obliged to make a forced sea landing from the effects of enemy gunfire and, while he was attempting to launch a rubber life boat, the airplane was again shelled and exploded. The insured was never seen thereafter, but it could be inferred that he was killed by gunfire. With one judge dissenting, the majority held that there had been a disengagement from service, travel or flight in that airplane at that time, hence the policy covered the death thus occasioned.

Section 356(f) of the Insurance Code requires that exceptions to coverage in accident and casualty policies must, to be effective, be given the same prominence as the benefits thereby given. It was contended, in Custer v. Lincoln National Life Insurance Company, that such statute had no applica-

16 See cases cited in 7 Am. Jur., Bills and Notes, §§49-60.
17 141 F. (2d) 456 (1944). Major, C. J., wrote a dissenting opinion.
18 Ill. Rev. Stat. 1943, Ch. 73, §968(f).
19 141 F. (2d) 144 (1944).
tion to the policy there involved since the same was primarily one of life insurance. It appeared, however, that the company had issued a “Principal Contract” of life insurance to which was physically attached a “Supplemental Contract” covering accidental death. Finding that each was, in fact, a sufficiently complete contract calling for separate premiums, the court disregarded the manner of attachment and held the statute applicable to the supplemental one. Recovery was permitted thereon, even though the insured died from homicidal means of the type excepted in the exclusion clause, when the court found that such clause was in smaller type and lacked the prominence given to other provisions of the contract. Although the federal court could find no Illinois Supreme Court decision in point, it quoted with approval from an Appellate Court case which had stated that the plain purpose of the statute was “to compel insurance companies to fairly apprise the insured of all conditions in a policy that limit the beneficial provisions of the policy.”

When an insured owns only one automobile at the time he applies for a public liability policy and that very car is involved in a subsequent accident during the policy term, a question may arise as to whether the insurer should escape liability if the policy inaccurately describes that automobile through a variation in the motor and serial numbers and the year of make because of the insured's fault but in the absence of bad faith on his part. That question was answered in the negative in Kostecki v. Zaffina. Lacking authoritative precedent in Illinois, the court found support for its answer in decisions from California, Iowa, Michigan and Missouri as well as from its own reasoning. The court intimated, however, that an opposite result would probably follow had the policy protection covered fire and theft since the rate of premium might be different for the various models of automobiles.

SALES

Of principal significance in the field of sales law is the final outcome of the case of Donn v. Auto Dealers Investment

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Company to which attention was previously drawn by the holding of the Appellate Court giving priority to the possessor of a trust receipt who had first given notice of intention to engage in trust receipt financing\(^\text{22}\) even though the actual advancement of funds was postponed until after another had, in fact, made a similar advancement on the same property by taking the same type of security.\(^\text{23}\) Upon leave to appeal being granted, the Illinois Supreme Court reversed such decision and decided that priority had to be accorded to the person who first, in fact, advanced the funds.\(^\text{24}\) The court rejected the theory that the person who gives notice of an intention to engage in trust receipt financing thereby acquires an inchoate security interest which might later ripen into an actual one. It also seemed to be unimpressed by the argument that to require inquiry before advancement would impede the normal flow of business. The case was well argued in both courts and the final decision seems sound. As the case represents a situation of first impression in any jurisdiction, it is likely that the decision will become a leading case in those states where the Uniform Trust Receipts Act is in force.

QUASI-CONTRACTS

So emphatic is the rule of law that municipal corporations may not enter into binding contracts except pursuant to law that recovery has been denied even on a quasi-contractual theory for the reasonable value of the performance under any contract rendered invalid by reason of non-compliance with statutory requirements.\(^\text{25}\) A logical extension of that doctrine was made in *W. Q. O'Neal Company of Illinois v. Coon Run Drainage and Levee District*\(^\text{26}\) when the same rule was applied to a drainage district organized under statute which, while not strictly a municipal corporation, possesses many of the aspects of such public bodies. Despite the fact that the defendant

\(^{22}\) Ill. Rev. Stat. 1943, Ch. 121 1/2, §178.


\(^{24}\) 385 Ill. 211, 52 N. E. (2d) 695 (1944), noted in 22 CHICAGO-KENT LAW REVIEW 145 and 32 Ill. B. J. 279.


\(^{26}\) 319 Ill. App. 324, 49 N. E. (2d) 283 (1943).
district had accepted plaintiff's materials and had incorporated the same in its public works so that return thereof was impossible, recovery in quantum meruit was denied.

It is a well-recognized doctrine also that courts will not usually act in cases where the parties have fully performed an illegal contract but rather will leave them in the position they have placed themselves. That rule, however, does not apply to suits brought by a trustee in bankruptcy for one of the parties, according to Chatz v. Bloom, for he is said to stand in a different position than his illegally acting bankrupt. As a consequence, the former was permitted to maintain an action to recover a portion of an insurance commission paid over by the bankrupt broker to the insured. Although there can be no dispute that the division of such commissions is illegal, and that the trustee in bankruptcy is not barred by the reprehensible conduct of the bankrupt, yet the court seemingly overlooked the fact that the remedy for the recovery of any such divided commission is, by the same statute which makes the act illegal, placed in the insurance company. It would seem, therefore, that the action should have been maintained by the latter rather than by the trustee in bankruptcy.

III. CIVIL PRACTICE AND PROCEDURE.

Cases which do not involve some issue of practice or procedure are rare, yet many of the questions presented to the reviewing courts each year may be dismissed as being trite. Those cases which did present some novelty in procedural law during the past year are here summarized and arranged in roughly the same order as the question would be likely to arise in the mind of a lawyer engaged in preparing or presenting his client's case.

AVAILABILITY OF REMEDIES

Of first concern to the practitioner should be the question of whether or not the tribunal he contemplates using possesses jurisdiction, for if it does not all his other efforts will prove

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27 322 Ill. App. 435, 54 N. E. (2d) 889 (1944). Leave to appeal has been allowed.
28 Ill. Rev. Stat. 1943, Ch. 73, §§763-4.
30 Ill. Rev. Stat. 1943, Ch. 73, §764.
futile. It would be expected that by this time all doubts as to the power of the Illinois courts to hear and determine cases would be resolved. Such is, however, far from the case for aftermath of the effects of the decision in *Werner v. Illinois Central Railroad Company* may be observed in the action taken in *Herb v. Pitcairn* where it was held that an Illinois city court was without jurisdiction to grant change of venue to an appropriate circuit court so as to save an action, commenced in apt time but filed in the wrong court, from the defense of the statute of limitations. Such holding is clearly contradictory to the view expressed in the earlier case of *Central Illinois Public Service Company v. Industrial Commission* and seems extremely unfortunate inasmuch as in no other instance is the statute permitted to operate as a bar if the action is commenced within the time permitted even though subsequent amendment of some sort becomes necessary. It would logically seem to follow that appeals to the wrong court should be dismissed rather than transferred, yet the court has exercised the right to transfer causes in many instances during the past year without giving any thought to possible invalidity in such practice.

Notice has been taken elsewhere of the decision in *McFarlin v. McFarlin* which deals with the related problem of the scope of jurisdiction of city courts in divorce cases. But equally confusing is the theory underlying the decision of the Illinois Supreme Court in *Moffett v. Green* in which it was held that city courts had appellate jurisdiction over judgments by justices of the peace, acting for a township located wholly within a municipality possessing a city court, even though the cause of action arose outside the territorial area

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1 Appellate jurisdiction is treated separately in the subsection which appears at page 33 post.
3 384 Ill. 237, 51 N. E. (2d) 277 (1943), noted in 32 Ill. B. J. 347.
5 293 Ill. 62, 127 N. E. 80 (1920). See also Gill v. Lynch, 367 Ill. 203, 10 N. E. (2d) 812 (1938).
8 384 Ill. 428, 51 N. E. (2d) 520 (1943), noted post, p. 48. Wilson, J., dissented.
of both the township and the city. Had the action been originally instituted in the city court, jurisdiction to hear the cause would be entirely absent by reason of the Werner decision. When, however, the case reaches that court on appeal, even though it is to be tried there de novo, appellate jurisdiction is said to attach under the statute because the thing involved, i.e., the judgment of the justice of the peace, arose within the corporate limits. If the city court is to be confined for use by residents of the city and for the purpose of settling disputes arising therein, it is somewhat strained to hold that it may possess an appellate jurisdiction foreign to that purpose. The unsettlement produced by the Werner decision, therefore, seems to be far from subsiding.

Any doubts which may have existed as to the right of Illinois courts, otherwise competent, to hear and determine civil cases arising under the Emergency Price Control Act of 1942 were removed by the decision in Regan v. Kroger Grocery & Baking Company which not only held such statute to be a constitutional exercise of the war powers but also pointed out that the provision thereof concerning suits "in any court of competent jurisdiction" was not intended to limit such proceedings to federal courts. The claim that no action could be maintained here to recover a penalty under a foreign law was likewise held inapplicable since federal statutes were deemed not to be "foreign law" within the meaning of such rule. By applying equally well established principles, the court in Wieboldt Stores, Inc. v. Sturdy came to the conclusion that the Municipal Court of Chicago has jurisdiction to send its garnishment process beyond the territorial limits of the city in aid of any valid judgment which it may have had occasion to pronounce. Although original process could

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10 Ill. Rev. Stat. 1943, Ch. 37, §344.
11 50 U. S. C. A. § 925 et seq.
12 386 Ill. 284, 54 N. E. (2d) 210 (1944). Thompson, J., wrote a dissenting opinion but based the same solely on the ground that the judgment was manifestly against the weight of the evidence.
14 50 U. S. C. A. §925(e).
16 U. S. Const., Art. VI.
17 384 Ill. 271, 51 N. E. (2d) 268 (1943), affirming 318 Ill. App. 191, 47 N. E. (2d) 566 (1943).
not be served beyond the municipal limits,\textsuperscript{18} proceedings by way of garnishment have long been regarded as auxiliary to a jurisdiction which has previously attached\textsuperscript{19} and, by analogy to cases concerning the powers of city courts,\textsuperscript{20} power was said to reside in such court to enforce its judgments by execution\textsuperscript{21} or other lawful means anywhere in the state.

Jurisdiction involves more than the power to hear and determine, for problems of venue and service of process must be faced. Section 50(5) of the Civil Practice Act,\textsuperscript{22} for example, fixes venue for purpose of taking judgment by confession in either the county where the note was executed or where one or more of the defendants reside. A similar requirement is laid down in Rule 185 of the Municipal Court of Chicago.\textsuperscript{23} It was argued, in Greenberg v. Netman,\textsuperscript{24} that such provisions were jurisdictional so that no valid judgment could be entered by confession against a non-resident defendant in such court where the note was executed outside of Cook County. The majority of the court was able to evade the necessity of deciding such question by finding that the petition of the defendant to vacate such a judgment constituted a general appearance. The dissenting judge voiced the opinion that, as the whole proof on defendant's petition went to the question of residence, no such general submission to jurisdiction had occurred hence the judgment was invalid. Had the question arisen in proceedings begun in a court operating under the Civil Practice Act, it would seem that there is merit in such dissenting view for that statute expressly declares that a judgment entered by any court other than one referred to therein shall have no force or validity.\textsuperscript{25} Other venue provisions appear to have been adopted to suit administrative convenience particularly since they permit suit in either the county

\textsuperscript{18} Wilcox v. Conklin, 255 Ill. 604, 99 N. E. 669 (1912).
\textsuperscript{19} Toledo, W. & W. Ry. Co. v. Reynolds, 72 Ill. 487 (1874).
\textsuperscript{20} Reid v. Morton, 119 Ill. 118, 6 N. E. 414 (1886).
\textsuperscript{21} Ill. Rev. Stat. 1943, Ch. 37, §423.
\textsuperscript{22} Ibid., Ch. 110, §174(5).
\textsuperscript{23} Since 1940 such provision has been incorporated in Rule 75 of that court: Municipal Court Manual, p. 50.
\textsuperscript{24} 320 Ill. App. 99, 49 N. E. (2d) 817 (1943). Burke, P. J., wrote a dissenting opinion in which he raised the question as to the application of the holding in Werner v. Illinois Central R. Co., 379 Ill. 559, 42 N. E. (2d) 82 (1942), to the Municipal Court of Chicago.
\textsuperscript{25} Ill. Rev. Stat. 1943, Ch. 110, §174(5).
of the defendant's residence or in any county "in which the transaction or some part thereof occurred out of which the cause of action arose." As the court, in *LaHam v. Sterling Canning Company*, could see no convenience being served by a suit in a county in which only mere incidental events occurred it ordered the proceeding dismissed for lack of proper venue. By so doing, it emphasized the fact that the "transaction" or "part thereof" referred to in such statute must be the one upon which the action is based or out of which the dispute arose.

Jurisdiction may be acquired over a non-resident motorist who uses the highways of this state in the fashion prescribed by Section 20a of the Motor Vehicles Act. It should be noticed, however, that the act applies only to cases involving the use and operation of motor vehicles "over the highways" of the state. With that limitation in mind, the court in *Brauer Machine & Supply Company v. Parkhill Truck Company* decided that nothing short of actual personal service would suffice to support jurisdiction when the unloading of the non-resident's automobile caused personal injury after it had come to rest on private property within the state. The fact that such car had traversed the highways in order to reach its destination was regarded as insufficient to support service of summons on the Secretary of State as agent for the non-resident. The benefit of the statute, then, can be claimed only when the injury is produced during the actual use of the highway. Notice should also be taken of the decision in *Pergl v. U. S. Axle Company* which gave clarification to the problem of the right to serve process on a foreign corporation found "doing business" in this state. An earlier Illinois holding on the subject has been substantially modified.

Choice of tribunal and manner of acquiring jurisdiction

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20 Ibid., §131.
21 321 Ill. App. 32, 52 N. E. (2d) 467 (1943), noted in 22 CHICAGO-KENT LAW REVIEW 208.
24 320 Ill. App. 115, 50 N. E. (2d) 115 (1943), noted in 22 CHICAGO-KENT LAW REVIEW 157, and also noted ante, p. 7.
over the defendant being determined, the practitioner must next observe that his action is instituted in apt time. Of unusual significance in that regard is the Appellate Court decision in Gangloff v. Apfelbach which adopts, for the first time in this state, the rule that the statute of limitations begins to run, in malpractice cases against surgeons, from the time when the operation is negligently performed rather than from the time when treatment ceases, even though the patient is not aware of the malpractice until long after the event, so long as no fraud is practiced. While a cause of action for breach of warranty of title to land does not arise until the grantee is actually evicted, that analogy will not serve, according to Lives v. National Mineral Company, in suits to recover damages for breach of warranty of the right to make uninterrupted use of patented machines. Contracts of that nature were there deemed broken from the moment when the warrantee is enjoined, even by temporary injunction, from the use of such machines despite the fact that finding of infringement does not come until much later.

Next in order would probably be a determination of the point as to just who should sue as plaintiff. An interesting point on that score was made in People ex rel. City of Chicago v. Schreiber dealing with the right of a taxpayer to bring suit on behalf of a municipal corporation. The court held that, even though the taxpayer had begun his action first, he could not assume to exercise the functions of the city law officials in conducting litigation to enforce municipal rights if such officials evidenced a purpose to bring suit in the name of the city and did, in fact, do so. Analogy to preliminary steps necessary to sustain representative suits by shareholders in private corporation matters is evident.

