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Property - Survey of Illinois Law for the Year 1947-1948

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VI. PROPERTY

REAL AND PERSONAL PROPERTY

A tangled story of a little-used country graveyard appears in the report of the case of Smith v. Ladage. Land had there been conveyed to named grantees as "Trustees of the Brush Creek Burying Ground," and to their successors, without any limitation or restriction other than might be inferred from the descriptive words attached to the grantees' names. Occasional burials occurred from 1848 to 1922, subsequent to which time the cemetery fell into disrepair and became overgrown with weeds, vines and brush. In 1940, the defendants acquired title to the quarter-section of land from which the cemetery had been carved and thereafter, dealing with the township officials, obtained passage of a vacation ordinance on condition the defendants would remove all bodies and provide for the re-interment thereof in a nearby cemetery at their own expense. Upon completion of these conditions, a quit-claim deed covering the cemetery site was given to defendants and was duly recorded. Thereafter suit was brought by persons who claimed an interest in the property, either by quit-claim from the heirs of one of the original grantees or as relatives of persons buried in the cemetery, to prevent desecration of the burial ground. A decree dismissing the suit was reversed because the court failed to find proper compliance with the provisions of Section 1 of an "Act to provide for the removal of cemeteries," in that (1) the assent of the trustees or persons controlling the cemetery had not been obtained, and (2) there was no showing of "good cause" for the removal as the evidence failed to indicate any danger to public health or welfare. Mere neglect was not regarded sufficient to constitute either abandonment or justification for the vacation ordinance.

1 397 Ill. 336, 74 N. E. (2d) 497 (1947).

2 The court decided the conveyance vested no title since the estate of the deceased trustee, he being one of joint trustees, passed to the survivor of the grantees rather than to the heirs applying the rule laid down in Reichert v. Missouri & Illinois Coal Co., 231 Ill. 238, 83 N. E. 166, 121 Am. St. Rept. 307 (1907).

A typical conveyance frequently made during the early days of this state, particularly by those interested in establishing school facilities, would run to school trustees "so long as the same shall be used for school purposes." The estate thereby created, being a fee simple determinable, would automatically end upon the clear happening of the contingency and no reconveyance would be necessary to restore the title to the grantor or his heirs. A natural consequence thereof would be that any improvements made on the property would also pass to the grantor. It was on this theory that the plaintiff, in *Hackett v. School Trustees,* sought an injunction to restrain the school officials from selling the improvements to strangers after the premises were abandoned for school purposes. Relief was denied, however, when the court, on examination of the conveyance determined that, by reason of its peculiar language, a fee simple absolute estate had been granted with the reservation of an option to repurchase the soil only, exercisable in case an abandonment should occur. Exercise of the option entitled the successor in title to the grantor to no more than a conveyance of the land without the buildings.

It has sometimes been said that no word in Anglo-American law has more varied and disputed meanings than the word "heir." Two more illustrations of that fact are to be found in the reported decisions. Instances of the creation of estates tail in Illinois, particularly by deed, are rather rare, hence the case of *Bibo v. Bibo* possesses some significance. The grantor there concerned, owner of a fee simple estate, conveyed the premises to his son "and his bodily heirs." The grantor died some time thereafter leaving a will bequeathing his entire estate, including all property "to which I am entitled or which I may have the power to dispose of at my death," to his wife. After the grantor's death, the grantee also died without ever having had any issue but leaving a wife surviving who was likewise named as sole devisee and legatee.

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4 See *Regular Predestinarian Baptist Church v. Parker,* 373 Ill. 607, 27 N. E. (2d) 522 (1940).
5 398 Ill. 27, 74 N. E. (2d) 869 (1947).
6 397 Ill. 505, 74 N. E. (2d) 808 (1947).
under the grantee’s will. In a suit to determine the title to the premises, the grantee’s widow claimed either that her husband held a fee simple title or, if not, that at least he held a contingent remainder in a portion of the premises which, upon the death of his father, became vested in the grantee, the interest then passing to his widow. The first argument proceeded on the theory that the words “his bodily heirs” were words of purchase but, there being no persons in esse to take, were to be treated as a nullity thereby resulting in the named grantee receiving a fee simple since a conveyance to a named person, no other limitation appearing, creates that type of estate. The court held, however, that the phrase was one of limitation suitable to the creation of a fee tail at common law and, under the present Illinois law, gave the first taker only a life estate. The second contention was overcome by noting that, after the creation of a fee tail estate, the grantor is regarded as retaining a reversionary interest which may be effectively devised by the grantor’s will. For these reasons, the grantor’s widow was held entitled to the estate.

