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Property - Survey of Illinois Law for the Year 1951-1952

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having sustained personal injuries by reason of her husband’s negligent operation of an automobile, sought to recover damages from him on the basis that the several Married Women’s Acts had removed the common-law rule. The Appellate Court for the First District found difficulties with this argument which it considered to be insuperable. In the first place, the acts do not purport to remove the husband’s common law disability from suing his wife in tort so a construction thereof which would permit a suit by the wife would create an inequality between the sexes contrary to the policy contemplated by the legislature. Secondly, the Married Women’s Acts were said to have expressly removed only those disabilities peculiar to married women, giving such persons the right to sue separately in only a limited group of cases, hence were inadequate to remove common law disabilities between the spouses. A forthright decision by the Supreme Court or substantial statutory revision by the legislature would now seem to be in the offing.

VI. PROPERTY

REAL AND PERSONAL PROPERTY

Little has been said concerning the acquisition of present rights by way of title to land in Illinois, for most cases involving aspects of real property law were of a stereotyped nature. One significant point was made, however, in the case of Miner v. Yantis. The plaintiffs there concerned, who owned the record title to the land involved, sought to have a deed to the realty and a bill of sale for the school house erected thereon, purchased by the defendants from the school trustees, set aside. The suit presented three technically novel questions. The first challenged the power of school trustees to acquire title to realty in fee simple absolute except in those cases where the title was taken either in satisfaction of a judgment or in settlement of a debt. The second posed a question

25 Evidence of a design to provide equality of rights appears in Ill. Rev. Stat. 1951, Vol. 1, Ch. 68, §§ 3, 5, 8, and 11.
1 410 Ill. 401, 102 N. E. (2d) 524 (1951).
as to whether or not school trustees could acquire title to land by adverse possession. The third dealt with reversionary rights in school buildings, erected on land acquired by school trustees under an exercise of the power of eminent domain, after the tract ceased to be used for school purposes. The Supreme Court answered the first question in the affirmative, stating that the question implied too narrow a construction of the statutory power of school trustees who could, by proper grant, take title in fee simple absolute. The second question was also answered affirmatively, the court noting that it had never before passed upon the question but resting its decision on analogy as well as on a general rule that governmental entities may acquire title by adverse possession. On the third point, and again reasoning from analogy, the court held that the statute placed a separate title to school buildings in the school trustees, and that whether the site had been acquired by deed, written or verbal lease, by permissive use, or, as in the instant case, by the right of eminent domain. As a consequence, the common-law doctrine pertaining to fixtures was held not to be applicable, with the result that the plaintiff's relief was limited to the setting aside of the deed only.

The much litigated question of the uses to which Chicago's lake-front Grant Park may be put was again before the Illinois Supreme Court, this time in the case of Michigan Boulevard Building Company v. Chicago Park District wherein the plaintiff unsuccessfully attempted to prevent the defendant from putting into operation a plan to construct an underground parking garage in Grant Park across the street from plaintiff's large office building. The case provided the Supreme Court with an opportunity to make several new holdings concerning the rights in land prob-

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3 Foote v. City of Chicago, 368 Ill. 307, 13 N. E. (2d) 965 (1938).
4 In that regard, see I Am. Jur., Adverse Possession, § 17. The court, however, indicated that the use made by the school trustees had never ripened into an adverse possession.
5 The cases of Hackett v. Trustees of Schools, 398 Ill. 27, 74 N. E. (2d) 869 (1947); Brown v. Trustees of Schools, 403 Ill. 154, 85 N. E. (2d) 747 (1949); and Law v. Blakeney, 403 Ill. 156, 85 N. E. (2d) 741 (1949), deal with related aspects of the problem. See also note in 27 CHICAGO-KENT LAW REVIEW 340.
lems inherent in the Grant Park legal situation. In the first place, the court agreed with the plaintiff's contention that it was established case law in Illinois that it would be improper to divert a dedicated park from the park purpose for which it was so dedicated. It pointed out, however, that while the resolution accepting the dedication in question stated that the land should be enclosed as a public park, the original common-law dedication had made no such restriction as it had specified that the land should be used for "public" purposes. Even if the original common-law dedication had been limited to "park" purposes, there was precedent elsewhere supporting the construction of underground parking garages in public parks. While agreeing with another contention of the plaintiff, to-wit: that the so-called Ward cases had determined that it was the intent and purpose of the common-law dedication to prohibit the erection of buildings on the land constituting the park area, the court pointed out that the former cases referred to surface buildings only, hence would not serve to prevent underground construction.