Decisions of the Illinois Supreme Court since the outcome of the case of Hansberry v. Lee dealing with the problem of the right of a single plaintiff to maintain a representative

32 319 Ill. App. 596, 49 N. E. (2d) 795 (1943), noted in 38 Ill. L. Rev. 323.
35 142 F. (2d) 315 (1944).
36 322 Ill. App. 452, 54 N. E. (2d) 862 (1944), noted post, p. 79.
class suit\textsuperscript{38} reflect a nervous apprehension on the part of that court that constitutional rights will be invaded unless all parties can, in some way, be brought before the court. Such reluctance to act seems also evidenced by the holding in Newberry Library v. Board of Education\textsuperscript{39} where a holder of bonds was denied the right to sue, for himself and as a representative of other holders of the same issue, to compel payment thereof even though the same objection was being made by defendant as to all such bonds. As the several holders were said to have acquired the bonds at different times and by independent purchases, it was decided they did not constitute a common class which could be represented in that fashion.

Although Section 22 of the Civil Practice Act \textsuperscript{40} specifically sanctions the right of an assignee of a chose in action to sue in his own name, it does not purport to destroy the fundamental distinctions which exist between a total, or legal assignment and a partial, or equitable one.\textsuperscript{41} The assignee, when suing, should observe such distinctions in order that his proceeding be instituted in the proper forum for intrinsic differences between legal and equitable remedies are still preserved.\textsuperscript{42} If the person claiming to be assignee has nothing more than a power of attorney to collect the chose in action, he should also remember that suit can properly proceed only in the name of the principal.\textsuperscript{43} Wholesome observance of these principles should have dictated reversal of the judgment in Standard Discount Company v. Metropolitan Life Insurance Company\textsuperscript{44} wherein a partial assignee was permitted to recover in its own name through proceedings brought in the Municipal Court of Chicago.\textsuperscript{45} Support for the holding was said to rest in the

\textsuperscript{39} 387 Ill. 85, 55 N. E. (2d) 147 (1944), noted post, p. 82.
\textsuperscript{40} Ill. Rev. Stat. 1943, Ch. 110, §146.
\textsuperscript{41} Compare Ball v. Chadwick, 46 Ill. 28 (1867), with Safford v. Miller, 59 Ill. 205 (1871).
\textsuperscript{42} Ill. Rev. Stat. 1943, Ch. 110, §258.10.
\textsuperscript{43} See cases cited in 22 CHICAGO-KENT LAW REVIEW 269 at 274, footnote 30.
\textsuperscript{44} 321 Ill. App. 220, 53 N. E. (2d) 27 (1944), noted in 22 CHICAGO-KENT LAW REVIEW 269, et seq.
\textsuperscript{45} That court lacks equitable jurisdiction in the true sense of the term: Ill. Rev. Stat. 1943, Ch. 37, §357.
fact that the debtor had, subsequent to the assignment, paid part of the claim to the assignor leaving due an unpaid balance equal to the portion which had been transferred to the assignee. It is a little difficult, however, to see how a purely equitable assignment could become converted into a legal one by some act of the debtor short of novation.

Pensions granted under the Blind Relief Act, however, have finally been held to be non-assignable, either in fact or by operation of law. The right being exclusively personal, according to Creighton v. Pope County, any action must necessarily abate with the death of the recipient of the public charity and will not be revived by reason of any statute. The holding in Proffitt v. Christian County was distinguished on the ground that the action there maintained was brought and completed by the pensioner in his lifetime.

Selection of the appropriate remedy may require attention. Although no change has occurred with reference to legal actions, some decisions regarding proceedings in equity merit notice. The likelihood of a multiplicity of actions at law has long been regarded as a basis for invoking equitable jurisdiction especially where the claim of the plaintiff rests upon a series of insurance policies issued by different defendants each containing a provision for prorating the aggregate loss. Nothing derogatory to that basis for equitable jurisdiction was found to exist in Jay-Be Realty Corporation v. Agricultural Insurance Company despite the argument that the joinder provisions of the Civil Practice Act, which permit the presentation of separate demands against several defendants even in law actions, made application to equity unnecessary. Since Rule 10 of the Illinois Supreme Court declares that all

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46 Ill. Rev. Stat. 1943, Ch. 23, §279 et seq.
47 386 Ill. 468, 54 N. E. (2d) 543 (1944), modifying 320 Ill. App. 256, 50 N. E. (2d) 984 (1943).
48 Ill. Rev. Stat. 1943, Ch. 1, §10, is expressly limited to causes which would survive.
49 370 Ill. 530, 19 N. E. (2d) 345 (1939).
52 320 Ill. App. 310, 50 N. E. (2d) 973 (1943), noted in 42 Mich. L. Rev. 945. Leave to appeal has been denied.
54 Ibid., §259.10.
matters which were cognizable in equity prior to 1934 are still to be treated as such, it was held that only an express statute abrogating the jurisdiction previously exercised in equity could operate to destroy the power of that court to hear cases of the nature therein involved. Passing mention should also be made of the opinion of the Illinois Supreme Court in *Ames v. Schlaeger* in which the jurisdiction of equity to restrain the levy, extension or collection of taxes is discussed at length.

The Appellate Court, in *Adams v. Rakowski*, gave considerable attention to the enforcement of equitable decrees by contempt process. A decree had been entered therein finding that defendants had received money and securities as trustees *ex maleficio* and directing that a certain sum with interest be paid to plaintiffs. Defendants failed to make the payment so plaintiffs filed a petition for a rule to show cause why the defendants should not be held in contempt of court. The rule issued and the defendants answered relying for excuse upon their financial inability to pay the sum demanded. The chancellor, after requiring the transfer by the defendants of certain property which was later found to be worthless, ordered the rule discharged upon the ground that defendants' failure to comply with the decree was not contumacious in view of their inability to comply. Such decision was reversed by the Appellate Court. That court admitted the general rule to be that "in proceedings to punish one as for civil contempt for failure to carry out the directions of a decree to pay money or deliver up property, proof that the disobedience to the decree has not been wilful but was due solely to the pecuniary inability or other misfortune of the accused, not resulting from his fraudulent conduct to produce that condition, will purge him of the contempt." It was decided, however, that this rule was inapplicable to a situation wherein defendants have had possession of money or property committed to their care for others and have wrongfully disposed of it. It was further held that the constitutional provision against imprisonment

56 319 Ill. App. 556, 49 N. E. (2d) 733 (1943).
57 319 Ill. App. 556 at 560-1, 49 N. E. (2d) 733 at 735.
58 Tudor v. Firebaugh, 364 Ill. 283, 4 N. E. (2d) 393 (1936).
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for debt did not apply, since the obligation of the defendants was not that arising out of a mere civil judgment for money. It was added, however, that the court committing a contemner had jurisdiction to consider a petition for discharge because of inability to carry out the order of the court.⁵⁹

Brief mention might also be given to City of Kankakee v. Lang⁶⁰ where a decree was entered in an injunction suit brought by a municipality requiring the defendant to repair a building to comply with certain city ordinances. At the close of the decree appeared the following: "O.K.; A.W. DeSelm." DeSelm was attorney for and had represented the defendant in the proceeding. The Appellate Court held this to be a consent decree which could not be reviewed by appeal but had to be set aside only "by an original bill in the nature of a bill of review." It is interesting to mark not only the survival, under the Civil Practice Act, of equity but also of its terminology.

Preparation of Pleadings

Nothing significant has developed with regard to the statement of the plaintiff's case in the complaint except for the suggestion in the case of Petta v. Petta⁶¹ that it would be erroneous to couple issues concerning the property rights of the spouses with a complaint for separate maintenance. No dispute is advanced as to the holding therein that a court hearing separate maintenance proceedings would lack jurisdiction to settle property rights for the statute creating that remedy definitely restricts the court to questions of temporary or permanent allowance for support.⁶² The liberal provisions of the Civil Practice Act, however, seem to authorize the combination of any number of claims between the parties if presented as separate demands,⁶³ so the language of that opinion might be open to criticism on the ground that it tends to minimize the effect of such joinder provisions unduly.

For that matter, little has been developed with regard to defensive pleadings. The answer may, if the defendant so de-

⁵⁹ People ex rel. Meier v. Lewe, 380 Ill. 531, 44 N. E. (2d) 551 (1942).
⁶⁰ 323 Ill. App. 14, 54 N. E. (2d) 605 (1944). Leave to appeal has been denied.
⁶³ Ibid., Ch. 110, §168(1).
⁶⁴ Ibid., Ch. 110, §167(1).
sires, contain a counterclaim, but that counterclaim must, according to Biedler v. Malz, be based on a claim that is due and owing to the defendant at the time plaintiff institutes his suit for the rule still adheres, in law actions, that all matters between the parties must be determined as of that date. Damages caused by the improper suing out of a writ of attachment were, consequently, excluded from a counterclaim filed therein since the injury necessarily arose after the time when plaintiff began his suit. While the statute directs that the counterclaim may generally be stated without regard to whether or not the same presents a related or wholly distinct demand from that stated in the plaintiff's complaint, that section was held inapplicable, in Sauvage v. Oscar W. Hedstrom Corporation, to forcible entry and detainer proceedings so that a counterclaim filed therein was held properly dismissed. Such practice would have been admittedly erroneous prior to the adoption of the Civil Practice Act but it was urged that the breadth of the present counterclaim provisions had nullified the effect of earlier decisions. While it is true that certain types of statutory proceedings are exempted from the operation of the procedural rules laid down in the Civil Practice Act, still a clause of the Forcible Entry and Detainer Act assimilates the practice in cases thereunder to that of other civil proceedings. It has been held that the provisions of the practice statute with respect to summary proceedings applied to such cases, so it is somewhat strained to say that the counterclaim provisions are inapplicable simply because heretofore the only issue which could be advanced in such a case was one concerning the right to possession of the leased premises. Such a holding would seem especially harsh where,

65 Ibid., Ch. 110, §162.
67 Kelly v. Garrett, 6 Ill. (1 Gil.) 649 (1844).
68 Ill. Rev. Stat. 1943, Ch. 110, §162.
70 Although the case arose in the Municipal Court of Chicago, so not technically under the Civil Practice Act, its Rule 33 is similar to Section 38 thereof: Municipal Court Manual, pp. 22-3.
72 Ill. Rev. Stat. 1943, Ch. 110, §155(2).
73 Ibid., Ch. 57, §11.
as in the Sauvage case, the reason for the non-payment of the rent reserved was the tenant's claim to credit for moneys allegedly due because of the lessor's use of a portion of the demised premises.

If a counterclaim or other affirmative matter appears in an answer, a reply by plaintiff becomes necessary \(^7\) and if not filed in time \(^8\) may lead to default with the consequent admission of the correctness of the opponent's allegations.\(^9\) If, however, the person failing to act in appropriate time petitions for permission to cure the defect before default has been taken, the trial court should grant leave so to do, according to the holding in *Snively v. Crownover*,\(^8\) where judgment was reversed because plaintiff was denied the right to make a late filing of a reply. Liberality on this point was deemed proper in the furtherance of justice. When drafting the reply, however, due caution should be given to the rules of pleading. In that regard, the first clear expression on the subject of departure since the adoption of the Civil Practice Act was handed down in *Spence v. Washington National Insurance Company*\(^7\) where plaintiff's reply, really unnecessary because no new matter appeared in the answer, deviated from the theory of the complaint and was construed to be a violation of the rules of good pleading. As under the former practice, the pleader who realizes that he cannot sustain his case on the theory first advanced in the complaint should take advantage of the liberal provisions for the amendment thereof rather than try to save his case through a reply.

Motions to strike pleadings or to dismiss suits, whether made under Section 45 or Section 48 of the Civil Practice Act,\(^9\) are intrinsically demurrers so the issues raised thereby must be confined to matters already on the face of the record or which can properly be brought within the compass thereof by affidavit. Lack of power on the part of a trustee to make the contract sued upon is matter which is not so apparent on the

\(^7\) Ill. Rev. Stat. 1943, Ch. 110, §156.
\(^8\) Ibid., §259.8.
\(^9\) Ibid., §164(2).
\(^8\) 321 Ill. App. 292, 53 N. E. (2d) 7 (1944).
\(^7\) 320 Ill. App. 149, 50 N. E. (2d) 128 (1943), noted in 22 CHICAGO-KENT LAW REVIEW 146.
\(^9\) Ill. Rev. Stat. 1943, Ch. 110, § § 169 and 172.
record, hence, according to the decision in City National Bank and Trust Company of Chicago v. Bairstow,\textsuperscript{81} that issue may only be raised by affirmative pleading in the fashion directed by Section 43(4) of the act\textsuperscript{82} and cannot be made the basis of a motion to strike.\textsuperscript{83}

**THE TRIAL OF THE CASE**

Except for one case, the rules of evidence were applied without producing any occasion for comment. In Noel State Bank v. Blakely Real Estate Improvement Corporation\textsuperscript{84} the presumption that public records possess absolute verity, hence cannot be impeached, was relied on as the basis for holding a master in chancery liable to account for moneys which he reported he had received but which, in fact, had never been turned over to him. The majority of the court declared that a sound public policy forbade that he should be permitted to escape the consequences of his act by repudiating and contradicting his official report, although the court was careful to note that the misstatement therein was not actuated by any motive to procure advantage for the master or with a desire to produce injury to others.

Unnecessary repetition in instructions given on behalf of a plaintiff in a personal injury case, so as to place undue emphasis on the kind of injuries suffered by plaintiff and their bearing on the measure of damage, was condemned in O'Hara v. Central Illinois Light Company\textsuperscript{85} where, out of ten instructions given at the request of plaintiff, four of them contained almost identical language on that point. Though the court recognized that some latitude should be allowed so that the

\textsuperscript{81} 319 Ill. App. 632, 50 N. E. (2d) 111 (1943).
\textsuperscript{82} Ill. Rev. Stat. 1943, Ch. 110, §167(4).
\textsuperscript{83} A distinction should be drawn between the situation there presented and the one covered by Ill. Rev. Stat. 1943, Ch. 110, §172(1c). The latter deals with plaintiff's incapacity to sue as by reason of his alienage, etc.
\textsuperscript{84} Sub nom. Cuzzone v. Cohen, 321 Ill. App. 594, 53 N. E. (2d) 621 (1944). O'Connor, P. J., wrote a dissenting opinion. Leave to appeal has been denied. The dissenting judge predicated his opinion on the fact that it was common knowledge that masters in chancery, when conducting foreclosure sales, rarely receive cash for the amount of the bid made by the mortgagee since it would be foolish to compel the mortgagee to deposit the full cash amount of his bid only to receive the return thereof, less costs, a day or so later. He therefore believed that the realities of the situation, rather than technicalities, should be the basis of any decision on the question of the master's duty to account for sums supposedly received.
\textsuperscript{85} 319 Ill. App. 336, 49 N. E. (2d) 274 (1943), noted in 42 Mich. L. Rev. 536.
instructions might cover every phase of a damage claim, it could find no justification in such frequent repetition and concluded that the same constituted reversible error.