By contrast, in Gridley v. Gridley, the testator devised an estate in trust for the benefit of his daughter for life with remainder to the “heirs of her body” and, in default of such heirs, to the heirs of the testator’s body then living. Here, however, the problem concerned not so much the existence of the reversion upon default of issue of the life tenant as the identity of the persons described by the phrase “heirs of the testator’s body then living.” It was held that the term had to be construed literally, i.e. as referring to those who would, at the time of the testator’s death, have succeeded to the decedent’s intestate estate. Such a rule of construction is admittedly subject to modification where the testator’s words indicate that some other meaning is intended, but the court found not such basis for varying the construction and the property in question was held to go to the personal representatives of the life tenant as the sole heir of the

8 Ibid., § 5.
9 399 Ill. 215, 77 N. E. (2d) 146 (1948).
testator at the time of his death. Both the Bibo and the Gridley cases appear to have been taken to the Illinois Supreme Court in the hope of persuading the court to extend the liberal construction of the term "heirs" that had been applied in *Albers v. Donovan* and in *Hauser v. Power*. The court, however, plainly showed it was not disposed to extend these modifications to new situations.

Another fertile source of controversy in the law of future interests has always been in the creation of interests that arise upon a death "without issue." The case of *Hull v. Adams* concerned such a testamentary gift of a farm to the testator's daughter for life with a gift over to the "legal heirs" of the testator in the event of the daughter's death without issue. When the life tenant, the testator's only child, died without leaving issue, the estate was claimed by a nephew of the testator as the "legal heir." However, the executor of the estate of the testator's daughter was judged to have the better claim since he represented the person who was the testator's legal heir at the time of his death. Thus, again, was affirmed the rule held controlling in the Gridley case, that the word "heirs" is presumed to intend those persons who are the heirs of the testator at the time of his death, unless it is plainly apparent that the testator intended to refer to those who would be his heirs had he died at the termination of the life estate. In this respect, therefore, the case of *Himmel v. Himmel* is still to be regarded as the leading decision in Illinois.

One more decision, that in *Chicago Title & Trust Company v. Shellaberger*, might be noted for it concerns the familiar problem of reconciling the rule against perpetuities with the desire to keep family fortunes intact as long as possible. Actually, the decision introduces no new law but it does tend somewhat to clarify the court's much criticized holding in *Corwin v. Rheims*.

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10 371 Ill. 458, 21 N. E. (2d) 563 (1939).
11 356 Ill. 521, 191 N. E. 64 (1934).
12 399 Ill. 347, 77 N. E. (2d) 706 (1948).
13 294 Ill. 557, 128 N. E. 641 (1920).
14 399 Ill. 320, 77 N. E. (2d) 675 (1948).
Specifically, the problem was whether the interests of remaindermen could be regarded as vested even though there was no immediate right to possession of the interest whenever and however the preceding supporting estate was terminated. In the Shellaberger trust agreement, the measuring lives for the duration of the trust were selected partly from two generations, that is from among the trustees under the original agreement and from among the grandchildren then living of the settlors. During the life of the trust, the income from the corpus went to the settlor and certain other named beneficiaries and, at the termination of the measuring lives, it was provided that there should be a distribution among the heirs of the settlor and certain other life tenants. It was contended that, under such an arrangement, some of the heirs of those in the first generation who served as measuring lives might not be ascertained until more than twenty-one years after that measuring life was determined, thereby involving a violation of the rule against perpetuities. The argument was based on the holding in Corwin v. Rheims, which had declared that, in determining whether vesting occurred within the period of a life in being plus twenty-one years, the "life in being" could only refer to the life of the preceding taker of the interest to which the remainderman would eventually be entitled to succeed. Applying that ruling to the Shellaberger trust, it was contended that if the heirs of the first-generation takers were not to be ascertained until the time of distribution, which would occur at the death of the second-generation taker, it might just be possible that one of the heirs of the first generation measuring life would not have been born more than twenty-one years after the death of such measuring life. The Illinois Supreme Court, however, did not follow the suggested interpretation of the holding in Corwin v. Rheims, but rather pointed out that the fatal defects in the prior situation were attributable to other grounds. Instead, it held that, under the Shellaberger trust, the heirs of those who served as the first generation measuring lives were to be regarded as ascertained at

16 See 399 Ill. 320 at 340, 77 N. E. (2d) 675 at 684.
the moment of the expiration of such lives, and that postponement of the right of possession for such heirs until the expiration of the second generation measuring lives did not serve to make the interests of those heirs in any sense as non-vested. Postponement of enjoyment was regarded as being for the convenience of the estate rather than for reasons personal to the ultimate distributees.