The court then proceeded to dispose of another argument, one to the effect that easements created in favor of the abutting landowners at the time of the dedication would be violated. In that regard the court found that no violation would occur since any easement rights arose out of the dedicatory restrictions and these had been determined to be left unhampered by the proposed construction. Having observed that the character of the abutting landowners' easement rights had never before been defined, the court pronounced them to be easements to light, to air, and for view. It followed therefrom that there would be no unlawful

7 See, for example, Melin v. Community Cons. School Dist., 312 Ill. 376, 144 N. E. 13 (1924); Village of Riverside v. Maclean, 210 Ill. 308, 71 N. E. 408, 66 L. R. A. 285 (1904); Village of Princeville v. Auten, 77 Ill. 325 (1875); City of Jacksonville v. Jacksonville Railway Co., 67 Ill. 540 (1873).

8 City and County of San Francisco v. Linares, 16 Cal. (2d) 441, 106 P. (2d) 369 (1940); Lowell v. City of Boston, 322 Mass. 709, 79 N. E. (2d) 713 (1948).

9 Prior litigation over Grant Park may be found in City of Chicago v. Ward, 169 Ill. 392, 48 N. E. 927, 38 L. R. A. 849 (1897); Bliss v. Ward, 198 Ill. 104, 64 N. E. 705 (1902); Ward v. Field Museum, 241 Ill. 496, 89 N. E. 731 (1909); South Park Com'rs v. Montgomery Ward & Co., 248 Ill. 299, 93 N. E. 910 (1910).

10 The definition would not seem to be as broad as an abutter's own description, for the element of "passage" was not included. See McCormick v. Chicago Yacht Club, 331 Ill. 514, 163 N. E. 418, 60 A. L. R. 763 (1928).
diversion in the use of a boulevard laid out on the dedicated land if the subsurface thereof was used to regulate and control traffic upon the surface.\textsuperscript{11}

Future, rather than present, interests in land were dealt with in several other noteworthy cases, two of them presenting questions never before decided in Illinois. One of these new cases, that of \textit{Spicer v. Moss,}\textsuperscript{12} presented an issue concerning the destructability of contingent remainders under the Contingent Remainder Act.\textsuperscript{13} A grant by warranty deed had been made to A and the heirs of her body if any such heirs should survive her, but if no heirs of the body should survive her, then to the heirs of the body of B.\textsuperscript{14} A died without leaving heirs of her body, but she was survived by B. As the grant had not provided for this fact situation, the heirs of B's body being neither ascertained nor ascertainable, interpretation was necessary. As a preliminary matter, the conveyance was held to have created a life estate in A, with a contingent remainder in favor of the heirs of the body of A, and an alternative contingent remainder to the heirs of the body of B.\textsuperscript{15} It was contended, in a suit by persons claiming through A to remove a cloud on title, that, because the alternative contingent estate in the heirs of B's body was not ready to take possession at A's death, it failed and was destroyed under the common-law rule that a contingent remainder must vest \textit{eo instanti} the preced-

\textsuperscript{11} Barsaloux v. City of Chicago, 245 Ill. 598, 92 N. E. 525 (1910).

\textsuperscript{12} 409 Ill. 343, 100 N. E. (2d) 761 (1951), noted in 40 Ill. B. J. 184, 46 Ill. L. Rev. 925, and 28 N. Dak. L. Rev. 225.

\textsuperscript{13} Ill. Rev. Stat. 1951, Vol. 1, Ch. 30, § 40, provides in part that "no future interest shall fail or be defeated by the determination of any precedent estate or interest prior to the happening of the event or contingency on which the future interest is limited to take effect."

\textsuperscript{14} Certain additional facts required the decision of another issue. At the grantor's death, A had inherited a reversion in one-third of the property involved. She and her husband executed a warranty deed of all her interest to X who, on the next day, reconveyed to A, all for the purpose of destroying the contingent remainders and to enable A, the life tenant, to convey at least a one-third fee interest in the property. The court held, however, under a well-established estoppel rule peculiar to Illinois, that A, as grantor in the original warranty deed, was obligated to defend rather than to destroy the interests created thereunder, hence the contingent remainders to the heirs of the body of B were not destroyed by the attempted merger. Plaintiff, who had claimed through a quit-claim deed from A and her husband, was unsuccessful in his attempt to remove a cloud on title.

The Supreme Court, however, apparently for the first time, held that the statute in question preserved contingent remainders in this situation, i.e., where the preceding estate terminated naturally, as well as in those cases where the remainders would have been destroyed by a merger under the common-law rule.

