December 1949

Property - Survey of Illinois Law for the Year 1948-1949

Chicago-Kent Law Review

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The legislature adopted three important statutory amendments during the period of this survey. The first empowers the Supreme Court to adopt rules providing for a sixty day "cooling off" period in divorce cases so as to provide an opportunity to effect a reconciliation. The second, enacted to overcome constitutional objections which had rendered sterile prior attempts to create a special divorce division, now provides for statewide operation of such tribunals. The third, intended to obviate the construction previously placed on Section 18 of the Divorce Act as it related to the payment of alimony after remarriage, directs that lump-sum alimony provisions, although payable in installments, shall continue in effect until discharged in full even though the ex-spouse entitled thereto should remarry or either party to the decree should die. Another bill concerning family relations, one designed to compel support of dependent wives, children and poor relatives, both within and without the state, has already been exposed to criticism over its possible unconstitutionality.

VI. PROPERTY

REAL AND PERSONAL PROPERTY

Owners of land can no longer expect to thwart prospective adverse claimants simply by keeping them off the surface of the land. They must cock a watchful eye toward the air above, according to the holding in *Poulos v. P. H. Hill Company, Inc.*, wherein the land owner was denied the right to erect a building on some two and one-half feet of his property because an adjoining owner had acquired the right, by prescription, to maintain a fire escape over the premises through its long continued presence in the air.

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45 Hunt v. Cook County, 398 Ill. 412, 76 N. E. (2d) 48 (1947).
47 See cases cited in note 6, ante.
50 See Fins, "Legislation Affecting Practice," 38 Ill. B. J. 71, particularly p. 91.
space above and downward to within twenty feet of the ground. The statement that permissive use can never give rise to an adverse right is familiar law. It is also well-established that use of vacant, unenclosed and unoccupied property is presumed to be permissive. But whether or not the presence of a fire escape hanging over a lot used only for storage purposes could result in an easement by prescription required the Supreme Court to give further definition to the words "vacant, unenclosed and unoccupied" as used in the doctrine mentioned. It held that all three of the conditions must exist before a presumption that the use was permissive could arise, for which reason there was little opportunity to invoke the presumption in improved metropolitan areas. Having found that a right to maintain the fire escape over the plaintiff's land existed by reason of an easement by prescription, the court directed that an amendment be made in the decree, so as to show the right to use the land immediately beneath the swinging ladder and the arc through which it would descend, for the right to use for a particular purpose was said to carry with it all the intentions of such use.

Illinois lost little time in applying the decision of the recent case of Shelley v. Kraemer, wherein the United States Supreme Court had dealt with the right to enforce covenants restricting ownership and occupancy on the basis of race and color. A decree entered in Tovey v. Levy, enjoining an owner of property from leasing to a negro in violation of a restrictive covenant, was reversed on the ground that the granting of such an injunction constituted prohibited state action. Although the court noted that restrictive agreements do not, per se, violate the Fourteenth Amendment and are proper so long as the purposes thereof are effected through voluntary adherence, no other intimation was made as to the manner by which compulsory enforcement might be accomplished. Religious freedom did not fare as well as civil rights, however, for in Housing Authority of Gallatin County v. Church of God a restrictive covenant prohibiting the erection of

2 334 U. S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948).
3 401 Ill. 303, 82 N. E. (2d) 441 (1948).
4 401 Ill. 100, 81 N. E. (2d) 500 (1948).
churches in the named area was enforced despite claims of violation of the First Amendment to the federal constitution and of Section 3 of Article II of the Illinois constitution. It might be noted that total exclusion of religious establishments was not attempted under the covenant for the Housing Authority had provided areas elsewhere for church purposes.

The disappearance of a large number of former school districts, made possible by statutory authority for their consolidation, has been heretofore noted. In many instances, questions have arisen as to the power possessed by the school boards to dispose of the school buildings in cases where the school lands were to revert upon the discontinuation of the school use. Any doubt as to the power of such boards was resolved, albeit some new doubts were raised, through the medium of the decisions in Brown v. Trustees of Schools of Township No. 56 and Low v. Blakeney, in each of which cases the grant contained a reverter clause but the board was allowed to sell the school building separately from the land, permitting the latter to revert in its original state. Justification for that result was said to lie in an 1857 statute which authorized the school boards to acquire independent titles to the land and to the buildings erected thereon as well as on the presumed intent of the parties to the grant to exclude all buildings from the operation of the reverter clause. The holding therein, contrary to the law generally relating to fixtures, may at least serve the desirable purpose of vindicating the action taken by several thousand such school boards who have already sold the school buildings and who might have become exposed to substantial liability if a contrary result had been obtained. It is doubtful if the court would extend the holding to purely private cases.

Construction of a deed which placed an obligation on the grantee to pay money to a third person was called for in Mathis v.

5 See comment on Hackett v. School Trustees, 398 Ill. 27, 74 N. E. (2d) 869 (1947), noted in 27 CHICAGO-KENT LAW REVIEW 71.

6 403 Ill. 154, 85 N. E. (2d) 747 (1949). Crampton and Thompson, JJ., dissented.

7 403 Ill. 156, 85 N. E. (2d) 741 (1949). Crampton, J., wrote a dissenting opinion, concurred in by Thompson, J.
Mathis. Both the grantor and the third person had died before the money had been paid so the grantee sought a decree declaring that he had been freed from the obligation imposed and was not required to make the money payment to the heirs of the third person. The obligation to pay was sustained when the court held that the provision was a covenant running with the land. The provision undoubtedly did create a charge on the land properly enforcible by the heirs of the designated payee, but it is questioned whether the charge should have been called a covenant running with the land, particularly since no transfer had occurred.