A person seeking to obtain a directed verdict under the former practice was obliged not only to present a motion to that effect but also was required to submit a proposed form of instruction for use in case such motion was granted. If no such instruction was submitted, there was no legal issue before the court to be determined.86 It was urged, in Compass Sales Corporation v. National Mineral Company,87 that such requirement still continued so that it was error to grant defendant's motion for a directed verdict inasmuch as the same was not accompanied by the proper written instruction. The court nevertheless approved the action of the trial court in sustaining such motion when it observed that the new procedure laid down under Section 68(3a) of the Civil Practice Act88 in practical effect converts such motion into one for judgment notwithstanding the verdict if ruling thereon is reserved by the trial court until after verdict has been received. The court did note, however, that it was better practice to present a written instruction with the motion for a directed verdict so that the same might be used if the trial court should decide to pass thereon before submitting the case to the jury.

Under the earlier procedure in equity a motion by defendant to dismiss the bill of complaint for want of equity amounted to a submission of the cause to the chancellor and precluded further testimony.89 By the 1941 amendment to the Civil Practice Act90 the defendant was permitted, if such motion was denied, to adduce evidence in support of his defense and the right of the chancellor to open the case for further testimony was recognized. It is now indicated, by the decision in Havill v. Darch,91 that the same rules will apply to a hearing

86 See West Chicago St. R. R. Co. v. Foster, 175 Ill. 396, 51 N. E. 690 (1898).
88 Ill. Rev. Stat. 1943, Ch. 110, §192(3a).
89 Abel v. Flesher, 296 Ill. 604, 130 N. E. 353 (1921); Thorworth v. Scheets, 269 Ill. 573, 110 N. E. 42 (1915); Koebel v. Doyle, 256 Ill. 610, 100 N. E. 154 (1912).
91 320 Ill. App. 667, 52 N. E. (2d) 64 (1943). Leave to appeal has been denied.
before a master in chancery, even though the latter is but a ministerial officer, since his action is open to review by the chancellor upon exceptions taken thereto.

Motions for judgment notwithstanding the verdict have long been used in law actions where the practice is limited to granting such motions only if the trial court can say that, taking the evidence in the record as true and rejecting all contradictory circumstances, there is no reasonable basis to sustain the verdict. When ruling on such motion, the trial court is not authorized to weigh the evidence or to determine controverted questions of fact. A similar procedure has been devised for use in equity cases tried with a jury, but where that jury is to serve merely in an advisory capacity the chancellor is free to accept or reject the verdict as he believes justice may require. For that reason, it was held in Shipman v. Mosely, that Rule 22 of the Illinois Supreme Court does not limit the chancellor to the consideration merely of the evidence which would tend to sustain the verdict but rather that he is free, upon such motion, to exercise his own independent judgment on the whole of the evidence.

Circuit of procedure on post-trial motions was struck down by Rule 22 of the Illinois Supreme Court which was so designed as to give the appellate tribunal the benefit of the views of the trial judge, at the time of his ruling on both the motion in arrest of judgment and the motion for new trial, so that the reviewing court might, at one time, dispose of all disputed issues thus raised. That rule, however, concludes with the statement that "any party who fails to file a motion for a new trial as herein provided shall be deemed to have waived the right to apply for a new trial." Application of that proviso became necessary in Todd v. S. S. Kresge Company when the Supreme Court concluded that the trial court had erred in granting defendant's motion for judgment notwithstanding the verdict and, as no motion for new trial had

92 Ill. Rev. Stat. 1943, Ch. 110, § 192(3).
93 Ibid., §259.22.
95 319 Ill. App. 443, 49 N. E. (2d) 662 (1943).
96 Ill. Rev. Stat. 1943, Ch. 110, §259.22.
97 384 Ill. 524, 52 N. E. (2d) 206 (1944), reversing 317 Ill. App. 536, 47 N. E. (2d) 138 (1943).
been made, the court found it necessary to enter judgment on the verdict.

Two cases have bearing on the nature of the judgment which should be pronounced. The action of the Illinois Supreme Court in affirming the judgment of the Appellate Court in Shaw v. Courtney \(^9\) should not be construed to sanction the practice of taking separate judgments for varying amounts against joint tortfeasors,\(^9\) for the higher court was careful to state that its decision was to be confined to the precise questions presented to it. Section 50 of the Civil Practice Act \(^1\) does permit the entry of more than one judgment in a given case, so that a person may not be delayed in his remedy against one party while litigating issues involving another, but that statute has not changed the rule that if a unit judgment is rendered it must be reversed as to all if erroneous as to some.\(^2\) As a consequence it was held, in Fredrich v. Wolf,\(^3\) that a judgment taken by confession on a joint note signed by two persons, being a unit judgment and erroneous as to one maker, had to be reversed as to the other. By so doing, the surviving maker was thereby rendered incompetent to testify as to conversations with the deceased maker tending to establish authority to sign as agent for the latter.\(^4\) It was also held that such surviving maker was not rendered any the more competent because called as an adverse witness under Section 60 of the Civil Practice Act.\(^5\)

After judgment has been rendered, the trial court may have occasion to consider whether the same should be vacated, particularly if the same was taken by confession. Such judgments may be vacated by the trial court upon motion disclosing a prima facie defense on the merits to the whole or to a part of the plaintiff’s demand.\(^6\) In the past, however, it has

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\(^9\) 385 Ill. 559, 53 N. E. (2d) 432 (1944), affirming 317 Ill. App. 422, 46 N. E. (2d) 170 (1943), noted in 21 CHICAGO-KENT LAW REVIEW 249.

\(^9\) That practice was criticized in a note on the decision of the Appellate Court which appeared in 21 CHICAGO-KENT LAW REVIEW 249.

\(^1\) Ill. Rev. Stat. 1943, Ch. 110, §174.

\(^2\) The former practice is illustrated by Claffin v. Dunne, 129 Ill. 241, 21 N. E. 834 (1889).

\(^3\) 383 Ill. 638, 50 N. E. (2d) 755 (1943), reversing 316 Ill. App. 672, 45 N. E. (2d) 551 (1942). Wilson, J., dissented.


\(^5\) Ibid., Ch. 110, §184.

\(^6\) Ibid., Ch. 110, §259.26.
been held no reason to vacate such judgment merely because the judgment debtor possessed a counterclaim which he desired to assert.\(^7\) Strict construction of existing statutes would lead to much the same result for it can hardly be said that a counterclaim growing out of some unrelated transaction constitutes a defense “on the merits” to plaintiff’s demand. Liberal construction thereof, however, as dictated by express statutory command,\(^8\) was given in *State Bank of Blue Island v. Kott* \(^9\) so that the judgment debtor was held entitled to have a judgment by confession vacated, without any defense to the claim on the judgment note, merely because he asserted ownership of a claim against the plaintiff growing out of an entirely independent and unrelated transaction.

Other judgments become final thirty days after rendition so that the trial court lacks jurisdiction to set the same aside except in the fashion permitted by Section 72 of the Civil Practice Act.\(^10\) Views expressed by the dissenting judge in *Jerome v. 5019-21 Quincy Street Building Corporation*,\(^11\) to the effect that the motion there provided should be limited to cure defects not apparent on the face of the record and cannot reach obvious errors, were approved by the Illinois Supreme Court when it took the case on leave to appeal and reversed the holding of the majority of the Appellate Court.\(^12\) Practice under the new provision must, therefore, be assimilated with that which formerly prevailed.\(^13\) If the legislature contemplated any change in the law by substituting the newer motion for the older writ, that change has now been minimized to one of terminology only for the motion has been declared unavailable for use in equity proceedings\(^14\) and apparently possesses no broader scope at law than did the old writ. It

\(^7\) Stead v. Craine, 256 Ill. App. 445 (1930).
\(^8\) Ill. Rev. Stat. 1943, Ch. 110, §128.
\(^9\) 323 Ill. App. 27, 54 N. E. (2d) 897 (1944).
\(^10\) Ill. Rev. Stat. 1943, Ch. 110, §196.
\(^11\) 317 Ill. App. 335, 45 N. E. (2d) 878 (1943).
\(^14\) Frank v. Salomon, 376 Ill. 439, 34 N. E. (2d) 424 (1941), noted in 19 CHICAGO-KENT LAW REVIEW 372.
might be expected, therefore, that the confusion generated by the change should now subside.  

APPEAL AND APPELLATE PROCEDURE

Review of trial court decisions may produce questions of jurisdiction for the higher courts of the state must move within constitutional and statutory limits. Of foremost significance, therefore, is the well-considered opinion written by Justice Wilson of the Illinois Supreme Court in the case of Superior Coal Company v. O'Brien which gives exhaustive treatment to the question of the power of reviewing courts over nisi prius decisions on certiorari directed to test the correctness of findings by administrative bodies. That opinion declares that review of such nisi prius decisions is possible, even in the absence of statutory language authorizing the same, whether such review takes the form of an appeal or a writ of error, since nothing short of a mandatory prohibition against further review can operate to deny the power of the higher courts of this state to pass on the work done by the inferior tribunals. A similar holding as to review of determinations in lunacy proceedings may be found in the case of In re Cash.

The reported holding in In re Petition of Ekendahl should serve to explode a common notion that there is no right to seek review of a decree of adoption but that all questions concerning the validity thereof must be tested by habeas corpus proceedings. It was there held that although the Adop-

15 The rather unique decision in Nikola v. Campus Towers Apt. Bldg. Corp., 303 Ill. App. 516, 25 N. E. (2d) 582 (1940), which translated such a motion into a complaint in equity, will probably go without explanation.

16 383 Ill. 394, 50 N. E. (2d) 453 (1943).

17 The statute there involved, Ill. Rev. Stat. 1943, Ch. 120, §451, now permits appeal direct to the Supreme Court, but the amendment added by Laws 1943, Vol. I, p. 1151, was not applicable to the facts of the instant case.

18 383 Ill. 409, 50 N. E. (2d) 487 (1943), affirming 313 Ill. App. 281, 40 N. E. (2d) 312 (1942). Smith, J., wrote a dissenting opinion on another issue of the case. It should be noted that the present Mental Health Act, Ill. Rev. Stat. 1943, Ch. 91½, §24, expressly covers the right of appeal.

19 321 Ill. App. 457, 53 N. E. (2d) 302 (1944), noted in 39 Ill. L. Rev. 88. Leave to appeal has been granted.

20 That notion proceeds from the decision in Meyers v. Meyers, 32 Ill. App. 189 (1889).

21 Sullivan v. People, 224 Ill. 468, 79 N. E. 695 (1906).
tion Act is silent as to any method of review and specifically declares that the appellate provisions of the Civil Practice Act do not apply to adoption proceedings, still review by writ of error was possible as in the case of other statutory proceedings wherein the use of the writ of error is not expressly forbidden. Defects which could not be reached by habeas corpus proceedings were there deemed open to consideration by the appellate tribunal. Improvident use of a notice of appeal rather than a writ of error was overlooked because of the liberality displayed in Rule 28 of the Illinois Supreme Court.

Review is not usually possible, however, unless the decision of the trial court is one possessing finality for until that time the lower court is in a position to remedy its own errors. Construction of the term "final order," therefore, became necessary in Brauer Machine & Supply Company v. Parkhill Truck Company where the trial court had sustained a motion to quash the service of process upon a finding that the defendant was a non-resident corporation not doing business in Illinois. It was urged that such order was neither a final one nor an interlocutory one within the scope of Sections 77 and 78 of the Civil Practice Act so that appellate review was not possible. Although the court recognized that the essence of finality usually involves a determination of material issues on the merits, it concluded that a stalemate would result if no opportunity was provided for re-examination of an erroneous decision on such a point and it therefore treated the same as a final order even though no judgment had been entered dismissing the suit.

Principles laid down in Borman v. Oetzell received a logical extension through the decision in Phillips v. O'Connell.

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23 Only issues as to the jurisdiction of the court granting adoption could be tested in that form of remedy: Ashlock v. Ashlock, 360 Ill. 115, 195 N. E. 657 (1935).
24 Ill. Rev. Stat. 1943, Ch. 110, §259.28.
28 382 Ill. 110, 46 N. E. (2d) 914 (1943), noted in 21 CHICAGO-KENT LAW REVIEW 332.
29 322 Ill. App. 164, 54 N. E. (2d) 84 (1944).
where it was held that although the Civil Practice Act permits the joinder of legal and equitable claims and also sanctions separate judgments thereon, still no final order will exist as to one part of the case if the court should decide that eventual disposition of the entire claim should await the outcome of the hearing on the other portion. The case is noteworthy because plaintiff could have accomplished his entire purpose, i.e. foreclosure and recovery of a deficiency judgment, in one equitable proceeding but instead chose to include a count at law on the note. If his claim had been single, an order denying him a deficiency judgment would have constituted a final and appealable order, but because he had incorporated a separate claim at law for the same thing it was held that the decision denying a deficiency judgment in equity and remitting him to a hearing on the legal cause of action was not a final determination on the merits. Any hardship in such holding was said to result from plaintiff's voluntary action in joining the claims.

The extent of jurisdiction to review the action of a trial court upon a motion for new trial was considerably expanded by Section 77 of the Civil Practice Act which now authorizes such review in case a motion of that nature is granted whether at the request of plaintiff or defendant. Such appeal so provided, however, is not a matter of right, as is the case with true final orders, for leave to appeal must first be obtained from the reviewing court or some judge thereof. Further limitation thereon is noted in Baumgardner v. Boyer in which the Illinois Supreme Court declared that no other review is possible than that permitted by the statute despite the contention that due process of law would be denied to a litigant if the reviewing court should refuse to grant permission to appeal from an order granting a new trial. An attempt to accomplish the same objective by indirection was

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31 Ibid., Ch. 95, §17.
33 Ill. Rev. Stat. 1943, Ch. 110, §201. See also Rule 30 of the Illinois Supreme Court: Ibid., Ch. 110, §259.30.
34 384 Ill. 584, 52 N. E. (2d) 247 (1944).
35 It might be noticed that allowance of an appeal is not a requisite of due process: People ex rel. Radium Dial Co. v. Ryan, 371 Ill. 597, 21 N. E. (2d) 749 (1939).
likewise frustrated in *Goodrich v. Sprague*\(^{36}\) where the court criticized an effort to procure review by the Supreme Court of the action taken by the Appellate Court when passing on an appeal from an order granting a new trial.\(^{37}\)

Notice of appeal is necessary to give jurisdiction to the appellate tribunal. The statute also requires that a copy of such notice be served on the opposing party\(^{38}\) and proof of service be made within a limited time thereafter. The filing of a duplicate copy of the notice of appeal, bearing suitable endorsement showing the manner of service, on a day subsequent to that on which the notice of appeal itself was filed does not, according to *Deibler v. Bernard Brothers, Incorporated*,\(^{39}\) amount to the taking of two appeals from the same decision\(^{40}\) but rather that such endorsed form merely supplements the original notice. As the notice of appeal must be filed within the time limited by law, questions are likely to arise as to the point when time begins to run. On that score, the action taken in *Snook v. Shaw*,\(^{41}\) dealing with the question of the finality of an oral declaration by a chancellor of his decision so as to set the period for appeal running, has been re-enforced by the decision in *Woods v. Old National Bank of Centralia*\(^{42}\) which holds that not even the judge's minutes of a decision on the merits constitute a final order, particularly if such minutes show that a formal written decree was to be prepared and submitted for signature. Until such decree was entered, there was always the possibility that the chancellor might revise or entirely change his decision if the equities of the case required it.