The rules to guide in the construction of substitutional gifts effective in case of "death" of the first taker were reconsidered and clarified by the Supreme Court in *Harris Trust & Savings Bank v. Jackson.* Under the terms of the testamentary trust there involved, income was to be paid to the two life beneficiaries, after which the trust was to terminate and the trustee was to distribute the principal to "my nephew, Arthur S. Jackson, or if he be dead, then to his lawful heirs." The named nephew predeceased both life tenants leaving a widow who, in an action by the bank as trustee for construction, argued that the nephew, being dead, took nothing, but that she, his widow and his heir, took a substitutional gift. The administrator of the testator's wife, the wife having been a surviving life tenant, argued that the nephew, by reason of the fact that he had survived the testator, had acquired an indefeasibly vested remainder, for which reason the trust principal should be transferred to the nephew's executor, rather than to his heirs at law. The court held that the plain terminology used by the testator clearly indicated that, on the death of the life tenants, the trustee was to deliver the trust assets to the nephew if living, but if dead then to his heirs, and, there being no room for construction, the application of technical rules of construction would be unnecessary and improper. Finding the law of constructional rules, as argued by the parties, to be unsettled, the court then sought to clarify the same, particularly with regard to whether a reference to the death of the first taker, here the nephew, contemplated death at a time prior to the testator's death, or merely at any time prior to the death of the last life tenant. It said that the cases of *Murphy v. Westerhoff* 18

16 1 Simes, Law of Future Interests, § 93, p. 165.
17 412 Ill. 261, 106 N. E. (2d) 188 (1952), noted in 1952 Ill. L. Forum 456.
18 386 Ill. 136, 53 N. E. (2d) 931 (1944).
and *Peadro v. Peadro*¹⁹ insofar as they construed "death" of the first taker to mean death before the death of the testator, should be limited, and the rule of *Smith v. Shepard*²⁰ was still the law in this field, that is when a gift over is preceded by a particular estate, the gift over will usually take effect if the contingency happens at any time during the period of the particular estate.

In another case involving construction, that of *Stern v. Stern*,²¹ the court held that gifts had been created by implication. The testator, by will, had given his son Carl an option to purchase the testator's farm within two years of testator's death or within one year after the death of testator's wife, whichever should occur later. A general residuary clause benefited the children equally. Although it appeared that testator had not contemplated the situation of the son dying within the option period, he had included a provision substituting the children of any child who should predecease him, the testator. In a proceeding by testator's widow and certain descendants for partition, instituted following the death of Carl, who had died about a month later than the testator but who left five children, the contention was advanced that the son’s descendants were barred from exercising the option. The Supreme Court nevertheless held that a gift of the right to exercise the option was to be implied in favor of the son’s descendants in view of the general plan of the testator to benefit them. That result was dictated, the court said, because it was "necessarily implied that the descendants of Carl should have the same opportunity to exercise the option where Carl died directly after the testator, but before he could exercise the option, as they would have had if Carl had died the day before the testator’s death," which contingency was specifically covered by the will.²²

¹⁹ 400 Ill. 482, 81 N. E. (2d) 192 (1948), noted in 28 CHICAGO-KENT LAW REVIEW 72.

²⁰ 370 Ill. 491, 19 N. E. (2d) 368 (1939).

²¹ 410 Ill. 377, 102 N. E. (2d) 104 (1952), noted in 1952 Ill. L. Forum 303.

²² 410 Ill. 377 at 386, 102 N. E. (2d) 104 at 109. It may be questioned whether a better result might not have been based on the survival statute: Ill. Rev. Stat. 1951, Vol. 1, Ch. 3, § 494. If, as the court held in this case, the option right was not personal, hence did survive, it would seem that this right should have passed to the son's widow, under his will naming her as sole heir and devisee, rather than to the descendants of the son.
The last of these cases dealt with a new question of accumulations under the so-called Thellusson Act.\textsuperscript{23} In \textit{United States Trust Company of New York v. Jones},\textsuperscript{24} a conveyance had been made in 1916 to a trust company in trust for the benefit of the settlor's five children. The trust agreement, among other things, provided that, out of income, the trustee should "pay all taxes, assessments or other governmental charges which it may be required to pay . . . because or in respect of any part of the principal." Some twenty-five years after the death of the settlor, part of the trust res was sold at a gain which was added to corpus. The trustee paid a capital gains tax thereon and then brought suit to determine whether the tax so paid should be charged against income or corpus. On appeal from a decree that the tax was chargeable against income, the issue was presented, for the first time in Illinois, whether the Illinois rule against accumulations of income would be violated by payment of the capital gains tax out of income. The income beneficiaries argued that if the amount of tax, taken from income, were to be effectively frozen into capital, the charge against income would then violate the statute. The Appellate Court for the First District, affirming the decree, held that as none of the income which would otherwise have gone to the beneficiaries was paid into the trust corpus, the payment of the tax from income, pursuant to the mandate of the trust instrument, did not constitute an improper accumulation in violation of the statute.