Only one case may be said to have any bearing on the rights of purchasers. A suit for specific performance of a contract for the sale of land is essentially an action *in personam*, hence the court must, of necessity, have personal jurisdiction over the vendor in order to be able to enter a binding decree. If the vendor, when ordered to convey, willingly executes the deed to the purchaser, it matters not that the land involved happens to lie outside of the state for the proceeding is not one *in rem*. There is serious doubt, however, if the court would have power to direct one of its officials, such as a master in chancery, to execute the conveyance if the vendor refused to comply with the decree, for the foreign state, in which the land is located, would be under no obligation to give full faith and credit to the decree or to the acts done thereunder. Such being the case, there is some occasion to wonder if the plaintiff, in the case of Brown v. Jurczak, may not have obtained a hollow victory in having a decree dismissing his suit for specific performance reversed inasmuch as the land involved was located in the State of Michigan, even though the Illinois court had obtained personal jurisdiction over the parties.

Some cases concerning issues arising under the law of personal property deserve attention. In the first of these cases, that of Schoen v. Wallace, the owner of a fur coat sued the furrier to recover for the loss thereof while in the furrier’s hands for storage. By way of defense, the bailee pleaded an agreement in the

17 Cloud v. Greasley, 125 Ill. 313, 17 N. E. 826 (1888); Baker v. Rockabrand, 118 Ill. 365, 8 N. E. 456 (1886).
18 See Fall v. Eastin, 215 U. S. 1, 30 S. Ct. 3, 54 L. Ed. 65 (1909). The same thing may well be true of an act done by a trustee appointed for the purpose: West v. Fitz, 109 Ill. 425 (1884).
19 337 Ill. 532, 74 N. E. (2d) 821 (1947).
20 334 Ill. App. 294, 78 N. E. (2d) 801 (1948). Leave to appeal has been denied.
storage receipt designed to limit the measure of recovery in case of loss from any cause, "including our own negligence." It appeared that the owner carried insurance on the property for her own account and, at the time of receipt, it was agreed that the bailment charge would be reduced accordingly. The plaintiff's claim that the agreement to reduce liability was a nullity, since it was not proper to contract to relieve the bailee from his own fraud or neglect, was overruled on the theory that (1) there was no showing of fraud, and (2) it was proper for private parties to stipulate as to the measure of recovery, even for neglect, in consideration of a reduction in the storage charge. In Meyer v. Rozran,\(^{21}\) however, the bailee succeeded in eliminating all liability for loss of the bailed articles, even though the agreement fixed a maximum limit for recovery, because he was able to show that the loss occurred without fault and by reason of the criminal acts of third persons. Plaintiff had sued on the theory that defendant was a common carrier or, if not, was at least guilty of unnecessary delay in making delivery, hence had subjected the goods to an additional risk. The court found, on the contrary, that defendant was an ordinary bailee for hire, being only a contract carrier, and further had acted with every possible precaution when he found it impossible to make delivery to the consignees because of the intervention of a holiday between time of receipt and time of attempted delivery.

A logical extension of the holding in Phillips v. W.G.N., Inc.,\(^{22}\) which dealt with common law rights of an author of an uncopyrighted radio serial script, has been made in the case of Morton v. Raphael.\(^{23}\) The plaintiff therein, a commercial artist, had been hired to paint certain murals on the walls of a public dining room in a Chicago hotel. The defendant, engaged to do the interior decorating of the premises, subsequently took photographs of the completed installation, incidentally revealing plaintiff's handiwork, and published the same in conjunction with an advertise-

\(^{21}\) 333 Ill. App. 301, 77 N. E. (2d) 454 (1948).
\(^{22}\) 307 Ill. App. 1, 29 N. E. (2d) 849 (1940).
\(^{23}\) 334 Ill. App. 399, 79 N. E. (2d) 522 (1948).
ment of defendant’s business which appeared in a trade paper. It was claimed by plaintiff that such reproduction, without her permission, amounted to a violation of her common law copyright. The court, however, held that, if copyright were possible, there had been a dedication to the public domain inasmuch as the finished product had been exposed to unrestricted public view, but even if not, the plaintiff could have no right therein for the work had been done at the commission of the hotel proprietor, hence the copyright, if any, would belong to him in the absence of any reservation by the artist.