Few branches of the law in Illinois are in such chaotic condition as is true of the rather esoteric field of future interests. For that matter, few cases have been decided which have so successfully added to the confusion as is true of the decision in Spiegel's Estate v. Commissioner of Internal Revenue. The impact of the case has been felt not only in taxation but in the fields of estate planning and probate and trust administration as well. Because of its many ramifications, the case has been discussed time and again; for which reason a rehash of the same material is hardly necessary, particularly since the interested lawyer has already thoroughly digested its import. But certain aspects of the case merit attention for it is submitted that the holding therein is baseless both in reason and in authority. First, the United States Supreme Court there said that testamentary disposition of an inter vivos nature cannot escape the effect of the Internal Revenue Code merely by hiding behind "legal niceties contained in devices and forms created by conveyancers." Ironically enough, this logical, and the word is used advisedly, extension of the Hallock

8 402 Ill. 60, 83 N. E. (2d) 270 (1949).
9 See comment in 1949 U. of Ill. Law Forum 528, particularly p. 530.
11 At least twenty law review articles or comments on the case have appeared, ranging from the critical to the vehemently abusive. It is anticipated that more will come.
12 Despite the fact that the decedent retained no power to alter, amend or revoke an inter vivos trust, which apparently provided for a complete disposition of the trust res, it was there held that the decedent had a reversionary interest, subject to federal estate taxation, under the rule of Helvering v. Hallock, 309 U. S. 106, 60 S. Ct. 444, 84 L. Ed. 604 (1940).
rule results only in the substitution of one set of "legal niceties" or technicalities for another. If the conveyancer has exhausted all desired alternative remaindermen and a slight possibility of reverter, no matter how slight mathematically, yet exists, he need merely add an ultimate remainder for charitable purposes generally. Second, the court refused to review the determination of the Court of Appeals for the Seventh Circuit as to the state of the applicable Illinois law on the ground that, unless the intermediate court is clearly in error on the point, its holding will be sustained. In a case having such far-reaching consequences, spineless reliance on procedural technicality is hardly excusable. Third, even the most cursory review of the intermediate appellate decision in the case will reveal glaring error. For example, the court there refused to consider Illinois cases suggested by counsel to support the allegation that the ultimate remainder was vested, not contingent. It cited the Illinois case of Baley v. Strahan for the proposition that the grant of the remainder was contingent, yet the specific holding therein was that "the remainder devised to Margaret was vested and not contingent." It is also interesting to note that, in O'Hare v. Johnston, a conveyance, almost the same, clause for clause, as the one in the Spiegel case, was held to create a vested interest, despite the powerful advocacy of the eminent Albert M. Kales arguing the opposite. All in all, the Spiegel case is a superb example of judicial ineptness. It is to be hoped that the Illinois Supreme Court, when the opportunity is

13 The creation of a use on a use, to defeat the operation of the Statute of Uses, is a familiar illustration in the law of property.


15 Helvering v. Stuart, 317 U. S. 154, 63 S. Ct. 140, 87 L. Ed. 154 (1942), is authority for this rule. It is interesting to note that Justice Black, who wrote the majority opinion in the Spiegel case, dissented in the Stuart case. He there said that merely because the circuit court had decided a matter of state law such act should not preclude the Supreme Court from reviewing the decision. Incidentally, the dissenters in the Stuart case were of the opinion that the government's levy of a tax should have been sustained.

16 See 159 F. (2d) 257 (1946), particularly p. 258. It had been settled law in Illinois, for at least twenty-two years prior to the decision here considered, that the rules of construction for wills are equally applicable to the construction of trust agreements: Brinkerhoff v. Ridgely, 232 Ill. App. 12 (1924), cert. den.

17 314 Ill. 213, 145 N. E. 359 (1924).

18 314 Ill. 213 at 220, 145 N. E. 359 at 362.

19 273 Ill. 458, 113 N. E. 127 (1916).
afforded, will reject the holding. Until that is done, the local attorney must take cognizance of the case and draft his trust instruments accordingly.

Interest in the case of Cahill v. Cahill\textsuperscript{20} is provoked by the fact that it provides further illustration for the meaning of the rule in Shelley's Case.\textsuperscript{21} The testator had there left certain real estate to a nephew for life with remainder over, upon the nephew's death, to "his Heirs of Blood." The nephew attempted to pass the property by will, the devisee relying on the claim that the nephew had acquired a fee simple estate because of the rule mentioned. The court, treating the case as one of first impression, decided that the quoted words were not merely words of limitation, descriptive of the quality of the estate granted, but were words of purchase, descriptive of those to whom the estate was granted. That being the case, the Shelley rule was inapplicable leading to the result that the nephew had no estate to pass by the devise.

Of at least equal interest is the case of Peadro v. Peadro\textsuperscript{22} wherein a testator devised certain lands to his wife for life with remainder to his children "or the survivor of them" in fee. Two of the children had survived the testator but had predeceased the life tenant, so an issue arose as to whether the survivorship requirement concerned itself merely with survival of the testator or required survival until the time of distribution. As words of survivorship, when used in relation to a limitation to remaindermen in a will, usually have reference to the termination of the particular estate, it may occasion some surprise to note that the court held that all that was necessary was that the remaindermen should survive the testator in order to enjoy a vested estate. Justification for this clear departure from the normal construction was said to be required by the case of Murphy v. Westerhoff.\textsuperscript{23} It is submitted that a careful examination of that case will reveal that the decision therein rests upon completely dissimilar

\textsuperscript{20} 402 Ill. 416, 84 N. E. (2d) 380 (1949).
\textsuperscript{21} 1 Co. Rep. 93b (1581).
\textsuperscript{22} 400 Ill. 482, 81 N. E. (2d) 192 (1948), noted in 43 Ill. L. Rev. 859 and 1949 U. of Ill. Law Forum 530.
\textsuperscript{23} 386 Ill. 136, 53 N. E. (2d) 931 (1944).
language having little or no regard to the survivorship requirement. Again, until further clarification is adduced, testators who wish to limit to persons, and only those persons, who survive the life tenant must need be explicit in their language.

