The Pledge as an Illinois Security Device

Elliot G. Robbins
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I. INTRODUCTION

The pledge is unquestionably one of the oldest¹ and perhaps one of the least complicated² of the security devices developed in law. It should be a matter of no small surprise, then, that there could yet remain considerable areas of doubt and confusion regarding the use or abuse of this form of security relationship. It could, therefore, prove to be a matter of constructive interest to re-examine the rights, duties, and liabilities of the various persons who may be affected by the fact that a pledge exists, insofar as the security interest created could concern each of them, at least as measured by the law of one particular jurisdiction, that of Illinois.³

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³ As the scope of this article is to be confined to pledging transactions as measured by the law of Illinois, areas may well exist where the authority of Illinois decisions may be either sketchy or non-existent. To aid the reader who may wish for authority or comment on some peculiar phase of pledge law not there settled, considerable reference will be made to materials external to the law of Illinois. Of these, Brown, Treatise on the Law of Personal Property (Callaghan & Co., Chicago, 1936), and Restatement of the Law of Security (American Law Institute Publishers, St. Paul, 1941), will be most frequently cited. Such references will hereafter appear as Brown, or Restate., as the case may be.
The concept of the pledge is simplicity itself: a pledge is the bailment of a chattel for the purpose of securing the performance of a legal obligation incurred by the bailor on the behalf of some other person than the one for whose benefit the bailment was made. It is worthy of note, at this point, that the fundamental basis for an effective pledge is that the pledgor has transferred possession of the pledged chattels to the secured creditor. The acts necessary to consummate a proper delivery of possession will be developed later.

The pledge transaction is entered into, by the parties to an agreement, for the express purpose of furnishing security to the creditor with respect to an obligation due him. It is typical of the pledge that the obligation to which the pledge is germane is usually incurred contemporaneously with the agreement to pledge,

4 In this article, the verb "pledge" is used to denote the act or acts necessary to effectively create a secured right. The noun "pledge" is used to indicate the secured interest in the chattel pledged. The adjective "pledged" is descriptive of the object which has been made the subject of a pledge.

5 The noun "chattel" is here used to denote any type of personal property, whether tangible or intangible, either in the form of goods, negotiable paper, or choses in action, which may be capable of being pledged.

6 In Henderson v. Victor, 268 Ill. App. 514 (1932), the consideration for which a pledge was given amounted to the compounding of a felony so the pledge was held to be void for illegality. See also Mercantile Trust Co. v. Kastor, 273 Ill. 332, 112 N. E. 988 (1916), where a purported sale of accounts receivable was treated as an attempted pledge at a usurious rate of interest.

7 Many forms of security are dependent upon a transfer of title or the creation of a non-possessory charge which, if properly executed, are valid. These devices, however, although often similar to, are not pledges. It is not within the scope of this article to discuss other forms of security devices except where comparison may be advantageous for purposes of clarity. As an illustrative contrast, a pledge is to be distinguished from a chattel mortgage in that the pledgor retains title and the pledgee obtains possession of the pledged object as his security whereas, under the chattel mortgage, the mortgagor usually retains possession and the mortgagee is given the title as his security.

8 The pledge ought to be contrasted to the possessory lien on the basis that the former can only arise out of a contract between the parties to give the pledge as security whereas the latter may be a right to assert a security interest by implication of law: Brown, § 107 et seq., and Restate., § 59 et seq. There is dictum, however, in Farson v. Gilbert, 114 Ill. App. 17 (1904), to the effect that a pledge may arise by implication.

9 It is most usual for the pledge to be given by the person actually obtaining a loan or credit from the pledgee. It is not unusual, however, for a pledgor to pledge his property to secure a loan made to some third person: Price v. Dime Savings Bank, 124 Ill. 317, 15 N. E. 754 (1888); Towler v. Mt. Carmel Trust & Savings Bank, 206 Ill. App. 427 (1917); Merchants & F. State Bank v. Sheridan, 166 Ill. App. 25 (1910). The effect of this factor will be elaborated upon later in this article.
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but it is not atypical for the pledge to be made in consideration of an antecedent debt\(^{10}\) or with respect to future obligations.\(^{11}\)

The extent to which a pledgee may assert a secured interest in chattels pledged to secure future advances would seem to rest on several factors. Where there are no third-party claimants and only the pledgee and pledgor assert rights, the pledgee may hold the pledged chattels for whatever advances he has made within the terms of the agreement to pledge. If, subsequent to delivery of the pledged chattels,\(^{12}\) a person who is dealing bona fide and for fresh value should acquire an interest paramount to that of the pledgor, the pledgee, after notice of such right, may normally no longer obtain security in the pledged chattels for any additional advances made thereafter.\(^{13}\) Notwithstanding this, if at the time the pledge agreement was initiated the pledgee was contractually bound to make the future advances, the pledgee should be allowed to have a secured position to the extent his future advances were consonant with such contract, regardless of any subsequently acquired interest in the pledged chattel paramount to that of the pledgor. The same consideration would seem to be applicable where the pledgee makes future advances required to maintain or enhance the value of the pledged chattels or, to put it negatively, makes such advances which, if not made, would cause a serious and irreparable injury to the pledged chattel to the great disadvantage of all interested parties. In considering all these and other factors, it must be observed, however, that the pledgee will have a secured interest only to what-

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\(^{10}\) Smith v. Dennison, 101 Ill. 531 (1882); Belden v. Perkins, 78 Ill. 449 (1875); Mayo v. Moore, 28 Ill. 428 (1862); Parsons v. Overmire, 22 Ill. 58 (1859); Mongovin v. Watts, 258 Ill. App. 106 (1930). The pledge is not to be confused with the pawn, although originally the terms were used synonymously. The pledge is security for a personal obligation; the pawn is given as a gage, or sole source of satisfaction, in the event a sum of money is not repaid but where the borrower has assumed no personal liability.

\(^{11}\) Union Brewing Co. v. Inter-State Bank, 240 Ill. 454, 88 N. E. 997 (1909); Mongovin v. Watts, 258 Ill. App. 106 (1930).

\(^{12}\) For rights of bona-fide purchasers and the like who come in prior to delivery, see below, Division II, notes 18 to 31.

\(^{13}\) Mongovin v. Watts, 258 Ill. App. 106 (1930).
ever extent is consistent with a reasonable construction of the transaction.\textsuperscript{14}

Because of the early judicial preoccupation with the requirement of an acquisition of a possessory interest, as distinguished from title, the older cases seem to have held that only tangible personal property might be made the subject of a pledge.\textsuperscript{15} By reason of the press of commercial necessity, courts gradually began to recognize the right to assign a chose in action and, from that fact, a chose in action became of considerable value as a device for expanding one's credit. All that remained was for the courts to recognize the right of an assignee of a chose to sue in his own name to make such an assignment an ideal subject matter of credit transactions. This having been accomplished, it is now everywhere recognized that at least certain types of intangibles are capable of being the subject matter of a pledge.\textsuperscript{16}

As a consequence of difficulties inherent in the transfer of possession of such interests, the blurring of procedural methods for the enforcement of rights, and the continued business pressure for further relaxation of formalities, there has been a sloughing off along the line of demarcation between the pledge and other security devices. There yet remains, however, a sufficient num-

\textsuperscript{14} Pledges may often be unsecured creditors respecting claims due them from their pledgors in addition to the secured debt. If the pledgor should become insolvent, the pledgee, no matter how much he might desire to do so, may not convert the lien of the pledge from a specific lien into a general lien securing all indebtedness due from the insolvent, barring an understanding to the contrary prior to the insolvency. See Union Brewing Co. v. Inter-State Bank, 240 Ill. 454, 88 N. E. 997 (1909); Smith v. Dennison, 101 Ill. 531 (1882); Buchanan v. International Bank, 78 Ill. 500 (1875); Adams v. Sturges, 55 Ill. 468 (1870); Painter v. Merchants & Manufacturers Bank, 277 Ill. App. 208 (1934); Stewardson, etc., Ass'n v. First Nat. Bank, 260 Ill. App. 189 (1931); Ware v. Barnard & Leas Mfg. Co., 94 Ill. App. 498 (1900). See also notes in 39 Harv. L. Rev. 903, 38 Mich. L. Rev. 921, and 25 Va. L. Rev. 747. It has also been held that where two or more persons sign an agreement providing security for their joint obligation, such agreement cannot be made to extend to provide security for other debts of one of the signers individually or in conjunction with some other person: First Nat. Bank v. Southworth, 215 Ill. 640, 74 N. E. 771 (1905). But see Foltz v. Harden, 133 Ill. 405, 28 N. E. 786 (1891). In this connection, it would be well to consider the effect of an extension agreement between a pledgee and a debtor where the pledgor is an accommodation party, which point will be discussed later in Division IV hereof. See also Brown, § 117.

\textsuperscript{15} Brown, § 128.

\textsuperscript{16} See cases cited herein, Division II, note 70 et seq.
ber of distinctive characteristics about the pledge to formulate a basis of decision respecting problems arising out of the transaction. These traits relate primarily to the fact of possession in the pledgee.  

II. Acts Necessary to Create a Pledge

A. Need for Delivery of Possession

By its very definition, the operativeness and validity of a pledge transaction as a security device in legal contemplation would seem wholly dependent upon a delivery of possession of the pledged item to the pledgee. That there are urgent motives for the possession requirement is not to be doubted, and the definition merely reflects cogent reasons for such transfer. Primarily, there is the judicial distaste for secret liens. A person who, in good faith, has paid a fair price for an item, has a right to expect the law to afford him protection in his purchase where ordinary inquiry or observation would not reveal that some third person might be able to assert an interest adverse to that of the seller. A judgment creditor might be put to unnecessary, if not entirely fatal, delay or expense if his execution and levy were to be held subordinated to interests asserted by third persons respecting property held by the judgment debtor, where such holding in no way indicated the outstanding claim. Ordinary creditors could be lulled into a false sense of security and might lose the opportunity to take timely steps in establishing their rights against the borrower's unfettered property where he remains apparent owner of property subject to a hidden claim. If a pledgee

17 This is not to infer that other interests akin to the pledge are necessarily legally ineffective; it merely means that formalities of a differing nature will need to be complied with according to the nature of the other interest.

18 Immel v. Travelers Insurance Co., 373 Ill. 356, 26 N. E. (2d) 114 (1940). For an interesting case in this respect, see Corbett v. Underwood, 83 Ill. 324, 25 Am. Rep. 397 (1876), where it was held that a commission merchant dealing in grain futures, who closed out a customer's account without giving notice of time and place of sale, could not be held to be a converting pledgee for, as it was said to be impossible to possess a grain future, nothing was deemed to have been pledged.

refrains from taking possession, subsequent creditors of the pledgor may be misled by the apparent property of the latter. In all of these instances, the existence of a secret lien, if sustained, would work to the prejudice of innocent persons. Other reasons have also been suggested. Since the pledge is such a simple transaction, being relatively free of statutory restrictions or filing requirements applicable to other security devices, it may not seem too unjust to require a rigid conformity to the possession requirement in order to assure adequate notice to all persons dealing with respect to the chattels involved.

It is almost axiomatic that the entire structure of commercial economy is based on credit. Few commercial activities, aside from retail transactions, and only a negligible number of other types of financial dealings are conducted on a strictly cash basis. An obvious corollary of this observation must be that the successful business man, large or small, is one who is capable of so conducting his affairs as to obtain maximum credit. In respect to short-term credit, any of several ways of raising funds by using one’s personal property exist, each with its advantages and disadvantages. But the rub lies in how to raise such funds without having to restrict, or perhaps even be disabled, from using some or all of one’s available assets. A sale of a chattel is, no doubt, the simplest way to raise cash, but it has the obvious disadvantage of barring the vendor from using the chattel from thenceforth on. The chattel mortgaging of tangible personalty is often used as a means to raise funds. It has the advantage of allowing the borrower to remain in possession but, as the legal validity of a chattel mortgage, so far as third persons are concerned, lies in recording, there is a consequent notoriety which may be the very factor that would deter a borrower from resorting to this method. The trust receipt has been developed as another scheme

20 See note in 37 Col. L. Rev. 621.
used to finance dealings in tangibles, but it would seem to encompass many, if not all, of the disadvantages attaching to the chattel mortgage insofar as the present day borrower is concerned. With respect to intangibles, the right of assignment could give rise to credit but, unless the obligor is notified of the assignment, the creditor is afforded small protection. There is the added disadvantage, if it could be considered such, that the borrower is at the loss of any further use of the assigned right. To offset these objections, the pledge may be used with respect to either tangible or intangible interests, for it requires no recording and reserves the title, with all emoluments flowing therefrom, to the pledgor.

There is a certain amount of annoyance, expense, and delay incidental to the transfer of property from one person to another. This; however, may be no difficulty at all in a pledge transaction as compared with other defects inherent in other forms of security devices. Some of the obstacles to the use of other methods of obtaining credit have been noted. They are also usual to the pledge device. The transfer of possession may seriously prejudice the pledgor in that it may well be necessary, for the small business man at least, to continue to use all of the available assets in the business enterprise in order to continue to operate ef-
The transfer of possession, like the recording of a chattel mortgage or the notice given the obligor of an account receivable, is as much notice of the pledgor's need to borrow as it is notice of the pledgee's secured right. It is not of necessity fraudulent or unethical but, on the contrary, it may be the exercise of prudent business acumen to avoid publicizing the extent of one's indebtedness. For these several reasons, it is understandable why both lender and borrower may press for some relaxation of the formal requirements incident to credit transactions in order to leave the security res in the borrower's hands.

The requirement of possession in the pledgee has the desirable effect of affording a specific identification of the subject of the secured interest and, as has already been suggested, it assures desired publicity to the transaction. Is it necessarily correct for the courts to assume, as a fact, that potential unsecured creditors place any great reliance upon an actual examination of the assets physically available to the borrower before advancing credit? In fact, is it not a form of naivete on the part of courts to assume that an examination is made of any documentary evidence of intangible interests which the borrower may have? Even if the courts are in error in making such an assumption, it has been suggested that the possession requirement is insisted upon by the courts, not so much because of a desire to assure notoriety, but rather to forestall debtors from being able to prefer favored creditors in the event of an impending insolvency or bankruptcy. At any rate, there is the desire on the one hand to relax the formalities of pledging and, on the other, cogent reason to insist upon formalities going beyond the simplicity of compliance. Nevertheless, there has been a relaxation from the early concept of the acts necessary to constitute a

29 For an effective disposition of this issue in the negative, see notes in 34 Yale L.J. 895 and 37 Col. L. Rev. 621.
30 It has been the author's experience that lenders would rather rely on the report of an accrediting agency, which takes into consideration sundry intangibles of earning power and personality, rather than rely on a search of the public records or an inquiry respecting non-recordable choses.
31 See note in 37 Col. L. Rev. 621.
proper delivery of possession. To the extent that there has been a relaxation in the possession requirement, the law of security has been responding to the needs of ordinary commercial affairs.

B. WHAT CONSTITUTES DELIVERY OF POSSESSION

Assuming the basic premise of pledging to be a delivery of possession, it is clear that when an agreement to pledge has been executed by a delivery of possession of the pledged chattel to the pledgee, the latter's security interest is then enforceable against the world. Upon maturity of the secured obligation and default by the pledgor, the pledgee will have his option to collect in any of several ways. In contrast, where there has been an insufficient delivery of possession to a lender to effectuate a pledge, the pledge would be valid only in equity. In such an instance, although the interest the lender has obtained would be regarded as valid as to the borrower, it would probably be held to be subordinate to the claims of persons who had greater equities. The crucial determination to be made would, then, appear to be whether or not a sufficient delivery of possession has been made. There are undoubtedly ambiguities to any definition of the term "delivery of possession," but the term is now so adaptable that, in many cases, the security interest which has been sustained as a pledge has been sustained without any resort to the greater intricacies of "equitable pledge" law. One soon suspects, then, that the concept of "possession" is now only a convenient rationalization to sustain a lender's security interest in a particular transaction if some minimum acts have been done to give notice, ostensible or otherwise, to third persons.

32 This, of course, presupposes the pledging to be legal in all other respects. But see note 6, ante.
34 Chicago Title & Trust Co. v. Storage Co., 260 Ill. 485, 103 N. E. 227 (1913); Hoffman v. Schoyer, 143 Ill. 598, 28 N. E. 823 (1892); Union Trust Co. v. Trumbull, 137 Ill. 146, 27 N. E. 24 (1891); Keiser v. Toppling, 72 Ill. 226 (1874). See also Brown, § 128, and Restate., § 10.
35 Certainly, bona fide purchasers ought to be protected. It will be shown, however, that levying creditors, trustees in bankruptcy, receivers, and sometimes even general creditors of the borrower may have a greater equity than that of the lender.
It would seem self-evident that the mere fact of delivery of possession to the lender should not necessarily create a proper pledge of the item transferred. The delivery must be made by one who couples his delivery with the privilege to so act,\(^3\) as contrasted with the power. If only the power to deliver exists, the transferee does not obtain a valid pledge interest; but such transferee may be able to assert rights as a bona fide purchaser of a negotiable document or may be able to rely on the transferor’s apparent authority to act.\(^3\) Surprisingly enough, some phase of this issue has been before the Illinois courts on at least nine different occasions. Certainly there ought to be no doubt that tangible personal property may not be pledged by anyone but the true owner or his agent.\(^3\) If the rule were the contrary, it would be anything but prudent to lend chattels to another.\(^3\) On the other hand, it would also seem to be undoubted law that an attempted pledge of a negotiable document which did not belong to the pledgor would give the lender, who acted for value and without notice of the rights of the true owner, the status of a holder in due course of such paper.\(^4\) However, if the purported pledgee knows,\(^4\) or has reason to know,\(^4\) that the transferor is


\(^3\) Silverman v. Bush, 16 Ill. App. 437 (1885).

\(^3\) Cox v. McGuire, 26 Ill. App. 315 (1887).

\(^3\) In Cox v. McGuire, 26 Ill. App. 315 (1887), the pledgee urged that the pledge should be sustained on the theory that the pledgor had “indicia of ownership.” If this were so, it would be a logical conclusion to assume that a thief could make a good pledge. That conclusion would scarcely square with the normal tort law doctrine regarding an owner’s right to sue in trover against the bona fide purchaser from a converter.

\(^4\) Knight v. Seney, 290 Ill. 11, 124 N. E. 813 (1919); Drouineau v. First Nat. Bank, 244 Ill. App. 251 (1927). It is, perhaps, pertinent to draw a contrast at this point with an analogous situation. A pledge of a negotiable document of title is effective, insofar as the pledgee is concerned, even though the property subject to the paper does not belong to the pledgor. For example, a person who pledges a negotiable bill of lading representing property of another makes a good pledge if the lender advances credit in good faith. This is true regardless of whether the pledgor acted with intent to deprive the true owner of his property or was merely disabled from performing his own contract with the owner because of an intervening insolvency: Ohio & Mississippi R. R. Co. v. Kerr, 49 Ill. 458 (1869); M. C. R. R. Co. v. Phillips, 60 Ill. 190 (1871).

\(^4\) People v. Peoples Tr. & Sav. Bank, 276 Ill. App. 269, 7 N. E. (2d) 556 (1934).

\(^4\) Title & Trust Co. v. Brugger, 196 Ill. 96, 63 N. E. 637 (1902). See also Midland Co. v. Huchberger, 46 Ill. App. 518 (1892).
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not the true owner of, nor empowered to deal with, the negotiable paper, the attempted pledge is ineffective. Here is a proper instance of the fact that the law of negotiability may, or may not, cut across usual property law lines. A rule similar to that applicable to tangible personal property has been established to defeat the rights of a pledgee in non-negotiable documents,43 or in choses in action,44 as against the real owner thereof.