\(^{36}\) 385 Ill. 200, 52 N. E. (2d) 250 (1944).

\(^{37}\) Attention is invited to a still more recent holding, not in the period of this survey, which points out the only way by which final review by the Supreme Court would be possible under existing statutes: Kavanaugh v. Washburn, 387 Ill. 204, 56 N. E. (2d) 420 (1944).

\(^{38}\) Ill. Rev. Stat. 1943, Ch. 110, §259.34.

\(^{39}\) 385 Ill. 610, 53 N. E. (2d) 450 (1944), affirming 319 Ill. App. 504, 48 N. E. (2d) 422 (1943).

\(^{40}\) Two separate appeals in fact by the same party would be improper: Spivey Bldg. Corporation v. Illinois Iowa Power Co., 375 Ill. 128, 30 N. E. (2d) 641 (1940), noted in 19 CHICAGO-KENT LAW REVIEW 274.

\(^{41}\) 315 Ill. App. 594, 43 N. E. (2d) 417 (1942), noted in 21 CHICAGO-KENT LAW REVIEW 98.

\(^{42}\) 322 Ill. App. 1, 53 N. E. (2d) 734 (1944).
After proper notice of appeal has been filed, however, jurisdiction over the cause attaches to the reviewing court and, since a case cannot be before the trial and the appellate tribunal at the same time, the trial court is necessarily ousted of its jurisdiction. The latter cannot, by attempted reservation of jurisdiction over undisposed of matters, enter any other or further orders even though no bond has been filed so as to make the appeal operate as a supersedeas. For such reason, a supplemental decree taxing costs was reversed in Cowdery v. Northern Trust Company on the ground that it was an absolute nullity.

Procedural matters after an appeal has been taken are regulated principally by rule of court. One such rule declares that "each party shall file a printed brief" in every case brought up on appeal. That rule should not be given too literal a meaning, according to McKey v. McKeen, just because an appeal is taken on behalf of a number of persons. Separate briefs are not only to be regarded as unnecessary but the filing thereof is subject to condemnation. The court did note, however, that if separate or conflicting issues are involved and such questions cannot be properly presented in one brief then, on motion, permission will be granted for the use of separate briefs.

ENFORCEMENT OF JUDGMENTS

Significant law has been made during the past year with regard to methods by which judgment orders and decrees may be made enforceable. Of foremost importance is the case of Dunham v. Kauffman in which a distinct setback was given to proponents of the claim that the legislature, when amending the Attachments Act in 1935, by inference authorized the use of an equitable attachment. The higher court declared

[Footnotes]
44 321 Ill. App. 243, 53 N. E. (2d) 43 (1944). O'Connor, P. J., wrote a brief concurring opinion. Leave to appeal has been denied.
46 384 Ill. 112, 51 N. E. (2d) 189 (1943).
47 385 Ill. 79, 52 N. E. (2d) 143 (1944), reversing 319 Ill. App. 229, 48 N. E. (2d) 777 (1943), noted in 22 CHICAGO-KENT LAW REVIEW 80 and 38 Ill. L. Rev. 408.
that, in the absence of express language showing an intent to create a new remedy, older doctrines would have to prevail particularly since distinctions between actions at law and proceedings in equity have not been abolished. The holding might well have been the other way for the change by the legislature would seem to have little significance if it were not designed to permit equitable attachments.

Rights under successive attachments were involved in *Scheetz v. Crabill* where the debtor’s bank account had first been attached in favor of one Martens and, while that attachment was in force, the bank honored certain checks including one designed to satisfy the debt due Martens. Prior to the time when the Martens attachment proceedings were dismissed, another creditor attached the same fund but was given judgment against the garnishee only for the net balance remaining in the account. A claim that the bank had acted improperly in honoring such checks during the pendency of the first attachment without court order, hence should account for the entire fund, was rejected when the court said that to adopt such theory would in effect force the garnishee to be a receiver of the debtor’s assets responsible to all the debtor’s creditors who might thereafter serve attachment writs. The protection intended by the statute was said to be designed solely for the benefit of the first attaching creditor.

The nature of the property which may be subjected to garnishment proceedings was involved in *Kovich v. Live Stock National Bank of Chicago* where the judgment creditor sought to reach funds on deposit in an account in the name of a person other than that of the judgment debtor on the ground that the funds deposited therein really belonged to the debtor. On finding that such claim was true, the court held garnishment proper for the same was said to be a remedy to

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49 *Phelps v. Foster*, 18 Ill. 309 (1857), declared that until the creditor had exhausted his remedy at law by securing judgment and having execution returned *nulla bona* resort to equity was improper.


51 322 Ill. App. 49, 53 N. E. (2d) 741 (1944). Leave to appeal has been denied.


be administered upon equitable principles. The cash surrender value of a life insurance policy issued prior to the statute exempting such proceeds from garnishment was, however, held exempt in *Fidelity Coal Company v. Diamond* upon a showing that the policy was not taken out to defraud creditors, as the statute was said to indicate a definite public policy in that regard. As the proceeds of such a policy could not be reached by garnishment, it followed that no better relief could be obtained by a creditor's bill. Shares of stock deposited by a bank director in order to qualify for office were, on the other hand, held subject to garnishment by an individual creditor in *Molner v. South Chicago Savings Bank*.

An interesting question over the rights of a judgment creditor who also purchased the property seized at public sale was presented in *Benj. Harris & Company v. Western Smelting & Refining Company* where it developed that a substantial portion of the property had disappeared between garnishment and sale. The court held that the rule of *caveat emptor*, which applies to judicial sales, would control so that loss had to fall on the purchaser. A claim that the provisions of the Garnishment Act should serve to hold the garnishee to account was rejected since the loss appeared to have preceded the levy. The creditor in *Roseland Cab Company for the use of Hibley v. Savings Mutual Casualty Company* fared better in a dispute with the garnishee over the question whether the automobile involved in a traffic accident was the one covered by the policy. A statement made by the assured in a notice of accident to the effect that the covered car, rather than another automobile, was the one involved was held competent evidence against the garnishee by a majority of the court.

Law on the subject of fraudulent conveyances was made in *Woodham v. Miller*, where the judgment creditor attempted to avoid a deed made by judgment debtor to his daughter,

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54 Ill. Rev. Stat. 1943, Ch. 73, §850.
56 138 F. (2d) 201 (1943), noted in 22 CHICAGO-KENT LAW REVIEW 213.
59 320 Ill. App. 363, 51 N. E. (2d) 609 (1943). Burke, P. J., wrote a dissenting opinion. Leave to appeal has been denied.
60 319 Ill. App. 388, 49 N. E. (2d) 317 (1943).
when the court said that the fact that a deed is made to a near relative does not render the deed presumptively fraudulent although the fact of relationship is a circumstance which might excite suspicion. The court also had occasion, in DeMartini v. DeMartini,\textsuperscript{61} to reiterate the proposition that a judgment is not a lien on property previously conveyed by the judgment debtor, even though such conveyance was designed to defraud creditors, for the levy and execution does not operate to cancel the conveyance. Priority of lien, therefore, was given to one whose judgment was later in point of time and who executed the same after decree had been entered avoiding the fraudulent conveyance.

IV. CRIMINAL LAW AND PROCEDURE

Clarification of the substance of the criminal law of Illinois was provided through four decisions of sufficient significance to merit attention. In the first, that of People v. Potter,\textsuperscript{3} it was claimed that the state had failed to prove a violation of the statute condemning open lewdness\textsuperscript{2} because the testimony showed that the parties concerned maintained separate domiciles and lived the major portion of the time therein. It was asserted that the fact that they enjoyed frequent sexual interviews was insufficient to warrant conviction inasmuch as the statute condemns only the living together "in an open state" of adultery or fornication. While private immoral indulgence might not be enough,\textsuperscript{3} the court did find that the acts of the parties were so brazen and notorious that every neighbor in the community was cognizant of what went on, hence affirmed the conviction.

To warrant conviction for manslaughter growing out of the negligent operation of an automobile, however, it must appear that the defendant's conduct was not only the proximate cause of the death of the victim but also that such conduct amounted to recklessness.\textsuperscript{4} The fact that the defendant, at the time, was engaged in the violation of some other statute as, for example, driving without lights, does not neces-

\textsuperscript{61} 385 Ill. 128, 52 N. E. (2d) 138 (1944).
\textsuperscript{3} 319 Ill. App. 409, 49 N. E. (2d) 307 (1943).
\textsuperscript{2} Ill. Rev. Stat. 1943, Ch. 38, §46.
\textsuperscript{3} See discussion of this point in 1 Am. Jur., Adultery, §17.
\textsuperscript{4} People v. Burgard, 377 Ill. 322, 36 N. E. (2d) 558 (1941).
sarily prove that his act in so doing amounted to reckless or wanton driving. When, therefore, a collision occurs because, shortly before the impact, the lights of defendant's car become extinguished through mechanical failure of which he has had no advance warning, and the act of driving continues only for the purpose of removing the car to a safe place off the highway, it could be expected that the court would, as it did in People v. Lynn, conclude that evidence of recklessness was lacking so as to warrant reversal of a conviction for manslaughter.

The statute making it criminal for any person to "solicit to prostitution" was questioned, in People v. Rice, on the ground that it did not sufficiently define the offense condemned or describe the act or acts which constitute the same. The statute was held sufficiently broad for that purpose as the terms used therein were said to possess a meaning so well understood as to require no further definition. The indictment based thereon was, however, held properly quashed since it was lacking in sufficient particularity to protect the defendant from a subsequent prosecution for the same offense. A somewhat similar point was made in People v. Friedrich wherein criticism was addressed to the statute making it criminal to possess or sell obscene books, pictures, etc., on the ground that the statute laid down no definition for the terms "obscene" and "indecent" as used therein. Defendant contended that, in the absence of definition, such words could have different meanings to different persons so that no man might know whether the thing he possessed or sold was an object of vulgarity and indecency or had some cultural value as a work of art until after he had been tried for a violation of the statute. It was, nevertheless, adjudged that the statute was not void for indefiniteness.

Most of the appeals in criminal cases raised issues as to the correctness of procedural steps taken in securing convic-

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5 People v. Przybyl, 365 Ill. 515, 6 N. E. (2d) 848 (1937).
6 385 Ill. 165, 52 N. E. (2d) 166 (1944).
7 Ill. Rev. Stat. 1943, Ch. 38, § 163.
8 385 Ill. 584, 50 N. E. (2d) 711 (1943).
9 385 Ill. 175, 52 N. E. (2d) 120 (1944).
Of cases in this category, the following are deemed noteworthy and are arranged in the order in which the question involved in each is apt to arise during the course of a criminal prosecution.

Acquisition of jurisdiction over the person of the offender is essential to a valid conviction. That jurisdiction could not be obtained merely by attaching a ticket to an illegally parked automobile directing the owner thereof to appear on a stated date. But if that action is followed up by the filing of a complaint and the issuance and service of a warrant, jurisdiction will then attach according to *City of Chicago v. Crane* despite the fact that the defendant might appear specially for the purpose of questioning the jurisdiction so acquired.

Section 8 of Article II of the Illinois Constitution of 1870 provides that no person shall be held to answer for a criminal offense unless on indictment of a grand jury but that in case of punishment by fine or imprisonment otherwise than in the penitentiary other methods of prosecution may be adopted. Reliance was placed on that section, in *People v. Kobylak* as ground for the claim that when the punishment provided by law adds any additional penalty to the fine or imprisonment in the manner indicated then the prosecution must be by indictment. It was also argued that inasmuch as Section 47 of the Uniform Act Regulating Traffic on Highways directs that, in addition to fine or imprisonment, the license of the convicted violator shall be revoked, no valid prosecution could be conducted thereunder in the Municipal Court of Chicago as that court possesses jurisdiction only in cases where the punishment is limited to fine or imprisonment for a short term. The fallacy of such argument was exposed when the court declared

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11 Cases which only involved problems of the sufficiency of evidence or credibility of testimony to sustain the verdict or judgment are not included in a survey of this character. They do, however, represent the bulk of the work of the appellate courts.

12 *Ker v. People*, 110 Ill. 627 (1884), affirmed in 119 U. S. 436, 7 S. Ct. 225, 30 L. Ed. 421 (1886).


14 383 Ill. 432, 50 N. E. (2d) 465 (1943).

15 Ill. Rev. Stat. 1943, Ch. 95½, §144.

16 Ibid., Ch. 37, §357. See also *People v. Russell*, 245 Ill. 268, 91 N. E. 1075 (1910).
that revocation of the license was an incidental consequence to the conviction and was not to be considered as punishment for the offense.\textsuperscript{17}

Statutes of limitation require that indictments must be found within certain fixed periods after the commission of the offense,\textsuperscript{18} but to obtain the benefit thereof it must usually appear that, at all times concerned, the party charged must have been “usually and publicly resident” within the state.\textsuperscript{19} By attempting to give the technical legal definition to the word “resident” as referring to a legal domicile in the state, the defendant in \textit{People v. Carman} \textsuperscript{20} hoped to be able to sustain his contention that prosecution was barred even though he was absent from Illinois for a long period undergoing incarceration in the penitentiary of another state. The conviction was affirmed, however, when the court concluded that, even though a man’s legal residence could not be changed by involuntary imprisonment elsewhere, still the term “resident” as used in the statute in question referred to one publicly and actually present in the state.

Along similar lines is the problem in \textit{People v. Utterback} \textsuperscript{21} where the defendant contended that, by reason of a failure to grant him a speedy trial as required by law,\textsuperscript{22} the court had lost jurisdiction over him even though he withdrew his motion for discharge for want of prosecution and pleaded guilty. Admitting that had his motion been pressed he probably was entitled to be discharged, the court nevertheless held that the guarantee of a speedy trial, like the guarantee of trial by jury, was personal to the defendant hence could be, and was, waived.\textsuperscript{23}

Principles of evidence law particularly applicable to crim-

\textsuperscript{17} Similar holdings in State ex rel. Connolly v. Parks, 199 Minn. 622, 273 N. W. 233 (1937), and Commonwealth v. Funk, 323 Pa. 390, 186 A. 65 (1936), were noticed.


\textsuperscript{19} Ibid, §632.

\textsuperscript{20} 385 Ill. 239, 52 N. E. (2d) 775 (1944).

\textsuperscript{21} Ill. Const. 1870, Art. II, §9; Ill. Rev. Stat. 1943, Ch. 38, §748.