The power of the sovereign state to act to abate a nuisance may not be questioned but if, in order so to do, it becomes necessary to seize and destroy personal property there is occasion to consider whether the seizure can be justified without notice and hearing to the owner or possessor,\(^\text{24}\) except in cases where the object is small in value and the cost of a condemnation proceeding would outweigh the worth of the thing destroyed while abating the nuisance.\(^\text{25}\) Obviously, however, the right of seizure can be justified only provided the object seized is then involved in conduct which has been clearly declared to be a nuisance requiring summary abatement. It was for this reason that the Illinois Supreme Court, in Cox v. Cox,\(^\text{26}\) reversed a judgment dismissing a suit brought by the owner and possessor of certain fish nets which had been seized and destroyed by state officials for an alleged violation of the Fish Code. The statute in question condemned the “use” of such nets and authorized summary proceedings for the destruction of nets so illegally used, but it was held that the provisions thereof could not be regarded as applicable to a case where nets of that character were merely possessed and stored in Illinois when not in operation in waters outside the territorial area of the state.

\(^{24}\) People v. Marquis, 291 Ill. 121, 125 N. E. 757, 8 A. L. R. 874 (1920).

\(^{25}\) Lawton v. Steele, 152 U. S. 133, 14 S. Ct. 499, 38 L. Ed. 385 (1894).

\(^{26}\) 400 Ill. 291, 79 N. E. (2d) 497 (1948). Direct appeal to the Supreme Court was proper inasmuch as the constitutionality of Ill. Rev. Stat. 1945, Ch. 56, § 109, was directly involved. That statute was repealed in 1947 and was not re-enacted at the time of the adoption of the present Fish Code: Ill. Rev. Stat. 1947, Ch. 56, § 141 et seq.
The case of Sandra Frocks, Inc. v. Ziff,\(^{27}\) companion to a case of similar name noted in last year's survey which dealt with the propriety of serving a notice of termination of tenancy by registered mail,\(^{28}\) merits attention, but this time that attention is directed to the question of whether or not a tenant may insist upon performance of an option to purchase, contained in the lease, at a time when he is in default in rent and the landlord has exercised his right to terminate the lease. The plaintiff there had filed suit for specific performance of the option agreement as well as for an injunction halting the suit for possession. In affirming a judgment for the defendant, the Illinois Supreme Court agreed that the notice sent plaintiff terminating the lease for non-payment of rent also put an end to any other rights plaintiff may have asserted under the lease, including the option to purchase. If the suit had been one at law, a discussion of dependent and independent covenants might have been in order but as the case was in equity, equitable principles prevailed.

Incorporation by reference was involved in 7039 Wentworth Avenue Building Corporation v. Trough,\(^{29}\) which case raised the problem as to whether or not certain rules and regulations set out on the reverse side of a lease were to be treated as a part of the terms thereof, there being a clause within the body of the lease adopting them by reference. The Appellate Court, declaring that the same rules were applicable to the construction of leases as were applicable to other contracts and noting that a contract might consist of several documents internally connected, held the rules and regulations were a part of the lease and binding on the tenant.

The effect of successive notices for the termination of a tenancy was involved in Mitchell v. Tyler.\(^{30}\) The facts there showed

\(^{27}\) 397 Ill. 497, 74 N. E. (2d) 699 (1947).
\(^{29}\) 332 Ill. App. 635, 76 N. E. (2d) 350 (1947).
\(^{30}\) 335 Ill. App. 117, 80 N. E. (2d) 449 (1948).
that plaintiff, the landlord, had served a notice of termination of tenancy on the defendant and had then proceeded to a favorable decision in forcible entry and detainer proceedings based thereon. The defendant appealed from that judgment asserting the invalidity of the notice and, while the appeal was pending, the plaintiff then served a sixty-day notice of termination of tenancy upon the defendant against the possibility that the judgment might be reversed on appeal. The tenant then claimed, through a petition in the nature of a writ of *audita querela*, that the plaintiff had thereby waived the first notice and had nullified the action taken thereon. Each party cited an Illinois case to support his contention. The Appellate Court distinguished the two cases; the one holding the first notice was waived being a case where the second notice demanded the payment of accrued rent,\(^3\) whereas in the other, in which two notices were served on the same day, the second notice was only a precautionary device to protect the lessor should the first notice be held insufficient.\(^2\) Relief was denied the tenant in the instant case when the court noted that the defendant could not have been misled and should have realized that the only purpose of the second notice was to save the lessor additional time in the event the appeal was determined in the tenant's favor.