Assuming the property right to be one fully belonging to the borrower,45 it is inherent in his agreement to pledge that he make a delivery of possession to the pledgee. Although the cases are rare, there would seem to be no reason why, as between the parties to the agreement, specific performance would not lie to enforce the agreement to make a pledge.46 There is, of course, ample authority by way of analogy to be found in cases granting specific performance of contracts to give a real or a chattel mortgage.47 Where large sums are advanced, the pledge probably is not the most advantageous security device, but if it is used, the transaction will usually be carefully supervised by an attorney and no occasion for specific performance will be likely to arise. In the smaller transaction, if the credit has not been extended or the money advanced, specific performance would not lie for equity will not decree specific performance of an agreement to loan money. On the other hand, if the credit has already been extended, pledge transactions usually contemplate such an imme-

43 Drouineau v. First Nat. Bank, 244 Ill. App. 251 (1927).
45 With some degree of frequency, debtors will try to pledge property not yet in existence by the simple device of using words of present operation. These attempts generally cover items to be manufactured or crops not yet grown. Since it is impossible to make any sort of delivery of possession of such chattels, they cannot be made the basis of a legal pledge. However, most jurisdictions will recognize these transactions as sufficient to create a lien when the res comes into existence: Restate., § 10. A more expedient device would be the use of a chattel mortgage with an after-acquired clause or a crop mortgage.
diately maturity that a more appropriate remedy would seem to lie on the debt. Furthermore, equity proceedings are usually too expensive to warrant an action. Therefore, although it is understandable why an action for specific performance would be rare, there would seem to be no reason why such an action would not lie if it would provide the only way to accomplish substantial justice in a proper case.

The pledgor's refusal to perform his contract to convey possession involves another, and probably a more difficult, question to resolve. May a lender resort to self-help and take the chattel which is the subject of the pledge contract? No cases appear to deal directly with the point, at least in Illinois. It would appear that the lender ought to be denied the right to use self-help. If the lender has not, to that point, advanced credit, he could hardly be heard to complain but if he could, in those few instances where injury could occur, specific performance in equity would be the proper solution. If the lender has advanced credit and the borrower then refuses to make the pledge, the latter has then breached the contract,\textsuperscript{48} for which breach the lender then has an adequate remedy at law. It is not without reason, therefore, that the privilege of self-help has ordinarily been restricted to extreme instances, such as a fraudulent or a forcible dispossession by the recaptor, where the emergency may justify the risk of a breach of peace.\textsuperscript{49} A thwarted pledge does not seem to fall within this concept. If the lender should resort to self-help, and does take the chattel to be pledged from the borrower, there would appear to be a sufficient lack of delivery to support an action for conversion but, inasmuch as the act of taking would be done in a bona fide belief of right, punitive damages would not be granted to the borrower as some form of additional compensation.\textsuperscript{50} On the other hand, it would be well to note here, that a pledgee may protect his possession in the pledged article by any proper action

\textsuperscript{48} Restate., § 15.
\textsuperscript{50} Silverman v. McGrath, 10 Ill. App. 413 (1881).
against either the borrower\textsuperscript{51} or a third person\textsuperscript{52} once delivery of the pledged chattel has been made. The pledgee may even be allotted damages arising from a wrongful replevy by the pledgor.\textsuperscript{53}

C. WHAT CONSTITUTES POSSESSION IN PLEDGEE

The nature of the acts sufficient to constitute an adequate delivery of possession, under security law, will depend somewhat upon the nature and circumstances surrounding the property involved. There is presently no dispute regarding the right of a lender to maintain a secured interest in property already in his possession if the same should subsequently be made the subject of a pledge to him. Any valid agreement that the lender is to hold such goods for this purpose is sufficient to create a good pledge\textsuperscript{54} for a surrender with an accompanying re-delivery would not be essential.\textsuperscript{55} It would seem that if the goods to be pledged are in the hands of a third person at the time of the making of the agreement, which third person is acting as a bailee of the debtor, the giving of notice to the bailee to hold the goods subject to the security rights of the pledgee would constitute an adequate delivery of possession.\textsuperscript{56} It follows, of course, that a

\textsuperscript{51} McArthur v. Howett, 72 Ill. 358 (1874); Restate., § 39. The contract to pledge not only contemplates that the pledgor will deliver the security res but also imposes a duty on the pledgor not to jeopardize the pledge. If the pledgor wrongfully retakes the pledged chattel, he has breached his contract. In such a case, the pledgee may sue on the breach and effect an acceleration of the debt in order to avoid a circuity of actions. If the pledgee were permitted to recover the full value of the pledged chattel, he would have to account for the surplus over the amount of his claim at some later time. A limitation would, therefore, be placed on his recovery which would result in a settlement of all differences between the parties.

\textsuperscript{52} U. S. Express Co. v. Meints, 72 Ill. 293 (1874); Restate., § 38. The pledgee may recover the full value of the pledged chattel from one who wrongfully takes the chattel from him, being liable to account for the amount in excess of his claim to the pledgor at maturity. If the taking is from the pledgor rightfully in possession, the pledgee may recover to the extent of his lien interest only.

\textsuperscript{53} McArthur v. Howett, 72 Ill. 358 (1874).

\textsuperscript{54} The agreement to pledge need not be in writing: Restate., § 9.

\textsuperscript{55} Cottrell v. Gerson, 371 Ill. 174, 20 N. E. (2d) 74 (1939); Fairbanks v. Merchants' Nat. Bank, 132 Ill. 120, 22 N. E. 524 (1889); Parsons v. Overmire, 22 Ill. 55 (1859); Daniel v. First Nat. Bank of Englewood, 150 Ill. App. 575 (1911); Parson v. Gilbert, 114 Ill. App. 17 (1904); Restate., § 7.

\textsuperscript{56} Silverman v. Bush, 16 Ill. App. 437 (1885); Restate., § 8. While it is unusual for an agency relation to be created where the agent has not consented to this relationship, such acquiescence is unnecessary in these cases for the bailee's duties have not been materially changed. Of course, if the bailee objects to acting as a stakeholder of pledged chattels, he may surrender them to the pledgee, subject to the payment of any proper lien for storage or the like.
delivery of goods to a third person who is acting as agent or bailee for the pledgee will be enough to perfect the lender's security interest.\(^5\) While the courts may be inclined to sustain a delivery of this nature when there has been an actual assumption of possession by such third person pledgeholder,\(^6\) it should be noted that, all too frequently, the acts sustained would be insufficient to operate to give notice to other parties dealing with the pledgor of the existence of the pledgee's claims in the property.\(^5\)

Some goods, as a practical matter, are not capable of a manual transfer because of their bulky nature. Such goods are, nevertheless, capable of being pledged if there is a surrender to the pledgee of whatever degree of control the nature of the goods will permit.\(^6\) A security device of this nature will be enforceable wherever the courts will recognize a constructive delivery as a substitute for an actual physical transmission of possession. If the goods are to remain on the pledgor's premises, there must be a sufficient warning, from the acts done, as will apprise interested third persons that the pledgor's property in such goods is no longer unfettered; otherwise the purported pledge will be held to create merely a destructible equity.\(^6\)

It would seem that the policy laid down in the bulky goods cases would be not only to require the pledgee to assert the maximum control possible over the goods according to their nature but also to take whatever steps are necessary to notify the world generally of the existence of his interest. The standards set are often a considered relaxation of the possession requirement, and the notice provisions are minimal at best. There are cases in

\(^5\) Walsh & Co. v. First Nat. Bank, 228 Ill. 446, 81 N. E. 1067 (1907); Rice & Bullen Malting Co. v. Bank, 185 Ill. 422, 56 N. E. 1062 (1900); Lewis v. Springville Banking Co., 166 Ill. 311, 46 N. E. 743 (1897); Taylor v. Turner, 87 Ill. 296 (1877); Peters v. Elliott, 78 Ill. 321 (1875); M. C. R. R. Co. v. Phillips, 60 Ill. 190 (1871); Ohio & Mississippi R. R. Co. v. Kerr, 49 Ill. 458 (1869); Inderriedan Co. v. Bank of Newberg, 176 Ill. App. 301 (1913); Mueller v. Nichols, 50 Ill. App. 663 (1893).

\(^6\) Taylor v. Turner, 87 Ill. 296 (1877); Peters v. Elliott, 78 Ill. 321 (1875); Keiser v. Topping, 72 Ill. 226 (1874); Restate., § 6.

\(^5\) Chicago Title & Trust Co. v. Storage Co., 260 Ill. 485, 103 N. E. 277 (1913); Hoffman v. Schoyer, 143 Ill. 598, 28 N. E. 823 (1892); Union Trust Co. v. Trumbull, 137 Ill. 146, 27 N. E. 24 (1891); Keiser v. Topping, 72 Ill. 226 (1874).
other jurisdictions where the pledgee's interest has been sustained when all that was done was to segregate the goods on a seldom-used area of the pledgor's property; where signs have been posted before a stock of iron, although the signs were removed for an extended period without the pledgee's knowledge; or where lumber has been marked with the pledgee's initials.

The customary way for a debtor to effect a pledge of bulky items is to resort to a process referred to as field warehousing. There are sundry variations of the field warehousing technique, but any of several deviations from the norm will be likely to invalidate the transaction. Probably the most usual flaw in the technique is the attempt of the debtor to act as warehouseman, either personally or through an employee, instead of hiring a bona fide independent contractor. This has been done by setting up an ostensibly independent company, but one which is in fact completely dominated by the debtor and having no other business than that of its sire. The other usual defects to be found in this device are an inadequate segregation, an inadequate or improper posting of identifying signs, a failure to tag the goods, or the granting of a privilege to the borrower to remove, mingle, or substitute goods in the "warehouse."

In contrast to the problem of effectuating a pledge in bulky items is the problem inherent in perfecting a pledge of non-tangible personal property. The assignment of any one of the several sundry types of choses in action as a means to consummate a pledge agreement will present difficulty in regard to determining

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62 Keiser v. Topping, 72 Ill. 226 (1874).
65 It is not within the scope of this article to discuss field warehousing beyond reference to the fact that it is one form which a pledge may take. A more complete discussion of the subject is contained in Friedman, "Field Warehousing," 42 Col. L. Rev. 991 (1942), and in Kane, "Theory of Field Warehousing," 12 Wash. L. Rev. 20 (1937). See also Restate., § 11, comment d, and note in 39 Ill. B. J. 506.
66 Hoffman v. Schoyer, 143 Ill. 598, 28 N. E. 823 (1892).
67 Union Trust Co. v. Trumbull, 137 Ill. 146, 27 N. E. 24 (1891).
68 Chicago Title & Trust Co. v. Storage Co., 260 Ill. 485, 103 N. E. 227 (1913); Hoffman v. Schoyer, 143 Ill. 598, 28 N. E. 823 (1892); Union Trust Co. v. Trumbull, 137 Ill. 146, 27 N. E. 24 (1891).
69 See cases cited in the preceding footnote.
those acts in respect thereto which will constitute an effective delivery of possession. There is, perhaps, some justifiable reluctance to apply the term "pledge" to an assignment of a chose in action for the purpose of creating a security interest. If there is any inaccuracy in such an application, it is because, technically speaking, there can hardly be a delivery of possession of an intangible. Nevertheless, it can no longer be doubted that a mere chose in action may be the subject matter of a pledge, particularly in those instances where the chose is embodied in the form sometimes referred to as an "indispensable instrument." 70 Usual types of choses falling in this area, represented by a document which is non-negotiable but which fully identifies the obligation, include a bank deposit pass-book or a certificate of deposit,71 corporate shares evidenced by a stock certificate,72 or a fire or life insurance policy.73

Since it is not possible to physically transfer the chose in action, steps ought to be taken which would achieve the same effect respecting notice that a physical transfer would have possessed. Thus, if the chose is represented by an "indispensable document," a proper written assignment or endorsement thereon would normally be sufficient to create the pledge relationship. Be that as it may, a further problem has arisen which needs resolution. Corporation by-laws or articles often attempt to place a restriction on the right of transfer or, in the alternative, pro-

70 The terminology has been adopted from Restate., § 1, comment e. For a rather unique attempt to create a pledge relationship by the use of negotiable paper, see Parish Bank & Trust Co. v. Wennerholm Bros., 313 Ill. App. 121, 39 N. E. (2d) 376 (1942), where the "pledgor" gave his personal demand note to secure his personal time note. The court said that one personal obligation of a debtor could not be pledged to secure another, but that if either of the notes was paid it did discharge the other.


vide that a transfer of shares is to be regarded as ineffectual until the same has been registered on the books of the corporation. It is also usual, in the case of insurance agreements, to provide that rights under the policy are to be regarded as terminated by a transfer of such rights by assignment unless the insurer is notified and acquiesces in the assignment. In view of these provisions, some courts have held that attempted pledges of these types of choses in action will be regarded as incomplete until registration of the change has been made by the corporation or has been acquiesced in by the insurer. In short, a third person dealing with the "pledgor" would obtain a right superior to that of the "pledgee" under such rulings.\(^7\)

These decisions are unfortunate and not to be sustained in principle. The restrictive provisions under consideration are generally intended merely to adjust the rights of the parties to the agreement, that is (a) the corporation might invoke such a rule to clarify administrative problems respecting voting and dividend rights, or perhaps to give present shareholders first option on a sale of additional shares of that corporation, or (b) the insurer could stipulate for power of approval or disapproval in order to assure itself that the moral risk assumed under the personal contract with the transferor would not be increased by such transfer. In neither event is the primary purpose one to restrict alienation of the property. Therefore, if no actual harm is sustained, the law ought to follow ordinary commercial practice and convenience, for stock certificates and policies of insurance certainly are the best evidence of the rights they represent. If such were to be the case, a valid pledge could be made by mere delivery of the corporate share certificate or by surrender of the insurance policy. Perhaps because of a fear that to sustain the pledge would do harm to the insurer, an Illinois court once refused to accede to the reasoning set forth above, despite the fact that no harm was or could have been done to the insurer in the

\(^7\) Immel v. Travelers Insurance Co., 373 Ill. 256, 26 N. E. (2d) 114 (1940). But see Lombard v. Balsley, 181 Ill. App. 1 (1913), which held that, if both the insured and the beneficiary consent, a valid pledge may be made by delivery of a policy without an assignment. There were, however, no intervening claimants, nor did the insurer object.
decided case. Strangely enough, the same court came to a contrary conclusion with regard to corporate share certificates.

More difficult are those problems which arise where the written instrument is not ordinarily accepted as evidence of the chose in action. If creditors are to be able to obtain a secured interest in such property, something closely approximating a delivery of a tangible ought to be required. The nearest approach would be that of a written assignment of the chose with adequate notice served on the obligor thereof. The writing would have to be more than just an informal memorandum of obligations due the borrower; it must, in fact, be a proper assignment. What constitutes a proper assignment is a matter of some difficulty. So long as it has been established that choses of this type can be pledged, it is understandable why only minimal formalities are necessary to constitute an adequate transfer of a lessor's right to rentals, of a conditional vendor's interest under a con-

75 In the case of Immel v. Travelers Insurance Co., 373 Ill. 256, 26 N. E. (2d) 114 (1940), the real dispute lay between the "pledgee" and a subsequent assignee of the insured. The insurer could have avoided all possibility of harm by paying the money into court, letting it decide who was to prevail.

76 Rice v. Gilbert, 173 Ill. 348, 50 N. E. 1087 (1898); People v. Lake Sand Corp., 251 Ill. App. 499 (1929). Both cases did recognize, however, that although the pledge might be good despite such restriction in the by-laws a delivery without proper endorsement would not control the corporation's duties to such pledgee. The pledges involved there smacked more in the nature of coercive devices than of valuable property interests. It is submitted that the provisions of the Uniform Stock Transfer Act, Ill. Rev. Stat. 1951, Vol. 1, Ch. 32, §§ 416, 424, 428 and 430, would not materially affect these holdings. It provides that a transfer of shares of stock may be made by a delivery of a properly endorsed certificate, by delivery of the certificate and a separate assignment in writing, or by delivery of the certificate and a separate power of attorney to endorse the same. If the certificate is delivered without an endorsement or substitute therefor, the transferee has the right to obtain an endorsement on demand. A levy may not be made on the shareholder's interest so long as the certificate is outstanding. The act further provides that reasonable restrictions on transfer may be made if such restrictions on transfer are printed on the certificate. If no such notice is given, or if the restrictions stated would be void in law, a pledgee of the certificate would be deemed to take without notice thereof.

77 Restate., § 1, comment a, regards an attempted pledge of a chose not represented by an indispensable instrument as incapable of fruition.


79 Immel v. Travelers Insurance Co., 373 Ill. 256, 26 N. E. (2d) 114 (1940). It has already been observed that the agreement to pledge need not be in writing; Restate., § 9. A distinction should be made, however, as to the necessity of a writing to consummate a delivery of possession in accordance with the agreement to pledge, even though the latter is oral in form.

80 See cases cited in note 27, ante.

THE PLEDGE AS A SECURITY DEVICE

It is more difficult to conceive the nature of a writing which would be sufficient to assign an interest in a partnership, or a seat on a livestock exchange, for security purposes, but most of the difficulty arises in cases where there is a pledge of accounts receivable. Perhaps it is here, more than in any other area of pledge law, that the courts have nearly abandoned the possession requirement and have, instead, substituted therefor a minimum standard of conduct on the part of both borrower and lender which would make it apparent that the borrower recognizes the lender's security interest and that the lender is asserting such a right. The approach is rational for, if the taking of possession is impossible, an assertion of dominion by the pledgee should serve to give other persons adequate notice of the secured interest.

There is another type of written document which amounts to more than evidence of a chose; it is, in fact, a symbol of the goods themselves. In this area fall such documents as bills of lading and warehouse receipts, either of which may be used as a financing device. The seller, after shipping goods to the buyer, has the bill of lading drawn to the seller's order. This order bill, or receipt, is attached to a draft drawn on the purchaser and is discounted at a bank. The bank immediately gives credit to the seller on the faith of the attached document. The bank then presents the draft to the purchaser, who receives the order bill when he


83 Bowles v. Seymour, 184 Ill. App. 240 (1913). It is interesting to contrast this case with the holding in Shobe v. Luft, 66 Ill. App. 414 (1895), where it was held that an assignment of a certificate of purchase covering foreclosed real estate was not a pledge but rather amounted to an equitable mortgage.

84 Home State Bank v. Vandolah, 188 Ill. App. 123 (1914). At page 128, the court said: "A bill of sale of a partner's interest in a partnership being but a chose in action, possession of the property is presumed to have been delivered by the delivery of said bill of sale." The court went on to hold the transaction amounted to a valid pledge, secure as against attaching creditors.


86 The Illinois courts have sustained the assignment of an account receivable as a pledge: Dorothy v. Commonwealth Co., 278 Ill. 629, 116 N. E. 143, L. R. A. 1917E 1100 (1917); Mercantile Trust Co. v. Kastor, 273 Ill. 332, 112 N. E. 988 (1896). For a discussion of an important phase of the use of accounts receivable, see Neuhoff, "Assignments of Accounts Receivable as Affected by the Chandler Act," 34 Ill. L. Rev. 538 (1940), and note in 44 Yale L. J. 639.
honors the draft. The bank then debits the seller's account and the whole transaction is completed. In this fashion, the seller's title document is transferred via the bank to the buyer, who is now able to possess the goods covered by such document, and the buyer's money is transferred via the bank to the seller or to the extinguishment of the credit extended to the seller. Until the buyer honored the draft, if it were not for the intervention of the bank, the seller would not have the amount represented by the purchase price made available to him for immediate use. Because the bank has security in the form of holding the bill of lading or warehouse receipt, for the carrier or warehouseman may not rightfully deliver the goods covered by such documents without the surrender thereof, it may freely loan funds to the seller and eventually discharge such loan out of the proceeds collected from the purchaser.

Some cases have come to the erroneous conclusion that this tripartite transaction is really a sale to the bank with a resale to the ultimate purchaser. There is no doubt, however, that the essential nature of the deal is that of a pledge, for control of the documents is equivalent to control of the goods, and the bank's advance is made on the faith of that fact. It might also be observed that, with respect to negotiable documents of title, it is of no moment that the document is unendorsed or that the carrier or warehouseman has not been informed of the transfer, for possession of the paper alone is sufficient to control the goods and the carrier or warehouseman would be disabled from making delivery of such goods to a claimant who is unable to then surrender the document.