\textsuperscript{22} Statements in People v. Szobor, 360 Ill. 233, 195 N. E. 648 (1935), to the effect that a court was without jurisdiction to accept a plea or enter judgment after the expiration of the four-month period fixed by statute, were expressly overruled.
inal cases also received consideration. Presumptions designed
to assist the prosecution to establish a prima facie case of
violation of law 24 are rather rare as the burden of proof in
criminal cases is greater than in civil suits. Such presumptions
will be upheld, though, if the inference drawn is a reasonable
one and the same possesses only prima facie effect. 25 Tested
in that light, the presumption declared by a city ordinance to
the effect that whenever an automobile has been parked in viola-
tion of law then the person in whose name such vehicle is
registered shall be regarded as the violator 26 was deemed con-
stitutional in City of Chicago v. Crane. 27 Such holding repre-
sents a matter of practical importance to every municipality
of any size because of the increased use of automobiles and
the extreme difficulty of apprehending every violator at the
moment of his offense.

Any intimation which may have been found in recent
cases 28 to the effect that, in order to sustain a complaint of
unlawful search and seizure, the property seized must belong
to the defendant was flatly rejected in People v. Grod. 29 It
appeared, in that case, that during defendant’s detention at a
police station, a search of defendant’s home was made without
warrant and certain stolen property was found therein defi-
nitely belonging to the brother of the complaining witness.
Such property, over objection and motion to suppress, was
received in evidence in the trial court. Conviction was reversed
when the upper court held that such action violated the de-
fendant’s constitutional rights. 30 It was also indicated that if
defendant was obliged to claim ownership of the property in
order to secure suppression thereof he would be forced to
admit a possession which, unless explained, would itself have
been sufficient to support conviction. 31 The Illinois Supreme

24 As to proof of adultery, see Ill. Rev. Stat. 1943, Ch. 38, §47.
25 State v. Thomas, 144 Ala. 77, 40 So. 271 (1906).
27 319 Ill. App. 623, 49 N. E. (2d) 802 (1943), noted in 22 CHICAGO-KENT
LAW REVIEW 87.
28 People v. Exum, 382 Ill. 204, 47 N. E. (2d) 56 (1943); People v. Marvin,
358 Ill. 426, 193 N. E. 202 (1934); and People v. Patterson, 354 Ill. 313, 188 N. E.
417 (1933).
29 385 Ill. 584, 53 N. E. (2d) 591 (1944).
31 A distinction was noted as to cases of search of the person or immediate
surroundings of the defendant at time of arrest. See cases noted ante, foot-
note 28.
Court, although admittedly in the minority on this point,\textsuperscript{32} still prefers to adhere closely to the views expounded by the United States Supreme Court.\textsuperscript{33}

The scope of cross-examination, both of the defendant and witnesses in his behalf, for the purpose of showing a former conviction of crime to affect their credibility \textsuperscript{34} was given exhaustive analysis in the case of \textit{People v. Halkens} \textsuperscript{35} which makes some important distinctions from principles laid down long ago in \textit{Bartholomew v. People}.\textsuperscript{36} The court did, however, reiterate the requirement that proof of conviction of a prior offense, at least as to the defendant, must be made by a copy of the record of such conviction. Such prior conviction must not, according to \textit{People v. Henneman},\textsuperscript{37} be so stale that it bears only a remotely possible effect on the defendant's credibility at the time of trial.

A form of instruction not infrequently offered by the prosecution in criminal cases directs the jury that the reasonable doubt which will authorize acquittal must be on the "whole of the evidence and not as to any particular fact in the case not necessary to constitute the crime charged." The vice in such instruction lies in the fact that it is left to the jury to determine what are the material facts. For that reason, the use of such instructions has been criticized unless they are accompanied by others which define the material elements of the offense.\textsuperscript{38} It became necessary for the court in \textit{People v. Berne},\textsuperscript{39} when reversing a conviction because that instruction was utilized, to call attention to the fact that its admonition on former occasions was being generally overlooked. The court also declared that the defect will not be remedied by the use of another instruction which defines the offense as an abstract proposition of law.

\textsuperscript{32} See Wigmore, Evidence, 2d Ed., Vol. IV, §2184.
\textsuperscript{34} Ill. Rev. Stat. 1943, Ch. 38, §734.
\textsuperscript{35} 386 Ill. 167, 53 N. E. (2d) 923 (1944).
\textsuperscript{36} 104 Ill. 601, 44 Am. Rep. 97 (1882).
\textsuperscript{37} 323 Ill. App. 124, 54 N. E. (2d) 745 (1944).
\textsuperscript{38} See People v. Wells, 380 Ill. 347, 44 N. E. (2d) 32, 142 A. L. R. 1262 (1942), and cases there cited.
\textsuperscript{39} 384 Ill. 334, 51 N. E. (2d) 578 (1943), noted in 42 Mich. L. Rev. 943.
While the verdict of the jury will be sufficient if it merely finds the defendant "guilty" or "guilty in manner and form as charged in the indictment," there is always grave danger, when the jury fashions its own form of verdict, that the same may turn out to be insufficient to support a judgment. That danger became real, in *People v. Manning,* where the verdict found the defendant guilty of "assault with a deadly weapon in manner and form as charged" while the indictment merely charged assault with intent to inflict a bodily injury. As a consequence, the conviction had to be reversed and a new trial ordered. Exercise of a little care at the time such verdict was tendered would have saved both time and expense for, had the error been noticed prior to the time the verdict was received, the court could have refused to accept the same and given suitable instruction to the jury on the point.

Theft of a motor vehicle in Illinois may result in prosecution for grand larceny or for larceny of a motor vehicle. As these offenses are treated as distinct crimes, the test as to which is charged in an indictment has been made to turn on whether or not there is reference therein to the value of the automobile for if so the charge is then to be regarded as one of grand larceny. It logically follows from such distinction that only the proper punishment should be imposed for the offense involved and, as there are different maximum limits in the two cases, care must be taken that the wrong punishment is not assessed. It is now declared, in *People v. French,* that the judgment order must not only fix guilt but must also recite a finding of value in case the charge is for larceny so as to aid in the preservation of such distinctions. Failure to so find, together with the fact that although the indictment charged larceny the sentence imposed was for theft of a motor vehicle, was there held sufficient to warrant reversal.

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40 Eyman v. People, 6 Ill. (1 Gil.) 4 (1844).
41 People v Lee, 237 Ill. 272, 86 N. E. 573 (1908).
42 320 Ill. App. 143, 50 N. E. (2d) 118 (1943).
44 Ibid., §388a.
45 People v Brown, 383 Ill. 287, 48 N. E. (2d) 953 (1943).
46 Punishment for larceny shall not exceed ten years in the penitentiary if the car is valued in excess of $15.00 under Ill. Rev. Stat. 1943, Ch. 38, §389, whereas the maximum punishment for larceny of an automobile is twenty years under §388a.
47 387 Ill. 16, 55 N. E. (2d) 53 (1944).
It is fundamental law that the executive head of the state is not bound to grant a request for extradition, but if he does do so a question is likely to arise as to whether or not it is possible for him to attach conditions to the grant whereby the person sought may be returned to the asylum state at some future time so as to complete a sentence imposed by it. If the offender does not demonstrate consent to such transfer, as by accepting a conditional parole, it now appears, by reason of the decision in People ex rel. Barrett v. Bartley, that the state will lose jurisdiction over him when honoring the extradition request as such transfer will operate as a pardon of the unexpired portion of the offender's sentence.

V. FAMILY LAW

Problems arising from migratory divorce were left far from settled by the decision of the United States Supreme Court in Williams v. North Carolina despite widespread newspaper accounts declaring that by such decision that court had made foreign decrees obtained on transient residence binding upon the sister states under the full faith and credit clause. Such newspaper law may have, in part, accounted for the Appellate Court decision in Stephens v. Stephens which held that an Illinois court was not free to inquire into the jurisdictional basis of a foreign decree particularly when such decree recited a finding of jurisdictional facts. Although that case was not taken to the Illinois Supreme Court, an appeal from the decision in Atkins v. Atkins did reach the higher court where it was held that the courts of Illinois were not precluded from conducting their own investigation into the validity of the foreign decree. For that reason a Nevada decree, obtained by a husband who had been a resident of this state but had migrated to Nevada and there obtained a divorce after separate maintenance proceedings had been in-

49 383 Ill. 437, 50 N. E. (2d) 517 (1943), noted in 22 CHICAGO-KENT LAW REVIEW 226.

2 U. S. Const., Art IV, §1.
4 386 Ill. 345, 54 N. E. (2d) 488 (1944), noted post, p. 90.
stituted by the wife in Illinois, was held to be no bar to the latter action particularly since the husband's residence in Nevada was clearly transitory in nature.

Less satisfactory, however, is the reported decision in *McFarlin v. McFarlin* which brought up the point of the constitutionality of the proviso which was added in 1939 to Section 5 of the Divorce Act purporting to fix venue in divorce actions. An attempt was made, by that proviso, to confer jurisdiction over divorce cases on the city courts so long as the plaintiff was a resident of the county in which such city court was located and the defendant personally submitted to jurisdiction by filing an appearance. Doubts as to the constitutionality of that provision were engendered by the holding in *Werner v. Illinois Central Railroad Company* which had narrowed the jurisdiction of the city courts in civil cases to those matters arising within the city limits. There is enough language in the McFarlin opinion to cause a belief that divorce cases should also be so limited, but the action of the trial court in setting aside a divorce granted by a city court was reversed when the Illinois Supreme Court failed to find in the record any evidence that the plaintiff, while resident in the county, was or was not also a resident of the particular city concerned. The fundamental problem has, therefore, been left unsettled for the court was careful to state that the decision was restricted to the narrow scope allowed by the precise facts of that case.

The desire to produce a clear break between persons about to be divorced has often led to the formulation of agreements for the payment of lump sums in lieu of alimony or property rights. If such contracts are performed in full at the time the marriage is dissolved there is no likelihood of legal difficulty arising therefrom. If, however, full performance is to take a period of time, as by the payment of the agreed amount in instalments, questions may arise as to the enforceability of the terms of such contracts. When any such agreement be-

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5 384 Ill. 428, 51 N. E. (2d) 520 (1943). Wilson, J., dissented.
6 Laws 1939, p. 517.
9 384 Ill. 428 at 435, 51 N. E. (2d) 520 at 523.
comes incorporated in the decree of divorce it apparently loses its absolute character and becomes subject to suitable modification or destruction, according to Banck v. Banck,\textsuperscript{10} even though it may purport to be a final settlement of property rights and also to be binding regardless of a change in the status of the parties. The remarriage of the recipient of the benefits of such a contract was there held an excuse from the obligation to make further payment of the deferred installments.\textsuperscript{11} Drangle v. Lindauer,\textsuperscript{12} on the other hand, seems to point a way to the avoidance of the consequences of such a rule. No such settlement is possible though, where the relief sought is not divorce but merely separate maintenance for the policy of the law forbids any compromise of the husband's duty to support his wife.\textsuperscript{13} For that reason, a claim by a wife against the estate of a deceased husband, based on the provisions of a separate maintenance decree which had approved a lump sum settlement in full of all claims for support, was rejected in In re Young's Estate.\textsuperscript{14} Argument directed to the point that to deny the claim meant permitting collateral attack on the separate maintenance decree was answered by the statement that the trial court was without jurisdiction to enter an order approving such a settlement.

In much the same way, a clear distinction should be observed between the power of a court when hearing a divorce case to settle the property rights of the spouses\textsuperscript{15} in contrast to the absence of power to so decree when the action is one for separate maintenance. A separate maintenance decree which made a division of real estate between the parties in Petta v. Petta\textsuperscript{16} was, therefore, properly reversed particularly since there was no prayer for such relief. It would seem, though, under the liberal provisions of the Civil Practice Act,\textsuperscript{17}

\textsuperscript{10} 322 Ill. App. 369, 54 N. E. (2d) 577 (1944), noted in 22 CHICAGO-KENT LAW REVIEW 276. Dady, P. J., wrote a dissenting opinion. Leave to appeal has been denied.


\textsuperscript{12} 323 Ill. App. 23, 54 N. E. (2d) 751 (1944), noted in 22 CHICAGO-KENT LAW REVIEW 276, particularly p. 260.


\textsuperscript{14} 319 Ill. App. 513, 49 N. E. (2d) 742 (1943).

\textsuperscript{15} Ill. Rev. Stat. 1943, Ch. 40, §18.

\textsuperscript{16} 321 Ill. App. 512, 53 N. E. (2d) 324 (1944), noted in 22 CHICAGO-KENT LAW REVIEW 281.

\textsuperscript{17} Ill. Rev. Stat. 1943, Ch. 110, §168(1).
that property claims could well be litigated in the same pro-
ceeding with the question of separate maintenance provided
the property claims were presented as independent causes of
action.

Analogous to the problem of the amount of recognition to
be given to foreign divorce decrees was the issue in *Brown v.
Hall* 18 dealing with the question of the validity of a decree of
adoption granted by the court of a sister state. When it ap-
peared therein that the adopting parent had deliberately
chosen such sister state in order to accomplish what could
not be done in Illinois, i.e. adopt an adult person, 19 and had
also failed to become a bona fide resident thereof, the court
denied recognition to the foreign decree. In somewhat the
same fashion, the court in *Fuhrhop v. Austin* 20 refused to
apply the law of the place of birth of a child in order to de-
termine legitimacy when it appeared that such law was con-
trary to the public policy of this state and that title to Illinois
land was involved. 21

The settlement of custodial rights over the offspring of
marriages terminated by divorce undoubtedly produces the
most difficult problem of human relations that a chancellor
could be called upon to decide. He has been assisted somewhat
by the doctrine that, as between the actual parent on the one
hand and the grandparent of the infant on the other, exclu-
sive custody belongs to the parent if he or she is otherwise
a fit and proper person to rear a growing child. 22 A close
adherence to that rule should have led to the denial of the peti-
tion in *Solomon v. Solomon* 23 by which a limited right of cus-
tody and visitation over the infant was sought on behalf of
the paternal grandparents. The court seemed to feel, however,
seeing that the request was made by the child’s father who

18 385 Ill. 260, 52 N. E. (2d) 781 (1944).
19 Only minors may be adopted here by reason of Ill. Rev. Stat. 1943, Ch. 4,
§1, and Bartholow v. Davies, 276 Ill. 505, 114 N. E. 1017 (1917).
20 385 Ill. 149, 52 N. E. (2d) 267 (1944).
21 The court distinguished the situation from that found in Peirce v. Peirce,
379 Ill. 185, 39 N. E. (2d) 990 (1942).
22 People v. Sheehan, 373 Ill. 79, 25 N. E. (2d) 502 (1940), reversing 300 Ill.
267, 20 N. E. (2d) 987 (1939).
had been granted such a privilege but was unable to exercise the same because of service in the armed forces, that it would be proper to permit the request as a means of preserving contact between the divorced parent and his son. The underlying policy of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended, was said to warrant this minor infraction of the former doctrine.

