but represented a deliberate act of the legislature to extend the benefit of the section to any person, minor or adult, who had been validly adopted under the laws of a sister state.

VI. PROPERTY

REAL AND PERSONAL PROPERTY.

There is little of truly startling news to report concerning developments in the law of real property, but some new points have been made. Scientific progress which has been made in extracting crude oil from the earth produced one new problem. The practice of using re-pressuring methods to increase production from wells where the natural flow of oil has declined because of the exhaustion of original gas pressures is common enough to be recognized as conforming with reasonably prudent and competent operating procedures, but the right to the lessor of an oil interest to oppose such activities remained undecided until raised in the case of *Carter Oil Company v. Dees*.¹ The plaintiff-lessee there desired to convert an offset well on the defendant’s property into a gas input well so as to restore pressure. Defendant had objected on the ground that the proposed action would cause a migration of oil underlying his property to the land of others. It was true that the oil driven off would be replaced by a return flow which could then be captured at a large profit to himself, but the lessor preferred, perhaps for tax reasons, to continue the traditional mode of production without the proposed re-pressuring.² The oil lease was silent as to methods of production, but the Appellate Court for the Fourth District found for the plaintiff in a declaratory judgment proceeding, stating that the conversion would not deprive the lessor of any portion of his royalty and


² It more frequently happens that it is the lessor who seeks to compel more intensive and diligent operation by the lessee. It would appear to be a rare case in which it is the lessee who is faced with the owner's objection to the use of modern techniques.
that the new method of production could not be rejected because of its novelty.³

Another oil case, one involving the character of the title conveyed by the state to the Illinois Central Railroad Company under the famous checkerboard grants of 1850, came before the federal district court in United States v. Illinois Central Railroad Company.⁴ The government there sought to enjoin the railroad from extracting oil and gas from certain parts of its right of way not used for railroad purposes on the ground that only an easement had been granted to the common carrier. The court held that the railroad had been given a base or limited fee, subject only to an implied condition of reverter. Such limited fee, of course, carried with it the title to minerals underlying the surface of the property conveyed as well as the right to open new mines or drill new wells.

Draftsmen of restrictive covenants should take note of the Appellate Court decision in Leverich v. Roy.⁵ Confronted with the problem of construing a covenant which restricted building on a lot to "a private dwelling house" and to a "one dwelling house," the court concluded that the alteration of a two-story brick home into a two-flat apartment building did not constitute a violation of the covenant. The value of such a clause becomes doubtful in view of the construction placed upon it. One might well wonder what else the parties could have intended if it was not that the structure was to be confined to a single family dwelling.

Only two decisions affecting the law of future interests would seem to be noteworthy. In Beasley v. Beasley,⁶ property had been deeded to "Lottie A. Beasley and her Bodley Heirs." The heirs of Lottie claimed the estate as remaindermen on the theory that the interest created by the grant was, in essence, a fee tail which, by Illinois law,⁷ operated to provide a life estate in favor

³ Culbertson, J., in his dissenting opinion, took the position that the majority had inserted a covenant into the lease which the parties did not intend. In addition, he regarded the draining off of the lessor's oil as a clear invasion of his property right to the oil under his land.
⁴ 89 F. Supp. 17 (1949).
⁶ 404 Ill. 225, 88 N. E. (2d) 435 (1949).
⁷ Ill. Rev. Stat. 1949, Vol. 1, Ch. 30, § 5, is essentially a re-enactment of R. S. 1874, Ch. 30, § 6, in effect at the time the deed involved was executed. The provisions concerning fee tail estates, in effect then, were the same as now.
of the named grantee and a fee simple absolute, by way of remainder, for the heirs of her body. The defense raised was that Lottie had been the owner of the fee and that all of her interest now rested in the defendants because of a long period of adverse possession. In arriving at a solution to the problem, the court pointed out that one of the most familiar rules of construction is one which requires that, when technical words are used, they are to be given their usual technical meaning, unless the context of the instrument involved manifests a contrary intent. Such being the case, and there being no limitation or explanation of the use of the term "Bodley Heirs" appearing in the deed, the estate created was the usual common-law fee tail with its statutory modification. As an adverse holding against a life tenant can have no bearing on the rights of remaindermen until such time as they are in a position to assert their interests, it followed the heirs were entitled to the property.

Through the medium of the opinion in Northern Trust Company v. Cudahy, the court demonstrated how a well drafted residuary clause in a will can serve to exercise any testamentary powers of appointment of which the decedent may be donee, despite the fact that such powers are not expressly mentioned in the will itself. The court there reaffirmed and clarified prior holdings which had followed the rationale of Justice Story, in Blagge v. Miles, to the effect that intention, "however manifested, whether directly or indirectly, positively or by just implication, will make the execution" of the power valid and operative.