If the bill of lading is non-negotiable, usually then referred to as a straight bill, the document is not symbolic of the goods. It is, instead, merely intended to inform the carrier of the name and address of the consignee. Such being the case, it would seem that the mere delivery of a document of that type ought not be

87 Restate., §§ 2 and 13.
an adequate method to effect a pledge, for control of the docu-
ment is not control over the goods. Nevertheless, holdings to the
contrary do exist in Illinois, but such decisions are unfortunate.
It has already been noted that there is much difficulty in defining
what should constitute a delivery of possession, within the con-
cept of pledge law, where documents which do not fully repre-
sent the goods have been used as a security res. It would appear,
then, that most of the irresponsibility in pledge law results from
an attempt to sustain, as an effective security device, the transfer
of documents which do not in fact control or fully represent goods.
It is submitted that, with respect to non-negotiable bills of lading
or similar documents, the law ought to require the assignee of
the paper to notify the carrier of his rights in order to execute a
pledge of the goods involved. This view appears to have been in-
corporated in the Uniform Bills of Lading Act and in the Uni-
form Warehouse Receipts Act, so the transfer of non-negotiable
documents alone would no longer appear to be sufficient to effec-
tuate a valid pledge which could be considered to be good as
against third persons.

While a substantial encroachment on the possession require-
ment has been countenanced, either because of commercial de-
sire or necessity, it is still proper to generalize that a delivery
of possession of the pledged chattels, either constructively or
actually, as best suits the circumstances, must be made. Is that
rationale to be unqualifiedly accepted? There is one situation, at
least, which makes the relaxation appear to approach the pro-
portions of a complete collapse. It is everywhere recognized that
the parties to a loan may agree that the lender is to have a lien

89 Peters v. Elliott, 78 Ill. 321 (1875); M. C. R. R. Co. v. Phillips, 60 Ill. 190
(1871). See also Taylor v. Turner, 87 Ill. 296 (1877).
90 The case of Peters v. Elliott, 78 Ill. 321 (1875), is a particularly unfortunate
decision. The bill of lading there in issue was clearly marked not transferable
and it had been the custom of the carrier to make delivery of goods shipped under
such bills without requesting the surrender thereof. The court bluntly stated that,
regardless of the form of the bill of lading, a mere delivery of it to secure an
advance of credit was a valid, enforceable pledge. As a consequence, it preferred
the holder over a levying creditor.
91 Ill. Rev. Stat. 1951, Vol. 1, Ch. 27, § 34.
92 Ibid., Vol. 2, Ch. 114, § 274.
93 Keiser v. Topping, 72 Ill. 226 (1874).
on chattels which are to remain in the debtor’s possession, albeit such a lien would be enforceable only in equity. It must be obvious that an arrangement of this sort could lead to considerable fraud on other persons dealing with the debtor, so these liens are regarded as invalid as to bona fide purchasers or levying creditors who have dealt with the debtor in possession. They are, however, enforceable as to the debtor’s general creditors. While more nearly an aspect of lien law, rather than pledge law, the effect of transactions of this type has been carried into the law of pledges. It has been there accepted that, at such time as a lender does take possession of the property subject to his lien, the possession is deemed to relate back to the date of the agreement to give the lien, where such possession would not impair the rights of innocent third persons. The explanation given to support this result is that the lender’s action merely constituted the full enforcement of an already existing right.

It would, then, be possible for a borrower, on the brink of insolvency, to prefer one creditor over others by surrendering possession of property held subject to an equitable lien. To prevent this emasculation of the preference sections of the federal bankruptcy act, that law was amended so that a trustee in bankruptcy would be permitted to prevail over those creditors who might attempt to establish their preferred claims in this manner within four months of filing the debtor into bankruptcy. If done before that time, as well as in actions arising elsewhere than in a bankruptcy proceeding, the doctrine of relation back would appear to control the situation, but it is submitted that such holdings leave much to be desired for reasons already expressed.

95 See cases cited in note 68, ante.
97 See Hanna and MacLachlan, The Bankruptcy Act of 1898 as Amended, with Annotations (Foundation Press, Inc., Brooklyn, 1950), 3rd Ed., p. 74, for a more adequate discussion with citations.
98 Peters v. Elliott, 78 Ill. 321 (1875).
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D. NEED FOR CONTINUITY OF POSSESSION

As it would seem to be safe to assert that the security interest known as a pledge does not become fully effective until there has been a delivery of possession after whatever fashion is acceptable under the surrounding circumstances, it must follow that a pledge will continue of purpose only for so long as the pledgee continues to retain possession under color of right. If, therefore, the pledgee should return the pledged chattels to the pledgor, the usual result thereof would be that the pledge relationship has terminated. As a pledge may be regarded as valid where a third person holds possession of the pledged chattel in an agency capacity for the pledgee, it follows that a delivery of possession to still another third person, inconsistent with the pledge agreement, should also be a sufficient ground to terminate the relationship.

But for the fact that such action might work to the prejudice of those dealing with the pledgor, there should be no reason why the pledgor might not also hold the pledged property, provided he does so as agent for the pledgee. The business advantage to be gained by enhancing the value of the pledged chattels, thereby affording greater security on the one hand and an appreciated estate on the other, would alone justify a relaxation of the rule requiring possession to remain in the pledgee. For this reason, it has been held that a pledge will not be terminated by a redelivery of the pledged chattels to the pledgor provided such redelivery is temporary and for a purpose con-


100 It is to be observed that the type of delivery here discussed does not contemplate a mere assignment or sale of the pledgee's rights, unless such assignment or sale was intended to cut off the pledgor's rights. Usually, the issue here involved is raised by judgment creditors of the pledgor when they seek to assert a priority over the claim of the pledgee or pledgeholder. For an interesting case in this respect, see Lewis v. Springville Banking Co., 166 Ill. 311, 46 N. E. 743 (1897). In that case, sheep were unloaded, fed, and watered while enroute. The court denied the pledgor's judgment creditor an interest adverse to the pledgee of the bill of lading, despite the fact that such creditor had asserted that these acts constituted a release of possession such as would destroy the pledge.
sistent with the pledge agreement. What it is that constitutes this so-called "special purpose" is often made dependent upon the nature of the pledged articles. It is proper, for example, to return corporate share certificates, insurance policies, or order instruments, delivered in pledge without endorsement, for the purpose of securing a proper endorsement where endorsement is necessary to complete the transfer of the rights represented by such documents. Pledged notes or bonds and accounts receivable may be returned to the pledgor so that he may be enabled to make collection and remittance. The pledged chattels may also be returned to the pledgor, who is to act as the agent of the pledgee, for purpose of sale provided a subsequent accounting on the indebtedness is to be made out of the entire proceeds of the sale. It would also seem proper to return the pledged article to the pledgor so that, by its use, he would be enabled to obtain income which could then be applied on the indebtedness.

These examples go to illustrate a particularly important point in pledge law. In contrast to the possessory lien, which gives the bailee merely a right to retain possession as a coercive device, the pledge is a property right. Such being the case, the pledgee's rights may continue in existence so long as he retains control over the pledged chattels even though the actual custody of them may be elsewhere. Qualifications, however, have been placed on the "special purpose" doctrine. Not only must the reason for the return be consistent with the pledge idea, but the pledgor, again in possession, must conduct himself in a manner that will not cause injury to either innocent third persons or to the pledgee. It has been held, therefore, that if the pledged chattels are re-

101 Dorothy v. Commonwealth Co., 278 Ill. 629, 116 N. E. 143, L. R. A. 1917E 1110 (1917); Rice & Bullen Malting Co. v. Bank, 185 Ill. 422, 56 N. E. 1062 (1900); Hutten v. Arnett, 51 Ill. 198 (1869); Cooper v. Ray, 47 Ill. 53 (1868); Henry v. Eddy, 34 Ill. 508 (1864); Parsons v. Overmire, 22 Ill. 58 (1859); Colburn v. Commercial Security Co., 172 Ill. App. 510 (1912).

102 Henry v. Eddy, 34 Ill. 508 (1864).


104 Rice & Bullen Malting Co. v. Bank, 185 Ill. 422, 56 N. E. 1062 (1900).

105 Hutten v. Arnett, 51 Ill. 198 (1869); Cooper v. Ray, 47 Ill. 53 (1868); Parsons v. Overmire, 22 Ill. 58 (1859).
turned for the pledgor's personal convenience, to be mingled with his other assets, to be sold or collected, but without any obligation on the pledgor's part to account for the entire sale price or collection made, or so as to permit the pledgor to remain in possession of the redelivered goods for a time considerably in excess of that needed to accomplish the purpose for which they were returned, the pledgee's interest will be treated as being at an end.

It is to be observed that any one, or any combination, of the last mentioned acts would cloak the pledgor with an appearance of unlimited ownership which could give rise to a fraud on creditors or on bona fide purchasers. Since the law rightly looks with great disfavor on secret liens, a sale to a bona fide purchaser without notice should cut off the equity of the pledgee and it is quite likely that a levying creditor would prevail over a claim raised on the pledgee's behalf. The interest of such parties would not be dominant merely because a pledge represents a right to retain possession, with a release of possession destroying the pledge, but rather because their interest ought to be protected from the effect of a secret lien. Since this is the reason for refusing recognition of the pledgee's interest under the circumstances, no inconsistency arises between the holding that a pledgee, by agreement, may assert his lien against the pledged chattels returned to the pledgor and the holding that the pledgee may be estopped to do so where innocent third persons have dealt with the pledgor on a reasonable assumption that the latter's possession of the chattels signifies unfettered ownership. It follows, as a matter of course, that purchasers with notice, as

106 Cooper v. Ray, 47 Ill. 53 (1868), has sometimes been cited as an instance where the pledged chattel was returned for the pledgor's convenience.
107 Union Trust Co. v. Trumbull, 137 Ill. 146, 27 N. E. 24 (1891).
109 No Illinois cases appear to have rested the decision on this issue. In Cooper v. Ray, 47 Ill. 53 (1868), a bus was returned for four days. In Parsons v. Overmire, 22 Ill. 58 (1859), the pledgor and pledgee used a pledged mare as part of a team to work a farm together. In Williams v. Hall, 30 Ariz. 581, 24 P. 755 (1926), by contrast, the pledgor spent seven months collecting several notes which he had pledged but which had been returned to him for collection purposes.
110 Rice & Bullen Malting Co. v. Bank, 185 Ill. 422, 56 N. E. 1062 (1900).
111 Ibid.
signees for the benefit of creditors, and general creditors ought to be subordinated to the pledgee's rights for, just as the pledgor could not deprive the pledgee of his interest by asserting an adverse claim, persons claiming with no better equities ought not be permitted to impair the pledgee's security interest.

III. RIGHTS AND DUTIES PRIOR TO MATURITY

A. PLEDGEE'S RIGHTS AND DUTIES

There has been some discussion above respecting the pledgor's duty to make a delivery of possession of the chattels to be pledged under the terms of an agreement to give security as well as an indication that the pledgor may, in some instances, re-obtain possession of the pledged chattels under the "special purposes" doctrine. It would seem to go without saying that, under either situation, the pledgor would be obliged to use reasonable care in dealing with the pledged property in order not to jeopardize the pledgee's security. If the pledgor should abuse the pledged chattel, the pledgee may ask the aid of the courts to help him recover the pledged chattel or to obtain some form of restitution in lieu thereof, according to the dictates of the circumstances. Inasmuch as the pledgee may sue one who has dispossessed him of the pledged chattels for conversion, the same remedy would be available against the pledgor in an analogous situation. If the pledgee should sue a third-person converter, the measure of damages would be the full value of the pledged chattels with a duty on the pledgee to account to the pledgor for any surplus over the amount of the secured debt. If the same measure of damages were to be granted in an action by the pledgee against the pledgor, the pledgor might then be forced to bring a subsequent suit to recover such surplus amount.


113 Chicago Title & Trust Co. v. Storage Co., 260 Ill. 485, 103 N. E. 227 (1913).

1 Restate., § 39.

2 Ibid., § 15.

3 U. S. Express Co. v. Meints, 72 Ill. 293 (1874).
It would, then, appear to be more expedient to allow the pledgee to recover no more than the value of his secured interest from the pledgor and this, in fact, is what is done. The consequence of decisions to this effect is that the rights of the two parties to the pledge agreement are presently resolved despite the fact that the actual maturity date of the debt might yet lie in the future. If this seems to be a logical inconsistency, it might be excused on the ground that the set-off avoids circuity of action between pledgor and pledgee. It may also be pertinent, at this juncture, to note that even if the pledgee is in possession of pledged documents, the pledgor has a duty of reasonable care respecting the custody he has of the goods subject to control by the pledged documents.

Since the pledgor is the owner of the ultimate interest in the pledged chattels, subject only to the pledgee’s temporary claim, there should be no doubt that a pledgor is free to assign his rights subject to the pledgee’s interest. Consequently, the right of such an assignee would be held to prevail over any attempt on the pledgee’s part to expand his lien by claiming the right to hold the property as security for other claims due the pledgee from the pledgor. These issues would seem to be unambiguous, but more difficult questions must be resolved where it is the pledgor’s judgment creditors who attempt to subject his interest in the pledged chattels toward the satisfaction of claims which such creditors may have against the pledgor.

There is an astonishing dearth of cases in point, probably because no one questions the right of the pledgor’s creditors to seek satisfaction from any or all of his various property interests. But there is some adequate method which would afford them sat-

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4 The term “set-off” is used in this article to depict any equitable adjustment of the rights of the pledgor and pledgee, whether such adjustment is achieved by way of set-off, recoupment, counterclaim, or otherwise.

5 Hinkle v. Sallee, 335 Ill. 468, 167 N. E. 46 (1929).


isfaction yet not serve to prejudice the pledgee? The least difficulty might ensue if the judgment creditor of the pledgor would choose to take the necessary steps and pursue his rights via a creditor's bill in equity. Where the creditor seeks execution of his judgment, there are some more difficult points to be resolved. First, has the levying creditor discovered property which may properly be made subject to a levy? The courts, apparently, have felt no doubt that he has, but it is submitted that, in the event the pledged chattels are worth an amount equal to or less than the value of the debt secured, the right of levy ought to be denied. It would seriously jeopardize the value of the security which the pledgee has if he should be forced to defend against such a levy or make an accounting with respect thereto. Contrariwise, if the value of the pledged chattels exceeds the value of the secured debt, the excess certainly ought to be made available in some manner.

Secondly, assuming a right to pursue the pledgor's interest in the pledged chattels, the question then becomes one as to whether the levying creditor has a right to an immediate satisfaction or whether he should be delayed until the secured debt matures. The cases present no satisfactory answer. In an analogous situation, the Illinois court has held that, where a chattel mortgagee remains in possession, mortgaged property may be sold subject to the mortgage lien, but where the mortgagee is in

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8 There is apparently only one case touching on the point, and the pertinent statements made therein are dictum: Davis v. Hincke, 183 Ill. App. 475 (1913), affirmed in 264 Ill. 46, 105 N. E. 708 (1914). The Supreme Court decision does not consider this element of the case. See also Restate., § 28.

9 The right to levy an execution is granted by statute and covers the "goods and chattels" of the judgment debtor which are alienable: Ill. Rev. Stat. 1951, Vol. 1, Ch. 77, § 4. The issue, then, is whether a pledgor's interest in the pledged chattels can be said to fit the quoted description.

10 Walsh & Co. v. First Nat. Bank, 228 Ill. 446, 81 N. E. 1067 (1907); Rice v. Gilbert, 173 Ill. 348, 50 N. E. 1087 (1888); Lewis v. Springville Banking Co., 166 Ill. 311, 46 N. E. 743 (1897); Taylor v. Turner, 87 Ill. 296 (1877); Baldwin v. Bradley, 69 Ill. 32 (1873); Currier v. Ford, 26 Ill. 488 (1861).

11 Although not directly in point, note the analogy provided by the case of Steingrebe v. French Mirror & Glass Beveling Co., 83 Ill. App. 587 (1898).

12 In all the cases cited in note 10, ante, the court, without considering this issue, merely held the pledgee's interest to be paramount to that of the judgment creditor.

possession, the mortgaged property is not subject to levy and sale prior to the maturity of the mortgage debt.14 In much the same way, under pledge law, where the pledgor is in possession on other than a temporary basis, the levying creditor should prevail over the pledgee’s equitable lien but, where the pledgee is in possession, his interest ought to be considered paramount. A levying creditor, then, ought to be required to wait at least until the secured debt matures before he should be allowed to prosecute his rights to their ultimate conclusion.

There are good reasons for denying the right to a present levy and sale thereunder. In order to determine the extent of the levying creditor’s rights, the pledged chattels would have to be sold on terms whereby a percentage of the sales price, equal to the amount of the secured debt, could be set aside for the pledgee, if possible. But a present forced sale could be more disadvantageous than a more orderly liquidation, under more appropriate circumstances, within the terms of the pledge agreement. Furthermore, the pledgee has an election, on default by the pledgor, to pursue his rights either on the debt or against the pledged chattels. In the event he should select the former, the granting of a judgment on the debt does not extinguish the pledge; in fact, the pledge now becomes security for performance of the judgment. Thus, if a levying creditor is permitted to force a sale of the pledged property prior to maturity, and particularly where the return from such sale could prove to be disappointing, the pledgee loses a potent weapon from his arsenal. All this, to say nothing of the fact that the sale would automatically accelerate the maturity of the secured debt, at least pro tanto, with a consequent loss of a possible advantageous interest rate. The problem needs clarification15 but, in no event, should the levying creditor be permitted to prevail over the pledgee in possession unless and until the creditor tenders the debt due or the court transfers the lien of the pledge to the proceeds of the sale.16

14 Pike v. Colvin, 67 Ill. 227 (1873).
15 In general, see note in 25 Marq. L. Rev. 206.
16 Walsh & Co. v. First Nat. Bank, 228 Ill. 446, 81 N. E. 1067 (1907); Baldwin v. Bradley, 69 Ill. 32 (1873).
While in possession of tangible personal property, a pledgee is obliged to conform to a certain minimum standard of conduct insofar as the same relates to his care or use of the pledged property. In view of the fact that the pledgee is a bailee, holding the pledged goods for the mutual benefit of both pledgor and pledgee, the pledgee would owe the same duty of care which a bailee would be expected to exercise in respect to the subject matter of a bailment. Fundamentally, this merely imposes a duty of ordinary care on the pledgee, to-wit: he should take whatever steps a reasonable person in the same situation would take in order to forestall injury to the pledged chattels arising out of a predictable risk. Normally, this would contemplate the supplying of adequate storage facilities for the goods but, if it becomes necessary to expend money to comply with this standard, it is usually enough for the pledgee to inform the pledgor of such necessity, leaving it to the latter to act. Of course, where emergency conditions arise, a pledgee who pays for emergency expenditures is entitled to reimbursement.

In addition to the duty to anticipate reasonable needs, the pledgee is under a duty to refrain from doing any wilful act prejudicial to the physical well-being of the pledged property, and should avoid causing harm by negligent inattention. It is not to be questioned that such wilful or negligent conduct on the part of the pledgee might constitute an actionable conversion yet, in contrast to the position of a mere bailee, the pledgee would not forfeit his security rights as a consequence of such conduct, although the pledgor would, of course, have a cause of action for restitution of some sort for the injury done to his property interest.

17 For a more complete discussion of a bailee's responsibilities, see Brown, Ch. 11.
18 Restate., § 17.
21 Wadsworth v. Thompson, 8 Ill. 423 (1846). An analogous situation exists where a pledgee makes an improper assignment. Analysis of that problem will be taken up later in this article. See Division IV hereof.
22 This aspect of the pledgor's rights will be discussed more fully hereafter. See Division IV.
The same principles are applicable to pledgees who hold commercial paper in pledge, for a pledgee of that sort is obliged to prevent loss of the written evidence of the chose in action while it is in his possession, or is to be held accountable. But the pledgee's duty of care goes considerably further than this in respect to choses in action. It is to be observed that a pledgee may not sell commercial paper held in pledge for his own protection upon default, barring an agreement to the contrary. He must, instead, hold and collect such paper. There is sound basis for such a rule. If a pledgee holds tangible personal property and the pledgor defaults, there is no way to apply such property toward payment of the matured debt except by its liquidation. Since property of this type is bought and sold freely in the open market, it would have an ascertainable value dependent on its own intrinsic worth and not upon extraneous events. A proper sale thereof would do the pledgor no injustice. Commercial paper, on the other hand, whether negotiable or not, can have no value unless those principally liable thereon are solvent and willing to pay. This is a matter of fact which cannot be judged from the appearance of the paper alone, so a sale would ordinarily be made at a sacrifice, unless the purchaser should possess personal knowledge of the maker's solvency and ability to pay, in which case the purchase would usually be made for speculative purposes.