VI. PROPERTY

REAL AND PERSONAL PROPERTY

Ordinarily when one desires to check the title to a particular parcel of land he considers that he has properly safeguarded himself by viewing the premises to ascertain the rights of those in possession and by checking all pertinent information contained in the public records. Through its decision in the case of Chicago Title and Trust Company v. Wabash-Randolph Corporation, however, the Illinois Supreme Court has apparently increased the burden of the title searcher. In that case one Walker agreed to sell a parcel of land to one McKey, the contract stipulating that a way of ingress and egress be left open to conform to a similar way left open on the adjoining property. While the final deed which consummated the transaction failed to include this provision, the way was nevertheless left open. Some time later a subsequent purchaser of part of the McKey property enclosed the passageway by constructing a store thereon. In an action brought to compel such purchaser to remove the obstruction, the court held that since the agreement by McKey to create the easement could not have been fulfilled by the mere delivery of the deed there had been no merger. The obvious result of such a decision would seem to be that (1) an easement can be created by a mere contract, and (2) no one can any longer rely upon a recorded deed of conveyance to determine whether or not an easement was created or reserved, but must also examine the contract which led up to such deed to verify that no unperformed provisions thereof remain to cloud the title.

In the case of Mitchell v. Illinois Central Railroad Com-

1 384 Ill. 78, 51 N. E. (2d) 132 (1943), noted in 22 CHICAGO-KENT LAW REVIEW 223.
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the rights of the grantee of an easement were expanded to an unprecedented degree. The predecessor in interest to the plaintiff therein conveyed to the predecessor in interest of the defendant railroad a strip of land "for the purpose of constructing, maintaining and operating thereon a single or double track railway, with all the necessary appurtenances." Defendant leased a portion of such strip for use as a "combination bulk oil and filling station," which lease was subsequently approved by the Illinois Commerce Commission. The owner of the underlying fee brought action to enjoin the use of such portion of the railroad right of way as a retail drive-in gasoline station. The Appellate Court had held for plaintiff on the ground that the lease was an improper use of the easement, but this decision was reversed by the Illinois Supreme Court apparently for the reason that it seemed to be the practice of the Illinois Commerce Commission to encourage railroads to lease portions of their rights of way in order to increase revenues. At the same time, the court seems to have completely ignored factors which should have been considered, such as the terminology of the grant of easement with its restriction of use to railway purposes or the necessary appurtenances thereof and the fact that the oil station could have carried on its business completely independently of the railroad as the lease thereof did not require the lessee to use the railroad for the transportation of gasoline to its station.

The fact that land is subject to an easement of right of way for highway purposes does not destroy the right of the owner of the servient estate to the minerals located therein. He may, however, have to overcome practical difficulties in order to remove the same so as not to disturb the right of the public to use the highway laid out under such an easement. Such an owner, in Simpson v. Adkins, thought he had accomplished that objective when he obtained the consent of the local highway commissioner to the erection and maintenance of oil-drilling equipment on the surface within the area covered by the easement but placed so as not to obstruct the traveled


3 389 Ill. 64, 53 N. E. (2d) 979 (1944), noted in 22 CHICAGO-KENT LAW REVIEW 293.
portion of the public way. He was, however, commanded to remove such equipment when the court declared that his acts amounted to a violation of the criminal law. Not being the owner of adjacent property, he was, therefore, left owning the minerals in place but without means to enjoy the fruits of his ownership.

Some cases dealing with the relationship of landlord and tenant are also worthy of comment. Restrictive covenants in leases limiting the tenant's use of the demised premises are not at all rare. More unusual, however, are restrictions in favor of the tenant limiting the lessor's use of other property owned by him and not included in the demised area. Such restrictions, if otherwise legal, are undoubtedly binding on the person making the covenant but whether they will bind the lessee of such other property is a matter of some doubt. It has now been decided, in Farm Food Stores, Inc. v. Gianeschi, that even the latter will be bound thereby if he has knowledge thereof prior to taking possession so that injunction may be obtained to prevent a violation of the restrictive covenant.

It has long been declared that a lease must have a certain beginning and a certain ending in order to possess validity. If the term is uncertain, the arrangement will constitute but an estate at will terminable by either party. But a lease will be deemed sufficiently certain to serve as an estate for years if, by reference to a certainty, the period of its duration can be made certain. Suit for possession was contested, therefore, in Stanmeyer v. Davis, on the ground that a lease to run "for the duration of the war" was for a fixed and definite period because based on an event that was reason-

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5 University Club v. Deakin, 265 Ill. 257, 106 N. E. 790, L. R. A. 1915C 854 (1914).
6 A covenant restricting lessor's use of other property was held not to prevent a similar use thereof by another in Postal Tel. Co. v. W. U. Tel. Co., 155 Ill. 335, 40 N. E. 587 (1895), as such restriction was there strictly construed.
7 320 Ill. App. 582, 51 N. E. (2d) 792 (1943).
8 A covenant restricting lessor's use of other property was held not to prevent a similar use thereof by another in Postal Tel. Co. v. W. U. Tel. Co., 155 Ill. 335, 40 N. E. 587 (1895), as such restriction was there strictly construed.
10 321 Ill. App. 227, 53 N. E. (2d) 22 (1944), noted in 39 Ill. L. Rev. 85. Leave to appeal has been denied.
ably sure to happen, hence was not a leasing terminable at will.\textsuperscript{11} While the court inclined to that view, it nevertheless granted possession to the lessor when it appeared that further uncertainty was produced as to the duration of the term by additional language to the effect that the lease was to continue until "automobiles are again produced" and until "defendant [lessee] receives twenty-five automobiles in any one month."\textsuperscript{12} There being nothing to show that the lessee was obliged to receive that many automobiles a month, it could not be said that the lessor would ever be in a position to know when the lease came to an end.

The practice of taking deposits to secure the faithful performance of the lessee's obligations under a written lease is well known. Clauses covering such deposits, while providing for the forfeiture thereof, usually reserve to the lessor all other rights of action as for non-payment of rent, etc., and it would ordinarily be no defense to a suit for such rent that the landlord is possessed of a security deposit. There would seem to be no legal reason, however, which would prevent the parties from stipulating that, in case of default by the lessee, the lease shall terminate and the lessor be restricted to a forfeiture of the deposit. That effect was given to an ambiguous provision in a lease involved in \textit{Weill v. Centralia Service & Oil Company}\textsuperscript{13} even though the lessor claimed that to permit such construction would mean that the lessee would be allowed to take advantage of his own default. Of similar interest on the question of termination is the case of \textit{Deibler v. Bernard Brothers, Incorporated},\textsuperscript{14} which deals with the problem of the tenant's right to claim that his lease and the obligations thereunder were cancelled by operation of law inasmuch as federal regulations prevented him from using the demised premises for the purpose for which he had rented the same. No relief was granted when it appeared that the tenant was entitled to make any other lawful use of the premises.

\textsuperscript{11} \textit{Swift v. Macbean}, [1942] 1 K. B. 375, indicates that such period is sufficiently definite.
\textsuperscript{12} 321 Ill. App. 227 at 229, 53 N. E. (2d) 22 at 23.
\textsuperscript{13} 320 Ill. App. 397, 51 N. E. (2d) 345 (1943).
\textsuperscript{14} 385 Ill. 610, 53 N. E. (2d) 450 (1944), affirming 319 Ill. App. 504, 48 N. E. (2d) 422 (1943). The case is discussed in more detail ante, p. 11.
A failure on the part of a lessor to pay the general taxes assessed against the demised premises, so that the same became sold for non-payment of taxes, was utilized by the tenant in Beach v. Boettcher to defeat the lessor's action for possession. The claim that the lessee was estopped from questioning the lessor's title was answered by the statement, new in Illinois, that a subsequent destruction thereof by tax deed was not within the limits of such estoppel. There is some reason to doubt, however, that a tax deed has such effect in this state so that, had the tenant been forced to prove a valid destruction of the lessor's title, the outcome of the case might have been different. In the interest of eventual justice, the lessee was permitted to remain in possession so long as he deposited accrued rentals in the registry of the court.

While the general doctrines of law relating to personal property remain unchanged, two unusual questions concerning the transferability thereof came before the courts. Although personal property capable of delivery, actually or constructively, may generally be the subject of a gift, some doubt may arise over the validity of a gift thereof if such property is declared to be non-negotiable and non-transferable. Such, at least, was the question in Blair v. Kirchner where the donor under a gift causa mortis manually delivered certain United States Postal Savings Certificates to a donee without endorsement but with intent to make the donee owner thereof. It was held that the provision forbidding negotiation did not prevent a transfer by assignment, subject to any equities between the maker and the payee, while the limitation on transferability could only operate as between the maker and the donee, so that, as against the estate of the donor, the donee was entitled to whatever value such certificates might possess in the hands of the latter even though they might not be enforceable against the maker by reason of such limita-

15 323 Ill. App. 79, 55 N. E. (2d) 104 (1944), noted post, p. 96. Leave to appeal has been denied.
17 The case turned on admitted pleadings: 323 Ill. App. 79 at 88, 55 N. E. (2d) 104 at 108.
The earlier holding in *In re Estate of Wallace* was distinguished, both on the law and the facts, as the certificates there concerned were United States Treasury Certificates and payment was subject to regulations prescribed by the Secretary of the Treasury.

The negotiation or hypothecation of notes taken for loans of money made under the Small Loans Act, however, is restricted by a requirement contained in Section 12 thereof which purports to limit the right to the extent that such pledge can be made only with a bank authorized to do business in Illinois and then only under an agreement permitting the Director of Insurance to examine the papers so hypothecated. Attack upon the constitutionality of such restriction only was successfully made in *Metropolitan Trust Company v. Jones* on the ground that it denied a trust company, organized in Illinois, the right to exercise its powers and property without due process of law by preventing it from acting as trustee under contract with lenders, other than banks, who wished to loan money on the pledge of such small-loan paper. Although the court recognized that it was in the power of the legislature to forbid any hypothecation of such notes, it found that it was not intended that the licensee under the Small Loans Act should be limited to loaning his own capital hence he should be entitled to obtain credit, if necessary, by hypothecation. If regulation of that practice was desirable,

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20 Inquiry by the court, pursuant to stipulation, elicited the response of the Postmaster General that, despite the language against transferability, he would recognize the rights of the donee to the money represented by the certificates provided a valid decree established the donee's interest by reason of a perfected gift *causa mortis*: 319 Ill. App. 348 at 353, 49 N. E. (2d) 292 at 295.

21 266 Ill. App. 500 (1932).

22 3 Ill. Rev. Stat. 1943, Ch. 74, §19 et seq.

23 Ibid., §30.

24 The Director also appears to have subjected the practice, by regulation, to the requirement that the pledgor is to be regarded as agent for the pledgee for the purpose of accepting payments on such notes: *Metropolitan Trust Co. v. Jones*, 384 Ill. 248 at 250, 51 N. E. (2d) 256 at 258 (1943).

25 The balance of Section 12, and the rest of the act, was upheld on the theory that the invalid part could be separated without destroying the rest of the fabric: 384 Ill. 248 at 258, 51 N. E. (2d) 256 at 261.

26 384 Ill. 248, 51 N. E. (2d) 256 (1943).

27 The argument rested not only on Ill. Const. 1870, Art. II, §2, but also on Art. IV, §22, which forbids the passage of special laws granting to any corporation special or exclusive privileges, immunities or franchises.
the court indicated that, as both banks and trust companies were open to state inspection, there was no basis for any discrimination between them.

SECURITY TRANSACTIONS

Fundamental principles regarding the creation of security for money loaned or credit advanced have gone undisturbed but the enforcement of rights thereby obtained have received some additional attention. For example, a pledge of the rents, issues and profits of the mortgaged premises, such as is usually found in the average mortgage or trust deed, does not automatically give the mortgagee a right thereto, hence another creditor may, by appropriate action, gain a better lien thereon. That pledge may be made enforcible, however, at time of foreclosure by seeking equitable assistance as through the appointment of a receiver or by taking actual possession of the mortgaged premises. If a receiver has already been appointed at the request of another creditor, since two distinct receivers cannot control the same property, the mortgagee is then, necessarily, confined to seeking an extension of the original receivership for his benefit also. When he does so, according to Stevens v. Blue, he should be sure that the extension actually covers the rents, for the pledge in favor of the mortgagee will not be made effective if the order appointing the receiver is amended simply to extend the same to protect the corpus of the mortgaged premises for his benefit.

An interesting application of the statute permitting partial redemptions from sales under foreclosure decrees

28 Compare Ill. Rev. Stat. 1943, Ch. 16, §8, with Ibid., Ch. 32, §298.
29 Attention is directed to the decision in Donn v. Auto Dealers Investment Co., 385 Ill. 211, 52 N. E. (2d) 695 (1944), noted ante, p. 14, dealing with priority between successive trust receipts.
32 Seegren v Decker, 263 Ill. App. 373 (1931).
33 320 Ill. App. 375, 51 N. E. (2d) 603 (1943). Leave to appeal was granted and it would seem that the decision of the Appellate Court has been reversed. See 33 Ill. B. J. 50 which gives a synopsis of the decision in Stalzer v. Stevens, Case No. 27881, which is apparently the same case. The opinion has not yet appeared in the official reports.
was involved in *Muir v. Mierwin* where the owner had conveyed premises encumbered by a mortgage to her children as tenants in common but had expressly provided in the deed that the mortgage should be chargeable against the interests of only certain of the grantees and then only in a stated order of liability. Upon sale of the entire premises *en masse* for non-payment of the mortgage at maturity, certain of the grantees for whose benefit the grantor had established the order of liability sought to redeem their respective interests by tendering their portion of the debt due. The purchaser at the sale contended that, since the premises had been sold *en masse*, the redemption should be made in the same way. Such claim was rejected and partial redemption granted by the Appellate Court by reason of the language of the statute aforementioned. The Supreme Court, on granting leave to appeal, agreed that the grantees might legally have made a partial redemption but found that the amount tendered was insufficient because (1) interest had been calculated at the rate of five per cent. instead of the six per cent. rate called for by statute, and (2) because the redemptioners were not entitled to credit on the redemption price of moneys in the hands of the court as the ownership thereof was still in dispute. For these reasons the decision of the Appellate Court was reversed.

The respective rights of mortgagor and mortgagee to a fund of money deposited in satisfaction of a condemnation award for the taking of a portion of the mortgaged premises were under consideration in *City of Chicago v. Salinger*. It was contended by the mortgagee that, inasmuch as he had acquired title to the balance of the premises through foreclosure sale, he was entitled to the whole of the award even though the same became payable prior to his acquisition of the mortgagor's title. He was restricted, however, to the satisfaction of his deficiency judgment only.

Although many similarities exist between a conditional

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88 384 Ill. 515, 52 N. E. (2d) 184 (1944), affirming 317 Ill. App. 542, 47 N. E. (2d) 725 (1943), which had been noted in 22 CHICAGO-KENT LAW REVIEW 94.
sales agreement and a chattel mortgage, each has a distinct function to perform and the two may not be interchanged indiscriminately. The former is appropriately confined for use between a vendor and a vendee while the latter is designed to produce security in cases of loan of money upon chattels. A misuse of these concepts led to grief, in *Raymond v. Horan, Bailiff of Municipal Court*, where a financier took a conditional sales contract as security for an advance made to a person contemplating the purchase of certain chattels rather than a chattel mortgage thereon and was subordinated to the rights of an intervening execution creditor. The court deemed it insufficient to change its view that, prior to execution of the conditional sales contract, the borrower had made a bill of sale of the goods to the lender and had simultaneously received one back. Reality, rather than form, was regarded as essential.