Only one problem of conveyancing seems to have added anything to state law. The counterplaintiff in \textit{Jonas v. Meyers}\textsuperscript{25} sought reformation of a deed whereby his predecessor in title had made a gift which, because of a scrivener's mistake, had erroneously included more land than was intended to be granted. The evidence showed that the grantees named in said deed had no knowledge of the error in the conveyance at the time of its execution and delivery. Appealing from a decree allowing reformation,

\textsuperscript{24} 346 Ill. App. 365, 105 N. E. (2d) 122 (1952). Leave to appeal has been allowed.
\textsuperscript{25} 410 Ill. 213, 101 N. E. (2d) 509 (1951), noted in 40 Ill. B. J. 234.
the counterdefendant argued, among other things, that the decree ought not be sustained because of an absence of mutual mistake. The Supreme Court recognized it to be well-settled law in Illinois that there must ordinarily be mutuality of mistake before a deed or other written contract can be reformed;26 that if a grantor does not intend to include a portion of a tract in a deed but the grantee does so intend, there can be no reformation;27 and that where a mistake is unilateral the deed should be rescinded or cancelled but not reformed.28 The opinion went on to point out, however, that many jurisdictions recognize an exception to these general rules and permit the donor-grantor of a voluntary conveyance, or his heirs or successors in title, to have reformation as against the grantee where a mistake has occurred and, in such cases, mutuality of mistake is not essential.29 The decision, therefore, by affirming the decree, has incorporated the exception into Illinois law.

Apparent misunderstanding concerning rights of survivorship in joint bank accounts, certificates of deposit, and other personal property, renders the case of Johnson v. Mueller30 worthy of mention although it merely affirms prior law. In certain citation proceedings begun there to compel an administratrix to account for certificates of deposit issued and made payable jointly to her and the decedent, or to the survivor, it was argued that the Joint Rights and Obligations Act31 required an agreement signed by all parties in order to establish the right of survivorship. The Appellate Court for the Fourth District rejected the idea that an agreement would be indispensable in such a case and, affirming an earlier holding,32 held that any reference to an agreement in the statute in question related only to acquittance of the issuing

31 Ill. Rev. Stat. 1951, Vol. 1, Ch. 76, § 1 et seq.
bank. As there was clear and convincing proof of donative intent concerning the certificates in question, the certificates were held to be effective and the survivor was adjudged entitled thereto.

**LANDLORD AND TENANT**

Three unique questions concerning the landlord-tenant relationship were propounded during the year. In the tort action of *Wagner v. Kepler*, a suit by a lessee against a lessor involving a latent defect problem, it became important to know at exactly what time the letting commenced in order to ascertain whether or not tort liability existed. If the month to month tenancy involved was a continuous one, the landlord would not be liable for having leased premises containing a nuisance. If, on the other hand, each new month of occupation constituted a new demise, liability would exist. The Supreme Court, having traced the genealogy of the question through the earlier cases, and taking into account the treatment given to the problem by text-writers and by the courts of other jurisdictions, held that the tenancy was to be regarded as continuous from the time of the original letting.

A public housing authority tenant who refused to pay a small sum as additional rent for excess use of electricity, determined according to a schedule which was part of the lease, received little encouragement from the Appellate Court for the First District in the case of *Chicago Housing Authority v. Bild*. The tenant had argued, in defense of an action for forcible entry and detainer, that since the statute conferred no right to possession on

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33 Ill. Rev. Stat. 1951, Vol. 1, Ch. 76, § 2(a), provides in part that “when an agreement permitting such payment is signed by all said persons at the time the account is opened or thereafter, the receipt or acquittance of the person so paid shall be valid and sufficient discharge from all parties to the bank for any payments so made.” It is identical with Ill. Laws 1919, p. 634, which actually controlled the case under consideration.

34 411 Ill. 368, 104 N. E. (2d) 231 (1951), reversing 342 Ill. App. 136, 95 N. E. (2d) 533 (1950).


37 Suit was based on Ill. Rev. Stat. 1951, Vol. 2, Ch. 80, § 8, for an alleged non-payment of rent.
the lessor unless the tenant had defaulted in the payment of "rent," as defined in its common law context, an action for possession would not lie as the charge for electricity was not "rent."