Barring a stipulation to the contrary, it is not unreasonable to attribute an intent to the parties to the pledge that pledged property of this character should not be sold but, on the contrary, should be held until due and then be collected, with the funds collected being applied on the debt. Such an intent would

24 Hinkle v. Sallee, 335 Ill. 468, 167 N. E. 46 (1929); Peacock v. Phillips, 247 Ill. 467, 93 N. E. 415 (1910); Zimpleman v. Veeder, 98 Ill. 613 (1881); Union Trust Co. v. Rigdon, 93 Ill. 458 (1879); Joliet Iron & Steel Co. v. Scioto Fire Brick Co., 82 Ill. 548 (1876); Corn Belt Bank v. Forman, 264 Ill. App. 589 (1932); Powell v. Ong, 92 Ill. App. 95 (1900); Cole v. Dalziel, 13 Ill. App. 23 (1883).
25 State Bank of Clinton v. Parkhurst, 155 Ill. App. 101 (1910). See also Brown, § 134, and Restate., § 18. An additional reason for banning a sale of negotiable pledged paper and imposing the duty to hold and collect the same may lie in the fact that, normally, only the assignee is enabled to collect thereon, and the pledgee is an assignee.
not be an unreasonable one because there would be no object in jeopardizing a type of property not usually the subject matter of sale when the property itself could afford a means of reimbursing the pledgee. If the rule is that a pledgee may not sell commercial paper, it would be logical to expect that a court of equity would normally refuse to allow a foreclosure of such property for much the same reason. There may be an exception to this general rule, however, where long-term corporate securities have been pledged, for it would be unreasonable to expect the pledgee to hold on until the pledged paper matured, possibly years in the future, in order to realize on his security for an already defaulted debt. Recognizing that long-term securities are usually bought and sold freely in the public market, prudence would still dictate a foreclosure of the pledge, rather than a sale without a judicial proceeding, in order to assure fair dealing.

If an assignee of negotiable paper should fail to present it to those primarily liable thereon at maturity, or should fail to use due diligence in giving notice of default to parties secondarily liable, so that such parties thereby become released from liability, the assignee has caused as great an injury as would a bailee who neglects or abuses articles in his care. Such a person may be made to suffer the consequences. A pledgee of negotiable paper runs the same risk or, stated differently, has the duty of care to protect the chose in action from foreseeable injury. For example, if the pledgee, as holder of a note, should fail to use due diligence toward its collection at maturity, the parties liable thereon might be discharged because of an intervening insolvency or the running of a statute of limitation. To the extent either eventuality operated to impair the value of the note, the pledgee would be liable to the pledgor. But the rule is not unqualified, for it is also true that the pledgee is under no absolute duty to collect on his pledged chattels, having the option to look to his rights on the debt or to his rights in the pledge. It is, then, only where the pledgee’s failure to pursue all of the in-

27 Archibald v. Argall, 53 Ill. 307 (1870).
cidents of the pledged documents and a loss has resulted that the pledgor may in some manner recoup his ultimate loss.\textsuperscript{28}

If the pledgee has notified the pledgor, in adequate time, to take the necessary steps to prosecute for any defection caused to the pledged chattels, it would ill-behoove the pledgor to later complain of injury if he should have failed to act promptly on such notice. The pledgee may not wish to go to unnecessary expense to protect his security, having ample confidence in an ultimate satisfaction from the pledgor. Since the pledgor is the real party in interest, he should be the logical person to take the necessary steps to protect his own property where he is able to do so. It is unquestioned that the pledgor would have equitable process available, if needed, so to force the pledgee to enter upon what might turn out to be protracted and expensive litigation would be to place an unconscionable burden on him. Nor would it be proper to hold that the pledgee should be obliged to file a claim against an insolvent on the off-chance of some recovery, or to litigate with a party who denies liability on the pledged note. If, in spite of the pledgee's inaction, the pledged obligation should continue to be collectible, the pledgor would have suffered no injury of which he could complain.\textsuperscript{29} It must, therefore, be made to appear that not only has the pledgee failed to observe his duty of reasonable care but, further, that the pledgor has satisfied the burden of proving loss occasioned by the pledgee's action or inaction.

As a duty to collect may be imposed on the pledgee, it would also be his privilege to collect negotiable paper given him in pledge. If the obligor thereon is a third person, the pledgee may collect the obligation in full,\textsuperscript{30} although he would, of course, be required to account for any surplus to the pledgor at the maturity

\textsuperscript{28}Aldrich v. Goodell, 75 Ill. 452 (1874).

\textsuperscript{29}In Aldrich v. Goodell, 75 Ill. 452 (1874), the notes pledged were secured by a mortgage on real property, which property far exceeded in value the amount of the note involved. The makers of the note were insolvent but, since the value of the note was collectible by foreclosure, the pledgor was not allowed to complain.

of the secured claim.\textsuperscript{31} As a matter of fact, if the obligor should make payment to the original payee in full without asking for the surrender of his note, the obligor would continue to be liable to the pledgee.\textsuperscript{32} In this case, or in any other case, if the obligor should have a good defense as against the payee-pledgor, the pledgee’s recovery on the note would extend only to the value he has advanced on the pledge in good faith and without notice, provided that sum is less than the face value of the pledged note.\textsuperscript{33} These rights will exist provided the pledgee became a holder in due course prior to maturity of the pledged note, regardless of whether or not it matures before or after the date fixed for maturity of the secured debt.

In addition to the aforementioned privilege of collection, the pledgee may elect, if the pledged notes should be secured by a mortgage, to foreclose the mortgage in the event of a default on the note or mortgage.\textsuperscript{34} If the notes of third persons secured by a mortgage have been made the subject of a pledge, the pledgee has his option to hold and sue on the notes or to foreclose the mortgage if, at maturity, the obligor thereon should default.\textsuperscript{35} A question is likely to be presented as to the effect of the foreclosure action in those cases where the pledgee becomes the purchaser at the foreclosure sale. Does he become the owner of the property free of any claim asserted by the pledgor, or does the pledgee merely achieve a substituted security right? Assuming the pledgor has not been joined in the foreclosure action, it is the generally accepted rule that the consequence of the action would be to eliminate the mortgagor, if he should be someone other than the pledgor, as well, perhaps, to eliminate other lienors

\textsuperscript{31} See Hinkle v. Sallee, 335 Ill. 468, 167 N. E. 46 (1929), as well as the cases cited in the preceding footnote.

\textsuperscript{32} Mayo v. Moore, 28 Ill. 428 (1862); Valieu v. Second National Bank of Galesburg, 21 Ill. App. 126 (1886).

\textsuperscript{33} Burns v. Landrum, 238 Ill. App. 191 (1925).


\textsuperscript{35} See cases cited in the preceding footnote.
having claims against the real estate, but to accomplish no more than a change in the form of the security so far as the pledgor and pledgee are concerned.\textsuperscript{38}

Since a pledge is given for the benefit of both parties to the transaction, a sale of the pledged chattels by the pledgee ought to be conducted scrupulously to afford protection for the interest of both parties.\textsuperscript{37} It follows therefrom that, unless the pledgor is joined in the foreclosure action to give him an opportunity to protect his interests, the foreclosure sale should have no effect on his rights against the pledgee who purchases the realty except to cause a substitution in the form of the security. This means, then, that the pledgor would be able to redeem from either the pledgee or from whomsoever should receive the certificate of purchase at the foreclosure sale or, if the pledgor prefers, he may demand an accounting for any surplus produced by the sale in excess of the secured debt.\textsuperscript{38} Since such a foreclosure would constitute no more than a foreclosure of the mortgagor's interest, it would be necessary for a pledgee to again foreclose on his pledge\textsuperscript{39} in order to eliminate an adverse claim by his pledgor. Some states, including Illinois, obviate this unnecessary delay and expense by permitting the pledgee to join the pledgor with the mortgagor in the foreclosure action, thereby making it possible to cut off the equity of redemption as to both of them.\textsuperscript{40} It has been suggested that the presence of an express provision in the pledge agreement to the effect that the pledgee may purchase at the foreclosure sale would be sufficient to invest him with an unconditional title, free of the pledgor's claims, in the event such a purchase was made.\textsuperscript{41} It is to be doubted whether this would be

\textsuperscript{36} Riddle v. Todd, 306 Ill. App. 252, 28 N. E. (2d) 326 (1940).
\textsuperscript{37} Peacock v. Phillips, 247 Ill. 467, 93 N. E. 415 (1910).
\textsuperscript{38} See cases cited, this section, note 34 ante.
\textsuperscript{39} Strangely enough, without facing this point, the courts tend to treat a foreclosure of a pledged mortgage after the manner applicable to foreclosure of pledged personal property, despite the fact the mortgage interest is one in land. Possibly because no harm is done, the issue is more academic than practical, although it does defy logical analysis.
\textsuperscript{41} Brown, § 134.
good law in Illinois, however, because of the statutory provision forbidding a waiver of an equity of redemption by anyone other than a corporation.\textsuperscript{42}

Where the pledgee allows the maker of the pledged note to take it up and pay for it, or substitute other property in the place of such note, the pledgor may treat this as a full discharge of the pledge, and demand an accounting for the surplus if any.\textsuperscript{43} The result is not one to be criticized, for it would be highly improper for the pledgee to deal with the pledged chattels as if he were owner, especially where such dealing would seem to be a speculation to the possible detriment of the pledgor. In contrast to the negligence cases, such action smells of wilful injury. On the other hand, if the pledgee returns the pledged note to the pledgor, he can hardly be heard to assert a right against the maker of such note. In a case where this point was in issue, the court merely assumed the secured debt was paid, thus discharging the pledge.\textsuperscript{44} No mention was made of the fact that the pledgee could scarcely be said to be a proper party to sue on the theory he was no longer the holder of the instrument.

It was once thought that a pledgee might put the pledged chattels to use, so long as such use was consistent with the nature of the pledge. This was, at best, a permissive privilege, so if no use was made of the pledged property the pledgee was deemed bound only to maintain the property in a reasonable manner.\textsuperscript{45} More modern cases would seem to express the same rationale but, tacitly at least, the courts would seem to incline in the direction that a reasonable use would be only that use which a depositary might make of the same goods.\textsuperscript{46} A conclusion to this effect would seem reasonable since the pledgee is holding possession of the property merely as a form of security. It must follow from this that, barring special agreement from the pledgor, the pledgee's

\textsuperscript{42} Ill. Rev. Stat. 1951, Vol. 1, Ch. 77, § 18.
\textsuperscript{43} Union Nat. Bank v. Post, 192 Ill. 385, 61 N. E. 507 (1901); Post v. Union Nat. Bank, 159 Ill. 421, 42 N. E. 976 (1896).
\textsuperscript{44} Harding v. Hawkins, 141 Ill. 572, 31 N. E. 307 (1892).
\textsuperscript{45} Wadsworth v. Thompson, 8 Ill. 423 (1846).
\textsuperscript{46} Jacobs v. Grossman, 310 Ill. 247, 141 N. E. 714 (1923). See also Restate., § 22.
THE PLEDGE AS A SECURITY DEVICE

use ought not to extend beyond that point necessary for the preservation of the pledge. For example, if a saddle horse should be pledged, the pledgee might ride it as often as would be necessary to exercise the horse properly, but to hire the horse out to another would be an abuse of the pledge. If jewels should be pledged, all that the pledgee would need to do would be to put them in safekeeping, for a wearing thereof as a personal adornment would be an abuse of the pledge.

Permission to use the pledged chattels may arise out of the circumstances of the case, as where the situation is such as to indicate that the pledgee was intended to use the property. This would be especially true where the pledged article possesses an income producing factor. If, for example, a freshened milch cow should be pledged, the pledgee would have to milk it to avoid a serious injury to the animal. In case the use of the pledged object should produce an income, the pledgee would hardly be permitted to claim the income for personal gain. Instead, the revenue would have to be applied toward the discharge of the secured debt after all necessary expenses involved in the operation or maintenance had been deducted. In much the same fashion, it would be proper to collect dividends on corporate securities, interest on negotiable instruments, dividends or proceeds of insurance policies, or other income from productive property but subject to the same obligation to hold and to apply the same on the secured indebtedness. If, therefore, the obligor should continue to remit dividends, interest, or the like, to the pledgor after receiving notice of the pledge, the pledgee would be permitted to collect such funds from either the recipient thereof or the payor, at the pledgee’s election.

In case the pledgee should be required to take some form of action consistent with his duty to exercise reasonable care, he

47 See McArthur v. Howett, 72 Ill. 358 (1874), and Restate., § 27.
48 Fairbanks v. Merchants’ Nat. Bank, 132 Ill. 120, 22 N. E. 524 (1889).
51 Fairbanks v. Merchants’ Nat. Bank, 132 Ill. 120, 22 N. E. 524 (1889); Mayo v. Moore, 28 Ill. 428 (1862); Valieu v. Second National Bank of Galesburg, 21 Ill. App. 126 (1886).
might find it necessary to incur expense which he would be unwilling to incur unless he had a right to secure reimbursement. There is an even more substantial reason for allowing him to claim compensation than merely to overcome any unwillingness on his part. It is customary, in a pledge transaction, for the lender to advance funds which he expects will be returned with interest. If chattels have been pledged to secure a loan, they ought presently to be in such condition that the holder would not be called upon to make use of his own assets in order to care for or to enforce his secured interest. If not, and he is forced to go to some expense for the proper care of the pledge, he ought to be indemnified for having discharged the pledgor’s obligations for him. The allowance of indemnity should include not only those expenditures which were reasonably and necessarily incurred to provide full care for the pledged property but should extend to cover expenditures made to preserve the pledgee’s security interest in the pledged chattels.

The term “reasonable expenses” could well run the full gamut of financial dealing but it has been defined to include:
(a) costs or other charges incident to a sale of the pledge interest upon default;\(^5\) (b) collection fees respecting negotiable paper; (c) corporate calls on share subscription agreements or on shares only partially paid for;\(^5\) (d) premiums paid on insurance policies pledged;\(^5\) (e) expenses incurred in defending against a claim to the pledged chattels adverse to that of the pledgor;\(^5\) (f) for the discharge of prior liens or taxes;\(^5\) or for other and similar obligations.\(^5\) This right to reimbursement for necessary or proper expense becomes a first charge on the pledged property, but the pledgee is obliged to assert his right in this respect when the debt is tendered, or foreclosure had, otherwise he will be deemed to have waived his right in this respect.\(^5\)

\(^5\) Furness v. Union Nat. Bank, 147 Ill. 570, 35 N. E. 624 (1893).
\(^5\) Brown, § 129.
\(^5\) Ibid., §§ 129-30.
\(^5\) Furness v. Union Nat. Bank, 147 Ill. 570, 35 N. E. 624 (1893).
\(^5\) Restate., § 25.
There is some authority to the effect that certain of the necessary expense aforementioned may become a personal obligation of the pledgor, in addition to being a charge on the pledged chattels.\(^{59}\) This would appear, in the main, to be an unwarranted and insupportable conclusion. If the decision to make the expenditure were to be one of free election, a pledgor might well prefer not to expend the necessary funds for the further protection of his property. In that event, it would be highly improper to force the election to do so on him by the simple expedient of allowing the pledgee the right of exoneration or a right to a cause of action against the pledgor personally for reimbursement of such expense. If the expenditure should be necessary because of some statutory or contractual liability imposed on the holder of the particular property to incur such expense, there is the further consideration that the pledgor may not be able to respond as required for a variety of reasons.

To deny the imposition of personal liability on the pledgor is not irreconcilable with the thought previously stated to the effect that a pledgee has a right to expect the pledged chattel to be free of other claims when pledged. Since the pledgee is the dominant party to the transaction, he is in the position to choose to accept or reject whatever he wishes as a pledge to secure his loan.\(^{60}\) Having chosen to accept a chattel in pledge, it would not be unreasonable to allow the pledgee the right to make those necessary or proper expenses incurred for its protection a first

\(^{59}\) Restate., § 26, adds a comment which reads: "An application of the rule stated in this Section occurs where share certificates are pledged which are transferred to the name of the pledgee so that he becomes liable for calls, assessments or statutory obligations of a shareholder. If under the law of the particular jurisdiction the pledgee cannot escape such liability by showing his status as pledgee, the pledgee, if he pays, can hold the pledgor personally for reimbursement. Where the pledgee has not paid but where his liability is certain, the pledgee has a right against the pledgor of exoneration."

\(^{60}\) Despite this fact, some lenders appear to have been imprudent to the point of accepting property from which realization could be a difficult matter, to say the least, in the event the pledgor should default. For example, a tailor-made dress suit was pledged in Sell v. Ward, 81 Ill. App. 675 (1898); a sealed barrel containing miscellaneous items not identified to the pledgee was accepted in Farrell v. Stafford, 203 Ill. App. 357 (1917); a partnership interest was taken in pledge in Home State Bank v. Vandolah, 188 Ill. App. 123 (1914); and a seat on the Live Stock Exchange became the subject of a pledge in Press Co. v. Fahey, 313 Ill. 262, 145 N. E. 103 (1924).
charge on the pledge. On the other hand, since the choice was his, a proper inquiry could have forewarned the pledgee of the potential liability for further calls or assessments which might be imposed on him as the holder of the property so, having made the choice, it would ill be seem him to demand the right to increase the pledgor's responsibility because his own imprudence had led to the making of a bad bargain.\(^6\) Only if a proper agency relationship could be established, either express, implied, or by ratification, would it be proper to hold the pledgor personally liable for those expenses necessary to the care or protection of the pledge.\(^6\) It should be remembered that, while it is proper for the pledgee to incur necessary expense, he is under no duty to do so except insofar as a pledgee may be put to expense in collecting commercial paper pledged with him,\(^6\) so any contrary opinion could well operate to convert a pledge transaction from a beneficial interest into a financial burden.

Since the pledgee is entitled to have the value of his security interest remain inviolate, he should be able to insist on his lien interest in those few instances where it would be necessary for the pledged chattel to undergo a change in form or specie. With considerable frequency, it is necessary that chattels pledged be rehabilitated in one manner or another. This is especially true with regard to corporate securities for a corporation may recall its share certificates in order to issue a new certificate, as in the case of a stock dividend, a stock split, or under a reorganization plan. For that matter, a corporation may offer the holders of record the privilege of subscribing to a new share issue, as by the exercise of stock rights or warrants. In these cases, the owner

\(^6\) Silverman v. Bush, 16 Ill. App. 437 (1885). If there is any logical inconsistency in this consideration, it would lie in those instances where, because expenses are treated as a first lien, a deficiency could exist between the value of the pledged chattels and the secured debt, for which the pledgor would eventually have to respond. Despite this fact, the theory discussed has the grace of protecting the pledgor from an action for exoneration prior to maturity of the secured debt. That fact may be of tremendous importance to him as well as a matter of considerable advantage to his other creditors.  
may, if he so chooses, return his certificates and do whatever acts would be necessary to obtain these new rights. A pledgee, in such instances, might well return the pledged chattels to the pledgor who has made such an election, in fact must do so where the return is mandatory, as under a reorganization plan, provided it is understood that the lien is to continue in force and ultimately be transferred to the new paper, thereafter to be returned to the pledgee.

To the extent that the pledgor is able to do the acts necessary and incidental to the exchange, he ought to be allowed to do so for he might suffer financial loss, and even a loss of his proportionate control of the corporation, if the rights, warrants, or reorganization certificates were allowed to expire unexercised. The pledgee, on the other hand, may not wish to exercise these rights, especially so if the pledged shares are adequate to secure him. Conversely, it could happen that the pledgor might refuse to make the election or be unavailable to do so at a time when prompt action would be essential. In such a case, the pledgee should be permitted to make that election which would afford him the greatest security, and be permitted to impose any proper expense as an additional lien against the pledged chattels. Where the exchange is mandatory, for example in a case where a sovereignty repudiates a bond issue and orders the exchange thereof for a new bond issue with a different par value, an altered interest rate, or a changed maturity date, the pledgee should automatically acquire rights in the substituted chattel. If the exchange is voluntary, the pledgee should retain his rights dependent only on the pledgor acting in good faith, if his conduct is necessary to the formal acts of exchange.\(^6\) Any appreciation caused by the exchange should, of course, inure to the benefit of the pledgee’s security interest.\(^5\)

\(^6\) If corporate securities are registered in the pledgee’s name, the pledgor need only give the pledgee authorization to do the necessary acts. The corporation would then deal directly with the pledgee. If the securities are in the pledgor’s name, he would have an opportunity to deal unconscionably and might sell or repledge to a bona fide purchaser.