Taken by themselves, these last two decisions cannot be said to be significant, startling, or novel. They do possess importance, however, because the court concerned in each case illustrated a capacity for reasonable analysis of constructional matters in the

8 The defendants relied on both the twenty-year statute, Ill. Rev. Stat. 1949, Vol. 2, Ch. 83, § 1, and on the one relating to seven years of adverse possession under color of title, ibid., § 6.
12 1 Story 426 at 427, Fed. Cas. No. 1479 (1841).
rather esoteric field of future interests. That fact offers hope that the Illinois courts, by reverting to first principles, may be displaying a maturing perception of the policy issues involved in a field of law which has been subjected to grave abuse in recent years.

Problems are likely to arise in connection with the execution of a contract for the sale of land or the duty to make a conveyance thereof. In *Hanlon v. Hayes*, the plaintiff sought specific performance of an alleged contract of sale only to be met with a defense based on the Statute of Frauds. The defendant relied on the fact that the contract, even if operating as a memorandum, did not contain any mention of price. The plaintiff replied that, because of Section 3 of the statute, price was not a necessary element in a contract of this sort. In the absence of Illinois cases directly in point, but on the basis of decisions in other jurisdictions and as a matter of statutory construction, the court sustained the defense. It is in connection with this latter aspect that the case takes on the greatest interest. At the beginning of legislation in this field, price was treated as an essential part of every contract covered by the statute.

That requirement caused undue hardship in commercial activities, so the English Parliament later revoked the provision insofar as it related to sales of personalty. The Illinois legislature followed suit by enacting what is the present Section 3 of the Illinois Statute of Frauds, with its reference to extrinsic proof of the consideration for an "promise" or "agreement." Section 1 thereof, which deals with sales of personalty, speaks of "promises" and "agreements." In contrast, Section 2, covering sales of realty, refers to "contracts of sale." On the basis of this distinction in terminology, the court treated

15 The contract produced in evidence disclosed a statement of the price agreed upon, but the master found that the contract had been signed in blank on the understanding that the price was to be filled in later on, after it had been agreed upon.
16 Ill. Rev. Stat. 1949, Vol. 1, Ch. 59, § 3, declares: "The consideration of any promise or agreement need not be set forth or expressed in the writing, but may be proved or disproved by parol or other legal evidence."
17 See 29 Car. II, c. 3 (1677).
Section 3 as operating to qualify Section 1 only. By reason of that analysis, the law in Illinois is now settled that a statement of price is a necessary element to every enforceable contract for the sale of real estate.

The decision in *Margulus v. Mathes* reaffirms a rule which is to the effect that if a purchaser agrees, by the terms of his contract, to pay cash, he must do just that. The vendor had refused to accept a certified check at the time fixed for the closing of the deal and the court held, in a suit for specific performance brought by the vendee, that the vendor was within his rights without regard to his motives in making such refusal. The prudent purchaser had best take note to avoid what might be an otherwise unsuspected pitfall.

It has been established a sufficient number of times so as hardly to warrant citation that a vendor who is unable to secure a release of inchoate dower from his spouse cannot compel specific performance of a contract to sell realty if he has agreed to deliver a merchantable title. For that reason, the case of *Cities Service Oil Company v. Viering* is certain to cause comment among the legal fraternity. The purchaser there sought and obtained specific performance of a contract despite the fact that the vendor's wife had refused to join in the agreement. To this point, the case is analogous to other Illinois decisions which have allowed a purchaser to enforce a contract while taking some form of restitution for that portion of the obligation which the vendor is unable to perform. It is, however, well established that a purchaser cannot obtain abatement of the purchase price in the event the inability to provide full performance exists in the form of an outstanding inchoate dower interest. As a consequence, the

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20 *494 Ill. 538, 89 N. E. (2d) 392 (1950).*

21 See, for example, *Moore v. Gariglietti*, 228 Ill. 143, 81 N. E. 826 (1907), where specific performance was decreed at the instance of the purchaser even though the vendor could convey only 2/5ths of the land at stake.

plaintiff was there forced to pay the full purchase price and was left to rely on the covenants as to title in the vendor's warranty deed in case there should be a future eviction.

One cannot help but admire the extraordinary ingenuity of counsel presenting the cause for the plaintiff in Pruitt Office Machine Company v. Liberty National Bank of Chicago. The plaintiff there concerned was a lessee under an agreement whereby, in the event the lessor chose to sell the premises, the lessor could, upon six months' notice, regain possession of the premises although he would be obliged to pay the lessee a substantial sum. Such a sale did occur approximately a year and a half prior to the normal expiration of the leasehold interest. The plaintiff then sought to impress an equitable lien on the property to secure payment of the penalty. His theory was that, in giving up the leasehold interest prematurely, the plaintiff was reconveying a valuable real property right and, as vendor, had a right to a vendor's lien to secure the payment of the unpaid purchase price. Although the court could find no Illinois case in point, it seemed to be well satisfied that the lessee had only a contractual right to enforce, for the transaction did not call for a conveyance but only a surrender. Allowance of damage for breach of contract was deemed to be a sufficient remedy particularly since none of the usual equitable considerations to support a lien were present. The really impelling factor in this decision, however, would seem to be the fact that it is well established law that where two parties have agreed to restrict their claims against one another growing out of a certain transaction to legal remedies, such a contract is not illegal, fraudulent, or against public policy, hence neither party can later seek to resort to an equitable proceeding to resolve differences.