Contrast, however, is afforded by *Stagg v. Phoenix.* The husband and wife there concerned drew a joint will creating a life estate in the survivor with remainder to their two boys, but stipulated that if one of the boys should "die without issue, leaving surviving him no child or children as his heir or heirs," a gift over should be made of the remainder. Another clause in the will directed that no gift under the will was to be effective until the survivor of the husband or wife had died. The plaintiff, one of the two boys, claimed a fee estate on the ground that he had survived both parents. The court here correctly decided that the provision against dying without issue meant dying without issue either before or after the testator's death.

There is a relative dearth of significant decisions in the field of property law as it relates to the rights of sellers and buyers or invokes problems of conveyancing. In *Midwest Radiant Corporation v. Hentze,* the plaintiff held a mining lease from one in the chain of title as grantee under a warranty deed made by a certain Augusta Keim in 1907. Prior thereto, in 1902, she had purported to "convey and quitclaim" to the defendant's grantor the right to mine coal on the same premises. That instrument had provided that the grantee should "commence sinking a mine at Lensburg in six months from this date and have same in operation in one year from that date or this deed to be void." The grantee never did mine on the land but no steps were taken to abrogate any interest thus created so the defendant laid claim to an interest in the premises. Plaintiff contended that the defendant had nothing inasmuch as his grantor had only a mining lease subject to an abandonment clause. The court could find no Illinois precedent in point but did hold that, by construction and authority, the plaintiff had to prevail. Although the phrase "con-

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24 401 Ill. 134, 81 N. E. (2d) 565 (1948), noted in 24 Notre Dame Lawyer 259.
vey and quiteclaim” is typical of a deed, it was said that where no words of inheritance are involved it is not improper to treat the arrangement as one for a mining lease and no more. The presence of an abandonment clause, the lack of adequate consideration, and the fact that the parties, for some forty years, had acted as if they thought the document was a lease rather than a deed, caused the court to construe the instrument as it did.

On the other hand, *Shadden v. Zimmerlee* achieves a quaint result in the face of prior decisions. Several allegations were made to prove the invalidity of the deed there in question, but the only one of importance was that the deed was not under seal. The court, deeming that it made no difference whether the issue was raised at law or in equity, held that title had passed despite the absence of a seal. Assuming the case were one in equity, the result would seem to be error. It is true that a good title may be conveyed in equity without a seal where the contract is fully performed and a valuable consideration has been paid, but no consideration passed for the deed in question. Nor could a trust be imposed here, for a trust cannot be impressed in favor of a grantee whose claim arises out of an imperfect gift. On the other hand, it is novel to say the least, in face of the Illinois Conveyances Act, to hold that a legal title can be conveyed by an unsealed deed. The main case cited to sustain that proposi-

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27 As a model of what not to do, the instrument is here set out as it appears in the report of the case, to-wit:

"Apr 20-1944 Rockford Ill. Quick Claime Deed

Assignment to B. F. Zimmerlee

My interest it said piece of property consisting of 8 eight lots in Winebago County Ill as described upon the plat of G. W. Gilbert's Sub. being a part of the South West Quarter of Section 16 town 44 N. R. 1 E of the 3rd p.M. the plat of which Subdivision is recorded in Book 20 of plat on page 45 in the Recorder's office of Winnebago County Ill. and the above maned being my (husband said property is his) to hold and sell and use the proceeds as long as he shall live this is my last wish

Myrtle Zimmerlee

witness—Mrs. Bessie F. Malone

Notary public Lenna Smith

Rockford, Ill. (Seal)"

28 Aselford v. Willis, 194 Ill. 492, 62 N. E. 817 (1902).
tion, that of *Wilson v. Kruse*, in nowise does so. Quite the contrary, it only indicates that if possession is taken under an unsealed deed given for a valuable consideration such possession carries with it an equitable title. It would appear, then, that the case is wrongly decided. If it be desirable that one should be able to make a valid conveyance by an unsealed deed, the change should originate in the legislature, not in the courts.

A relatively rare problem of conveyancing law may be found in *Butcher v. May*, although the applicable principles are not new in any sense of the term. The plaintiff, occupying a farm under written lease for a definite term, was also husband of one of the owner-grantors and joined in the deed of conveyance to the defendants. Prior to the expiration of the lease, plaintiff had planted a crop of grain which did not mature until after the lease had ended and possession had been given to the grantees. When they denied plaintiff the right to enter and harvest the crop so sown, plaintiff sued on the theory of the conversion thereof. Recovery by plaintiff in the trial court was reversed on appeal because the warranty deed contained no reservation of the growing crop and evidence of a parole reservation could not be admitted to controvert the grant. Plaintiff had argued that his act in joining in the conveyance was for no other purpose than that of releasing his inchoate dower and homestead interest in his wife’s estate in the land and was not designed to pass his interest as a tenant. The court appropriately pointed out that, absent any express limitation placed on the face of the deed, the act of signing passed all of plaintiff’s interest in the property, regardless of its scope or nature.