\(^5\) Fairbanks v. Merchants’ Nat. Bank, 132 Ill. 120, 22 N. E. 524 (1889); Restate., § 21.
Another, and somewhat similar, situation needs to be examined. It concerns those acts which lie between an exchange made necessary by the acts of an independent agency and those concerned in the "special purposes" doctrine. That is, a pledgor may himself wish to transfer the pledge from one part of his estate to another. If the pledgor and pledgee are in agreement on the point, no objection could arise except as other creditors may assert a claim in case the substitution should result in a preference, as by substituting a considerably more valuable chattel for the one already pledged. Logically, upon substitution, the lien of the pledge should attach to the new chattels but, as the consideration therefor would be based on an antecedent debt, the lien might be defeated by levying creditors. Courts have, however, recognized that the pledgee should be able to assert the same quality of lien on the substituted chattels that he had in the original subject matter, provided the exchange occurs with no appreciable delay. If the time lag is an unreasonable one, the pledgee will be deemed to have released his security interest. This rule does not apply to unilateral exchanges for, if the pledgee authorizes the pledgor to substitute goods at will, for the sole benefit of the pledgor, the lien will be held to continue in equity only.

(To be continued)

66 Zollman v. Jackson Savings Bank, 238 Ill. 290, 87 N. E. 297 (1909); Restate., § 40.
67 See cases cited above, Division II, note 61, ante.
NOTES AND COMMENTS

WHY NOT ADVISORY OPINIONS FOR ILLINOIS?

The submission of a proposed revision of the Judicial Article of the state constitution,¹ offered to the Illinois General Assembly at its current session, raises the serious question as to whether or not the proposal is not incomplete by reason of the failure to include therein a provision calling for the rendition of advisory opinions by the Illinois Supreme Court to the governor and to the legislature on proper request. As it is essential that the new article should, in every respect, be complete before it is submitted to the electorate for ratification, an examination has been made concerning the utility of, as well as of the constitutional and legalistic bases for, advisory opinions to the end that, if they could be said to be of value, the proposed revision might be suitably amended prior to its approval by the legislature.

One scarcely should need to repeat the story of American experience under the ill-fated National Industrial Recovery Act² in order to invoke a recognition of the fact that the whole fiasco could have been avoided had the federal supreme court been empowered, or required, to first express an opinion on the constitutionality thereof before it was imposed upon a helpless public. The economic waste, not to mention the upheaval, the country suffered by reason of its efforts to comply with that statute, prior to the time it was declared unconstitutional,³ are matters of common knowledge. The dilemma of one whose previous lawful conduct faces the condemnation of a new penal statute, not sure whether to act and pay the penalty if the law turns out to be valid or to forego his legal rights until the question of its constitutionality can be determined at the suit of others, is amply illustrated by the holding in such cases as that of Ex parte Young.⁴ To come closer to home, local experience with attempts to secure a pre-adjudication as to the validity of Illinois tax levies⁵ should serve to demonstrate the urgent need for securing advice in advance as to the constitutional appropriateness of legislation of substantial import to the

general public. There should, then, be little need to belabor the point that the present system of government is inadequate so long as it permits one branch thereof to enact laws without a decent regard for the fact that another branch may be compelled to declare those acts to be invalid.

Despite this, both in England and the United States, the history of the advisory opinion has been one of pointed criticism, with every new attempt to provide for it bringing up the ghosts of past criticisms as well as some newer objections. Regardless of how history may have fashioned the advisory opinion, there can be no doubt, from the fact of the inclusion of a provision on the point in seven state constitutions, that there is need on the part of the executive and legislative departments for constitutional advice from the judiciary. It would be well, therefore, to examine into the basis thereof.

The English practice of calling upon the judges for their opinions was firmly established by the time of McNaghten’s Case for both the Crown and the House of Lords had exercised their right of appeal to the judiciary for advice before this. In fact, as history attests, it was the Crown’s abuse of the practice which induced Coke’s criticism thereof in Peacham’s Case and in Elliot’s Case. Manifestly, English precedent on this subject advances no compelling reason, either pro or con, for the adoption of the practice in this country, particularly because of a basic difference between the English system of government and that found in the United States. The doctrine of separation of governmental powers, stressed here, being unknown to the English system, the English judges

6 While compulsory rendition of advisory opinions has never been provided for in Illinois, either by constitutional provision or by statute, it is interesting to note that the Illinois Supreme Court once stated that it would not be averse to rendering such opinions: People ex rel. Billings v. Bissell, 19 Ill. 229 (1857), particularly p. 234.

7 See Pusey, Charles Evans Hughes (The Macmillan Co., New York, 1951), Vol. 2, p. 746, for an account of a message from President Franklin D. Roosevelt to a congressional committee requesting that it approve a measure which he had sponsored rather than to “permit doubts as to constitutionality, however reasonable, to block the suggested legislation.” The measure, afterwards enacted, was declared unconstitutional in Carter v. Carter Coal Co., 298 U. S. 238, 56 S. Ct. 855, 80 L. Ed. 1160 (1936).

8 The most recent statutory attempt to provide for an advisory opinion would appear to be Vt. Laws 1949, No. 51. The supreme court of that state promptly disavowed any duty to perform such a function: In re Opinion of the Justices, 115 Vt. 524, 64 A. (2d) 169 (1949). An earlier Vermont statute, enacted in 1864, had been repealed by Vt. Laws 1915, No. 84.


10 10 Cl. and Fin. 200, 8 Eng. Rep. 718 (1843).


at one time sat with the House of Lords as temporal assistants, and the executive was also considered as being a member of that body. It may be interesting to note, however, that while the English judiciary ultimately established its independence, it waged a fruitless battle against the advisory opinion for the practice is still alive and in use at the present time.

It might have been expected that the English practice of rendering advisory opinions would traverse the ocean and find roots among the colonial governments, and would be likely to appear in the early constitutions adopted shortly after the Revolution. The concept particularly manifested itself in the Massachusetts Constitution of 1780, in which constitution the principle is still operative. In fact, the influence of the English practice on the Massachusetts provision is apparent. The clause, as first reported to the convention, limited interrogation to the governor and the upper house, equivalent to the Crown and the House of Lords in the English practice, and it was only by an amendment added on the convention floor that the privilege was extended to the house of representatives. The New Hampshire provision appears to have been borrowed from Massachusetts, for the text of its 1784 constitution followed that of Massachusetts except for some essential changes in terminology. Maine next adopted the advisory opinion in the constitution it drafted in 1820 at the time of its separation from Massachusetts. The consultative power was, however, there made somewhat larger than that which prevailed in Massachusetts. Rhode Island, by its constitution of 1842, followed the

15 Hare, Constitutional Law (Little, Brown & Co., Boston, 1889), Vol. 1, p. 159.
17 Mass. Const. 1780, Part 2, Ch. III, Art. 2, provides: "Each branch of the legislature, as well as the governor and council, shall have authority to require the opinions of the justices of the supreme judicial court, upon important questions of law, and upon solemn occasions."
18 Ellingwood, op. cit., pp. 31-2.
19 See Thorpe, American Charters, Vol. 4, p. 2466.
20 The clause was repeated in the N. H. Const. 1792, Art. 74, except that the word "governor" was substituted for "president." See Thorpe, American Charters, Vol. 4, p. 2480. The wording remained unchanged when the present constitution was adopted. N. H. Const. 1902, Part 2, Art. 74, states: "Each branch of the legislature as well as the governor and council shall have authority to require the opinions of the justices of the superior court upon important questions of law and upon solemn occasions."
21 Me. Const. 1819, Art. VI, § 3, in part provides: "They shall be obliged to give their opinion upon important questions of law, and upon solemn occasions, when required by the Governor, Council, Senate, or House of Representatives." The Massachusetts provision gave the power of interrogation to "each branch of the legislature, as well as the governor and council." The Maine provision, authorizing requests from the "Governor, Council, Senate, or House of Representatives," eliminated the problem which had arisen in Massachusetts over whether the governor might alone request advice or whether he had to do so jointly with the council.
example of its neighbors, again with somewhat more liberality for, there being no council created by the new constitution, the consultative power rested with the governor or either house of the general assembly; the “important question and solemn occasion” qualification was omitted; and the judges were bound to give their opinion upon “any question of law.”

Missouri was the first of the western states to constitutionally provide for an advisory opinion, but the qualification that the opinion should be on “important questions of constitutional law” was severely construed as limiting the scope of the advice and the general construction placed upon the provision by the judges fore-shadowed its doom by confinement. Death blows were dealt to the provision in the course of some subsequent opinions and the drafters of the Missouri Constitution of 1875 must have considered the corpse well buried, for they omitted any reference to it in that constitution. Constitutional provision for an advisory opinion next appeared in Florida, in 1868, perhaps because conditions during the Reconstruction Era necessitated co-operation between the executive and the judiciary to curtail the actions of what promised to be an incompetent and an untrustworthy legislature. This may have accounted for the fact that the consultative power was there limited to the executive but it is, in other respects, quite broad, permitting requests “at any time,” and as to “the interpretation of any portion of this constitution, or upon any point of law.”

The adoption of an advisory opinion clause by the State of Colorado,

22 R. I. Const. 1843, Art. XII. § 2, as amended in 1903, reads: “The judges of the supreme court shall give their written opinion upon any question of law whenever requested by the governor or by either house of the general assembly.”

23 In Mo. Const. 1865, Art. VI, § 11, there appeared the statement that the “judges of the supreme court shall give their opinion upon important questions of constitutional law, and upon solemn occasions, when required by the governor, the senate, or the house of representatives; and all such opinions shall be published in connection with the reported decisions of said court.”

24 See Advisory Constitutional Opinion of the Judges, 37 Mo. 135 (1865).

25 The various opinions rendered under the Missouri provision are comprehensively analyzed in Ellingwood, op. cit., pp. 43-6.

26 Fla. Const. 1868, Art. VI, § 16, stated: “The governor may at any time require the opinion of the justices of the supreme court as to the interpretation of any portion of this constitution, or upon any point of law, and the supreme court shall render such opinion in writing.” In the 1885 Constitution, Art. IV, § 13, the Florida governor was permitted to, at any time, “require the opinion of the Justices of the Supreme Court as to the interpretation of any portion of the Constitution upon any question affecting his Executive powers and duties, and the Justices shall render such opinion in writing.”

27 Colo. Const. 1876, Art. VI. § 3, as amended in 1886, declares: “The supreme court shall give its opinion upon important questions upon solemn occasions when required by the governor, the senate, or the house of representatives; and all such opinions shall be published in connection with the reported decisions of said court.”
under an amendment promulgated in 1886, was undoubtedly intended to correct the problem of unconstitutional legislation which then plagued the state. It is important to note, however, that it is the "Supreme Court" of that state, and not the justices thereof, which is required to give the opinion. Why this choice of words was employed is not easy to discern, but the presence thereof gave rise to a problem as to whether or not, contrary to all precedent, the opinions were to have the force and effect of judicial decisions, rather than being merely advisory in character. While the court ultimately decided in favor of the latter construction, it even today considers the question as a whole body, rendering the opinion per curiam. The last state to deal with the point by constitutional provision was South Dakota where the section appeared in the original constitution. As in Florida, the consultative power is there limited to the governor but, unlike Florida, the question need not be one of constitutional significance but can be on "important questions of law."

In the absence of any constitutional requirement, advisory opinions were, at least in earlier days, rendered by courts in nine states with only one court expressly disavowing the duty to render such opinions. Statutory provisions sought to establish a practice for advisory opinions

29 In the Matter of the Constitutionality of S. B. No. 65, 12 Colo. 466, 21 P. 478 (1889).
30 In re Fire and Excise Commissioners, 19 Colo. 482, 36 P. 234 (1894).
31 So. Dak. Const. 1889, Art. V, § 13, provides: "The governor shall have authority to require the opinions of the judges of the supreme court upon important questions of law involved in the exercise of his executive powers and upon solemn occasions."
32 Opinion of the Judges of the Supreme Court, 30 Conn. 591 (1862); Opinion of the Judges of the Court of Appeals, 79 Ky. 621 (1881); In the Matter of the Application of the Senate, 10 Minn. 78 (1865); In re Railroad Commissioners, 15 Neb. 679, 50 N. W. 276 (1883); People v. Green, 1 Denio (N. Y.) 614 (1845); Opinion of the Justices, 31 N. C. (9 Ire.) 361 (1849); State v. Johnson, 21 Okla. 40, 96 P. 26 (1908); Respublica v. DeLongchamps, 1 Dall. 111 (1784); Opinion of the Judges of the Supreme Court, 37 Vt. 665 (1864). The practice in Nebraska was evidently discontinued by court rule: 62 Neb. xviii, Rule 32. For the later view in Vermont, see note 8, ante.
33 State v. Baughman, 38 Ohio St. 455 (1882). After their earlier experiment, the courts of Connecticut, Nebraska and New York appear to have denied their power, or duty, to render advisory opinions: Reply of the Judges of the Supreme Court to the General Assembly, 33 Conn. 586 (1867); In re Board of Purchase and Supplies for State Institutions, 37 Neb. 425, 55 N. E. 1092 (1893); In re Workmen's Compensation Fund, 224 N. Y. 13, 119 N. E. 1027 (1918). It was thought, in 1870, that North Carolina had taken a similar stand: Opinions of the Justices of the Supreme Court in Regard to the Term of Office of the General Assembly, 64 N. C. 785 (1870). Subsequent thereto, however, the supreme court of that state cheerfully acquiesced in giving advice: Resolution of request and summary of McLean and Murphy Bills, 294 N. C. 806, 172 S. E. 474 (1933); Advisory Opinion in re House Bill No. 65, 227 N. C. 708, 43 S. E. (2d) 73 (1947). See also Edsall, "The Advisory Opinion in North Carolina," 27 N. C. L. Rev. 297 (1949).
in Delaware,\textsuperscript{34} Minnesota,\textsuperscript{35} and Vermont,\textsuperscript{36} but the Minnesota act never became operative, the Vermont statute was repealed,\textsuperscript{37} and the Delaware provision appears to have been seldom relied on.\textsuperscript{38} It might be said, therefore, that out of the list of other states where advisory opinions have been rendered, North Carolina stands alone as the only state where such opinions are being actively rendered.\textsuperscript{39} Mention should be made, however, of the fact that one of the most recent statutes purporting to require the rendition of advisory opinions is the one passed in Alabama in 1923 and amended some four years later.\textsuperscript{40} The statute would appear to have been drawn with the hope of avoiding some of the objections heretofore voiced to the practice of rendering advisory opinions. It provides for the submission of briefs on those questions which are propounded,\textsuperscript{41} affords protection to those acting pursuant to the advice given,\textsuperscript{42} and, while confined to advice on constitutional questions, makes the advice available both as to proposed legislation and as to laws already enacted.\textsuperscript{43}

The fate of the advisory opinion at the hands of the federal judiciary

\textsuperscript{34} 27 Del. Laws Ch. 4 (1852), as amended in 1893, states: “The Chancellor and Judges, whenever the Governor shall require it for public information, or to enable him to discharge the duties of his office with fidelity, shall give him their opinions in writing touching the proper construction of any provision in the Constitution of the State or of the United States, or the constitutionality of any law enacted by the Legislature of this State.” See Del. Rev. Code 1935, § 374. The statute remained unrepealed as late as 1951.

\textsuperscript{35} Minn. Comp. Stat., Ch. 4, § 15.

\textsuperscript{36} Vt. Laws 1864, No. 70.

\textsuperscript{37} See Vt. Laws 1915, No. 84. See also note 8, ante.

\textsuperscript{38} The only noted instance of an advisory opinion rendered by the court of that state appears in In re School Code of 1919, 30 Del. 406, 108 A. 39 (1919).

\textsuperscript{39} See note 33, ante.

\textsuperscript{40} Ala. Code 1940, Tit. 13, §§ 34-6. Section 34, originally enacted in 1923, provides: “The governor by a request in writing, or either house of the legislature, by a resolution of such house, may obtain written opinion of the justices of the supreme court of Alabama, or a majority thereof, on important constitutional questions.”

\textsuperscript{41} Ibid., § 36, states: “The justices of the supreme court may request briefs from the attorney general, and may require briefs from other attorneys as \textit{amici curiae}, as to such questions as may be propounded to them for their answers.”

\textsuperscript{42} Ibid., § 35, added in 1927, declares: “The opinion of the justices of the supreme court or a majority of them shall be a protection to the officers and departments of the state, acting in accordance therewith, in the same manner and to the same extent as opinions of the attorney general of the state, and in the event of a conflict between the opinions of the attorney general and the opinions of the justices of the supreme court rendered in accordance with this article, the opinion of the justices of the supreme court shall take precedence and prevail. All opinions of the justices of the supreme court heretofore rendered in accordance with this article shall have the protective force and effect provided for herein.”

\textsuperscript{43} From the beginning, the Alabama Supreme Court has evidently entertained no doubt as to the constitutionality of the statute itself for it has rendered advisory opinions without any evidence of reluctance: In re Opinions of the Justices, 209 Ala. 593, 96 So. 487 (1923); In re Opinions of the Justices, 266 Ala. 70, 54 So. (2d) 68 (1951).
appears to have been dependent more on circumstance than on deliberative reasoning. The advantage of such a provision must have been clear to those who sat in the constitutional convention of 1787, for at least one such provision was debated there although Charles Pinckney's proposal for an advisory opinion clause substantially similar to that adopted in Massachusetts proved to be unsuccessful. It would appear that an omnipresent fear of a controlled judiciary, or the possibility of an alliance between the executive and the judicial departments against the legislature, was more responsible for the defeat than any consistency of principle.

Unfortunately, the first time the federal supreme court might have acted to render an advisory opinion, the question propounded was purely political in nature, was extremely comprehensive, and was presented in formidable shape. Under these circumstances, the court was afforded an excellent opportunity to refuse to answer and it did do so. It may be of some interest to note that, on May 4, 1822, President Monroe vetoed a bill seeking to extend federal power over turnpikes within state boundaries. He embodied his views on the point in a pamphlet and sent a copy to each justice of the United States Supreme Court. Marshall replied expressing agreement but Story merely acknowledged his receipt thereof. Thereafter, Justice Johnson obtained the views of his associates and, with their consent, forwarded a joint opinion to Monroe. If this could be considered in the nature of an advisory opinion, there can be no doubt that the Supreme Court did thereafter refuse, and has ever since refused, to render opinions which would be no more than advisory in nature.

Manifestly, the attitude taken by the federal supreme court demonstrates what amounts to the generally prevailing view in the United States, one which deems that, in the absence of a constitutional provision authorizing it, a requirement for the rendition of an advisory opinion by a court

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49 While the cases in point were not requests for advisory opinions in the commonly accepted sense of the term, the court dismissed cases for failure to satisfy the jurisdictional criterion of interested parties asserting adverse rights, where any other determination would be more in the nature of an advisory opinion. See Chicago & Grand Trunk Ry. Co. v. Wellman, 143 U. S. 339, 12 S. Ct. 400, 36 L. Ed. 176 (1892); In re Sanborn, 148 U. S. 222, 13 S. Ct. 577, 37 L. Ed. 429 (1893); Muskrat v. United States, 219 U. S. 346, 31 S. Ct. 250, 55 L. Ed. 246 (1911).
would violate the principle of separation of governmental powers.\(^5\) However, the truth of this is open to serious doubt. Surely, the advising of the executive or the legislature is not a function peculiar to either of those bodies. It is, rather, a function which has traditionally been judicial in nature, even though it may fall in the shadow zone which is said to lie between the several governmental powers. Of course, aside from abstract categorical analysis, the only logical objection to the rendering of such opinions is that to do so would subject the judiciary to a function impinging upon their independence. This, however, overlooks the essential nature of the advisory opinion. The duty is usually imposed on the justices individually, rather than upon the court.\(^5\) The opinions, when rendered, do not become precedent, for neither *res judicata* nor *stare decisis* is applicable.\(^5\) If the merit of an opinion should accord it weight, this merely attests to the quality thereof and its efficacy as preventive justice; but that fact by no means determines that it is more than persuasive in nature. Notwithstanding these observations, it is recommended that the function should be more positively imposed on the court by a constitutional provision rather than by a simple legislative enactment.\(^5\)

In practice the utility of the advisory opinion has been severely circumscribed by some doubtful interpretations given to clauses authorizing such opinions.\(^5\) It has, for example, been held that a question from the legislature can be answered only if it relates to pending legislation,\(^5\) with an accompanying qualification which would exclude inquiry as to a bill not yet definite in form\(^5\) or one which has already become law by reason of its final passage. It has been held that the question must relate to public as opposed to private rights,\(^5\) and must be one possessing

\(^5\) Although the federal constitution does not expressly provide that the several departments of government should be separate, the doctrine is now well established in federal law. Nearly every state, however, has expressly provided that the departments of the state government should be separate, distinct, and not subject to encroachment upon by the other departments. See, for example, Ill. Const. 1870, Art. III.