Sharp distinctions exist between the relationship of landlord and tenant on the one hand and that of innkeeper and guest on the other; especially with regard to eviction for non-payment of rent. In *Neely v. Lott Hotels Company*,\(^3\) the Appellate Court held that where a person occupies accommodations in an hotel, paying a daily rate and receiving general maid service, towels, linens and the like, even though the suite should consist of three rooms, the relationship was that of innkeeper and guest. For failure on the part of the guest to pay the daily charge, the hotel proprietor had the right summarily to eject the guest from the premises, using whatever force was reasonably necessary. The

\(^1\) Dockrill v. Scherk, 37 Ill. App. 44 (1890).


\(^3\) 334 Ill. App. 91, 78 N. E. (2d) 659 (1948).
case would appear to be lacking in novelty except for the fact that the court was unable to cite any local precedent on the point.

To prevent overcrowding of facilities, the typical apartment lease contains two stipulations, one to the effect that the premises shall be occupied only by the lessee and a second limiting occupancy for private dwelling purposes only. In *Liberty National Bank of Chicago v. Zimmerman*, the landlord sought to recover possession for an alleged violation of these covenants. The Appellate Court held, however, that the lessee’s daughter, son-in-law, and their child were entitled to occupy the premises with the lessee, for a search of authoritative sources revealed that persons of that relationship are included within the concept of a “family” while a private dwelling is one usually occupied not alone by the lessee but also by his family.

A case apparently of first impression in Illinois, that of *Kruse v. Ballsmith*, arose out of rent regulations imposed under the OPA Act. The court there decided that if a landlord, entitled to possession of his own premises for his own use, obtains a certificate from the Rent Director permitting eviction proceedings to be brought and complies with all other statutory regulations, the general provisions of the rent regulations then become inapplicable and the landlord may thereafter proceed under local laws as if the Emergency Price Control Act were not in effect. The case involved the right of the landlord to demand double rent under the local statute for the period of wrongful withholding. It was adjudged that the penalty might be awarded to him without violating the rent regulations or causing the tenant to pay excess rent.

Two cases involving oil leases merit some attention. The first, that of *Guth v. Texas Company*, involved an oil and gas lease under which plaintiff held a royalty interest. He brought action to recover royalties on wet casing-head gas which the

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34 333 Ill. App. 94, 77 N. E. (2d) 49 (1947).
36 163 F. (2d) 893 (1947).
defendant had permitted to escape. It appeared from the
evidence therein that such gas is gas that is intermingled with
the oil in the pool and serves as the force which drives the oil to
the surface. It is necessary to build a refinery to make the gas
economically useful, but the defendant, rather than wait until a
refinery could be constructed, permitted the gas to escape although
it did collect the oil. Justification for failure to wait until a
refinery could be built was said to rest in the fact that competing
producers were withdrawing gas and oil from the same pool. The
plaintiff, claiming that the defendant had reduced the gas to pos-
session and then permitted it to escape, felt that defendant should
pay royalties thereon. The court, however, decided that defend-
ant's possession was not such as would make it liable, for defend-
ant had no way to contain or control the gas.

The other case, that of Ramsey v. Carter Oil Company, was
an action to enjoin the defendant, lessee-operator of oil and gas
wells on plaintiff's land, from converting an offset well to a re-
pressure well. The federal district court involved formulated
some of the duties of the defendant by noting that such a tenant
(1) is obliged to use reasonable diligence to develop the premises
so long as the enterprise could be carried on at a reasonable profit;
(2) should, by appropriate measures, protect the leasehold against
drainage by offset wells; (3) ought to develop the property and
produce oil in the manner of a reasonably prudent operator, hav-
ing due regard for the interest not only of himself but also that
of the lessor; and (4) had the right and duty to adopt gas re-
pressuring systems for secondary recovery of oil. But, since it
was shown that converting an offset well into a repressuring well
would result in the loss of all the oil under five acres of ground,
the court felt that a reasonably prudent operator, having in mind
the best interests of the lessor, would not adopt the proposed
plan. It, therefore, granted the plaintiff an injunction against the
contemplated conduct.

SECURITY TRANSACTIONS

General doctrines concerning security for money loaned or credit extended have gone unchanged, but two small points have been considered concerning rights of mortgagees. If any intimation was gleaned from the action taken by the Illinois Supreme Court when reversing the holding of the Appellate Court in the case of Stevens v. Blue, to the effect that once a receiver has been appointed for mortgaged premises the benefit of the receivership redounds to the favor of all mortgagees holding liens thereon, the same should have been effectively dispelled by the more recent decision in the case of Fleischer v. Flick. A substantial sum of net rents had there been accumulated in the hands of a receiver appointed at the instance of a first mortgagee who later consented to the dismissal of his suit. On application by the owner of the equity of redemption for the payment of such balance, a junior encumbrancer contended the money should be applied toward the satisfaction of the junior lien pursuant to a pledge of the rents as additional security. His request was denied because the assignment was held not to be self-operating and he had done nothing to have the receivership extended for his benefit.