In order to secure an enforceable attorney's lien notice must be given to the person against whom such lien is claimed either by delivering the same to the individual personally or by sending such notice by registered mail. Attempts to gain service in any other fashion as, for example, by the use of ordinary mail, will be ineffective according to the holding in *Cazalet v. Cazalet*, which case also indicates that the notice should affirmatively assert a right to a lien and the amount thereof and not let those facts rest on inferences to be drawn from a recital of the terms of the retainer contract between the attorney claiming the lien and his client.

Action by a subcontractor to enforce a mechanics' lien heretofore had to be instituted within four months after the time when final payment became due. When the legislature repealed that requirement it also amended other sections of

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39 323 Ill. App. 120, 55 N. E. (2d) 99 (1944).
40 Absence of title in the supposed vendor was declared to make the purported conditional sales contract invalid as against other creditors in *First State Bank v. Harter*, 301 Ill. App. 234, 22 N. E. (2d) 393 (1939).
43 322 Ill. App. 105, 54 N. E. (2d) 61 (1944). Leave to appeal has been denied.
the Mechanics' Lien Law so as to give the subcontractor substantially the same rights as a general contractor,\textsuperscript{46} including the same period of limitation in which to file a lien claim \textsuperscript{47} or bring suit to enforce the lien.\textsuperscript{48} It has now been held, in \textit{Builders Supply & Lumber Company v. Calto},\textsuperscript{49} that such revision is to be accorded retroactive effect at least insofar as the owner of the premises is concerned.

\textbf{WILLS AND ADMINISTRATION}

The device of drafting a will passing title to property to trustees for transfer to the spouse if such spouse is living ten days after the death of the testator or testatrix, otherwise to the children or other beneficiaries named in other provisions of the will, was approved in \textit{Ickes v. Ickes},\textsuperscript{50} as a proper method of avoiding, in the case of semi-simultaneous death in the same accident, the effect of vesting property in a spouse who might die shortly after the testator's death.

Probate of a foreign will is expressly sanctioned by Section 85 of the Probate Act,\textsuperscript{51} whether the same has or has not already been admitted to probate in the state of the testator's domicile, which section reiterates doctrines recognized in this state in former times.\textsuperscript{52} For that reason the decision in \textit{In re Nielsen's Estate}\textsuperscript{53} does not represent any new law, but it does disclose that no change has occurred by reason of the adoption of the new Probate Act for a will executed in Illinois in conformity with the laws of this state disposing of land located here, was granted original probate regardless of the fact that the testator was not domiciled in Illinois at the time of his death.

Attention was directed last year to the holding in \textit{Lewis v. Hill}\textsuperscript{54} which declared that a sale of real estate by a con-

\textsuperscript{46} Ill. Rev. Stat. 1943, Ch. 82, §28.
\textsuperscript{47} Ibid., §7.
\textsuperscript{48} Ibid., §9.
\textsuperscript{49} 320 Ill. App. 1, 49 N. E. (2d) 876 (1943).
\textsuperscript{50} 386 Ill. 19, 53 N. E. (2d) 585 (1944).
\textsuperscript{51} Ill. Rev. Stat. 1943, Ch. 3, §237.
\textsuperscript{52} See Chicago Terminal R. Co. v. Winslow, 216 Ill. 166, 74 N. E. 815 (1905).
\textsuperscript{53} 320 Ill. App. 655, 52 N. E. (2d) 44 (1943), cause transferred 382 Ill. 422, 47 N. E. (2d) 697 (1943).
\textsuperscript{54} 317 Ill. App. 531, 47 N. E. (2d) 127 (1943), noted in 22 CHICAGO-KENT LAW REVIEW 56.
servator of an incompetent person would not operate to adeem a specific devise made thereof through the will of the ward executed prior to the time such person became incompetent. A decree which had dismissed a petition by the devisee to reach the fund so realized was there reversed and the cause remanded. The same case reached the reviewing courts again this year when a decree rendered pursuant to such mandate was affirmed, thereby giving full recognition to the doctrine of equitable conversion.

The Illinois Supreme Court had occasion, in *McQueen v. O'Connor*, to consider the effect of that part of Section 90 of the Probate Act which reduced the time for filing a complaint to contest a will. As could be expected after the decision rendered last year in *Masin v. Bassford*, the court held that the right to contest a will was not a vested right, might be abrogated or limited by legislative action at any time even after the period had already begun to run, and that the law in effect when the will contest suit was filed governed the time for filing the suit. In the case of filing claims, however, the saving clause of the Probate Act was held applicable, according to *Paschall v. Reed*, so that the longer period granted under an earlier law was held controlling once it had started to operate in favor of the creditor.

Procedural matters growing out of the administration of estates have also received judicial consideration. Thus a conflict of claims such as might arise between a judgment creditor and the executor under a will, when the judgment debtor is both a devisee and a debtor of the estate, was resolved in favor of the executor in *Meppen v. Meppen* without regard to the date

55 *Lewis v. Hill*, 322 Ill. App. 68, 53 N. E. (2d) 736 (1944). A certificate of importance was issued and the cause was taken by the Illinois Supreme Court which also affirmed in 387 Ill. 542, 56 N. E. (2d) 619 (1944), not in the period of this survey.

56 385 Ill. 455, 53 N. E. (2d) 435 (1944), noted in 22 CHICAGO-KENT LAW REVIEW 302.


58 381 Ill. 569, 46 N. E. (2d) 366 (1943), noted in 22 CHICAGO-KENT LAW REVIEW 55.


60 320 Ill. App. 390, 51 N. E. (2d) 342 (1943).

of the judgment. Action by an executor who had filed citation proceedings to discover knowledge and information only with respect to alleged assets of decedent’s estate was held, in *Schwaan v. Schwaan*, to constitute no bar to a second petition directed against the same respondent to recover property, where the order dismissing the first petition did not show that any matter had been determined on the merits. An heir at law was held to be an aggrieved person, in *In re Everly’s Estate*, for the purpose of permitting an appeal from the allowance of a claim even though decedent died testate and the assets of the estate were more than sufficient to pay all claims as well as the legacy given to the heir. When so holding, the court pointed out that, as the time allowed to the heir in which to contest the will had not expired when the appeal was perfected and it did not appear that the heir had elected not to file such a contest, his right to complain could not be disregarded.

It is usually essential, in the conduct of proceedings to sell real estate to pay debts, that all necessary parties be named therein, but, according to the holding in *Baker v. Devlin*, the mere fact that the property is alleged to be encumbered by unpaid taxes does not make it necessary that the municipalities possessing such tax liens be made parties if no relief is sought against them. For that matter, according to the same case, it is not necessary that the decree of sale in such a proceeding contain a conditional direction of sale giving the heirs an opportunity to pay an amount sufficient to cover the claims and costs of administration within a time fixed as would be the case, for example, in mortgage foreclosures. While an administrator may, in such a proceeding, seek to remove a cloud upon decedent’s title, *Roffman v. Roffman* decides that he may not attack his decedent’s title to the realty.

In *Griefin v. Garin*, the Illinois Supreme Court held that

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*3* 386 Ill. 441, 54 N. E. (2d) 449 (1944).
*5* 384 Ill. 315, 51 N. E. (2d) 560 (1943).
recovery could be had on a refunding bond which had been given by a distributee to obtain a partial distribution of a decedent's estate prior to the expiration of the period of probate, despite the objection that the condition of the bond had not been broken because no additional claims had been presented, when it appeared that a subsequently discovered will was admitted to probate under the terms of which such distributee was not entitled to any portion of the estate.\textsuperscript{68} It also held that Rule 17 of the Probate Court of Cook County,\textsuperscript{69} relating to such bonds, was valid and applicable even though it contained more stringent requirements than are found in the statute.\textsuperscript{70}

Section 118 of the Probate Act\textsuperscript{71} provides that in a proceeding for the appointment of a conservator the court may appoint a guardian ad litem to represent the alleged incompetent. The word "may" found therein was held, in \textit{Rankin v. Rankin},\textsuperscript{72} to be of a permissive nature and not mandatory so that, if it appears that the trial court has not abused its discretion in failing to appoint a guardian ad litem, the reviewing court will not disturb the action of the court on such a petition. Upon appointment of a conservator, no action may be brought or appeal prosecuted by any other person purporting to act on behalf of the ward as next friend, without appointment and authority from the court, according to the decision in \textit{In re Rankin's Estate}.\textsuperscript{73}

\textbf{TRUSTS}

There is some slight indication that the traditional immunity of trust beneficiaries from liability on account of obligations incurred by trustees may be "presently marked for

\textsuperscript{68} See the companion case of \textit{In re Estate of Mitchell}, 305 Ill. App. 289, 27 N. E. (2d) 606 (1940).

\textsuperscript{69} Rules of Practice, Probate Court of Cook County, effective prior to Jan. 1, 1940. Such rule provided, in part, that "a refunding bond shall be required . . . to indemnify the estate against loss by reason of such distribution, unless for good cause shown the Court shall otherwise order." Ru. 30, revised as of May 1, 1944, now directs that the "refunding bond shall be in the form prescribed by the Court and furnished by the Clerk."

\textsuperscript{70} Ill. Rev. Stat. 1943, Ch. 3, §446.

\textsuperscript{71} Ibid., §270.

\textsuperscript{72} 322 Ill. App. 90, 54 N. E. (2d) 58 (1944). Leave to appeal has been denied.

\textsuperscript{73} 322 Ill. App. 64, 53 N. E. (2d) 747 (1944).
destruction," or at least important limitation. The problem was presented through the specialized form of the business trust in two recent cases arising in Illinois. In the first of these cases, that of Commercial Casualty Insurance Company v. North, a father and son, engaging in the contracting business as partners, conveyed the assets of the business to themselves and another as trustees and retained the entire beneficial interest divided between them. The trustees undertook the installation of a high-pressure steam line for certain public agencies in Nebraska. The son, as trustee, applied in the name of the trust for a performance bond which was duly issued. The bonding company successfully defended a suit brought by the State of Nebraska and sought to recover its expenses from the father and son under the terms of an indemnity clause in the bond. The suit was brought on the theory that, since the defendants retained the beneficial interest and were also trustees, no trust was created and the defendants remained liable as partners. A judgment for defendants was rendered in the trial court. The Appellate Court decided that a valid trust could be created even though two of the trustees were also the sole beneficiaries. On this point the court relied upon the Restatement of Trusts. Applying the test laid down in Schumann-Heink v. Folsom, the court further decided that a valid trust had been created by the acts of the partners. From that point, the court seemed to think the conclusion irresistible that the defendants, as beneficiaries, were not liable either individually or as partners. The question of the son's possible liability as trustee was not discussed.

A somewhat similar case came before the Circuit Court of Appeals for the Seventh Circuit. In Reconstruction Finance Corporation v. Goldberg, bank stock was held in the name of a nominee for three trustees constituting the managing committee of a syndicate which took the legal form of a business trust. One of the trustees was also the holder of a large beneficial interest in the trust. It was decided that the beneficiaries or shareholders, including this trustee, were liable to creditors

74 320 Ill. App. 221, 50 N. E. (2d) 434 (1943).
76 328 Ill. 321, 159 N. E. 250 (1927).
77 143 F. (2d) 752 (1944).
of the bank as beneficial owners of the bank stock. The opinion found the syndicate to be a valid business trust under the Schumann-Heink case but imposed liability as a consequence of equitable ownership in view of the provisions of the Illinois Constitution. The exact point has never before been expressly decided in Illinois.

Dissatisfaction has occasionally been expressed with the insulation afforded by the trust device to certain classes of beneficiaries. In the North case, the court apparently assumed the non-liability of the beneficiaries and thought discussion unnecessary. The Goldberg case, on the other hand, indicates that the brief for the immunity of beneficiaries is less strong when the trust is utilized as a form of business organization. The opinion in the latter case did not indicate the court's views of the position of the beneficiaries with respect to liabilities arising out of contracts made by the trustees. The two cases are, of course, distinguishable with respect to the kind of liability involved.

Two other cases may be briefly mentioned. In Cowdery v. Northern Trust Company the Appellate Court ruled that undistributed income in the hands of the trustee at the death of the beneficiary of a spendthrift trust belonged to the trust and not to the estate of the beneficiary. The spendthrift provisions were relied upon as establishing the intent of the settlor. In Bundy v. Solon the Supreme Court decided that a direction in a trust instrument to trustees to convey property to the "heirs-at-law" of a beneficiary required a conveyance of a share to the wife of the beneficiary. In concluding that the wife was within the term "heirs-at-law," the court relied upon the provisions of the Probate Act which allow the wife a share of her husband's property upon waiver of dower.

VII. TORTS

As usual, the large volume of torts litigation for the past year contains little that is novel. The decisions are, rather,
characterized by adherence to fixed principles, although some of them are interesting by reason of the unusual factual situations involved.

Two such situations are presented in cases involving the distinction between cause and condition. In *Baker v. Cities Service Oil Company,* for example, a tank truck belonging to the defendant was parked at the curb while delivering gasoline to a filling station. The deceased, a five-year old boy in the company of another small child, attempted to cross the street but was struck and killed by a passing automobile as he stepped from behind the parked truck. Recovery for the wrongful death was denied when the court quoted and adopted the definition laid down in *Briske v. Village of Burnham* to the effect that if a negligent act or omission does nothing more than furnish a condition making an injury possible, and such condition, by the subsequent independent act of a third person, causes an injury, the two acts are not concurrent and the existence of the condition is not the proximate cause of the injury. The court further commented that since the truck was not in motion but was parked, its position on the street was obvious to all persons and was a condition necessary to be reckoned with by the traveling public.

The other case, that of *Carr v. Lee J. Behl Hotel Corporation,* presented an entirely different situation in that the condition which was alleged to have been a concurrent and therefore a proximate cause was not obvious and a condition necessary to be reckoned with by the travelling public but was, in fact, a concealed hazard. The plaintiff there, while walking along a public alley in the rear of defendant's hotel, slipped on the alley pavement which was icy and covered with a light snow. In an effort to regain his balance, he raised his arm and came in contact with a rear door of the hotel building. The door opened under the pressure and plaintiff was precipitated down a flight of concrete steps thereby sustaining injuries. It was proved that the lock of the door was defective and would not operate to keep the door securely fastened. The court,

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1 321 Ill. App. 142, 52 N. E. (2d) 284 (1943).
2 379 Ill. 193, 39 N. E. (2d) 976 (1942).
3 379 Ill. 193 at 199, 39 N. E. (2d) 976 at 979.
denying recovery against the building owner, relied on the same general principle and concluded that the act of slipping on the ice was the proximate cause of plaintiff's injuries, while the alleged negligent act of keeping the door unlocked or equipped with a defective lock was nothing more than a condition. The element of "foreseeability" also appears to have been considered by the court in determining the question for it declared that the injury "must be the natural and probable result of the negligent act or omission and be of such a character as an ordinarily prudent person ought to have foreseen as likely to occur as a result of the negligence, although it is not essential that the person charged with negligence should have foreseen the precise injury which resulted from his act."