Rejecting that argument, the court pointed out that under modern conditions, particularly in urban areas where multiple dwelling houses are common, there has been a broadening of the common law concept of rent for the parties may stipulate to include the furnishing of services such as electricity, gas and water as part of the consideration for the monthly rental agreed upon. Provisions with respect to the payment of taxes, insurance premiums and repairs have been recognized as valid stipulations intended to create additional rent obligations on the lessee. One for the payment for an additional sum for an excessive use of electricity would fall in the same category.

The question raised in the case of 400 North Rush, Inc. v. Bielzoff 38 was whether or not a lessee of commercial premises would be entitled to the use and possession of the exterior walls thereof. The defendant had taken a five-year lease to the top two floors of a building. The lease contained provisions allowing the defendant to erect a sign on the exterior walls of the floors leased provided the lessor consented to the specifications before the sign was constructed. After the defendant had erected an exterior sign on the leased premises, a dispute arose between the landlord and the tenant as to whether or not the defendant had received the plaintiff's consent. The landlord thereafter brought a forcible entry and detainer proceeding for that portion of the exterior of the building covered by the sign, contending that an unlawful possession had been taken thereof. The Appellate Court for the First District, reversing and remanding a trial court judgment in favor of the lessor, relied on the principle that the exterior walls of leased premises are part and parcel of the estate demised, 39 hence there could be no trespass by the defendant when a sign was affixed to the exterior wall which had been leased to the

tenant. The court intimated, however, that a suit for breach of covenant might lie.

SECURITY TRANSACTIONS

In addition to certain suretyship cases already mentioned,40 a few additional cases dealt with the claims of persons seeking security for their rights as creditors. For example, well-established principles regarding the right of a creditor to redeem from a foreclosure of a real-estate mortgage were involved in the case of Wojcik v. Stolecki41 but the case is worthy of notice because of the argument offered therein by the purchaser at the foreclosure sale designed to defeat the right of redemption. One contention turned on the claim that the redeeming judgment creditor had no standing inasmuch as the land in question was registered under the Torrens System and the judgment relied on had not been entered until after the foreclosure sale had taken place. Another was to the effect that redemption privileges did not exist in registered land inasmuch as the Torrens Act made no provision therefor. Both contentions were swept aside when the Supreme Court upheld the attempted redemption, first because the redeeming creditor need only have a valid judgment at the time of redemption,42 and second, because the statutory provisions regarding redemption were deemed to be incorporated into the Torrens Act by reference.43

It has long been the theory justifying the granting of a mechanics’ lien that the labor, services, or materials of the lien claimant have so gone into the structure erected on the land as to make it impossible for him to secure the return thereof in case of non-payment and, except for a suit for the contract price, the lien claimant would then be destitute of remedy unless some form of statutory lien be authorized in his behalf.44 If, by reason of

40 See ante, Division II, Contracts, particularly notes 35 to 42.
41 411 Ill. 443, 104 N. E. (2d) 288 (1952).
42 The court relied on Kerr v. Miller, 259 Ill. 516, 102 N. E. 1050 (1913).
44 Such a lien is granted by Ill. Rev. Stat. 1951, Vol. 2, Ch. 82, § 1 et seq., to those who furnished material “used for the purposes of or in the building” erected on the land.
contract, the claimant would be entitled to recapture the improve-
ment made, the theoretical basis for the lien would then be re-
moved, hence it has been held that no statutory mechanics' lien
may be claimed where personal property has been sold on con-
ditional sale basis, even though the personal property has become
incorporated in the realty or in the improvements made thereon. The
Appellate Court for the Second District, in the case of Stevens
v. David, while not directly challenging earlier views on the
subject, nevertheless saw fit, during the year, to enforce a lien
on behalf of the vendor under a conditional sales contract whose
automatic oil burner had become incorporated in the structure.
That result was reached because the court was of the opinion that
the land owner, defendant therein, had not directly put in issue
the vendor's right to maintain such a lien. The decision would
appear to be difficult to justify in view of the fact that the lien
claimant, in his own complaint, had alleged that the burner was
furnished on a conditional sales basis, thereby revealing that he
was not a person entitled to the benefit of the statute on which
he relied. Since the question could have been raised by a motion
to dismiss for failure to state a case, it would seem the question
of law thus generated would still be open to consideration under
exceptions to a master's report or by way of objection to a decree
foreclosing the purported lien, so the failure to urge the specific
defense through an answer should hardly have been visited with
the penalty here deemed proper.