\(^5\) See, for example, the Colorado provision set out in note 27, ante, and the cases mentioned in notes 29 and 30, ante. See also People v. Martin, 19 Colo. 565, 36 P. 543 (1894).


\(^5\) In re Opinion of the Justices, 115 Vt. 524, 64 A. (2d) 169 (1949).

\(^5\) Ellingwood, op. cit., p. 178 et seq., lists thirteen separate considerations bearing upon the rendering of advisory opinions with a comprehensive analysis of each.

\(^5\) In re Opinion of the Justices, 217 Mass. 607, 105 N. E. 440 (1914); In re S. R. No. 4, 54 Colo. 262, 130 P. 333 (1913).

\(^5\) In re Opinion of the Justices, 226 Mass. 607, 115 N. E. 921 (1917). The justification for this view would seem to be that an action for declaratory judgment would be a more appropriate remedy in these instances.

\(^5\) In re H. B. No. 99, 26 Colo. 140, 56 P. 181 (1899). This qualification obviously includes all questions relating to litigation then pending in the courts: Commonwealth v. Smith, 9 Mass. 530 (1810); In re Continuing Appropriations, 18 Colo. 192, 32 P. 272 (1893).
peculiar importance.\textsuperscript{58} Obviously, the question must be confined to matters of law for fact questions will not be considered.\textsuperscript{59} In Florida and South Dakota, where the interrogatories may come only from the executive,\textsuperscript{60} the questions cannot relate to legislative doubts,\textsuperscript{61} so the justices are not bound to advise the executive on a measure before it becomes law.\textsuperscript{62} In addition, under the Florida provision, which is more restrictive than the rest, the duty to advise is limited to constitutional construction of the powers and duties of the executive branch.\textsuperscript{63} It has also been said that the opinion, when rendered, is neither binding on the interrogating body\textsuperscript{64} nor on other governmental bodies.\textsuperscript{65} On the other hand, requested opinions will not be refused simply because of the possibility that the question submitted may be the subject of future litigation;\textsuperscript{66} because the subject is not one of judicial nature;\textsuperscript{67} because the court is lacking in legal assistance;\textsuperscript{68} or because immediate legislative or executive action is not contemplated.\textsuperscript{69}

The most startling development in the advisory opinion question has been in relation to the interpretation of the phrases "important question" and "solemn occasion" frequently found in constitutional or statutory provisions.\textsuperscript{70} Rather than construe the words to denominate the interrogating body as the arbiter of what should constitute an important question or a solemn occasion, the courts have unequivocally stated that they are to be the sole judges on these points.\textsuperscript{71} In certain instances,

\textsuperscript{58} In re Interrogatories of the Senate, 54 Colo. 166, 129 P. 811 (1913).
\textsuperscript{59} Opinion of the Justices, 120 Mass. 600 (1876); In re Opinion of the Justices, 76 N. H. 601, 81 A. 170 (1911).
\textsuperscript{60} See the text of the Florida and South Dakota constitutional provisions set forth in notes 26 and 31, ante.
\textsuperscript{61} In re Construction of Constitution, 3 S. Dak. 548, 54 N. W. 650 (1893).
\textsuperscript{62} In re Executive Communication Concerning Powers of Legislature, 23 Fla. 297, 6 So. 925 (1887).
\textsuperscript{63} In re Opinion of the Justices, 69 Fla. 632, 68 So. 851 (1915).
\textsuperscript{64} Ellingwood, op. cit., pp. 153-60.
\textsuperscript{65} In that regard, note the provisions of the Alabama statute set out in notes 40 to 42, ante.
\textsuperscript{66} This is true only as a general statement: Ellingwood, op. cit., pp. 181-205. The author cites cases containing qualifications on the rule.
\textsuperscript{67} Opinion of the Justices, 126 Mass. 557 (1878); Opinion of the Court, 60 N. H. 585 (1881).
\textsuperscript{68} In the Matter of the Constitutionality of S. B. No. 65, 12 Colo. 466, 21 P. 478 (1889); In re Bounties to Veterans, 186 Mass. 603, 72 N. E. 95 (1904).
\textsuperscript{69} If the question is not one of immediate concern, it must be one which the inquiring body could have occasion to consider in the exercise of the powers entrusted to it: In re Opinion of the Justices to the House of Representatives, 208 Mass. 614, 45 N. E. 927 (1911). In Colorado, questions from the legislature must relate to pending bills: In re S. R. Relating to Internal Improvement Fund Provided for by Act of Congress, 12 Colo. 285, 21 P. 483 (1889).
\textsuperscript{70} See particularly the provisions of the constitutions of Colorado, Maine, Massachusetts, New Hampshire and South Dakota set out above. See also the Alabama statute quoted in notes 40-2, ante.
\textsuperscript{71} Opinions of the Justices, 96 Me. 564, 51 A. 224 (1901); Opinion of the Justices, 122 Mass. 600 (1877); Functions of Judiciary, 148 Mass. 623, 21 N. E. 439 (1889).
they have declared that the two qualifications must concur, and may have used these phrases as a door by which to escape from odious or difficult questions. It is difficult to find any logical basis for this assumption by the courts of the right to pass upon these qualifications, but there can be no doubt that, precedent having been established, such precedent has been unvaryingly followed thereafter. Supposedly, the result has been dictated by an application of the principle of separation of powers, as based upon the imputed intent of the framers of the several constitutions, but this is, at best, no more than a weak rationale.

To reiterate, the attack upon the advisory opinion has been bottomed on the principle of separation of governmental powers. Yet, it has been admitted that that principle is one not capable of accurate delineation as between the several functions of government and there has always been recognition of a considerable degree of overlapping. For that matter, it has never been seriously contended that each department should be unwilling to assist the others in serving the public for whose benefit governments have been established. The manifest purpose of the advisory opinion, then, is to obviate those difficulties which can arise among the several departments and thereby to lend to the operations of the government at least some semblance of efficiency, a quality most conspicuously absent in our present system. The attack upon the advisory opinion falters and lags perceptibly in the face of the drain which may be put on the public treasury by the presence of unconstitutional legislation or in the face of the effect such laws may have upon the people during the period of their usurpatious existence. If for no other reason than to prevent the havoc which can be created by the presence of such spurious laws, there is ample justification for the use of the advisory opinion.

Traditional conservatism on the part of the judiciary should not be allowed to override the practical demands of a working government. True, the judiciary has played an invaluable role as the dominant constraining influence upon rash and ill-conceived movements which gnaw at the vitals of sound and stable government. It could, however, play an even more effective role if it would warn against such movements at the start. There would, then, appear to be full reason why the General Assembly should, as it considers the proposal to revamp the present Judicial Article, also consider the need for complete as well as proper revision.

R. K. Hoffman,

72 Advisory Opinion of the Judges of the Supreme Court, 37 Mo. 135 (1865), pronounced under a constitutional provision no longer in force.
74 Opinion of the Justices, 122 Mass. 600 (1877).
DISCUSSION OF RECENT DECISIONS

AUTOMOBILES—INJURIES FROM OPERATION, OR USE OF HIGHWAY—
WHETHER OR NOT A BOY SCOUT, INJURED ON SCOUTMASTER’S TRAILER
WHILE ASSISTING IN COLLECTION OF WASTE PAPER, IS WITHIN COMPREHENSION OF A “GUEST” STATUTE—In the case of Vest v. Kramer,¹ the Supreme Court of Ohio was confronted with a question concerning the right to recovery by a twelve-year old boy scout for injuries sustained by him while riding in the scoutmaster’s trailer and assisting in a scrap

¹ 158 Ohio St. 78, 107 N. E. (2d) 105 (1952). Taft, J., wrote a dissenting opinion concurred in by Middleton and Matthias, JJ.
paper drive for the benefit of his scout troop. Two separate actions were instituted, one by the minor boy scout, acting by his next friend, for the personal injuries, the other by his father for loss of services. The actions were consolidated for trial and, at the conclusion of the opening statement on behalf of plaintiffs, the defendant moved for judgment, which motion was granted. On plaintiffs' appeal to the Ohio Court of Appeals, that court reversed and remanded the cause for further proceedings. The Ohio Supreme Court, on the allowance of defendant's motion to certify the record, although divided four to three, in turn affirmed the judgment of the Court of Appeals, holding that the plaintiff was not a "guest" within the meaning of the Ohio "guest" statute at the time the accident occurred.

The Ohio Supreme Court described three possible relationships which might have existed between plaintiff and defendant. It concluded that (1) the plaintiff might have been rendering service to the defendant who had taken over the job of transporting the papers for the troop; (2) that the plaintiff and the defendant might have been jointly and mutually interested in the project of picking up and transporting the papers; or (3) that plaintiff and defendant might have been fellow workers for the troop in prosecuting the paper collection project. Although it proceeded to discuss each of these three possible relationships individually, it did not actually decide that any particular one existed, but arrived at an identical

2 The facts disclosed that the paper collection was being conducted to raise money for the troop and was under the supervision and direction of defendant, an assistant scoutmaster. The transportation consisted of a two-wheeled utility trailer attached to an automobile owned by defendant and under his control. The collection had progressed to the point where the trailer was filled to capacity, so the plaintiff, and other boys, at defendant's direction, climbed on the trailer for the purpose of pressing the papers into place. The defendant started his car and moved the trailer a short distance, then reduced his speed as some of the papers had fallen off. The plaintiff jumped down, replaced the dislodged papers, and was climbing back on the moving trailer when defendant increased his speed without warning. The plaintiff was thereby caused to lose his balance and fall, thereby suffering injury.

3 Page Ohio Gen. Code Ann. 1945, § 6308(6). Similar language is contained in Ill. Rev. Stat. 1951, Vol. 2, Ch. 951/2, § 58a. The only material difference between them is that the Illinois statute restricts the definition of guest to one riding in a motor vehicle while the Ohio statute includes a person riding "in or upon" the vehicle. The difference is noteworthy. Whether a person riding in a trailer attached to the host's automobile can be said to be riding in the host's vehicle has not been decided in Illinois. In Miller v. Miller, 395 Ill. 273, 69 N. E. (2d) 878 (1946), the Illinois Supreme Court made the general statement that one may be a guest whether riding in a tractor-trailer, a truck, or a pleasure vehicle, but the statement was dictum. In Samuelson v. Sherrill, 225 Iowa 421, 280 N. W. 596 (1938), a child riding on a sled attached to an automobile was not considered as being within the provisions of the guest statute of that state as he was not riding "in" the automobile. See also Longford v. Rogers, 278 Mich. 310, 270 N. W. 692 (1938), another sled case, where the rider was said to be "transported" by the vehicle, hence a guest.

4 Also involved was the question as to whether a "trailer" could be said to be a motor vehicle. The court said it could, defining a motor vehicle as being any vehicle drawn by power other than muscular power or power collected from overhead trolley wires.
DISCUSSION OF RECENT DECISIONS

conclusion as to each, to-wit: that plaintiff was not a guest of defendant at the time the accident occurred.

The question as to who may be said to be a guest, riding without payment, has been the subject of considerable litigation in the courts of those states which have enacted so-called "guest" statutes. It has been held that "payment" under the guest statute is not necessarily limited to monetary compensation and is not to be considered in its strict legal sense as the discharge in money of a sum due, but includes the acceptance of a ride for the purpose of conferring some substantial benefit on the host or car owner.

The Ohio Supreme Court, in the case of Duncan v. Hutchinson, outlined seven instances which have been held to constitute payment sufficient to remove the rider from the effect of the guest statute. One instance would cover those situations where carriage is provided to a prospective purchaser of property which the auto host has for sale, the trip being made for the purpose of inducing a sale. An example of this instance may be found in the Illinois case of Connett v. Winget where a prospective purchaser of real estate, riding in the broker's car to view the property, was held not to be a guest. In that connection, it might be noted that several states have guest statutes which specifically exclude prospective purchasers of automobiles while being taken on demonstration rides.

The second and third illustrations appear in those cases where the automobile host has a financial or business interest in the time or service of the passenger and the purpose of the transportation is to take the passenger to or from his place of employment, or where the passenger is making the trip to assist the automobile host in arriving at his destination or to perform some other service for the latter's benefit. In the case of Dorn v. Village of North Olmstead, for example, an individual was invited for a ride for the sole purpose of pointing out to the driver the location of a certain house and was held not to be a guest.

While another instance recognizes that the conferring of a substantial or tangible benefit upon the automobile host in lieu of and for the transportation may be enough to provide exemption, it has been held, by the vast majority of courts, that, if the trip is of a social nature, a sharing

5 Albrecht v. Safeway Stores, Inc., 159 Ore. 331, 80 P. (2d) 62 (1938). A definition of "without giving compensation therefor" may be found in Crawford v. Foster. 110 Cal. App. 81, 293 P. 841 (1930).
6 159 Ohio St. 185, 39 N. E. (2d) 140 (1942).
7 374 Ill. 531, 1 N. E. (2d) 807 (1940).
8 See, for example, Colo. Stat. Ann. 1935, Ch. 16, § 371.
9 Kruy v. Smith, 108 Conn. 628, 144 A. 304 (1929); Knutson v. Lurie, 217 Iowa 192, 251 N. W. 147 (1933).
10 133 Ohio St. 375, 14 N. E. (2d) 11 (1938).
of the expenses will not disturb an individual’s guest status. On the other hand, if the auto host and passenger embark on a joint adventure or enterprise in which each is equally or similarly interested, and which adventure or enterprise is of such moment and character as to indicate that payment is the motivating influence in providing the transportation, the statute is inapplicable. In that connection, the case of Carbonneau v. Peterson is significant for it listed the essential ingredients of a joint adventure as consisting of a contract, a common purpose, a community of interest, and an equal right to a voice accompanied by an equal right of control.

Still another instance may be found in those cases where the passenger might be said to be an involuntary occupant of the automobile. That situation could well arise where an infant child is taken for an automobile ride, thereby leading to the question as to whether or not the infant had the capacity to enter into the guest relationship. The Indiana court, in Fuller v. Thrum, took the position that a child under the age of seven years is conclusively presumed to be non’sui juris, hence incapable in law of accepting the invitation to become a guest, and this would appear to be the better view on the subject. In the instant case, the plaintiff was a twelve-year old minor but the court in no way seemed to consider the implications of his minority as a possible escape from the guest statute. If age is to be the criterion, it might be noted that in Hart v. Hogan a twelve-year old daughter of a woman employed as a companion to another woman who was doing the driving was held to be an involuntary occupant of the host’s car and thus not a guest. There may be reason to believe, however, that where the element of choice is present a child beyond the so-called “tender” years might be regarded as capable of entering into the guest relationship.

Although the last exception previously noted was in those instances where the compensation was paid by a third person, the Ohio Supreme Court would now seem to add another method of “payment” to the ever-

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12 1 Wash. (2d) 347, 95 P. (2d) 1043 (1939).
14 Kundra v. Adamski, 188 Ore. 396, 216 P. (2d) 262, 16 A. L. R. (2d) 1297 (1950). But see Morgan v. Anderson, 149 Kan. 814, 89 P. (2d) 866 (1939), where a seven-year old child was held to be a guest.
increasing list developed under the guest statutes. It would indicate that if the transportation tends to promote the "mutual interests" of both parties and operates for their "common benefit," then the person accepting the ride is not to be classed as a guest. While this so-called method of payment may not be entirely new, the statement thereof has not, heretofore, been as broad as the result in the instant case would tend to indicate. Although the Illinois court, in Miller v. Miller, stated that where "the relationship between the automobile host and a party riding with him has a business aspect and the transportation is supplied for their mutual benefit, any payment or service rendered to the automobile host by such person for the ride will constitute 'payment therefor' and will remove the automobile host from the protection of the statute," it was careful to restrict the mutual benefit theory to a transaction of a business rather than of a social nature.

The Ohio court concerned with the instant case placed substantial reliance upon the Iowa case of Thuente v. Hart Motors. The plaintiff there had volunteered to assist in a scrap paper drive sponsored by the local chamber of commerce and the defendant used his truck to assist in the collection. Holding the Iowa guest statute to be inapplicable to the relationship between the parties, the court pointed to a distinction between a purely social enterprise and a patriotic and community project such as a scrap drive. The court there stated that "the purpose of each was to aid the defense of his country. . . . The trip was advantageous to each in the accomplishment of their mutual enterprise." It is doubtful, however, if this case can be cited as precedent for the instant decision. Emphasis on the patriotic and community nature of the scrap drive in the one case is lacking in the other for the paper drive was there conducted solely for the benefit of a boy scout troop of which defendant was not actually a member but which he served in a supervisory capacity. As the real benefits to be derived from the paper drive were directed not at the defendant but at the plaintiff and his fellow scouts, the only benefit that defendant could be said to have received was a feeling of good will predicated upon his knowledge that he had helped the scout troop raise money.

It might have been pointed out that, where the benefit is conferred only upon the person to whom the ride is given, and no benefits other than such as are incidental to hospitality, companionship, and the like.

17 Hasbrook v. Wingate, 152 Ohio St. 50, 87 N. E. (2d) 87, 10 A. L. R. (2d) 1342 (1949).
18 395 Ill. 273, 69 N. E. (2d) 878 (1946).
19 395 Ill. 273 at 283, 69 N. E. (2d) 878 at 883.
20 234 Iowa 1294, 15 N. W. (2d) 622 (1944).
21 234 Iowa 1294 at 1303, 15 N. W. (2d) 622 at 627.
are conferred upon the host, the passenger has been held to be a guest within the statute. For that matter, courts have also stated that the benefit must be of a definitely tangible nature, that they should not be required to search for the benefit, and, if it is not apparent, then it can hardly be said to be substantial or material. There would, then, be occasion to believe that any benefit to the defendant in the instant case was only an incidental one at best and was secondary to the prime purpose of the transportation.

The mutual benefit idea has, in the past, been fairly closely confined to relationships of a business rather than of a social nature. For example, in the case of Chumley v. Anderson, a prospective purchaser of an automobile and a dealer drove to Detroit in the dealer's car to expedite the purchase of a new car. The court held that the parties were clearly engaged in a common purpose in which they were jointly interested, the plaintiff to get the new car as soon as possible and the defendant to complete the sale. By contrast, in Whitechat v. Gryette, the deceased was a passenger in an auto driven by the defendant to a meeting of an association of which both were members. The defendant, being an officer, was required to attend but the decedent, being only a member, could attend or not as he saw fit. The transaction was treated as being of a social rather than of a business nature; the mere fact of concurrence in membership in the same organization being held insufficient to remove the decedent from the guest classification. It would seem more logical, therefore, to conclude that the defendant scoutmaster in the instant case had offered the use of his automobile and trailer as more of a social gesture than a business undertaking for material gain and, while the arrangement may have promoted the mutual interests of both plaintiff and defendant, it did not create a joint business relationship between them.

Courts deciding cases arising under guest statutes should endeavor to ascertain the intention of the legislature before proceeding to the merits of each individual case. Most such statutes were enacted to protect the motorist from liability for injuries suffered by the guest growing from ordinary negligence unless the motorist, in turn, was compensated for the transportation furnished in a manner substantially commensurate with the benefit received.

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24 20 Tenn. App. 621, 103 S. W. (2d) 331 (1936).
25 19 Cal. (2d) 428, 122 P. (2d) 47 (1942). The case, however, actually turned on the point that a cash payment was made for the ride, hence the passenger was not a "guest" within the meaning of the statute.
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with the hazards of the undertaking.\textsuperscript{27} The object being, so to speak, to prevent the dog from biting the hand that feeds him, any failure to keep this object in mind is likely to result in decisions such as the one under discussion.