An unusual instance of fraud in obtaining title to a parcel of land may be noted in *Roda v. Berko* wherein the grantor, an aged foreign-born woman, claimed she was induced to convey a

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31 270 Ill. 298, 110 N. E. 395 (1915).
34 *Smith v. Price*, 39 Ill. 28 (1865).
36 401 Ill. 335, 81 N. E. (2d) 912 (1948).
portion of her land because of the grantee's alleged fraudulent representation that he intended to erect a modern factory building thereon whereas his true purpose was to turn the purchased premises into a junk-yard. Recission was sought, based on such fraud, because of a diminution in value of the remainder of plaintiff's land. A judgment dismissing the complaint for want of equity was reversed when the court drew a distinction between a promise or misrepresentation as to intended future conduct, not amounting to a matter of fact, on the one hand and a false promise or representation of intention as to future conduct, used as a scheme or device to defraud another of his property, on the other. The instant case was said to fall into the latter category, hence was one calling for equitable relief. The argument that plaintiff should have protected herself by insertion in the deed of an appropriate reverter clause, and was negligent in her reliance for not so doing, was answered by the remark that had she been suspicious she probably would have done so but that it was not open to defendant to say that the one whom he had defrauded "gave him too much credit for honesty."

Frequent use is made, in real estate sales transactions, of a tentative contingent contract based upon the buyer's ability to obtain necessary financing to complete the purchase. The contingency is usually expressed in terms of ability to obtain a commitment for a specified sum by way of mortgage within a specified time. In Kovacs v. Krol, the Illinois Supreme Court had held that a delay of two days beyond the stipulated time was insufficient to warrant denying specific performance at the instance of the buyer when the seller had taken no action to terminate the contract by reason of such delay. The related case of Nyder v. Champlin now answers the question as to what the outcome should be if the buyer is unable to get a commitment for the specified amount but is able to make up the deficiency from other sources. Specific performance at the buyer's request was

37 Compare Luttrell v. Wyatt, 305 Ill. 274, 137 N. E. 95 (1922), with Abbott v. Loving, 303 Ill. 154, 135 N. E. 442 (1922).
38 385 Ill. 593, 53 N. E. (2d) 456 (1944).
39 401 Ill. 317, 81 N. E. (2d) 923 (1948).
likewise there ordered on the theory that the seller, by inaction for thirty days after the stipulated time had expired, had waived the right to abrogate the contract for failure to meet the contingency as to amount and, such being the case, it was immaterial to the seller whether the buyer secured the purchase money from the anticipated source or from some other, so long as the buyer was able to tender all that the seller was entitled to have.

The consequences to follow upon a buyer's breach of a contract for the purchase of realty are usually made the subject of express stipulation, customarily one providing for the forfeiture of the down payment or other payments made under the contract as an agreed item of "liquidated" damages. The absence of such a stipulation projected a novel problem in Glenn v. Price, a case of first impression, wherein the buyer sought to recover the excess of the down payment over the amount alleged to constitute the seller's actual damage arising from a failure to complete the purchase. Recovery was denied, on analogy proceeding from holdings in other cases where the plaintiff is the person guilty of the breach of the indivisible contract, on the theory that to permit such recovery would tend to remove what is probably an added incentive to perform, rather than to breach, a contract. The plaintiff therein had also claimed that the seller, by wrongfully obstructing access to the premises, had prevented the buyer from reselling to others in an effort to stave off a breach of the original contract or to salvage some of his investment therein. The obstruction to access was claimed to be a violation of the seller's obligation amounting to a repudiation of the contract, entitling plaintiff to recover the entire down payment. The court held that, in the absence of stipulation for the right of visitation in order to show the premises to prospective assignees, the seller was under no obligation to permit access to the premises until the buyer had performed and title had passed.

41 See, as to employment contracts, the cases of Hansell v. Erickson, 28 Ill. 257 (1862), and Hofstetter v. Gash, 104 Ill. App. 455 (1902). The Illinois view is contra to the holding in Britton v. Turner, 6 N. H. 481, 26 Am. Dec. 713 (1834). See also Restatement, Contracts, § 357.
Difficulty in arriving at the facts, rather than any difficulty in applying the law of bailments, appears to be reflected in the case of *Sadler v. National Bank of Bloomington*, the only case of significance concerning personal property doctrines. The suit arose out of the claim of a lessee of a safety-deposit box to recover the worth of articles removed therefrom by an allegedly unauthorized person with the permission of the defendant, proprietor of the safety-deposit vault. The original leasing contract had named plaintiff and his sister as the only persons authorized to have access to the box and its contents. After plaintiff’s induction into military service, the plaintiff’s wife, possessed of one of the keys, appears to have paid rent for the box, to have been given access thereto, to have been placed on the leasing contract as one of the lessees, and to have been permitted to remove some of the contents, all, so plaintiff claimed, without his knowledge or permission. The property so removed was apparently squandered by the wife who later obtained a divorce from plaintiff. The evidence as to whether the acts aforesaid were done with plaintiff’s permission was inconclusive, so a judgment notwithstanding the verdict was reversed and judgment in favor of the plaintiff was ordered by the higher court on the ground that the bailee had failed to overcome the presumption of negligence arising from the inability to return the bailed articles or to show delivery to the bailor or an authorized agent. To hold otherwise, the court said, would be to “establish a precedent detrimental to the rights of all holders of safety-deposit boxes,” particularly since the mere payment of rent or possession of the key by the wife was not regarded as sufficient, under the bailment contract, to make her a party thereto.