Lawyers practicing in counties where the Torrens system of land registration is in operation should give particular note to a series of cases involving registered lands, for uncertainty ap-

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24 An analogous situation may be found in the general refusal of courts to grant specific performance where the contract contains a liquidated damage clause: 49 Am. Jur., Specific Performance, §§ 43-5.
pears to be developing over the question as to the nature of the interests which must be registered. In one case, that of Miller v. Frederick's Brewing Company, the registered titleholder, being the grantees of one who had previously given a registered mortgage on the property, filed a proceeding in ejectment to recover possession of the premises. He offered the Torrens certificate as conclusive evidence of his right to judgment. The defendant, in turn, relied on an actual possession obtained from the original mortgagee who had, prior to plaintiff's grant, entered into possession with permission after default in the mortgage but who had later surrendered such possession, together with the unpaid mortgage note, to defendant as transferree. Defendant's rights, as an equitable mortgagee in possession, did not specifically appear on the Torrens register but there was a registered memorial as to the existence of the ancient mortgage under which defendant held. Such memorial was regarded as being adequate to defeat the grantee's legal action for possession against one in peaceful possession for the purpose of collecting the mortgage debt.

In another case, that of People v. Mortenson, the plaintiff had purchased registered property at a tax sale under a decree which authorized the sale and provided that if no redemption was made within two years and the purchaser had complied with certain provisions of the Revenue Act, the purchaser was to be entitled to a deed. Upon expiration of the redemption period, the plaintiff demanded a deed, but the county clerk refused to issue one because of a non-compliance with Section 82 of the Torrens Act. The plaintiff asserted that as the provisions of

27 The court held that as the original mortgagee had gone into possession within twenty years after default, the right to exercise the privileges of a mortgage in possession was not barred by Ill. Rev. Stat. 1949, Vol. 2, Ch. 83, § 11b. See Brown v. Bookstaver, 141 Ill. 461, 31 N. E. 17 (1892).
28 404 Ill. 107, 88 N. E. (2d) 35 (1949), noted in 28 CHICAGO-KENT LAW REVIEW 277.
30 Ibid., Ch. 30, § 119. This section requires, among other things, that the holder of a certificate of sale of registered lands must register the certificate
the Revenue Act were complete and independent of the Torrens Act, and as the latter referred only to annual tax sales and said nothing about tax foreclosures, he was not required to comply with the latter or any other statute. The court treated the statutes as a whole, rather than piecemeal, on the theory they complemented each other, and pointed to the fact that a document which does not comply with the requirements of the Torrens Act may not be registered as ground for denying relief. It made short shrift of the allegations that the decree of sale alone was controlling by noting that the decree did stipulate that the title to the land was registered. Such being the case, the Torrens Act itself operated to notify all persons dealing with registered land to see to it that all provisions thereof were complied with if the transaction was to have any effect.

The case of *Interstate Bond Company v. Baran* provides an interesting supplement to the preceding case for the tax buyer there, having secured a deed, sought to force its registration on a register of titles who had refused to accept the deed because of a somewhat similar defect. The plaintiff proceeded on the theory that the registrar was under a positive ministerial duty to accept and register the tax deed without examination into its legal sufficiency or, if not, that Section 82 of the Torrens Act was unconstitutional. He, too, failed in his attempt. The court indicated that the first issue, one concerning the registrar’s duties, had been fully discussed in the case of *People ex rel. Dineen v. Simon*, where it had been established that his duties were quasi-judicial in nature so that, while he might not adjudicate disputes as to title, he at least had to inquire into the legal sufficiency of documents presented for registration. The claim of unconstitutionality was based on the idea that Section 82 of the Torrens

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32 The plaintiff there concerned had failed to notify all persons in interest that he had registered his certificate of sale within one year: Ill. Rev. Stat. 1949, Vol. 1, Ch. 30, § 119.

33 176 Ill. 165, 52 N. E. 910 (1898).

Act had amended Section 266 of the Revenue Act[36] without setting forth the amended section at length as is required by the state constitution.[36] No constitutional issue had been urged in the Mortenson case, but the court felt that the opinion therein had satisfactorily disposed of the problem by establishing that these two acts were complementary rather than one amendatory of the other. To this point, no uncertainty in the principles underlying the Torrens system would seem to have developed. The next case, however, strikes off on a new track.