W. J. MEYER, JR.

CRIMINAL LAW — EVIDENCE — WHETHER OR NOT A STATE STATUTE WOULD BE VALID IF IT REQUIRED A PERSON ACCUSED OF CRIME TO ESTABLISH THE DEFENSE OF INSANITY BY PROOF BEYOND A REASONABLE DOUBT — Through the medium of the recent case of \textit{Leland v. State of Oregon},\textsuperscript{1} the United States Supreme Court was presented with a question concerning the validity of an Oregon statute,\textsuperscript{2} first enacted in 1864, one which purported to require a defendant in a criminal case to establish the defense of insanity by proof beyond a reasonable doubt. The defendant there had been arrested for the theft of an automobile and had then freely confessed to the unknown murder of a young girl, even to the point of directing the police to the location of the body and supplying all particulars regarding that crime. At the ensuing trial for such murder, the defendant pleaded not guilty by reason of insanity but was convicted, under a verdict of the jury, of murder in the first degree and, as the verdict was without recommendation, an automatic death penalty was imposed.\textsuperscript{3} Defendant appealed to the Supreme Court of Oregon but that court, in a comprehensive opinion, affirmed the conviction, adhering to some previous decisions of that court which had stated that the court was not convinced that the legislature lacked the power to promulgate the statute in question. On further review, the Supreme Court of the United States also affirmed, holding that the policy of the state, as expressed in the statute, did not violate generally accepted standards of justice, hence could not be said to operate in violation of due process requirements.\textsuperscript{4}

The decision accents a fundamental difference in concept as to the operation of the defense of insanity in criminal cases. The majority of the court took it to be the prevailing view, both in England and in a

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\item \textsuperscript{27} Miller v. Miller, 395 Ill. 273, 69 N. E. (2d) 878 (1946).
\item \textsuperscript{1} 343 U. S. 790, 72 S. Ct. 1002, 96 L. Ed. 1302 (1952), affirming 190 Ore. 598, 227 P. (2d) 785 (1951). Justice Frankfurter wrote a dissenting opinion concurred in by Justice Black.
\item \textsuperscript{2} Ore. Comp. Laws 1940, § 26-929. The statute states: "When the commission of the act charged as a crime is proven, and the defense sought to be established is the insanity of the defendant, the same must be proven beyond a reasonable doubt."
\item \textsuperscript{3} Ibid., § 23-411.
\item \textsuperscript{4} U. S. Const., Amend. 14, § 1.
\end{itemize}
number of American jurisdictions, that the defense of insanity should be treated as a separate issue with the burden of proving such defense resting on the defendant. Such being the case, a requirement that the proof should reach the level of proof beyond a reasonable doubt was said to be merely one of degree and not, therefore, of such fundamental character as to involve a violation of constitutional rights. The dissent, on the other hand, took the basic position to be one under which it was the responsibility of the prosecution to prove culpability as an essential element in every charge of murder, so any attempt to shift that burden, as by requiring the defendant to ultimately establish lack of culpability, would expose the defendant to the hazard of being deprived of his life without due process of law. While the decision appears to be clear and determinative, it is not as thorough an evaluation of the problem as might be desired.5

As it has generally been regarded to be the policy of the Anglo-American law to treat an accused person as being innocent until proven guilty, there may be occasion to wonder why legal principles should be so fundamentally divergent over the nature of the issue of insanity in a criminal case. A summary of this contradiction might, therefore, by appropriate. Outstanding among the earlier cases in the field is the comment supplied in McNaghten’s Case6 wherein an English court adopted the same general principle as that which underlies the majority decision in the instant case, to-wit: the defense of insanity is one in the nature of a confession and avoidance, with the defendant having the burden of “clearly proving” to the jury that he was insane. That principle remains the English view today.7

In this country, the principle was picked up by the Alabama Supreme Court holding in the case of State v. Marlen.8 The court there expressed itself as being of the opinion that the defendant should be obliged to offer “clear and convincing” proof before raising a “reasonable doubt” as to the sufficiency of his sanity. A few years later, in Commonwealth v. Rogers,9 a Massachusetts court modified the principle by requiring “satisfactory” proof on the part of the defendant, with a “preponderance” being otherwise sufficient. The Supreme Court of Maine, in State v. Lawrence,10 took much the same view and the prin-

5 See, for example, the discussion of this problem in Davis v. United States, 160 U. S. 469, 16 S. Ct. 353, 40 L. Ed. 499 (1895).
6 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (1843).
8 2 Ala. 43, 36 Am. Dec. 402 (1841).
10 57 Me. 574 (1870).
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The principle was again well stated, in State v. Pagels,\(^{11}\) where a Missouri court said: "The law requires the defendant to prove the defense of insanity to the reasonable satisfaction of the jury."\(^{12}\)

The opposite of this view appears to have been first expressed by the Michigan Supreme Court in People v. Garbutt.\(^{13}\) It there stated the law to be that the defendant had only to overcome the presumption of sanity by "any" evidence and, since the burden of proof was on the prosecution, the prosecution would then have to prove the defendant sane, as well as otherwise guilty, by proof beyond a reasonable doubt. This principle was accepted in the early Illinois case of Hopps v. People,\(^{14}\) but it was not until about the turn of the century that two cases appeared which crystallized the two opposing principles in comprehensive and well stated opinions.

In one of these cases, that of Davis v. United States,\(^{15}\) the United States Supreme Court stated the federal rule to be one under which the burden of proving all the elements of a crime rests on the prosecution and, since mental capacity is an element of most federal crimes, the burden of proving mental capacity on the part of the defendant also necessarily rests on the prosecution. While the ordinary presumption of sanity will suffice to sustain this burden in the bulk of cases, the court indicated that whenever a defendant raises a doubt as to his sanity the jury must acquit unless the prosecution comes forward with convincing evidence that the defendant was sane at the time the criminal act occurred.

Despite this, in the second case, that of State v. Quigley,\(^{16}\) the Rhode Island court, after analyzing the conflicting doctrines, rejected the premise that sanity per se was an essential element to a crime. It took the position that malice and intention, the specific elements required, could exist independently of sanity; that proof of insanity would not necessarily affect inferences to be drawn from the defendant's acts; and that if the defendant relied on the claim of insanity to negative malice or intention, he would have to treat the defense as one in the nature of a confession and avoidance.

In the light of this background, it is not surprising that the law on this point should remain inconsistent and confusing, with approximately twenty states accepting the English principle, so thoroughly evaluated in

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11 92 Mo. 300, 4 S. W. 931 (1887).
12 92 Mo. 300 at 315, 4 S. W. 931 at 937.
13 17 Mich. 9 (1868).
14 31 Ill. 385 (1863). Walker, J., wrote a dissenting opinion.
15 160 U. S. 469, 16 S. Ct. 353, 40 L. Ed. 499 (1895).
16 26 R. I. 263, 58 A. 905 (1904).
the Rhode Island case, but with the federal courts and approximately
twelve states accepting the contrary view. Such being the case, it can
be seen why the federal supreme court, in the instant case, should approve
a state statute which did no more than codify one of these views, although
its own opinion regarding due process might differ from that followed
in the state in question. The decision, however, might not serve as a
binding precedent if one of the other states should attempt to make the
switch by legislative enactment.

The question in issue, in the absence of a statute, has been before
the Illinois Supreme Court on many occasions but nothing has been done
to change, in substance, the original alignment adopted in the leading case
of *Hopps v. People.* Judge Breese there stated that sanity and inten-
tion were inseparable; that the burden could not shift to the defendant
to disprove an essential element of the prosecution's case; that the de-
fendant had no more than a responsibility to go forward with sufficient
evidence to rebut the presumption of sanity; and that, if this was done,
the prosecution then had the primary burden of proving the defendant
sane beyond a reasonable doubt. There was present, however, a strong dis-
sent to the effect that the defendant ought to be required to establish
the claim of insanity by a preponderance of evidence and the confusion
became more evident, a few years later, when the case of *Chase v. People*
reached the court for decision. Judge Breese then admitted a failure
to achieve clarity in expression so he there restated the rule to be one
requiring the defendant's evidence to "raise a reasonable doubt" as to
his sanity. In all other respects, the view of the Hopps case was affirmed
and it was followed in the succeeding cases of *Montag v. People* and
*Hornish v. People* with further elaboration being provided in *Jamison
v. People* where it was said the "reasonable doubt" had to be raised
from "all the evidence."

Although, in *People v. Casey,* the court stated the burden of proof
issue was not vital, and that the defense of insanity could be established
in the same manner as a justification or an alibi, it was not until the

17 Wigmore, Evidence, 3d Ed., Vol. 9, § 2501, provides not only an analysis of
the two principles but also a list of the jurisdictions applying either of them.
18 31 Ill. 385 (1863). Walker, Jr., wrote a dissenting opinion. It would seem
important to read this case with the qualifying opinion written by the same judge
in *Chase v. People,* 40 Ill. 352 (1866), for the Hopps case has been quite gen-
erally cited as being authoritative of the American view.
19 40 Ill. 352 (1866).
20 141 Ill. 75, 30 N. E. 357 (1892).
21 142 Ill. 620, 32 N. E. 677, 18 L. R. A. 237 (1892).
22 145 Ill. 357, 34 N. E. 486 (1893).
23 See also *Lilly v. People,* 148 Ill. 467, 36 N. E. 55 (1894).
24 231 Ill. 261, 83 N. E. 278 (1907).
discussion in People v. Krauser that an instruction requiring the defendant to "clearly prove" his insanity was held to be erroneous. Since then, the court has wavered over the point of the quantum of proof which might be sufficient. In People v. Saylor, "any evidence to raise a reasonable doubt" was said to be sufficient for an acquittal. In People v. Skeoch, the emphasis was against requiring the defendant to "clearly prove" the defense. Within a year, however, in People v. Pugh, the court went further than it had ever done before in stating that insanity was to be treated as a separate issue, much the same as self-defense, but that while there was no hard and fast rule as to the quantum of evidence necessary, the evidence had to be sufficient to overcome the legal presumption of sanity. A fair appraisal of the cases, then, would appear to establish the fact that the Illinois Supreme Court is not prepared to depart from the view it adopted ninety years ago.

If legislation on the point should be contemplated, and it could help the problem, there is reason to believe that anything like the Oregon statute considered in the instant case would go too far if it sought to place the same degree of avoidance, by reason of insanity, on the defendant as is generally required in relation to proof by the prosecution. A sounder statute would be one incorporating the reasoning of the Illinois Supreme Court in the Pugh case, to-wit: the defense of insanity is one in avoidance, to be introduced by the defendant, but it is satisfied whenever the defendant has raised a reasonable doubt in the mind of the jury on the point.

C. E. Mahoney


25 315 Ill. 485, 146 N. E. 593 (1925). In the interim, the court, in People v. Cochran, 313 Ill. 508, 145 N. E. 207 (1924), had reaffirmed the view that the requirement for raising a doubt as to sanity had not shifted the primary burden on to the defendant.

26 319 Ill. 206, 149 N. E. 767 (1926).

27 The Saylor case was followed, in point of time, by People v. Christensen, 336 Ill. 251, 168 N. E. 292 (1929). This case has been cited by Wigmore, op. cit., § 2501, as supporting the English view. A careful reading of the opinion would not so indicate.

28 408 Ill. 276, 96 N. E. (2d) 473 (1951).

29 409 Ill. 592, 100 N. E. (2d) 912 (1952).

30 It might be noted that, in People v. DePompeis, 410 Ill. 587, 102 N. E. (2d) 813 (1952), the court expressed the view that while the giving of an instruction requiring the defendant to "clearly prove" insanity would be error, it would not necessarily constitute reversible error.
Company, the insured, subsequent to maturity of a twenty-year endowment policy entitling the insured to the proceeds thereof, entered into a written agreement with the insurer whereby the proceeds, or the remainder thereof not withdrawn during lifetime, were to be distributed after the insured's death to certain beneficiaries irrevocably designated. Plan One, adopted by the insured, of three optional plans for settlement, provided for the retention of the fund by the insurer subject to withdrawal by the insured at will. A further provision, clearly applicable to Plans Two and Three, but questionable as to Plan One, provided that, unless otherwise agreed in writing, any proceeds remaining at death should be paid to the insured's estate. Following death of the insured and a subsequent demand and refusal, the executor of the insured's estate sued the insurer to recover the proceeds on behalf of the estate, contending that the subsequent agreement was invalid as an abortive testamentary disposition. The insurer defended on the ground the subsequent agreement constituted a valid third party donee-beneficiary contract. The trial court dismissed the action and the Supreme Court of Washington, on appeal by the executor, affirmed on the ground the subsequent agreement was directly connected with the original contract of insurance, had vested rights in the beneficiaries during the lifetime of the insured, and did not amount to a testamentary disposition of an estate.

The validity of so-called supplementary insurance contracts, providing for disposition of proceeds after death, despite the frequency with which they are employed, has not often been passed upon by the courts. In several of the cases in which an agreement of the type here in question has been involved, the courts have assumed the agreement to be valid without inquiry. However, in those cases where validity has been

1 40 Wash. (2d) 538, 245 P. (2d) 205 (1952). Donworth, J., wrote a dissenting opinion concurred in by Schwellenbach, Ch. J., and Weaver, J. Judge Mallery also wrote a dissenting opinion.

2 Another provision immediately following a statement of each of the three optional plans of settlement, stated: "In the event of the death of a payee any unpaid sum left with the company under option 1 shall be paid in one sum; any unpaid installments under option 2, or any installments . . . under option 3 which shall not then have been paid . . . unless otherwise agreed in writing shall be paid in one sum to the executor or administrator of such policy." Unless the clause "and unless otherwise agreed in writing," following the semi-colon, applied to option 1 as well as to options 2 and 3, there was no indication as to whom any unpaid sum left under option 1 should be paid after the death of the insured. The majority opinion held that the quoted language applied to all three options but, if ambiguous, was controlled by the interpretation which the parties had placed on it. The dissenting opinion stressed non-applicability and non-ambiguity. See, on that point, United States Cas. Co. v. Cream Novelty Co., 195 Ill. App. 267 (1915); State ex rel. Northwestern Mut. Life Ins. Co. v. Bland, 354 Mo. 391, 189 S. W. (2d) 423 (1945).

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squarely in issue, the courts have declared such agreements effective, and not testamentary in nature, on the ground that contractual rights and not property rights should govern in determining the nature of the interest created in the beneficiaries.

Since the decision in the leading case of Lawrence v. Fox, the doctrine of the third party donee-beneficiary has become settled law in most American jurisdictions. The application of the doctrine, however, presupposes an executed contract made for the benefit of the third party where neither control over the subject matter nor power of revocation has been retained by the promisee. The mere fact that the benefit to be derived by the third party beneficiary is made subject to the death of the promisee does not, of itself, deprive the beneficiary of the right to enforce the agreement after death on the ground that the contract is testamentary in nature, for death of the promisee then becomes no more than a condition precedent to the beneficiary’s right to enjoyment. As a present right or interest would be vested in the beneficiary immediately upon the execution of the contract, the effect of such an agreement might well be considered to be analogous to the case of a valid gift inter vivos wherein delivery of the subject matter has been made to a third person for the benefit of the beneficiary but is not to be surrendered to the donee until after the donor’s death.

While the basic doctrine offers little or no problem to the courts today, each attempted extension thereof has left the courts in disagreement, particularly where the promisee or obligee attempts to retain control over the subject matter of the contract or has reserved a power of revocation over the right or interest created in the beneficiary. As the years have passed, however, the weight of authority would appear to have shifted from the conservative view, one holding that such contracts are not enforceable on the ground they are testamentary in nature, to the more liberal view which declares the true test to be not whether the contract has divested the promisee of all interest in the subject matter but whether a present right has been conferred upon the beneficiary. In the

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4 20 N. Y. 268 (1859).
6 In re Beyschlag's Estate, 201 Wis. 613, 231 N. W. 165 (1930); Sheldon v. Blackman, 188 Wis. 4, 205 N. W. 486 (1925). See also Whittier, “Contract Beneficiaries,” 32 Yale L. Rev. 790 (1923).
New York case of *Seaver v. Ransom*,\(^9\) for example, decided in a jurisdiction traditionally conservative in its attitude toward third party donee-beneficiaries, the court departed slightly from the traditional view to settle these questions by principles of property law\(^10\) when it held that, if the beneficiary and the promisee should be within certain degrees of relationship,\(^11\) the beneficiary could enforce the obligation even though some measure of control had been retained by the obligee.\(^12\) So too, a federal court sitting in New York, but applying what was presumed to be the California law on the point,\(^13\) in *Robinson's Women's Apparel, Inc. v. Union Bank & Trust Company of Los Angeles*,\(^14\) held a similar contract to be valid and enforceable by the beneficiary after the death of the promisee despite a reservation by the promisee of a life interest.\(^15\)

The instant case goes even farther. The endowment contract here concerned had matured during the lifetime of the insured so that any interest or right which had contingently been conferred upon the named beneficiaries in the event the insured died before maturity had become completely extinguished at maturity.\(^16\) The original contract of insurance no longer existed except to serve as consideration for the exercise of an option which the insured, as a matter of contract right, could compel the insurer to perform with regard to the retention of the endowment proceeds and a mode of settlement which he might select in conformity therewith. This, necessarily, would require a subsequent agreement which, while following as a natural consequence from the right created by the option, could in no way be considered as being a part of the original contract of insurance. As a consequence, any present right or interest conferred upon the beneficiaries who might be named in the

\(^9\) 224 N. Y. 233, 120 N. E. 639 (1918).
\(^11\) The third party beneficiary has traditionally had to show some obligation due him from the promisee before he could enforce a contract made for his benefit: 29 Corn. L. Q. 109.
\(^12\) The later New York case of *McCarthy v. Pieret*, 281 N. Y. 407, 24 N. E. (2d) 102 (1939), would appear to have overlooked the liberal implication of the Seaver case, for the court there, on finding that the promisee had reserved a life interest to himself as well as a power of revocation, settled the question by applying property law, thereby reaching the result that the purported transfer was testamentary in character. See also Sliney v. Cormier, 49 R. I. 74, 139 A. 665 (1928).
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subsequent agreement would not flow from the original contract but would stem from the subsequent agreement itself, that is, would come from a disposition which the insured made of funds which were then his to deal with as he saw fit. The majority opinion, adopting the liberal view for the first time in that jurisdiction, nevertheless failed to meet this issue squarely or to treat it precisely with respect to its wider implications. In view of the narrow margin supporting the decision, it would seem hardly likely that the court would have arrived at the same conclusion had not the subsequent agreement, in some way, been derived from the original contract of insurance.

Rightly holding that no gift of the proceeds had been intended by the insured during his lifetime, so that need for a delivery, either actual or symbolic, sufficient to divest the donor of dominion or control, was not an element which needed determination, the majority reached the conclusion that the subsequent agreement was not an attempt to transfer property. It was, instead, deemed to be evidence of a desire to create a present right in the beneficiaries which would enable them to enforce the promise originally made to the insured. Departing from its conservative view toward such agreements, the court found the subsequent agreement to be, in reality, a supplementary insurance contract, one which conferred upon the beneficiaries a vested right not in any specific property but in the performance of the contract by the insurer, much as if they have been named beneficiaries at the start in an ordinary life insurance contract. The fact that the insured had retained full control over the proceeds during his lifetime, or had reserved the power to completely extinguish the benefit by exercising his ability to withdraw the proceeds in full, did not render the supplementary contract invalid as testamentary in nature since the right which had vested in the beneficiaries, and which had vested immediately upon the execution of the supplementary contract, was based on the contractual obligation of the insurer to do what it had promised to do for a good consideration, to-wit: pay to the beneficiaries any of the proceeds remaining in its possession upon the death of the insured.

Even while the Washington court extended the doctrine to the point it did, it fell short of that point reached in the case of Mutual Benefit Life Insurance Company v. Ellis. A federal court, there applying what

it believed was the law of Colorado, upheld a subsequent agreement which was in no way derived from the exercise of any of the options offered in the original contract of insurance. That court indicated there was nothing in law to prevent the insured promisee from entering into a new agreement with the insurer whereby the proceeds of a policy should be retained by the insurer subject to a life interest in the promisee, with a power of revocation upon three-months' notice in writing, and with provision for payment of the remainder to named beneficiaries upon the death of the insured. The decision, predicated on third party donee-beneficiary contract principles, indicated that the present rights in the beneficiaries were derived not from the original contract of insurance, nor from the exercise of any option, but from the new agreement exclusively.  