A new statute has been enacted, applicable to bailees for hire who make a separate charge to cover the cost of insuring the bailed goods while in the possession of the bailee, requiring that such bailees shall furnish a statement to the bailor showing the nature and extent of the coverage so provided and the name of

42 403 Ill. 218, 85 N. E. (2d) 733 (1949), reversing 335 Ill. App. 18, 80 N. E. (2d) 387 (1948). Thompson, J., wrote a dissenting opinion. Wilson and Crampton, JJ., also dissented.
the insurance carrier, under penalty recoverable by the bailor, together with attorney’s fees, for non-compliance.\textsuperscript{43} The statute is evidently directed against cleaners and dyers, laundries, and the like, who augment their income by charging an “insurance” fee but provide nothing in return therefor, except their general responsibility as bailees, in case of loss or damage to the bailed articles.

\textbf{LANDLORD AND TENANT}

A double-barrelled option problem was presented in the case of Hindu Incense Manufacturing Company v. MacKenzie\textsuperscript{44} wherein the court was asked to determine the rights of the parties under a lease which contained a “mutual option to renew” and an option affording the lessee the right to purchase the premises at any time “during the term of this lease.” The “mutual” option was construed to give to either party the unilateral right to renew so that agreement of both landlord and tenant was not required. The majority of the judges of the Appellate Court, refusing to enter into the confused argument as to whether the parties had provided for an extension of the original term or had intended to make a new lease, held that the phrase “term of this lease” included the renewal term, regardless of its form, at least insofar as the option to purchase was concerned.\textsuperscript{45} The Supreme Court, affirming the majority holding, clarified the issue somewhat by stating that the option to purchase, being considered an integral part of the lease, was necessarily included as a provision in the new lease. While holding that the option to purchase would not be lost when the option to renew was exercised, the court was careful to point out that the option to renew would not reappear in the new leasing arrangement unless it was plainly illustrated that the parties had intended such a perpetual renewal possibility.

It has long been the law in Illinois that where rent is due

\textsuperscript{43} Laws 1949, p. 335, H. B. 557; Ill. Rev. Stat. 1949, Vol. 1, Ch. 73, § 1092 et seq.
\textsuperscript{44} 403 Ill. 360, 86 N. E. (2d) 214 (1949), noted in 27 Chicago-Kent Law Review 323, affirming 335 Ill. App. 423, 82 N. E. (2d) 173 (1948).
\textsuperscript{45} A dissenting opinion pointed out that, as an option to renew is not a present demise, any additional term should properly be regarded as a new leasing period, rather than as an extension of the old.
under a lease covering a tract of land, later divided by the lessor, subject to the lease, among different persons, an apportionment of the rent among the owners in severalty pro-rata is the only proper and legal action to take.\textsuperscript{46} That principle was invoked, in \textit{Central Pipe Line Company v. Hutson},\textsuperscript{47} to settle an analogous problem concerning royalties payable under an oil and gas lease. It appeared that the original lessor had given one lease covering two tracts of land on a royalty basis with no provision for royalty proration between the tracts. Subsequent thereto, and before production had commenced, the lessor conveyed one of the tracts to one child and the other to a second by deeds also silent on the point. The lessee drilled for and found oil on the first tract, took no action with reference to the second, and thereafter instituted an interpleader action, naming the separate owners as defendants, to determine the right to royalties earned to date as well as to those likely to arise in the future. The owner of the unproductive tract claimed an apportionment of the royalty fund, but both the trial and the Illinois Supreme Court held that the fund had to go to the person owning the portion of the land from which the oil had been obtained as the royalty was not "rent" in the ordinary sense of that term but more nearly payment for the mineral right in the land, a species of property which passed in severalty by the separate conveyances to the individual owners in fee. A conflict of authority elsewhere, illustrated by opposing Pennsylvania\textsuperscript{48} and Oklahoma\textsuperscript{49} views, was resolved in this state in favor of the latter, said to be the majority view on the point.\textsuperscript{50}

Notice was taken last year of the holding in \textit{Kruse v. Ballsmith}\textsuperscript{51} wherein it was found possible, under local law, to compel

\textsuperscript{46} Crosby v. Loop, 13 Ill. 625 (1852).
\textsuperscript{47} 401 Ill. 447, 82 N. E. (2d) 624 (1948).
\textsuperscript{49} Kimbley v. Luckey, 72 Okl. 217, 179 P. 928 (1919).
\textsuperscript{50} In another oil and gas case, that of Minerva Oil Co. v. Sohio Petroleum Co., 336 Ill. App. 372, 83 N. E. (2d) 385 (1949), the court held that the term "well," as used in an oil and gas lease, means any hole bored to a depth where oil is usually found, even though the same turns out to be a dry hole. The question arose because the lessor's share under the lease was to be determined on the basis of the average production of all wells. The court, in the absence of any prior Illinois holding in point, held that dry holes were to be counted in computing the average production.
\textsuperscript{51} 332 Ill. App. 301, 75 N. E. (2d) 140 (1947), noted in 27 Chicago-Kent Law Review 80.
a tenant guilty of an illegal withholding to pay more for the possession of premises than the normal ceiling price. The effect of that decision is shaken by the more recent holding in *O'Brien v. Brown* where the holdover tenant, a practicing lawyer, after being sued for the higher rate called for by the lease in the event possession was not surrendered promptly upon expiration, paid the amount demanded but reserved to himself all rights under the Emergency Price Control Act. He thereafter sued to recover treble the amount of the alleged overpayment, as well as attorney's fees, and obtained judgment for said sum in the trial court over the landlord's objection that the statute was unconstitutional if made applicable to the situation so presented. The judgment was affirmed by the Illinois Supreme Court on the ground the sum demanded by the landlord was excessive under the federal statute, was not for "damages" arising from the illegal detention of the property, and that the clause in the lease calling for the penalty rent had been suspended by the operation of the Emergency Price Control Act. A claim that the plaintiff should be estopped to recover because the payment was voluntarily made was also rejected. If the two cases mentioned are to be distinguished, it must be on the basis that the first was predicated on the local statute calling for damages in case of an illegal detention whereas the second rested upon provisions contained in the lease. It is doubtful, however, if that is sufficient to provide a distinction inasmuch as the federal law has operated to supersede both statute and contract, except as the situation of the parties may be taken out from under the operation thereof.