The case of Illinois Bankers Life Assurance Company v. Dunas also serves as a reminder that persons seeking to foreclose mortgages can do so effectively only if the court can secure jurisdiction over all interested parties, particularly in the capacity in which they bear relation to the property involved. If possession of the mortgaged premises is acquired under such an invalid foreclosure, however, the lapse of time will not serve to bar a later suit to eliminate the equity of redemption held by the unserved defendants, no matter how long a time may elapse,

38 388 Ill. 92, 57 N. E. (2d) 451 (1944), reversing 320 Ill. App. 375, 51 N. E. (2d) 603 (1943).
39 334 Ill. App. 461, 80 N. E. (2d) 81 (1948). Leave to appeal has been denied.
40 333 Ill. App. 192, 77 N. E. (2d) 54 (1948).
41 In the original foreclosure proceeding there concerned, jurisdiction was obtained by personal service on certain defendants but as individuals rather than in their capacity as trustees under the last will of the deceased owner.
42 Suits on mortgages are usually barred in ten years after the maturity of the debt, according to Ill. Rev. Stat. 1947, Ch. 83, § 11.
for in that case it was held proper for the mortgagee in possession to seek to re-foreclose and to obtain an injunction against a suit in ejectment brought by the owner of the right to redeem despite the claim that the mortgagee's rights were destroyed by the passage of time. Mention might also be made here of the case of *Hartsman v. Kaindl*\(^4\) which touches on the question of necessary parties in foreclosure proceedings. It was there held to be the law that while the mortgagee must generally verify whether or not a junior judgment creditor has made an assignment of the judgment and, if so, must name the assignee as a party, that rule does not apply where the land is registered under the Torrens System and no notation of the assignment has been made on the Torrens register.

**WILLS AND ADMINISTRATION.**

Cases involving the law of wills seem to run principally to problems concerning the existence of defects in the attempt to create an enforceable testamentary instrument. Lack of mental capacity to properly perform a testamentary act has always been such a popular basis for contesting wills that most courts have limited the scope of this defect in order to prevent its wholesale abuse. So, in Illinois, it has been held that only where a testator is afflicted with an insane delusion is he mentally incompetent to dispose of his estate by testamentary instrument. The leading exposition of that rule has, for over forty years, been the case of *Owen v. Crumbaugh*.\(^4\)

In applying this limitation, however, the courts have been under constant pressure to include all manner of other types of influence within the scope of incompetency. So, in *Jackman v. North*,\(^4\) where a will contest was based on an unusually bitter but actually unfounded hatred held by the testatrix for the con-

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\(4\) 400 Ill. 243, 79 N. E. (2d) 472 (1948). A more complete discussion of this case appears ante. See section on Civil Practice and Procedure, particularly enforcement of judgments.

\(4\) 228 Ill. 380, 81 N. E. 1044 (1907).

\(4\) 398 Ill. 90, 75 N. E. (2d) 324 (1947).
testant, her sister, it was shown by the testimony of two medical experts that the mind of the testatrix was dominated by this hatred at the time when the will was executed. On this, plus other non-expert testimony to the effect that the belief upon which the hate of the testatrix had been founded was in fact baseless, the contestant rested her case. A directed verdict admitting the will to probate was questioned on appeal, but the Illinois Supreme Court affirmed and pointed out that the contestant had "bypassed the primary question and ignored the necessity of making proof that the testatrix was suffering from an insane delusion in regard to the plaintiff." It might have been, the court indicated, that the dislike for the sister influenced the testatrix in the making of her will but, if such prejudice could be accounted for on any other ground than a truly insane delusion, she was not disqualified from making a will.

The existence of a dislike or prejudice against a relative is no ground for setting aside a will unless it could be said that the dislike rested on a belief in something impossible either in the nature of things or under the circumstances surrounding the afflicted individual, which belief must also be unyielding either to evidence or reason. Nothing in the plaintiff’s expert testimony was said to shed light on this particular aspect of the testatrix’ frame of mind. The case seems to be as good an illustration as usually appears of the difficulty of attempting to prove mental incapacity by expert testimony based on hypothetical questions. Since most will contests depend, for success, on the proof of unreasonableness in the testator’s belief under the particular circumstances surrounding the execution of the will, it is difficult to imagine a case where, under the law of this state, expert testimony could prove mental incompetency.