Cases involving the operation and effect of trust receipts, a
form of financing device, are relatively rare in Illinois, hence

45 In particular, see Ley Fuel Co. v. Welsman, 265 Ill. App. 185 (1932). The doc-
trine thereof was approved in Nu-Way Boiler & Engineering Co. v. Morensky, 268
Ill. App. 211 (1932).
47 Ill. Rev. Stat. 1951, Vol. 2, Ch. 110, § 169, permits the use of such a motion
where the defect is apparent on the face of the complaint.
48 The court relied on Illinois Interior Finish Co. v. Poenie, 277 Ill. App. 554
(1934), but the case was one in which there could have been a clear basis for a
lien if the right to a lien had not been waived. A failure to claim a waiver in the
answer was held to preclude proof on the point.
49 A discussion of People v. Levin, 412 Ill. 11, 104 N. E. (2d) 814 (1952), is set
out above, Division IV, Criminal Law and Procedure, notes 17 to 19. That case
deals with the constitutionality of certain penal provisions in Ill. Rev. Stat. 1951,
Vol. 2, Ch. 121 1/2, § 183, relating to trust receipts.
there is more than passing interest in the case of *North American Acceptance Corporation v. Northern Illinois Corporation* for it illustrates the extent to which a well-planned trust receipt transaction may operate to provide security against later creditors. The entruster there concerned took all proper steps to establish a valid trust receipt over a certain automobile which the dealer-trustee kept on the showroom floor. Sometime later the dealer-trustee purported to sell the car on a conditional sale basis to one of its employees and thereafter assigned the conditional sale contract and note arising from that transaction to another financing organization which paid value. When the trustee became financially involved, the entruster took possession of the automobile and later sold the same to a third person. On the basis thereof, the assignee of the conditional sale contract claimed that a conversion of its property rights had occurred as it deemed itself to be a "good faith" purchaser within the meaning of the Uniform Trust Receipts Act. Both the trial court and the Appellate Court for the Second District, however, disagreed with that contention, holding that the knowledge of the buyer-employee regarding the original trust receipt transaction prevented his purchase, and the coincidental conditional sale contract to the plaintiff, from being of bona fide effect.

Mention was made last year of a decision of a federal district court, sitting in this locality, on an issue of pledge law treating with the pledgee's right, after suit on the original debt contract had become barred by limitation, to realize satisfaction from the collateral security still in the pledgee's hands. The United States Court of Appeals for the Seventh Circuit affirmed the holding in that case, on appeal to it, although it too could find no express warrant for such a holding in Illinois law and had to rely an analo-
gies provided by doctrines relating to the rights of an unpaid mortgagee in possession. The analogy may be a strained one, for while such a mortgagee in possession may not be ousted prior to payment of the debt, the law is far from clear as to his right to maintain an affirmative action to foreclose the lien, otherwise barred, simply because he had been in possession all the time.

TRUSTS

Some aspects of trust law have already been noted but it might be said, by way of addition, that the case of Bowman v. Pettersen contains an excellent discussion of the law regarding purchase money resulting trusts and the case of Bremer v. Bremer provides a similar commentary on doctrines relating to constructive trusts.

Two other cases call for more extended comment. An interesting question pertaining to land trusts was decided by the Supreme Court in Breen v. Breen. The trust agreement there concerned provided, as is usual in cases of that type, that the interests of the trust beneficiaries in the real estate forming the corpus of the trust were to be considered as personal property, and that no beneficiary should have any right, title or interest in or to any portion of the real estate but only in the proceeds arising therefrom. The agreement further provided that the trustee should convey the property only when directed to do so by the beneficiaries and that any property which remained in the trust twenty years after creation should be sold by the trustee and the proceeds divided among the beneficiaries. Twenty years had elapsed and the trustee had made no preparation to sell the property when one of the beneficiaries filed a partition suit. The trial court dismissed that action because it was of the opinion that the interests

54 Fountain v. Bookstaver, 141 Ill. 461, 31 N. E. 17 (1892).
55 Ill. Rev. Stat. 1951, Vol. 2, Ch. 83, § 11, forbids the commencement of such a suit unless begun "within ten years after the right of action" accrues.
56 The case of United States Trust Co. of New York v. Jones, 346 Ill. App. 365, 105 N. E. (2d) 122 (1952), is noted above, this section, at note 24, ante.
57 410 Ill. 519, 192 N. E. (2d) 787 (1952).
58 411 Ill. 454, 104 N. E. (2d) 230 (1952).
59 411 Ill. 206, 103 N. E. (2d) 625 (1952).
of the several beneficiaries, being personal property, were not subject to partition. The Illinois Supreme Court affirmed. It pointed out that the trust had not come to an end merely because of the trustee's failure to sell the property after the expiration of twenty years, hence the interest of the beneficiaries had not thereby become converted into an equitable interest in land. If the trustee failed to wind up the trust within a reasonable time, the court indicated that the remedy was by way of a suit to compel the trustee to fulfill fiduciary duties or to secure removal of the trustee.