Authorities are rather evenly divided on the question whether a second notice to quit the demised premises operates as a waiver

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52 403 Ill. 183, 85 N. E. (2d) 685 (1949). Crampton, J., wrote a dissenting opinion charging not only a misapplication of the pertinent statute but also a "flagrant violation of elementary principles of justice."

53 That defense might have served had the action been one in quasi-contract to recover the money paid rather than one to recover treble damages: *Brown v. McKinelly, 1 Esp. 279, 170 Eng. Rep. 356 (1795); Benson v. Monroe, 7 Cush. 125, 54 Am. Dec. 716 (Mass., 1851).*


55 It should be noted that, in *Kruse v. Ballsmith, 332 Ill. App. 301, 75 N. E. (2d) 140 (1947),* the landlord had obtained a certificate for eviction from the Rent Director. No such certificate appears to have been obtained in the instant case.
of a previous notice. Cases in Illinois have reached opposite results, although the facts thereof may be distinguished. The Appellate Court for the Fourth District, through the medium of the case of Mitchell v. Tyler, has added to the view that a second notice does not possess the effect of a waiver. The landlord there concerned had obtained judgment in a forcible entry and detainer action. While an appeal by the tenant was pending, the landlord served a new sixty-day notice on the tenant. It was held that such action did not amount to a waiver of the previous notice inasmuch as the tenant could not have been misled into believing that the landlord had withdrawn from the appeal but was merely seeking to save time in the event the appeal should be decided unfavorably. In another forcible entry and detainer action, that of Melburg v. Dakin, the court indicated that it was proper to interpose an equitable defense based on the ground that the defendant had made improvements sufficient to take an oral lease from under the statute of frauds.

SECURITY TRANSACTIONS

Only one case concerning strictly local law, decided in the last year, seems to be of any special interest in the realm of security transactions. The plaintiff in Trustees of Zion Methodist Church v. Smith sought to establish the right to foreclose an alleged mortgage against the estate of a deceased landowner. Plaintiff had, for some thirty-four years, been the assignee of a duly recorded real estate mortgage on which interest had been regularly paid but under which no written renewal or extension agreement had been made until 1941, at which time a new note on a modified chattel mortgage form, containing suitable refer-

57 335 Ill. App. 117, 80 N. E. (2d) 449 (1948).
58 337 Ill. App. 204, 85 N. E. (2d) 482 (1949).
59 See section on Conflict of Laws, post, for a discussion of the case of First National Bank of Navada v. Swegler, 336 Ill. App. 107, 82 N. E. (2d) 920 (1948), which deals with the effect to be given to a valid foreign chattel mortgage of an automobile when rights thereunder are asserted against a resident bona-fide purchaser.
60 335 Ill. App. 223, 81 N. E. (2d) 649 (1948).
ence to the earlier real estate mortgage, was signed by the original mortgagors but was not recorded. Suit to foreclose based on the original mortgage and the 1941 instrument was resisted by the heirs and general creditors of the mortgagors on the ground that no equitable lien existed and all right of action, if any, was barred by limitation.\footnote{61} A decree for foreclosure was affirmed when the Appellate Court for the Fourth District found the 1941 instrument to be sufficient to evidence the intention to create an equitable charge on the property. While such equitable mortgages are not permitted with respect to liens in the future and must generally show an intention to create a present lien, it was said that the note in question was sufficient to create a new present lien rather than to operate as the revival of an older one.\footnote{62} The court also held that the statute requiring the recording of extension or similar instruments was designed to protect only bona-fide purchasers and other lien creditors from ancient recorded liens, hence could not operate in favor of the heirs and general creditors of the original mortgagors who were not "purchasers" within the meaning of Section 30 of the Conveyances Act.\footnote{63}

TRUSTS

Attempts to establish the existence of constructive trusts are apt to arise frequently, but in City of Rochelle v. Stocking\footnote{64} the Appellate Court reiterated the principle previously expounded in Miller v. Miller\footnote{65} that equity will not act to create a constructive trust merely for the purpose of enforcing a contract. "The mere failure to perform an agreement or to carry out a promise, or the failure to pay a debt," the court said, "cannot in itself give rise to a constructive trust, since such a breach does not in itself constitute fraud or abuse of confidence or duty requisite to the existence of a constructive trust."\footnote{66} Unless at least one of the latter

\footnote{62} See, on that point, Peckham v. Haddock, 36 Ill. 38 (1864).
\footnote{64} 336 Ill. App. 6, 82 N. E. (2d) 693 (1948).
\footnote{65} 266 Ill. 522, 107 N. E. 821 (1915).
\footnote{66} 336 Ill. App. 6 at 13, 82 N. E. (2d) 693 at 696. See also 54 Am. Jur., Trusts, § 221.
requirements are present, the parties will be remitted to ordinary legal remedies.

The bulk of the trust cases considered, however, had to do with the rights and duties of trustees. In *Plast v. Metropolitan Trust Company*, 67 for example, the question arose as to whether or not a provision in a trust agreement requiring the trustees to "sell" the trust property could serve to authorize the trustees to arrange for an "exchange" thereof. The Supreme Court answered that question in the affirmative, pointing to provisions in the trust agreement under which the trustees could terminate the trust at their discretion and could sell to another trust or to a corporation in exchange for bonds, stocks or other securities as evidencing an intention that the term "sale" should be given a broader sense than the more limited one of a transfer for money.