Proof of undue influence, where a fiduciary relationship exists between the testator and a devisee who receives a substantial benefit from the will, is likewise difficult to establish in fact. Generally, prima facie proof of such undue influence is made by

46 398 Ill. 90 at 100, 75 N. E. (2d) 324 at 329.
establishing the fact of a confidential relationship and a will actually favoring the confidante. It then remains for the proponent of the will to produce a preponderance of evidence favoring regularity. Such a problem arose in Tidholm v. Tidholm,\(^{47}\) when an eighty-six year old widower executed a will leaving practically his entire estate to a daughter. The testator’s son, contestant therein, showed that the testator had lived with his daughter, had been dependent upon her, and had reposed trust and confidence in her. Evidence having been produced to show that the testator’s freedom of action was actually not destroyed at the time of execution of the will, the case was given to the jury on instructions that, in order for undue influence to have the effect of invalidating a will, the influence had to be directly connected with the execution of the will, had to be operating at the time it was made, had to be directed toward the procuring of the will in favor of certain parties, and had to so destroy the testator’s freedom of action as to render the instrument more the will of another than his own. The instructions were approved. The test suggested is not new but is remarkable here to illustrate the consistency with which the court has acted in such matters.

Where separate papers are offered for probate and not all are executed and attested according to the statute, the law of wills restricts incorporation by reference to situations in which, first, the will itself refers to the papers to be incorporated as being in existence at the time of execution of the will and uses suitable language to reasonably identify the extrinsic papers and show the testator’s intention to make such incorporation, and second, it must be shown that the papers to be incorporated were, in fact, in existence at the time of the execution of the will. In Wagner v. Clausen,\(^{48}\) probate was sought for a letter found with the testatrix’ will on the theory that it had been incorporated by reference in the third clause of the will, which read: “All the rest, residue and remainder of my property . . . I give, de-

\(^{47}\) 397 Ill. 363, 74 N. E. (2d) 514 (1947).

\(^{48}\) 399 Ill. 403, 78 N. E. (2d) 203 (1948).
vise and bequeath to Katherine Clausen, as trustee for the purpose of converting it into cash and making distribution thereof in accordance with a memorandum of instructions prepared by me and delivered to her.” Looking at the facts closely, the court found two points of weakness in the case for incorporation in that (1) the memorandum was dated five days after the date of the will, and (2) had actually never been out of the control of the testatrix but had been placed in an envelope addressed to the trustee and left in the testatrix’ safety deposit box. With the memorandum unenforcible, the court then had to face the claims of the beneficiaries named in the memorandum, who urged that a constructive trust be recognized, and of Katherine Clausen, who urged that, by failure of the trust, the residue should come to her individually as a gift. Both claims were rejected in view of the clear intention of the testatrix that the residue of her estate was to be disposed of by trust. As the trust failed, the only alternative was intestacy.

The problem of revocation of mutual wills was raised by the case of Jordan v. McGrew where the evidence disclosed that a husband and wife had made mutual wills and thereafter, subsequent to the husband’s death, the wife attempted to destroy her will by burning. The problem was troublesome because Illinois has precedents holding that, where two testators execute a joint and mutual will, revocation is improper because such an instrument is said to show on its face that the devises are made in consideration of each other. On the other hand, the time tested maxim has been that only clear and conclusive evidence of an exchange of consideration, over and beyond the mere existence of mutual wills, should be sufficient to destroy the right to revoke. In the instant case, those seeking to thwart the attempt to revoke produced witnesses who testified to the fact of a verbal agreement between the husband and wife whereby, in consideration of what the beneficiary had done and was to do in helping

49 400 Ill. 275, 79 N. E. (2d) 622 (1948).
50 See Frazier v. Patterson, 243 Ill. 80, 90 N. E. 216 (1909).
51 Frese v. Meyer, 392 Ill. 59, 63 N. E. (2d) 768 (1945).
them, they would make their mutual wills giving the said beneficiary their property. When it was further shown that the beneficiary had, in fact, performed the assistance contemplated, the proof was deemed sufficient to make the wills irrevocable.