Elements of probability and foreseeability were found insufficient, however, in Neering v. Illinois Central Railroad Company, to break the causal chain so that a condition created by the railroad company in permitting vagrants to congregate around its unattended passenger stations and waiting rooms was held to be the proximate cause of injuries to a woman passenger who was assaulted and raped at the station by a vagrant. The court expressly recognized that the rule requiring the highest degree of care on the part of carriers for the protection of passengers applies only to the operation of trains and the immediate incidents of transportation and that, as to station buildings and other appurtenances, such carrier is required to exercise only ordinary care to keep them in a reasonably safe condition. Nevertheless, the court indicated that knowledge of conditions which are likely to result in an assault upon a passenger, or which constitute a source of potential danger, imposes the duty of active vigilance on the part of the carrier's agents and the adoption of such steps as are warranted in the light of the existing hazards. Answering the contention that the act of the vagrant was an intervening cause, the court said:

The rule that the causal connection between a person's negligence and an injury is broken by the intervention of a new independent,

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5 321 Ill. App. 432 at 437, 53 N. E. (2d) 295 at 297.
efficient and intervening cause so that the negligence is not actionable is subject to the qualification that if the intervening cause was foreseen or reasonably might have been foreseen by the wrongdoer, his negligence may be considered the proximate cause of the injury and he may be held liable notwithstanding the intervening cause. The intervening act of a third person does not necessarily relieve the author of an earlier negligent or wrongful act from responsibility when the intervening cause of an injury is of such nature as could reasonably have been anticipated, in which case the earlier negligent act, if it contributed to the injuries, may be regarded as the proximate cause.⁸

In still another case, that of *Hansen v. Henrici's, Incorporated*,⁹ an alleged condition created by the defendant was held to be the proximate cause of plaintiff's injury, notwithstanding intervening negligence of others. That action was for injuries sustained by plaintiff, an intended patron of defendant's restaurant, as the result of a fall caused when a revolving door at the entrance to the restaurant was pushed and caused to move rapidly by other patrons. There was evidence that one function of the flanges or strips on the side and bottom of the door was to produce a friction which would prevent the door from being moved too rapidly, but that these flanges or strips were worn and failed to maintain contact with the wall or floor. In holding that there was evidence from which the jury could reasonably return a verdict for the plaintiff, the court rejected the defendant's contention that it did no more than create a condition which, when acted upon by the independent conduct of a third person, produced the injury.¹⁰

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⁸ 383 Ill. 366 at 381, 50 N. E. (2d) 497 at 504.
⁹ 319 Ill. App. 458, 49 N. E. (2d) 737 (1943), noted in 22 CHICAGO-KENT LAW REVIEW 164.
¹⁰ On the subject of proximate cause, the court said: "We much doubt whether the manifold problems arising out of the doctrine of proximate cause can be solved by any metaphysical formula or made easier to solve by changes of nomenclature. Whether we call the cause 'proximate,' 'legal' or 'direct' matters little. It matters much that legal liability for bringing to pass that which harms another should be placed on the right person... Whether the defendant in the construction of this door was... at fault was, we hold, a question for the jury to decide. Defendant invited plaintiff to its restaurant. The business was managed and controlled by it. Upon it was the duty of seeing that the ways of ingress and egress to its place of business were reasonably safe... The question of whether defendant performed that duty was for the jury."—319 Ill. App. 458 at 462, 49 N. E. (2d) 737 at 739.
Three cases involved the doctrine of *res ipsa loquitur*. In one, that of *Oakdale Building Corporation v. Smithereen Company*, suit was brought to recover for damage to real and personal property caused by fire which apparently originated in the plaintiff’s apartment when no one was there but which was discovered shortly after the departure of the representative of the defendant exterminating company who had been in control of the apartment for about one-half hour. The case went to the jury solely on the testimony of the plaintiff since the defendant offered no evidence. The trial court refused the request of the plaintiff for a charge as to presumptive negligence but instead charged the jury that the burden was upon the plaintiff to prove the specific negligence alleged in the complaint. The latter instruction was held sufficiently misleading to warrant reversal because (1) no specific negligence had been charged, and because (2) plaintiff had predicated its case on the theory of *res ipsa loquitur*. The evidence offered by the plaintiff was regarded as sufficient to raise the presumption of negligence and to require evidence from the defendant in rebuttal particularly since there was evidence to negative any inference that defective electric wiring or smoking in the apartment were probable causes of the fire.

Still another illustration has been added, by *Paolinielli v. Dainty Foods Manufacturers, Inc.*, to former decisions wherein the doctrine of *res ipsa loquitur* and also the “sealed package” doctrine have been successfully invoked to impose liability upon the original processor of food products for the benefit of the ultimate consumer, even though the product was purchased from an intervening retailer. The wrongful death of the infant there concerned was alleged to have been occasioned by a piece of bone or foreign matter in a certain “soup noodle mix” put out by the defendant in a sealed glass jar, the contents of which were used in a soup prepared therefrom and fed to the infant. Despite conflicting evidence, a verdict and judgment in favor of the plaintiff were affirmed. To counteract evidence of want of due care, defendant showed that the chicken fat used in the mixture, the component most likely to contain a

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12 322 Ill. App. 586, 54 N. E. (2d) 759 (1944). Leave to appeal has been denied.
piece of bone, was government inspected. The court held that such fact was proper evidence for the jury on the question of negligence, but such inspection was not a substitute for due care on the defendant's part.

In the third case, *Nielsen v. Pyles*,\(^{13}\) the Appellate Court reversed and remanded for a refusal on the part of the trial court to give defendant's requested instruction, predicated upon his evidence, which advanced the theory that the presumption of negligence raised by the doctrine of *res ipsa loquitur* is not conclusive. It appeared from the facts that the plaintiff, an automobile driver, had stopped his car for a stop light when defendant, also driving an automobile, came up from behind, carelessly struck plaintiff's car and propelled it forward suddenly. Plaintiff claimed that the impact produced a spinal injury. Defendant offered evidence tending to show that the spinal injury was produced by the subsequent acts of the plaintiff when endeavoring to raise the rear end of his automobile in an effort to disengage the locked bumpers. As the original accident itself afforded reasonable evidence of want of proper care, the doctrine of *res ipsa loquitur* was applicable in the absence of any explanation. Since the defendant had offered evidence tending to rebut the presumption, however, it was held improper to refuse a charge predicated upon defendant's theory of the case.

Several questions of law with respect to negligence were also up for consideration. *Carrell v. New York Central Railroad Company*\(^{14}\) announces a distinction which must be drawn between the duties owed between users of a highway on the one hand, and the corresponding duties owed in situations involving railroad crossings and approaching trains on the other. Plaintiff's intestate in that case was struck and killed by defendant's train, which was admittedly running at a speed of seventy to seventy-five miles per hour, while she was walking across the railroad tracks at the point of their intersection with a city street. No barrier or warning device was maintained there other than the usual fixed cross-arm sign and the evidence preponderated to the effect that no warning bell or

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\(^{13}\) 322 Ill. App. 574, 54 N. E. (2d) 753 (1944).

\(^{14}\) 384 Ill. 599, 52 N. E. (2d) 201 (1944), affirming 317 Ill. App. 481, 47 N. E. (2d) 130 (1943).
whistle was sounded by the train. An unobstructed view for over seven hundred feet could be had in the direction from which the train was approaching and it was admitted that the plaintiff's intestate saw the train when she was about ten feet from the crossing and while the train was still from eight hundred to eleven hundred feet away, but it was necessary for her to focus her attention on her footing owing to the broken, rough and irregular condition of the walk leading up to the track and the steepness of the incline. Relying principally upon Blumb v. Getz, a case involving a pedestrian and an automobile on a highway, it was argued on behalf of the plaintiff that the decedent had a right, as a reasonably prudent person, under the circumstances, to believe the train would be travelling at a reasonable rate of speed and also to assume that she would have ample time to cross in safety in the absence of a warning signal apprising her of danger. In disposing of such contention, the court said:

The observations made in the Blumb case upon which plaintiff places reliance are not applicable to railroad crossings. A highway motorist, presumably being in control of his automobile, a maneuverable conveyance, can readily bring his machine to a stop or change its course out of the sphere of danger. This is not true of railroads, which are engaged in the performance of a business of quasi-public nature, and, in carrying out the purposes for which they are created, must necessarily often operate their trains at such a high rate of speed they cannot be brought to a sudden stop without endangering the lives and safety of the passengers. Moreover, trains travel on fixed tracks, and it is impossible for them to turn aside or change their course in order to prevent injury to a person attempting to cross the tracks when a train is approaching. Where a railroad train and a person travelling on a highway each approaches a railroad crossing at the same time, it is not the duty of the company to stop its train, but is, instead, the duty of the traveller, in obedience to the known custom of the country, to stop and not attempt to pass in front of the approaching train.

Imputed negligence was one of the points at issue in De Buck v. Gadde where plaintiff, owner and operator of a rid-

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16 366 Ill. 273, 8 N. E. (2d) 620 (1937).
17 384 Ill. 599 at 606, 52 N. E. (2d) 201 at 205.
ing stable, had rented one of his saddle-horses to a horseman for a ride. The horse later appeared riderless upon an adjoining boulevard where the animal was run down by a passing motorist driving at a speed greatly in excess of the legal limit. The driver of the car had knowledge of the intersection of a bridle path with the boulevard near that point and saw the horse before the accident. After deciding that the horse was not "running at large" within the meaning of the statute, the trial court instructed the jury to the effect that the negligence of the bailee could not be imputed to the bailor. Such instruction was held proper.

In another negligence case, that of National Builders Bank of Chicago v. Schuham, plaintiff's intestate was employed, as an independent contractor, to paint the window sashes of defendant's building. Decedent fell to his death when a rotted portion of a wooden sash which he was painting gave way. The trial court granted defendant's motion for judgment notwithstanding the verdict thereby deciding, as a matter of law, that the defendant was not guilty of fault. Although the Appellate Court found some evidence of contributory negligence and also of assumption of the risk on the part of plaintiff's intestate, it expressly preferred to rest its decision on the failure of plaintiff to prove actionable negligence on the part of the defendant. The rot or decay was inside the sash, and there was no evidence that any of it was discernible on the outside. The court held that, as a matter of law, the defendant could not be guilty of negligence unless the requirement to use reasonable care to protect those lawfully on his premises placed upon him the duty of testing the wood in the sashes of all the windows covered by the contract before permitting decedent to paint the same. It concluded that the defendant was under no such duty. To arrive at that result it was necessary to distinguish the case from that of Houlihan v. Sulzberger & Sons Company which the court did by pointing out that in the latter case the rotted condition of the ends of certain ladder

\[^{18}\text{Ill. Rev. Stat. 1943, Ch. 8, §1.}\]
\[^{19}\text{319 Ill. App. 546, 49 N. E. (2d) 825 (1943).}\]
\[^{20}\text{282 Ill. 76, 118 N. E. 429 (1918).}\]
A claim of fraud and deceit was presented in *Lackus v. O'Donnell* where plaintiff, desiring to purchase business property in a certain subdivision adjacent to a highway, went to a firm of real estate brokers with whom lots in that subdivision had been listed for sale. One of the firm's agents took plaintiff to the subdivision and showed him a lot marked by a "For Sale" sign erected by the firm and told plaintiff that it was the lot which they had for sale. The plaintiff indicated that he did not care for the lot as it was low and wet, but that he would be willing to pay more for a lot upon higher ground. The situation terminated with plaintiff's purchase of a lot in the subdivision owned by defendant. Delivery of the deed was made through the real estate firm whose agent had shown the lot to the plaintiff. Plaintiff thereafter erected a sheet metal garage building upon the lot which, he claimed, was the one shown him. That lot was, in fact, located in another block in the same subdivision. When the mistake was discovered, plaintiff moved the garage building to the lot to which he had actually acquired title, a distance of about one hundred and fifty yards, and brought action against the vendor for the damages occasioned by the erection of the building upon the wrong lot. The court, very properly it appears under the factual situation presented, found an absence of any fraudulent intent to deceive on the vendor's part which would be an indispensable element to the successful maintenance of an action for fraud and deceit. A statement by the court to the effect that the case involved the question of identity of property, rather than active fraud and deceit, presents an interesting question. It is generally considered, on questions of identity of property, that where a vendor points out a lot or tract to a purchaser he is bound to do so correctly, and where the purchaser is ignorant of the location, he has a right to rely upon the positive statement and representation of the vendor and to hold him responsi-

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21 It should be noted, however, that the Houlihan case went to the jury and the point was decided as a question of fact rather than, as in the instant case, settled as a matter of law.

ble. As the vendor never, personally, pointed out the property that principle could hardly apply but the discussion ignored the question as to the possible agency of the real estate firm to act for the vendor in showing the property.

The chance of a claim of nuisance by those who become residents of an industrial district, or who remain while a residential neighborhood gradually becomes a manufacturing district, was somewhat restricted by the Illinois Supreme Court decision in *Gardner v. International Shoe Company*\(^2\). The nuisance there complained of grew out of the maintenance of a pond or settling basin, installed by a tannery at the direction of the Sanitary Board of Illinois, for the purpose of receiving and holding the effluent of the tanning process before the same was drained into an adjoining river. The operation of the plant was shown to be modern and in accordance with the best practices in such line of business. The hygenic director of the Sanitary Board, a licensed physician, also testified that the odors emitted by the pond were not deleterious or injurious to health and were substantially the same as the odors emanating from the tannery itself. It was also proven that it was impossible to tan hides without this odor. The court, after noting that the question involved had received considerable attention but not with complete uniformity of result, proceeded to an exhaustive review of the subject by citing and quoting from textual authority\(^2\) and from decided cases in Illinois\(^2\) as well as from other jurisdictions\(^2\) and arrived at an ultimate conclusion that the unlimited and undisturbed enjoyment which one is entitled to have of his own property is qualified to the extent that trifling inconveniences resulting from the useful employment of adjacent property must be submitted to

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\(^{22}\) Jack v. McConkey, 208 Ill App. 84 (1917), abst. opinion.

\(^{24}\) 386 Ill. 418, 54 N. E. (2d) 482 (1944), affirming 319 Ill. App. 416, 49 N. E. (2d) 328 (1943).


\(^{26}\) City of Pana v. Central Washed Coal Co., 260 Ill. 111, 102 N. E. 992 (1913); Cooper v. Randall, 59 Ill. 317 (1871); Lambeau v. Lewinski, 47 Ill. App. 656 (1893).

when what is complained of arises from and is suitable to the locality and is reasonable under the circumstances.

One other case is worthy of attention, that of *London & Lancashire Indemnity Company of America v. Duner*,\(^2\) wherein a president of an Illinois corporation, which company had been dissolved prior to the time suit was instituted in its name by such officer, was held liable in tort for damages suffered by the plaintiff in conducting a successful defense to that suit. Resort to or conduct of legal remedies would ordinarily involve no such liability for tort usually arises in such situations only when the actor is motivated by malice or want of probable cause. It was held, nevertheless, that since the corporation was no longer in existence the president was totally lacking in authority to institute the prior proceeding in its name so could be held despite his lack of knowledge of the dissolution of the company.

*(To be continued)*

\(^2\) 135 F. (2d) 895, 146 A. L. R. 1119 (1943), noted in 22 CHICAGO-KENT LAW REVIEW 166. Evans, C. J., concurred in the result.

* The balance of this survey will appear in the March issue. Government limitations on the use of newsprint make this action necessary.