It is plain law that an easement of way by implication may arise when a common owner creates a right of way over his land and then sells a portion of the property to a grantee who needs must use the right of way in order to have access to the part so purchased.[37] The existence or non-existence of a recorded grant of such an easement privilege is generally deemed immaterial for the nature of the privilege is usually apparent to the eye. For that reason, the physical condition of the premises is customarily regarded as providing common law notice of the existence of the encumbrance to a subsequent purchaser of the servient estate. The picture becomes clouded, however, when the title to the two parcels is registered under the Torrens System and no memorial concerning the presence of the easement appears on the Torrens register, for claims intended to affect the title to registered land should there appear.[38] The defendants in Carter v. Michael,[39] relying upon the state of the Torrens register, acquired the supposed servient estate and thereafter fenced the same so as to exclude plaintiffs, who had previously become owners of the alleged dominant property, from their claimed right of passage. A decree commanding removal of the obstruction

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35 Ibid., Vol. 2, Ch. 120, § 747.
36 Ill. Const. 1870, Art. IV, § 13, reads in part: "... no law shall be revived or amended by reference to its title only, but the law revived, or the section amended, shall be inserted at length in the new act."
39 403 Ill. 610, 87 N. E. (2d) 759 (1949). Crampton, J., wrote a dissenting opinion predicated on the belief that the supposed easement was not "necessary" to the enjoyment of the dominant estate, hence should have been expressly granted or reserved.
was affirmed by the Supreme Court on the ground that there is nothing in the Torrens Act which bars the possibility of the existence of an implied easement. If common law notice arising from the fact of exclusive possession by the holder of an unregistered contract to purchase is inapplicable in the case of registered lands, it is difficult to see why the same principle should not apply to even less important unregistered interests. The decision would appear to have done much to unsettle the primary thesis of the Torrens system, to-wit: the register is everything and only registerable interests should appear thereon.

Only one case established anything of significance with respect to ownership of personal property, but it was a case possessing a tremendous impact on the law as well as on a fairly common practice. By affirming the Appellate Court holding in the case of In re Wilson's Estate, the Supreme Court made it clear that the typical joint-tenancy lease of a safety deposit box is not sufficient to establish a joint tenancy, with right of survivorship, over the contents but that some other written evidence of the joint title must exist if such survivorship rights are to be enjoyed. A signed memorandum found in the safety deposit box involved in that case was also deemed insufficient for the purpose, apparently because lacking in operative words of transfer. The court did not reach the question whether, to be completely effective, there must be an observance of the same four unities as is required in every joint tenancy interest in real estate, but there is enough in the case, and in prior and current history, to induce a belief that the creation of a joint tenancy in personal property must be as formal an act as is required in the case of a joint tenancy in real estate.

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40 Bjornberg v. Myers, 212 Ill. App. 257 (1918).
43 In David v. Ridgely-Farmers Safe Deposit Co., 342 Ill. App. 96, 95 N. E. (2d) 725 (1950), not in the period of this survey, the Appellate Court for the Third District expressed the view that the traditional unities are essential, as well as a further condition that the instrument conveying title must specifically provide for the right of survivorship.
Novelty in law, at least so far as Illinois is concerned, appears in three recent bailment cases. In the first, that of *Prince v. Railway Express Agency, Inc.*, a carrier was held liable for injury to dairy livestock being transported by it arising from a failure to milk the cows while en route, despite an oral request by the shipper that such care be provided. Reliance was placed, by the bailee, on a provision in the shipping tariff, to the effect that instructions "when given in writing or plainly marked on the container" were to be complied with, as indicating that no duty attached in the absence of any written instruction. The court held that it was, nevertheless, the duty of the carrier to anticipate and guard against all those natural consequences which might occur in the course of transportation, even though no special charge was made nor any special written instruction given concerning the extra service. In the second case, on the other hand, that of *Berg v. Schreiber*, evidence of a failure to provide written notice of loss caused the Illinois Supreme Court to favor the carrier on the ground that mere knowledge of the loss is not enough but that the same must be brought to the attention of the carrier in the form stipulated for, and within the time fixed, in the bill of lading. The third case, that of *Kassman v. Thomas F. McElroy Company*, was a suit against a consignee based on the theory that a breach of his duty had occurred, productive of the loss suffered, in returning the goods by common carrier at only a nominal value instead of at full valuation. The court concluded that, in the absence of specific instruction, the consignee was entitled to follow the path of conduct used by the consignor when making the initial shipment, since the consignor had thereby fixed the measure of what it considered to be a reasonable degree of care for the bailed property.