In another trust termination case, that of *Pool v. Rutherford*, 68 the testamentary trustee conveyed the real estate forming the subject matter of the trust to the duly authorized grantee in accordance with the provisions of the will under which the trust had been established. The deed was made subject to "all taxes, assessments, encumbrances, leases and charges now outstanding, if any." Approximately six months later, the trustee claimed a right of lien on the realty for moneys expended by her in the administration of the trust. The Appellate Court, admitting that a trustee may ordinarily be reimbursed from the trust estate for reasonable expenses and be entitled to a lien therefor, affirmed a decree denying to the trustee a right of lien when it appeared that the property had come into the hands of a bona-fide purchaser for value without notice. Any equitable interest in the former trust property by way of lien was said to be cut off by the transfer and the recital that the property was conveyed subject to "encumberances and charges" was considered insufficient to put the purchaser on inquiry.

Issues concerning trust administration were involved in *Ellis*

67 401 Ill. 302, 82 N. E. (2d) 155 (1948). Gunn, J., wrote a dissenting opinion.
The testamentary trustees there concerned had rented the trust realty and had used the rental income to retire a mortgage resting on the trust estate. In a suit brought by a beneficiary, the Appellate Court found that the trustees had been guilty of a breach of trust by diverting the rentals in the fashion indicated, it being a recognized canon of trust law that, while interest on a mortgage may be paid out of income, the principal is to be paid from the corpus unless there is specific direction to the contrary.

A continuation of prior proceedings dealing with the rights of holders of tax anticipation warrants may be observed in the case of State Life Insurance Company v. Board of Education of the City of Chicago. The instant question concerned plaintiff's right to recover solicitor's fees out of the trust fund which had been set aside for the purpose of satisfying the claims of the warrant holders. The original proceeding had been of representative character but the Supreme Court had rejected the representative features of the case. It was now urged that, as plaintiff had proceeded in its own behalf, other warrant holders who did not join should not be compelled to share the expense. The Supreme Court, conceding that claims for solicitor's fees are usually advanced only in representative suits, declared that representation is not a condition precedent to making the allowance. Relying on two United States Supreme Court decisions, the court advanced the proposition that the form of the litigation had no bearing upon the power of equity to bring about justice as between a party and one who has been made the beneficiary of his litigation. Inasmuch as plaintiff's efforts had brought about a highly beneficial result for all the warrant holders, payment of solicitor's fees out of the trust fund was approved.

70 401 Ill. 252, 81 N. E. (2d) 877 (1948).
A rather ticklish problem created by the decision in the earlier probate case of *Bruce v. McCormick* appears to have been resolved by the holding in *Barker v. Walker*. The earlier case had held that, until such time as dower is barred by lapse of the statutory period or the surviving spouse has elected to take dower, such surviving spouse has no vested interest capable of being made the subject of a conveyance. A logical extension of that holding would require a court to decide that, if a spouse had failed to claim dower and had died before the period barring dower had run, the second estate could claim nothing from the estate of the first deceased spouse since no vested transmissible interest in property had arisen. The testator in the Barker case had left his estate to his wife for life with remainder to his three children or, if a child was dead, to such child’s bodily heirs. One son survived the testator but predeceased the life tenant, dying intestate. It was held that the deceased son had acquired a vested interest in the remainder. The widow of that son then sought to claim a share in the remainder by intestate inheritance. The contestants, relying heavily on the Bruce case and on reasoning analogous to that above set forth, denied the widow’s right to dower in the premises, saying that she could not take under the descent provisions of the Probate Act because the right to dower first had to be eliminated before she could inherit as a widow. The court, believing the argument to be completely at odds with the legislative intent, held that the widow of the son, despite the fact that she was unable to claim dower, was able to inherit under the rules of descent and distribution applicable to intestate estates. The decision seems correct both in policy and in logic.

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73 396 Ill. 482, 72 N. E. (2d) 333 (1947), noted in 25 Chicago-Kent Law Review 324.

74 403 Ill. 302, 85 N. E. (2d) 748 (1949).


76 Because the remainderman had predeceased the life tenant, although holding a vested interest, he was not "seised" of the property as required by Ill. Rev. Stat. 1949, Vol. 1, Ch. 3, § 170.

Two novel cases bearing on the execution of wills merit more than passing notice. In the first of them, that of In re Westerman's Will, the testator died leaving two wills. The testator's maiden name was Wilhelmina Westerman; her name by her second marriage became Wilhelmina Frerichs. The second marriage had ended in a divorce, but the decree therein did not provide for resumption of the maiden name. A will dated April 9, 1942, was signed "Wilhelmina Frerichs," but the other, dated April 13, 1942, bore the signature "Wilhelmina Westerman." A claim was advanced that only the earlier will should be probated inasmuch as the second was not signed with the name of the testatrix. The Court could find no cases, in Illinois or elsewhere, in point but held that, as both names referred to the same person, the later will, together with its express revocatory provision, controlled. The court quite correctly pointed out that it was not necessarily the name used but the person to whom that name applied which would determine whose will was involved.

In the second case, that of Yowell v. Hunter, a will was offered for probate which was typed around the testatrix's signature in the exordium clause. The court said that since the testatrix's name was in her own handwriting and the remainder of the will was typed, the name did not appear in the instrument merely by way of identification. It thereby refused to follow Hoffman v. Hoffman and Bamberger v. Barbour, in each of which cases the entire instrument was in the testator's own handwriting. The formalities required of wills being so elemental, and it being a simple matter, even for the unlearned, to sign a will properly, the decision seems most unfortunate in the length it goes to sustain the bizarre.