In the field of estate administration, there were few developments of significance although in Brandt v. Phipps\(^5\) the court found it necessary to reiterate the rule concerning the interest in real estate acquired by an executor to whom no devise is made but who is directed to sell and convey the land and apply the proceeds to specified purposes. The court again held that the executor takes only the power of sale, not the fee, unless vesting of the fee is necessary to effectuate the intention of the testator. It was also held that if the power of sale is not exercised within a reasonable time it will lapse, the title necessarily descending to the heirs at law. The holding should set at rest doubts on the question which may previously have existed because of views expressed in prior cases tending to indicate that the executor who is directed to sell and convey takes an estate in the land.\(^6\) In the instant case, the executor sued to set aside his executor's deed, made some nine years after the will had been admitted to probate, on the ground that he was mentally incompetent at the time the deed was made. The evidence abundantly established the fact of incompetency but the court, affirming a dismissal of the executor's suit, pointed out that the power was not exercised during the two years of administration by plaintiff's predecessor nor during the three years of plaintiff's own administration preceding his incompetency, and consequently had lapsed. The executor's deed being a nullity, the decision on this point made it unnecessary to make any pronouncement on the validity or invalidity of the acts of mentally incompetent executors.

In Clark v. Bentley,\(^7\) the court further evidenced its dispo-


\(^7\) 398 Ill. 535, 76 N. E. (2d) 438 (1948).
sition to continue to construe "no contest" provisions in wills so as to avoid forfeiture of a beneficiary's interest in the estate, if that result can possibly be achieved. Testator's children, being contingent remaindermen, quit-claimed their interest to the testator's widow, who was the lifetenant, and she, in return, conveyed undivided interests in the rents and profits to the children. Part of the real estate was subsequently conveyed to purchasers. Plaintiff in the action, one of testator's grandchildren who had been given a cash legacy, contended that the conveyances between the widow and children, operating to change the terms of the will, had worked a forfeiture of the property involved. The court found it unnecessary to determine whether "no contest" provisions in wills are contrary to public policy, holding instead that the testator contemplated not some amicable composition of the estate but some form of court or judicial contest. The soundness of the decision is scarcely open to question. To adopt the construction urged by the plaintiff would certainly force the present to submit to the dead hand of the past.

An interesting question of evidence law was presented in George v. Moorehead, a will contest case, where a transcript of testimony taken in heirship proceedings was held inadmissible, there being no showing that the witnesses were dead or unavailable. The court pointed out that while prior testimony may be received if the witnesses are dead, insane, under restraint, or otherwise not available, provided the parties and the issues are substantially the same, that rule was of no help in the instant case. It is clear that the issues could not be the same for a hearing to determine heirship in no way involves the validity of a will, which issue is the prime one in a will contest case.

Mention perhaps ought to be made of the erstwhile holding

55 The claim was based on a provision in the will which read: "If any of my children, or grandchildren, or any of the cestui que trust under this will shall contest the validity of this, my will, or attempt to vacate the same, or alter or change any of the provisions thereof, he, or she, or they, shall be thereby deprived of any beneficial interest under this will, and of any share of my estate. . . ." Italics added.

56 399 Ill. 497, 78 N. E. (2d) 216 (1948).
of the Appellate Court for the First District in the case of Weil v. Levy. The court there indicated that a petition to sell decedent's real estate to pay debts was not barred by laches, even though filed thirteen years after decedent's death, provided it was filed within seven years following the granting of letters of administration. The decision apparently contradicts the leading Illinois cases on the point and does not follow the rule now prescribed by a recent amendment to the Probate Act. As it does not appear that reason dictates a change from the rule customarily applied, the action of the court in withdrawing the opinion is to be commended.

VII. PUBLIC LAW
CONSTITUTIONAL LAW

As was the case last year, the decision attracting the most public interest was that achieved by the United States Supreme Court in the McCollum case, which tribunal, by a divided court, voted to reverse the holding of the Illinois Supreme Court. The case, as is now well known, turned upon the right of the public school authorities to permit religious instruction on school premises under a "released time" arrangement. The majority were of the opinion that the plan pursued fell squarely under the ban of the First Amendment, as interpreted in Everson v. Board of Education of Ewing Township, and violated the "wall of separation" between state and church. The dissenting opinion of Justice Reed, however, clearly points out the futility of supposing there can be such a separation so long as the two exist side by side. Interaction between the two is inevitable, so

57 332 Ill. App. (adv.) 468, 76 N. E. (2d) 192 (1947). The opinion was later withdrawn by order of court: 76 N. E. (2d) XV.
58 See cases cited in a criticism of the decision in 36 Ill. B. J. 426.
3 330 U. S. 1, 67 S. Ct. 504, 91 L. Ed. 711 (1946).