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45 13 C. J. S., Carriers, § 63(a).
47 An almost opposite result was attained by the Circuit Court of Appeals, Seventh Circuit, in Hopper Paper Co. v. Baltimore & Ohio R. R. Co., 178 F. (2d) 179 (1949), on the theory that the stipulation as to notice of loss was addressed to a practical exigency, hence should be construed in a practical way.
LANDLORD AND TENANT

Rarely is an Illinois court so impressed with the decision of a court of a sister state that it quotes such decision in full to sustain its own position, but such was the fact in the only landlord-tenant suit of any importance. In *Kenny v. Thompson,*\(^4^9\) the Appellate Court for the First District, relying on the Maryland case of *Tudor Arms Apartments v. Shaffer,*\(^5^0\) held that the owner of shares of stock in a cooperative apartment building was not precluded from maintaining an action to evict the defendant tenant. The federal Housing and Rent Act of 1947 gave to a landlord the right to recover possession, subject to local law, where he desired occupancy for his own purposes.\(^5^1\) The case has now established the doctrine that the privilege extends to members of cooperative housing organizations, even though the title to the premises is vested in a corporation, which corporation is the nominal landlord.

SECURITY TRANSACTIONS

Aside from points already noted,\(^5^2\) the only cases in the realm of security transactions which proved to be of interest dealt, primarily, with the question of whether or not the particular contract at issue was truly a security device or merely an agreement for some other form of legal relationship. In *Brust v. Brust,*\(^5^3\) for example, a son had contracted to meet the mortgage payments on the family farm in exchange for an agreement on the part of his parents to will the farm to him. As each payment was made, the father gave the son a note to cover the amount of such installment. The mother died and the father later remarried. The father, after unsuccessfully trying to buy


\(^{5^0}\) — Md. —, 62 A. (2d) 346 (1948).

\(^{5^1}\) 50 U. S. C. A., Appendix, § 1881 et seq.

\(^{5^2}\) See ante, under the heading of Real and Personal Property, for a discussion of *Miller v. Frederick's Brewing Co.,* 405 Ill. 591, 92 N. E. (2d) 108 (1950), dealing with the rights of a mortgagee in possession of registered lands where no affirmative action to foreclose would be permitted because the debt was barred by limitation.

\(^{5^3}\) 466 Ill. 132, 89 N. E. (2d) 897 (1950).
back the contract, willed the farm to his second wife. The son then sought specific performance of the contract by having the will set aside insofar as it affected the family farm. The second wife, after tender of the amount of principal and interest laid out by the son, asked to have the contract cancelled as being no more than a mortgage. The court, deciding for the son, held that the nature of the contract had to be established on the basis of the intention of the parties at the time it was entered into, and considered it was a good contract to make a will. The notes given by the father were treated as being no more than evidence of payment, intended to establish satisfactory performance by the son according to the tenor of his agreement rather than, by some retroactive process, to create a mortgage relationship.

By way of contrast, the grantor, in Miller v. Allen, deeded land to the defendant, a former tenant, in consideration of a down payment and an agreement to make monthly payments until a specified sum had been paid or the grantor had died, whichever occurred first. The grantor died not long after the conveyance and the executor of the grantor's estate sought to foreclose, alleging that the mortgage provision regarding discharge in case of death was an invalid attempted testamentary disposition. With no Illinois case directly in point on which to rely, the court chose to follow the usual ruling applied in analogous situations, frequently involving parents and children, where it has been held that a vendor who sells land on installments payable until the full price has been met or the vendor has died, whichever occurs first, is engaged in a contractual rather than a

54 He was unsuccessful because he refused to offer anything near the amount the son had paid out on the mortgage.

55 The defendant relied on the fact that the son had demanded and received a note covering each payment, as well as upon the subsequent negotiation to release the contract, as indication that the agreement was essentially a mortgage.


57 339 Ill. App. 471, 90 N. E. (2d) 251 (1950). Leave to appeal has been denied.

58 The sum agreed upon represented no more than principal, for the debt was declared to be interest free.

59 The instrument was not witnessed in conformity with Ill. Rev. Stat. 1949, Vol. 1, Ch. 3, § 194.
testamentary transaction.\textsuperscript{60} One cannot help but be persuaded that the correct result was reached.

Again, the nature of the agreement was of substantial importance in determining the rights of the parties in the case of \textit{In re Scheribel’s Estate}.\textsuperscript{61} A decedent, prior to death, had there deeded property to the defendant corporation and had contracted to buy it back under a repurchase agreement. Thereafter, while the sole devisee was \textit{non compos mentis}, the administrator assigned the rights under the contract. Shortly after the sole devisee was restored to civil status, he brought an action to set aside the transaction and to surcharge the administrator. The defense was that the action should fail as it amounted to a collateral attack on the jurisdiction of the probate court which had approved the original sale. The prime transaction between the decedent and the defendant corporation, in reality, had been a masked security device, was nothing more than a mortgage, and the purported assignment was an attempt to cut off the equity of redemption. That being so, the administrator was adjudged to have no authority to deal with the real property interest\textsuperscript{62} and the probate court judgment was open to collateral attack for lack of jurisdiction. It might be observed that the cases discussed thus far provide further illustration of the folly of entering into financial transactions without competent advice or, conversely, of trying to mask the true nature of the agreement. Either alternative breeds litigation with its consequence of expense and delay.