78 401 Ill. 489, 82 N. E. (2d) 474 (1948).
79 403 Ill. 202, 85 N. E. (2d) 674 (1949).
80 The court pointed out that the paper was torn on the left-hand side and was a heavy paper of the quality and size usually found in the inside covers of books. The name was written in ink in the upper right hand corner, where an owner of a book might be expected to denote his ownership. Despite this, and other interesting evidence, it was held that the will was not a forgery.
81 370 Ill. 176, 18 N. E. (2d) 209 (1939).
82 335 Ill. 458, 167 N. E. 122 (1929).
The facts involved in the case of *In re Holmberg's Estate* presented an interesting but hardly a startling problem concerning the revocation of wills. The testatrix had left the original of her will with a friend. At her death, a duly executed carbon duplicate original of the will was found among her effects with the word "Void" written in large letters across each page followed by the signature of the testatrix. The court again could find no Illinois case in point but relied on an overwhelming weight of authority elsewhere to establish the proposition that there had been an effective revocation of the will as a consequence of which probate of the unmarked original was denied.

Another decision settling a point raised for the first time in Illinois may be found in the case of *In re Harmount's Estate*. The issue there was whether or not adopted children could claim under the provisions of the anti-lapse statute which provides for a substitutionary gift to the "descendants" of a deceased legatee or devisee. Another section of the Probate Act defines a lawfully adopted child as a "descendant of the adopting parent for purposes of inheritance." On both reason and authority, the court held that the adopted children were protected. It would seem unfortunate that the issue should even have been raised and it is hoped that the legislature will soon end the discrimination which exists affecting inheritance from and by natural children as contrasted with the rules affecting adopted or illegitimate children.

Personal representatives will be interested to learn of two decisions in the last year. In *Glaser v. Chicago Title and Trust Company*, the trustees under a will, having successfully appealed in a will contest, sought to surcharge the trust property with the expense of the appeal. The court said that, when a will had been construed by a court of competent jurisdiction, the de-

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86 Ibid., Ch. 3, § 165.
87 401 Ill. 387, 82 N. E. (2d) 446 (1948).
cree afforded authority for all interested persons to act accordingly until the decree was set aside by an appellate decision. One not approving of such decree had the right to appeal but had to do so at his own expense. For this reason, the trustees were denied the right to recover the expense of the appeal. In the other case, that of In re Reighard's Estate, it was held that a probate court which possesses jurisdiction over an incompetent ward's estate also has the power to order the conservator to renounce a will in his ward's behalf. It was also indicated therein that the power was exercisable in an ex parte proceeding to which other persons interested in the will need not be joined.

The Probate Act received amendment at the hands of the legislature during the recent session. A proponent of a will, for example, may now introduce any evidence competent to establish a will in chancery beside that of the attesting witnesses, and either party may introduce evidence on appeal from an order of the probate court admitting or refusing to admit a will to probate. The provisions regarding incompetents have been changed so as to include those who are "mentally ill" as well as other incompetents. The former widow's award has now been changed to a "surviving spouse's" award and both the minimum allowance for a surviving spouse and for a child have been increased. The child's award now, incidentally, runs in favor of "all children of the decedent who were minors and all female children residing with him at the time of his death."

Section 80 of the Probate Act, as amended, makes it mandatory that the executor or administrator with the will annexed shall administer the whole of the decedent's estate, where heretofore

88 402 Ill. 364, 84 N. E. (2d) 345 (1949), noted in 37 Ill. B. J. 490. Crampton, J., wrote a dissenting opinion.
90 Ibid., Ch. 3, § 223.
92 Laws 1949, p. 1, H. B. 552; Ill. Rev. Stat. 1949, Vol. 1, Ch. 3, §§ 330-4, 354, 356, 361, 450 and 475. It is interesting to note that in all the above sections the grammatical articles and pronouns were changed to correspond to the neuter gender of "surviving spouse" except that, in section 380, the first clause is still left to read as follows: "The family pictures and the wearing apparel, jewels and ornaments of herself and her minor children."
only a preference had been granted as to intestate property.\textsuperscript{94} The act now provides that no veteran's award, regardless of size, shall be subjected to costs taxed or charged by public officers.\textsuperscript{95} Probate courts may now determine claims of title by adverse parties, but the latter may have a jury trial if they so desire.\textsuperscript{96} It is also now permissible to carry life insurance on a ward or on some person in whose life the ward has an insurable interest, the cost of such insurance being charged to the ward's estate as a form of investment.\textsuperscript{97}

VII. PUBLIC LAW

ADMINISTRATIVE LAW

A question may arise, when an administrative tribunal makes a finding of fact of the type frequently required of it by statute, as to whether or not such finding should follow the exact wording of the statute so as to provide clear support for the accompanying order. That question was answered, in \textit{Missouri Pacific Railway Company v. Illinois Commerce Commission},\textsuperscript{1} where the commission, acting under the Public Utilities Act, sought to require the carrier to maintain rear-end flag protection for two of its passenger trains. The specific provision of the statute authorized the commission to require the performance, by any railroad, of "any other act which the health or safety of its employees, customers, or the public may demand."\textsuperscript{2} The commission found, in substance, that public safety required the rear-end flag protection but nowhere, in its findings, did it make specific reference to the public "demand" for such protection. The carrier argued that the findings of the commission were defective for failure to correspond with statutory requirements, but the court held that it was not necessary to utilize statutory terminology so long as other synonymous terms were used.


\textsuperscript{97} \textit{Laws} 1949, p. 6, S. B. 260; \textit{Ill. Rev. Stat. 1949}, Vol. 1, Ch. 3, § 413.

\textsuperscript{1} 401 Ill. 241, 81 N. E. (2d) 871 (1948).