The second case, that of Stone v. Baldwin, spells out the considerations which should govern a court in appointing a successor trustee. In making such an appointment, the chancellor is not bound by the wishes of the beneficiaries and is not required to confine his appointment to those persons suggested by them. He may appoint a sole trustee instead of several trustees, or he may appoint several trustees in place of one. In short, the chancellor may exercise a sound discretion in such matters. It was there indicated, by the Appellate Court for the Second District, that an attorney who represented the former trustee, who had resigned, ought not be appointed as successor trustee, or successor co-trustee, particularly not when the beneficiaries were claiming that an order procured by the attorney in behalf of his client, the former trustee, for compensation out of the trust estate, was an unwarranted one. Acting as an attorney for his client, he would be under an obligation to exert all proper efforts to secure the compensation for his client. If he were appointed trustee, he would, in accordance with the wishes of the beneficiaries, have to fight the claim which he previously had helped to enforce. The conflict in interest would obviously be sufficient to prevent that faithful discharge of duty to be expected of a trustee.

60 Suits for partition under Ill. Rev. Stat. 1951, Vol. 2, Ch. 106, § 1 et seq., are limited to cases where "lands, tenements or hereditaments" are held in joint tenancy or tenancy in common.

A number of wills cases are worthy of attention, some of them presenting questions new in Illinois. Notice has been drawn to the case of *Dillman v. Dillman* which reaffirms the earlier established principle that the widow is, and has been, technically an "heir at law" since the adoption of the 1923 Descent Act, by reason whereof the phrase "heir at law" is to be given its technical statutory meaning unless the testator expresses a contrary intention.

A strained construction of the statute governing inheritance by illegitimates enabled the court, in *Calamia v. Dempsey*, to hold that the decedent was, in effect, the "maternal ancestor" of an illegitimate paternal aunt of his, by reason of which the aunt was entitled to inherit, taking precedence over legitimate first cousins. Although the 1872 statute had provided that an illegitimate could inherit from "any person from whom its mother might have inherited, if living," no equivalent language was carried over into the 1939 revision. The court, however, did not consider this difference conclusive but, expressly applying what was substantially the test of the 1872 statute, it adverted to "an intention upon the part of the Legislature to remove the rigors of the common law" as well as to the rule of Section 9 of the Probate Act, one requiring a liberal construction.

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62 409 Ill. 494, 100 N. E. (2d) 567 (1951), noted in 1951 Ill. L. Forum 160.
63 *Bundy v. Solon, 384 Ill. 137, 51 N. E. (2d) 183 (1943).* The note in 1951 Ill. L. Forum 160 reviews all prior cases said to imply a contrary rule. See also Zacharias, "Husband and Wife as Heir Under Testate Succession," 12 CHICAGO-KENT LAW REVIEW 264-292 (1934).
64 Ill. Rev. Stat. 1923, Ch. 39, § 1, for the first time provided that, where a decedent was survived by both a spouse and descendants, the surviving spouse should receive an absolute one-third of each parcel of real estate of which the decedent died seized, if the surviving spouse adequately waived his or her right to dower. See also Ill. Rev. Stat. 1951, Vol. 1, Ch. 3, § 182.
65 *Ill. Rev. Stat. 1951, Vol. 1, Ch. 3, § 163,* provides that an "illegitimate child is heir of his mother and of any maternal ancestor; and in all cases where representation is provided for by this Act an illegitimate child represents his mother and his lawful issue represent him and take, by descent, any estate which the parent would have taken, if living."
66 344 Ill. App. 503, 101 N. E. (2d) 611 (1951), noted in 40 Ill. B. J. 289.
68 See text set forth in note 65, ante.
The case of *First National Bank of Chicago v. People*°⁰° concerned the question whether the widow of a child acknowledged, but not adopted, by a step-father should stand in the favored class of relatives, upon whom the lowest rate of inheritance tax is imposed, with respect to property inheritances, devises or bequests from the step-father. The statute favors surviving spouses of children, surviving spouses of adopted children of the decedent, and the acknowledged child, but it does not mention the surviving spouse of an acknowledged child.°¹° The Supreme Court held that, because of the statutory omission and because of the other statutory differences between acknowledged and adopted children,°²° the widow of the acknowledged child was not in the favored statutory class.