The case of \textit{Fohrman v. Laird}\textsuperscript{63} provides a fascinating example of the inter-relationship which exists among the several statutes of limitation. A husband and wife had signed a mortgage which matured in 1935. The wife had died in 1943 and the hus-

\textsuperscript{60} See cases listed in annotation in 127 A. L. R. 628.

\textsuperscript{61} 340 Ill. App. 238, 91 N. E. (2d) 443 (1950).

\textsuperscript{62} Ill. Rev. Stat. 1949, Vol. 1, Ch. 3, § 379, authorizes the personal representative to sell real estate only in the event it is necessary to do so in order to discharge debts of the estate, and then only after the personal estate has been exhausted. No allegation of that character was made or established in the instant case.

\textsuperscript{63} 338 Ill. App. 393, 87 N. E. (2d) 235 (1949).
band died in 1946. The mortgagee, seeking foreclosure, joined all concerned in a suit begun in 1947. The defense for the husband's estate was that, as no claim had been filed within the nine-month period following probate,\(^6\) the estate could no longer be held liable. This defense was held to be good. The wife's estate had never been probated but, on her side of the case, the defense raised was that of the ten-year period of limitation.\(^5\) Since her estate had never been probated, her property was subject to claims for a period of seven years after her death,\(^6\) hence the present foreclosure action was considered to be timely. Of course, so long as the claim was valid as to one of two joint makers, the lien of the mortgage was enforcible in an in rem action despite the fact that the other joint maker had been absolved from personal liability. One's rights may seem to be barred by one section of the statute of limitations, but the action might still be prosecuted under another.

Not so fortunate, from the mortgagee's standpoint, was the outcome of the case of *Lowenstein v. Chicago Title & Trust Company*.*67* It has been said that indirect attack may sometimes produce results not open to accomplishment by a direct frontal assault. That maxim must have been in the mind of the plaintiff there concerned for, finding that direct foreclosure of a mortgage was no longer possible because suit on the debt was barred, he attempted to accomplish the same result by using certain unsatisfied and operative judgments against the guarantors of the mortgage debt as the basis for his attempted foreclosure. The mortgage had originally been given by the trustee under a land trust and the trustee had adequately prevented the rise of personal liability on the debt by apt limitation confining the mortgagor's right to foreclose the lien and no more. The lender had insisted upon the personal guarantee of those beneficially interested in the trust and had, on default, taken judgment against


\(^{65}\) Ibid., Vol. 2, Ch. 33, § 11.

\(^{66}\) That period has been established by judicial construction. For a case discussing the Illinois decisions on this matter, see *In re Estate of Levy*, 335 Ill. App. 367, 82 N. E. (2d) 209 (1948). Leave to appeal denied.

them, which judgment had been revived from time to time. He then claimed that the unreleased mortgage stood as security for such judgment and, as the guarantors were alleged to be the equitable owners of the mortgaged premises, he asserted the right to foreclose against such equitable interest under the land trust. The legal and equitable title had, in the meantime, become vested in certain purchasers who, as defendants, moved to dismiss the suit. A decree of dismissal was affirmed when the Appellate Court for the First District, noting the novelty in the situation, concluded that the guarantors, while being beneficiaries under the land trust, actually held no more than a personal property interest therein, which interest did not become encumbered by the mortgage or the judgment based thereon and had passed freely to the purchasers who had also acquired the now unencumbered legal title of the trustee. The court distinguished the situation before it from that arising where the guarantors had, in fact, gained an equitable interest in the mortgaged premises.

TRUSTS

What started out to be an interesting and a rather novel attempt to erect a constructive trust was thwarted by the decision of the Appellate Court in the case of Ordahl v. Johnson. The complaint filed there alleged that plaintiff’s aunt, for a cash consideration, executed a bill of sale to plaintiff, her niece, covering certain rugs, pictures, jewelry, silver, and other furnishings, on the niece’s oral agreement that the property so sold should remain in the aunt’s apartment so long as the aunt wished to keep the same there. The complaint also averred that the aunt’s administrator, some seven years later, took possession of the property upon the aunt’s death and refused to deliver it up. Plaintiff sought a decree to the effect that the administrator was

68 The court held, on the authority of Thompson & Thompson v. Brown, 121 Mo. App. 524, 97 S. W. 242 (1906), that part payment by one guarantor did not revive the obligation of the other guarantors since they were not joint makers.


70 See Burt v. Gage, 50 S. D. 208, 208 N. W. 985 (1926).

a constructive trustee of the property. The complaint was dismissed, and the higher court affirmed the decision, on the basis that no constructive trust could arise, as the case was not one wherein a person had acquired title to property either by fraud or by abuse of a confidential relationship. The mere fact that a person who has acquired no more than possession may be under a duty of restitution is not enough to make him chargeable as a constructive trustee, for other adequate legal remedies exist to take care of the situation.

Duties and liabilities of trustees were considered in two cases. In *Piff v. Beresheim*, the court announced and followed a well-accepted rule to the effect that a successor trustee is not liable to the beneficiaries for a breach of trust committed by his predecessor, although he can be held for his own breach of trust occurring after he has succeeded to the office of trustee. In the other case, that of *Victor v. Hillebrecht*, the issue was one as to whether or not trust managers of a liquidation trust were entitled to purchase beneficial trust participation certificates and to retain the profits derived from such purchases. The question was answered in the affirmative by the Supreme Court on the basis of the instrument and the facts before it. The court recognized the general rule that a trustee is not free to purchase from himself and at his own sale, but emphasized that most of the cases which apply that rule deal with instances where the trustee has purchased an encumbrance upon or claim against the trust property or is placed in a position of holding an interest adverse to the beneficiary. In the case before it, the trustees had purchased outstanding interests belonging to other beneficiaries on the open market but were being sued by those who remained certificate holders and who stood to gain handsomely from the acts of the trustees. Because the trustees had no power to control the sale of the participation certificates, and had not placed themselves in any adverse position to the trust, being cer-

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72 Restatement, Restitution, Ch. 1, § 4.
73 405 Ill. 617, 92 N. E. (2d) 113 (1950).
tificate holders from the start, no violation of duty was said to have occurred.

The decision is a regrettable one, however, for it sacrifices one of the most fundamental principles in the law of trusts on the altar of convenience, seemingly dictated by the facts of the individual case. It fails to take into consideration the fact that the trustees, by acquiring a sufficient number of trust certificates, could actually become owners of a sufficient percentage to prevent a sale of the trust property, in which case they could then well hold a position adverse to the interests of the rest of the beneficiaries. It is precisely such dangers which prompted Justice Cardozo to declare: "Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions . . . Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd."75

Trust termination, even by mutual consent of all interested parties, may entail grave difficulties. In Fenske v. Equitable Life Assurance Society,76 the holder of a life insurance policy entered into an irrevocable trust agreement which required the trustee to divide the policy proceeds equally among the settlor's children but, if any beneficiary had died before distribution occurred, the beneficiary's share was to be paid as the deceased beneficiary may have directed by will or, in default thereof, to the descendants of the deceased beneficiary. The policy lapsed during the lifetime of the settlor, and a request was made to the insurance company for payment of the cash surrender value. The company agreed to pay provided it was furnished with releases from "all parties in interest." At that time, the settlor had four adult children and six grandchildren, one of whom was a minor. None of the grandchildren joined in the release. The insurance company refused to pay the surrender value and the Appellate Court sustained that position. It pointed out that, where all parties interested in a trust fund are sui juris, the beneficiaries may con-

sent to a termination of the trust and a distribution of the fund, but that this rule is not applicable where there are contingent interests or where the interests of minors are involved.

Of a somewhat similar nature was the case of Waller v. Waller, one in which the surrender of life insurance policies was also at issue but with a new angle, to-wit: the existence or possible appearance of irrevocably designated secondary beneficiaries. A wife had there taken out life insurance policies payable irrevocably, in equal shares, to her husband and her children or to the surviving issue of any deceased child per stirpes. The wife later created a trust and assigned the policies to the trustees, one of whom was apparently her husband. The trustees, claiming ownership by virtue of the assignment, applied for the cash surrender value of the policies and were met with a refusal based on the absence of any reserved right to make a change in the designated beneficiaries. Suit to recover the surrender value was defeated on the ground that it could not be made to appear whether all of the persons interested in the policies were in being or had been made parties to the suit. As the grandchildren of the insured, born and unborn, were irrevocably made beneficiaries under the policies in question, their valuable property interests could not be divested except by due process of law. Not being made parties, nor being represented by parties having an identity of interest, for the minor beneficiaries had interests conflicting with those of the parents and the trustees, the court was without power to bring the trust to an end.

WILLS AND ADMINISTRATION

Despite the paucity of cases, some areas in the law of wills and administration received clarification. In Gowling v. Gowling, the widow asserted her statutory right to renounce the

77 341 Ill. App. 294, 93 N. E. (2d) 113 (1950).
78 See ante, under the heading of Security Transactions, for a discussion of Miller v. Allen, 339 Ill. App. 471, 90 N. E. (2d) 251 (1950), wherein it was held that a mortgage provision calling for payments against principal until the indebtedness was discharged or the mortgagee died, whichever occurred first, was not a testamentary disposition so as to require compliance with factors necessary for a good will.
will and claimed a one-third interest in each parcel of real estate involved in the estate as a portion of her statutory forced share. The specific devisees contended that they had a right to restitution from the residuary estate to the extent their devise was thus abated. They were of the opinion that the testator, by making specific devises, had intended them to take a specific portion of his estate, regardless of subsequent factors which might affect other interests under the same will. It was thought that the usual rules for abatement, utilized where an estate is insufficient to cover debts, administration expenses and legacies, were applicable to the situation at bar. Despite the fact that there would appear to be no case directly in point, the court was not impressed with the suggested logic and concluded that the pertinent section of the Probate Act was sufficiently explicit in language to eliminate any variation from its express terms because of any professed intention on the part of the testator.