One case in which the contestant failed to establish undue influence should serve to re-emphasize the rule that, in order to raise the presumption of undue influence, it must be shown that the child-beneficiary was instrumental in causing the will to be drawn, and that the mere existence of a friendly or confidential relationship will not be sufficient, but indeed, may even tend to rebut such a presumption.°³° Thus, in *Lake v. Seiffert*,°⁴° it was held that the trial court had properly excluded the contestants' evidence and had correctly directed a verdict for the defendant, because the contestants had failed to introduce any evidence from which a jury might infer the essential fact of procurement by the beneficiary.

Procedural matters of administration occupied the reviewing courts in several instances. The decision in *Ellis v. Union National Bank of Macomb*°⁵° would seem to reflect a misunderstand-
ing of the nature of an action to contest a will. In such a proceeding, a named defendant of unknown address, but actually residing out of the state, was served by publication and a decree was entered. Within the one-year period allowed for the setting aside of chancery decrees based on constructive service, the named defendant filed her petition for that purpose. Notwithstanding cases relied upon by the executor which state that an action to contest is statutory and not an ordinary chancery action, the Appellate Court for the Second District held that the suit was no different from any other chancery action, hence the defendant was entitled to a hearing on her petition.

In another case, that of Metropolitan Trust Company v. Young, it was held, apparently for the first time on this precise question, that a nunc pro tunc order discharging an administrator, entered by the probate court during the same term in which the original order was issued, if without notice to parties affected, would be void, notwithstanding the fact the court still had jurisdiction of the parties and of the subject matter at the time the nunc pro tunc order was entered.

Two cases regarding claims against estates should be of interest. In one of them, that of In re Bird's Estate, the court intimated, but was not obliged to decide the point, that the limitation period fixed for the filing of claims against a probated estate binds the state government and its several subordinates. In the other, that of Northern Trust Company v. Wilson, a widow renounced the will of her deceased husband and elected to take her statutory share under Section 16 of the Probate Act.

78 346 Ill. App. 257, 104 N. E. (2d) 850 (1952). Leave to appeal has been allowed.
79 See Ill. Rev. Stat. 1951, Vol. 2, Ch. 110, § 174(8), and Rule 60 of the Probate Court of Cook County.
81 344 Ill. App. 508, 101 N. E. (2d) 604 (1951), noted in 40 Ill. B. J. 400. Leave to appeal has been denied.
82 Ill. Rev. Stat. 1951, Vol. 1, Ch. 3, § 168. Methods to be pursued in order to produce a renunciation were discussed in Leonhart v. Reighard, 409 Ill. 544, 100 N. E. (2d) 637 (1951), a case which holds that the declaration of renunciation need not be personally signed by the surviving spouse but may be executed, in the spouse's behalf, by a legal representative such as a conservator.
In the executor's suit for construction and instructions as to distribution, a decree was entered declaring that the widow took her statutory share after deduction of the federal estate tax, with certain exceptions. On appeal, the widow argued that the federal tax was not a "just claim," within that phrase of Section 16 which declares the surviving spouse entitled to a share "after payment of all just claims," hence her share ought to be based upon the size of the estate before taxes. This attempt to pass the tax burden on to other beneficiaries did not succeed, the court holding, by analogy to prior cases, that, absent statutory enactment to the contrary, the federal estate tax had to be considered as a charge against the whole estate rather than against particular individual shares, thereby producing the apparently just result obligating the renouncing spouse to bear the tax burden proportionately with the other beneficiaries.

Personal representatives and fiduciaries generally should take note of the significant decision in *Dyslin v. Wolf*. It will be recalled that the appellant-trustees in *Glaser v. Chicago Title & Trust Company* had failed in their attempt to surcharge trust property with the expense of a successful appeal, the court there affirming their right to appeal but requiring them to take the same at their own expense. In the instant decision, the Appellate Court for the Second District held that attorney's fees and expenses for services to the appellees, who had been brought involuntarily into the Supreme Court, were properly allowable as expenses of the estate. Emphasizing the fact that the appellees ought not to be required to elect between doing nothing or paying their own expenses, the court interpreted the earlier case of *Strauss v. Strauss* as a precedent for this decision notwithstanding Supreme Court dictum to the contrary in the Glaser case.

83 People v. Pasfield, 284 Ill. 450, 120 N. E. 286 (1918), and People v. McCormick, 327 Ill. 547, 158 N. E. 861 (1927), both treated the federal estate tax as an expense of administration, hence deductible before determination of the Illinois inheritance tax.


85 401 Ill. 387, 82 N. E. (2d) 446 (1948).

86 293 Ill. App. 364, 12 N. E. (2d) 701 (1938).