Incidentally, if the court had sustained the rationale of the specific devisees in that case, future testators would have been placed in a position where it would have been possible to circumvent the beneficient policy of the legislation in question. The surviving spouse could be forced into the position of having to take either the meager provision of the will or of having to elect to take against the will and thereby deprive the residuary legatees or devisees of a substantial portion or perhaps all of their potential inheritance, because such residuary interests would be subordinated to those of the specific devisees and legacies. If, in such a case, the residuary beneficiaries were children of the

81 Ibid., Vol. 1, Ch. 3, § 168.
82 It should be noted that the section of the Probate Act providing for the equalizing of legacies in the event of a renunciation does not apply to devises of real estate: Ill. Rev. Stat. 1949, Vol. 1, Ch. 3, § 202; Dunshee v. Dunshee, 263 Ill. 188, 104 N. E. 1100 (1914).
83 The specific devisees had relied on Pace v. Pace, 271 Ill. 114, 110 N. E. 878 (1915), but the court refused to follow the authority and the holding of that case because it had been decided under the older statute, one which differed from Section 16 of the present law.
84 Ill. Rev. Stat. 1949, Vol. 1, Ch. 3, § 168, provides that, upon renunciation, the surviving spouse's share shall consist of one-third, or one-half if no descendants, of "each parcel of real estate of which the testator died seized."
marriage and the specific beneficiaries were persons of no consequence to the surviving spouse, the determination to renounce the will or not would be a hard one, indeed, to make.

Something of the converse to the Gowling case arose in the case of *In re Estate of Phelps*.\(^{85}\) The testator there had left his property in trust to pay specific sums to certain beneficiaries with the stipulation that if the fund proved to be insufficient to meet such payments each gift was to abate proportionately. In fact, there was a surplus. The question then became one as to whether or not the surplus should be treated as intestate property. Again, no Illinois case in point could be found, but the court was fully satisfied that the surplus property was undisposed-of property and, as a consequence, had to go by way of intestate succession. There is ample analogy in comparable situations to attest to the soundness of the decision,\(^ {86} \) but the moral is that a competent draftsman would have anticipated the contingency and would have made adequate provision for it.

The case of *Kessler v. Martinson*\(^ {87} \) presents quite a different problem, and it is suspected that this decision ought to provide whatever clarification is needed regarding the time restrictions which the law has placed on the right to contest a will. From the facts of that case it would appear that decedent’s brother had died about six months after the date of decedent’s death. The plaintiff, executor of the deceased brother’s estate, filed a suit to contest the decedent’s will some seven months after his testator’s death and shortly after his appointment as executor, but the suit was not begun until more than fourteen months after the death of the decedent. A motion to dismiss the action was sustained by the trial court and the holding was affirmed on appeal. It was there pointed out that matters of probate are

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\(^{85}\) 339 Ill. App. 304, 89 N. E. (2d) 833 (1950).

\(^{86}\) See Dahmer v. Wensler, 350 Ill. 23, 182 N. E. 799, 94 A. L. R. 1 (1933); Minkler v. Simons, 172 Ill. 323, 50 N. E. 176 (1898). The court chose to rely on the reasoning of *In re Seay’s Estate*, 180 Cal. 304, 181 P. 58 (1919), because comparable language had been used in the will there considered.

\(^{87}\) 339 Ill. App. 207, 89 N. E. (2d) 735 (1949), noted in 28 CHICAGO-KENT LAW REVIEW 177. See also ante, under the heading of Security Transactions, for a discussion of *Fohrman v. Laird*, 338 Ill. App. 393, 87 N. E. (2d) 235 (1949), concerning the application of the statute of limitations to claims against an estate.
completely statutory for there is no inherent common-law right to contest a will. Consequently, any action to contest a will must conform to the statute. Section 90 of the Probate Act\(^8\) places a time restriction of nine months on the right to contest. As this provision is a statute of repose rather than one of limitation, none of the saving provisions of the general chapter on limitations\(^9\) can be deemed to modify it in any way. The court felt constrained, therefore, to hold that there could be no redress, regardless of circumstances,\(^{90}\) if a timely suit was not filed. Little quarrel can be had with the decision, despite its seeming harshness, for it is most desirable, both from the standpoint of the interested parties and of general public policy, to administer a decedent's estate with as much dispatch as is possible.

\((T)o\ be continued.\)


\(^{89}\) Ibid., Vol. 2, Ch. 83, § 20.

\(^{90}\) See, for example, Marvin v. Bassford, 381 Ill. 569, 46 N. E. (2d) 366 (1943), where even the newly-appointed conservator of an insane heir was not allowed to institute a contest after the nine-month period had expired.