In much the same way, the Missouri Supreme Court, in *Kansas City Life Insurance Company v. Rainey*, had occasion to consider the effect of an annuity contract under which the annuitant reserved the power to change the beneficiary at will, to surrender the policy after three years for its full cash value, or to withdraw up to one-half of the principal amount at any time. In reply to a contention by the annuitant's executor that this was not an insurance contract, since no element of risk was involved, and was invalid as being testamentary in nature, the court held that it was a contract for the benefit of the third party regardless of the element of risk and would have been so considered even if it had been made with a bank, a corporation of any sort, or with an individual. The issue was decided in favor of the beneficiary purely on property law theories. The payment of the money by the annuitant to the insurance company was said to operate to transfer title thereto immediately to the company, thereby divesting the annuitant of control and simultaneously vesting in the beneficiary an immediate interest in the fund itself subject, however, to the postponed right of enjoyment until after the death of the annuitant. The conditions of revocation and defeasance

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20 As to the contractual rights of life insurance beneficiaries, see Hall v. Capitol Life Ins. Co., 91 Colo. 300, 14 P. (2d) 1006 (1932), and Johnson v. New York Life Ins. Co., 56 Colo. 178, 138 P. 414, L. R. A. 1916A 568 (1914). The dissent in the instant case expressed the view that the holding in the Ellis case had been based on an erroneous belief as to the Colorado law, which error had been exposed in Urbancich v. Jersin, 123 Colo. 88, 226 P. (2d) 316 (1950). The two cases would, however, appear to be easily distinguished. The money involved in the Urbancich case had been deposited in a bank in the joint names of the promisor and promisee but upon the express understanding it was to be the exclusive property of the promisee, not to be withdrawn until the death of the promisee and then only for the purpose of transmittal to the named beneficiaries. The agreement was between the promisor and promisee, not between promisee and the bank; no consideration passed between the parties; and no present rights were vested in the beneficiaries. The situation clearly constituted an abortive testamentary disposition.

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were treated as being no different than those which might be involved in the creation of an inter vivos trust.\(^{22}\) While the court found little difficulty in arriving at a conclusion wholly in accord with the more liberal approach to this problem, it did so without the necessity of completely departing from a conservative attitude based entirely on principles of property law.

Use of the third party beneficiary device as a means of transferring property has not been confined to insurance or similar contracts. Perhaps the most fertile field in which this problem has presented itself in recent years has been in connection with the purchase of United States Savings Bonds. In some instances, contract principles have controlled; in others, property doctrines have prevailed. In *Warren v. United States*,\(^{23}\) for example, it was held that certain war savings certificates, payable to beneficiaries therein named after the death of the registered owner, were regulated purely by the contract between the registered owner and the United States. The Supreme Court of Washington, however, thirteen years before deciding the instant case, had held, in *Decker v. Fowler*,\(^{24}\) under circumstances almost identical with the Warren case, that as the bonds had remained in the possession of the registered owner at all times there was no delivery sufficient to divest the owner of his present control and dominion, hence no present right or interest had been created in the beneficiary which would permit the latter to enforce the contract between the deceased owner and the obligor. The only question considered was whether a valid gift *inter vivos* had been executed and, finding none, the court held the bond agreement to be testamentary in nature. The overwhelming weight of authority today, at least as to savings bonds, is that the payment-on-death provision found therein does create a present vested, though defeasible, right in the beneficiary contemporaneous with and subject to the deceased's superior right.\(^{25}\) Where this has not been obtained by decision, it has been successfully effectuated by statutory provision.\(^{26}\)

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\(^{23}\) 68 Ct. Cl. 634 (1930), cert. den. 281 U. S. 739, 50 S. Ct. 346, 74 L. Ed. 1154 (1930).

\(^{24}\) 199 Wash. 549, 92 P. (2d) 254, 131 A. L. R. 961 (1939), noted in 14 Wash. L. Rev. 312, 27 Minn. L. Rev. 411, 4 Mont. L. Rev. 61.

\(^{25}\) In re Murray's Estate, 236 Iowa 807, 20 N. W. (2d) 49 (1945); *Harvey v. Rackliffe*, 141 Me. 169, 41 A. (2d) 455, 161 A. L. R. 296 (1945), noted in 44 Mich. L. Rev. 317; *Ervin v. Conn.*, 225 N. C. 267, 34 S. E. (2d) 402 (1945); In re Disanto's Estate, 142 Ohio St. 223, 51 N. E. (2d) 639 (1943), noted in 42 Mich. L. Rev. 944.

\(^{26}\) See, for example, Thompson, N. Y. Cons. Laws, 1943 Supp., p. 178, for Section 24 of the Personal Property Law, which provides that the right of a beneficiary named in a non-transferrable government savings bond to receive payment after the death of the registered owner shall not be defeated or impaired by any rule
A thorough search of the law in Illinois has failed to disclose adjudication on the precise issue here involved from which a lawyer interested in this problem could reasonably arrive at a conclusion as to how the courts of this state might hold. The generally conservative attitude displayed by Illinois courts would more naturally incline one to believe that, if confronted with the problem, the court would most likely apply those principles requiring complete divestment of dominion and control of the subject of the contract as a condition precedent to enforcement by the beneficiary after the death of the promisee. In *Felter v. Erwin,* for example, the decedent had made several deposits of money in a bank which were evidenced by certificates of deposit made payable to the depositor, to the beneficiary, or to the survivor in the event of the death of the depositor before that of the beneficiary. The Appellate Court held the whole transaction to be an attempted testamentary disposition. Despite the apparent intent of the depositor to vest some quantum of present right in the beneficiary at the time each deposit was made, the court failed to recognize even the slightest possibility of a third party donee-beneficiary transaction. While the decision was reversed by the Supreme Court, the reversal was based on the ground the certificates were so worded as to clearly indicate an intention to create a joint tenancy, so there is nothing in the ultimate decision which could be interpreted as controverting the idea that complete divestment may be required as a condition precedent to the creation of a present right or interest under a third party beneficiary transaction.

By deciding the issue on other grounds, the Supreme Court may have silently voiced tacit approval of that view. Whatever interpretation a local lawyer may desire to place upon this silence, more than slight consideration should be given to recent decisions in other jurisdictions, such as the one in the instant case. They would tend to indicate that it is possible to extend third party beneficiary contract doctrines so as to implement the apparent intent of the promisee to create enforceable rights in those whom he designates as beneficiaries in his transactions.

I. FRANK

of law governing the transfer of property by will, gift, or intestacy. A legislative note annexed to the bill stated that its purpose was to remove doubt resulting from the decision in *Deyo v. Adams,* 178 Misc. 859, 36 N. Y. S. (2d) 734 (1942), noted in 27 Minn. L. Rev. 401. See also *In re Deyo's Estate,* 180 Misc. 32, 42 N. Y. S. (2d) 379 (1943).

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TAXATION—Legacy, Inheritance and Transfer Taxes—Whether a Decedent's Beneficial Interest in a Trust of Foreign Realty is of Such Character as to Be Subject to an Inheritance Tax Imposed by Decedent's Domiciliary State—In the recent case entitled In re Stahl's Estate,¹ the Supreme Court of Michigan was asked to determine the validity of a Michigan claim to an inheritance tax on the transfer of proceeds arising from the sale of real estate located in Illinois held as the corpus of a trust in which the decedent was a beneficiary. The decedent, who had died a resident of Michigan, had been designated as beneficiary in a common form of land trust, set up in Illinois with an Illinois trustee for certain Illinois real estate, which described the beneficiary's interest as a personal one.² Following the death of the beneficiary, the trustee sold the land in question and delivered the proceeds to an organization named in the trust agreement by the beneficiary to succeed to his interest. The administrator of the decedent's estate then petitioned the Michigan court for an order to the effect that no Michigan inheritance tax was due. It determined otherwise, but on trial de novo the decision was reversed. On further appeal by the Michigan Department of Revenue, the Supreme Court of Michigan affirmed the holding on the ground that as the beneficiary possessed all the attributes of a fee ownership, except for the power to sign instruments of conveyance, the interest of the beneficiary was essentially one in foreign land, hence not subject to an inheritance tax imposed by the state of decedent's domicile.

It is axiomatic to state that the due process clause of the Fourteenth Amendment places definite limitations upon the power of an individual state to impose taxes. Thus, it has been established that it is inconsistent with the Fourteenth Amendment to allow a state to tax property which is outside its limits and within the jurisdiction of another state.³ The latter doctrine has also been extended to apply to the common inheritance tax, which technically is not a tax upon the property itself but rather is a tax upon the transfer of the property at the death of the owner. Despite the technical difference, inheritance tax, for all practical purposes, is treated as an ad valorem property tax and thus is subject to the

² In general, the trust agreement provided that the interest of the beneficiary should consist solely of a power of direction to deal with the title to the property and the right to receive the proceeds from rentals or sales. The trustee was not to deal with the property unless authorized to do so in writing signed by the beneficiary.
³ See, for example, Wheeling Steel Corp. v. Fox, 298 U. S. 193, 56 S. Ct. 773, 80 L. Ed. 1143 (1936); Adams County v. Northern Pac. Ry. Co., 115 F. (2d) 768 (1940).
same constitutional restriction. The underlying reason for such treatment is basic in that, once it has been established that property is situated in a particular state, that state has entire dominion over it and may "regulate its transfer, and subject it to process and execution, and provide for and control the uses and disposition of it." It follows that, when dominion over property is vested in one state, that dominion operates to the exclusion of all other states and the laws of another state cannot affect such property. Stated succinctly, the principle of law which has been established by the courts is that no state can tax the testamentary transfer of property which lies wholly beyond its power.

It was with this principle in mind that the Michigan court, in the case at hand, approached the question presented by the litigation. It therefore became necessary to determine whether or not the property which was transferred was within the jurisdiction of that state. Such a determination depended, in turn, upon the nature of the decedent's interest under the trust. Clearly, there were two possibilities which a construction of the trust agreement could have disclosed, each of which carried with it a different tax consequence. If the interest of the decedent were determined to be a purely personal one, as designated in the trust agreement, the property interest would be an intangible one and, following the doctrine of *mobilia sequuntur personam*, the situs of the property would be that of the domicile of the decedent and thus taxable by that domiciliary state. Since Michigan was the domicile of the decedent, it could then have property assessed a tax. On the other hand, the court could have determined that the decedent's interest was essentially one in real estate lying beyond its borders and thus not subject to tax under the principles aforementioned. Of these two possibilities, the court determined the latter to be correct.

It is the effect of the decision which presents a problem for some consideration. As has already been indicated, the trust agreement under which the decedent's interest existed provided specifically that the beneficial interest should be deemed to be personal property. At this point it is clear that there was an intention to work an equitable conversion of any legal or equitable interest in the land itself into a purely personal interest. Although there was no apparent consideration of this problem by the

8 Blodgett v. Silberman, 277 U. S. 1, 48 S. Ct. 410, 72 L. Ed. 749 (1928).
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court, its ultimate decision in the case had the practical result of giving no recognition to the intention to convert. The question arises, then, whether there was such an equitable conversion which should have gained the recognition of the court in reaching its decision.

The doctrine of equitable conversion rests on the old maxim that equity regards that as done which ought to be done, and is a fiction in law which is invoked to effectuate a declared intention. The law seems to be well settled that in order to create an equitable conversion of realty into personalty there must be a clear intention that the property is to be so converted. It appears that words in a trust agreement to the effect that the interest of the beneficiary shall be deemed to be personal property do not, in themselves, create an equitable conversion, but merely aid in disclosing the intention of the settlor. Therefore, it would seem that when the courts declare that there must be an intention which, in itself, would be sufficient to create a conversion, that intention must take the form of a direction to sell, since it is generally conceded that the true test of conversion is whether or not a sale has been directed. However, there are cases which seem to indicate that there need be no specific direction to sell the land in order to convert it into personalty if the direction to sell may arise from the nature of the instrument.

Whichever view is accepted, the direction to sell does seem to be essential. Furthermore, the direction that the land be sold must be more than a mere authorization to sell under certain circumstances; it must be a mandatory direction to sell at a definite time, although the time of sale may be indefinite to the extent that it is measured by the occurrence

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9 Equitable conversion has been defined as "the exchange of property from real to personal, or from personal to real, which takes place under some circumstances in the consideration of the law, such as to give effect to directions in a will or settlement, or to stipulations in a contract, although no such change actually takes place." See 18 C. J. S., Conversion, § 1, p. 45.


12 In Bartlett v. Gill, 221 F. 476 at 484 (1915), the court said: "You cannot impress upon real estate the character of descendability according to rules applicable to personal estate without directing the estate to be sold." See also Tait v. Dante, 78 F. (2d) 303 (1935) ; Lynch v. Cunningham, 131 Cal. App. 164, 21 P. (2d) 154 (1933) ; Equitable Trust Co. v. Ward, 29 Del. Ch. 206, 48 A. (2d) 519 (1946).


15 In re Phelps's Estate, 287 N. Y. S. 490, 159 Misc. 92 (1936).

of some event which is sure to happen.\textsuperscript{17} In those instances where an equitable conversion has been created, the conversion is regarded as having taken effect from the date the intention or direction to sell was expressed.\textsuperscript{18}

Having thus established what seems to be the law applicable in determining whether or not an equitable conversion has been created, it is appropriate to examine the circumstances of the case at hand to see if they fulfill these requirements. As has been indicated, two basic elements must be present in order to create the conversion. First, an intention to so convert; second, a mandatory direction to sell at some definite time. As for the first of these elements, the intention to convert is made obvious by the declaration in the trust agreement that the interest of the beneficiary shall "be deemed to be personal property" and that "no beneficiary should have any right, title, or interest in said real estate as such, but only an interest in the proceeds, it being the intention to vest the full legal and equitable title to the premises in the trustee."\textsuperscript{19} It would be impossible to express an intention any more emphatically than was done.

In addition to the intention, however, there must also be a direction of sale at some definite time. The opinion in the principal case fails to state clearly whether or not there was a mandatory direction to sell. It would not be unreasonable to assume, in that regard, that there was a provision to the effect that any property remaining in the trust twenty years from the date of the trust instrument should be sold by the trustee for such a provision has been utilized consistently in the type of land trust agreement under discussion. Aside from that fact, it would appear that the direction in the agreement that the beneficial interest was to pass to another would be sufficient to give rise to an implied direction to sell which, as has been indicated,\textsuperscript{20} may operate in such a manner as to have the same effect as an explicit direction. Under either situation, the time of sale would be definite, i.e., either at the end of twenty years or upon

\textsuperscript{17} See, for example, In re Baldwin's Estate, 120 Misc. 226, 198 N. Y. S. 85 (1923), where it was held that an equitable conversion was created when the land held in trust was directed to be sold upon the death of the survivor of two out of three trustees.

\textsuperscript{18} It would be more accurate to say that the conversion operates from the time the instrument in which the intention is expressed becomes effective. That is to say, in the case of an inter vivos instrument, such as a trust agreement, from the time it is dated and signed; in the case of a will, from the date of the testator's death. See Rockland-Rockport Lime Co. v. Leary, 203 N. Y. 498, 97 N. E. 43, L. R. A. 1916P 352, Ann. Cas. 1913B 62 (1911); In re Cantagalli, 92 N. Y. S. (2d) 829 (1925).

\textsuperscript{19} The exact text of the instrument is not set out in the opinion. The quotation is drawn from the court's statement of facts: 334 Mich. 380, 54 N. W. (2d) 691 at 692.

\textsuperscript{20} See cases cited in note 13, ante.
the death of the principal beneficiary. Thus, from all indications, it would appear that an equitable conversion had occurred.

Since the opinion of the court does not specifically indicate why the conversion was not recognized, it might be well to point out possible reasons for the court's conclusion. The first of these is necessarily conjectural for the opinion of the court in no way openly reflects the fact that it might have had some bearing. At any rate, it is worthy of note that there has been some discussion as to the propriety of invoking the doctrine of equitable conversion for purposes of taxation. Some thought has been expressed to the effect that a state should not enlarge its jurisdiction by means of a fiction and thus subject property to a succession tax which otherwise would not have been taxable. Despite the desirability of a uniform system of taxation, it would seem to be more desirable to be consistent in the application of settled law. Fictional though it may be, if the doctrine of equitable conversion is to be recognized, its application should occur in those instances where it has been provided for without regard to peculiar circumstances.

It is also interesting to note one other factor which no doubt was instrumental in leading to the decision. It is a purely mechanical one which stems from an obvious error on the part of the court. In answer to the contention of the Department of Revenue that the decedent's interest should have been determined according to the law of Illinois, which state was the situs of the land in question, the court quoted from Senior v. Braden wherein it was stated that, where the validity of a state tax is challenged under the federal constitution, the court must determine for itself the nature and incidence of the tax. Obviously, the court misconstrued the words "nature and incidence of the tax" to mean nature and incidence "of the property sought to be taxed." The error is made more apparent when it is realized that it has been universally accepted that the doctrine of lex rei sitae controls in determining whether an interest in land is personal or real. Had the court adopted the latter view, a different result might have been obtained since the Illinois courts have repeatedly held that an agreement creating an interest in the profits or

21 The annotation in 78 A. L. R. 793 contains a discussion of the cases dealing with this question.
22 In re Phelp's Estate, 150 Misc. 92, 287 N. Y. S. 490 (1936).
proceeds of sale of real estate creates no interest in, or lien upon, the land itself.25

Viewed within the bounds of established legal reasoning, then, the principal case can be said to have added to a certain amount of confusion already generated by the decision in the case of Masters v. Smythe.26 In that case, the owner of an undivided one-half interest in land conveyed her interest to a trustee for her benefit by means of an agreement which embodied substantially the same provisions as those contained in the agreement here under discussion. It was there held that the beneficiary had sufficient equitable title to maintain partition proceedings, but the merits of the basis for that decision may be somewhat doubted since it was the contention of the court that, by the filing of the suit for partition, the beneficiary had thereby given sufficient direction to the trustee to reconvey the property, in equity, to her.27 Considering the decision in that light, it could also be said to fail to grant recognition to the conversion of the realty into personalty.

The problem so presented is of interest from another viewpoint. If there is a failure to give effect to the equitable conversion, it would then follow that the interest of the beneficiary would be one in realty, placing the trust in the category of those trusts which, potentially at least, might be executed by the Statute of Uses.28 That possibility was discussed in the case of Chicago Title & Trust Company v. Mercantile Trust & Savings Bank,29 but the danger of such execution was minimized by the determination therein that a trust of the type under discussion was to be considered as an active one. It would appear to be well established that where the trustee’s duties are to convey, to make deeds, to sell after twenty years, to divide the proceeds, or to otherwise deal with the property, an active trust would arise. It has, for that matter, been expressly stated that a trust created for some particular purpose, as to convey real

25 Chicago Title & Trust Co. v. Mercantile Trust & Savings Bank, 300 Ill. App. 329, 20 N. E. (2d) 992 (1939). The case involved a trust agreement apparently identical to the one involved in the principal case. The case of Duncanson v. Lill, 322 Ill. 528, 153 N. E. 618 (1926), should prove interesting for it was there held that direct appeal to the Supreme Court of Illinois was improper because no interest in a freehold estate had been vested in the beneficiaries of a trust similar to the one under discussion. See also Marshall v. Solomon, 335 Ill. App. 302, 81 N. E. (2d) 777 (1948).

26 342 Ill. App. 185, 95 N. E. (2d) 719 (1950).

27 See, however, Breen v. Breen, 411 Ill. 206, 103 N. E. (2d) 625 (1952), where partition was denied, even though the twenty-year period had elapsed and a sale had not yet occurred. The court indicated that a reasonable time would be allowed after the time for sale had arrived, during which a sale could be effectuated, and that, during such period, the beneficiaries had no legal or equitable interest in the land which would entitle them to maintain partition proceedings.


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estate, would be one which the Statute of Uses would not execute, and it is immaterial, for this purpose, that the trustee's duties are merely formal or ministerial.

The doctrine of equitable conversion is not one to be treated lightly, both in view of its long established recognition and because of its effect in various fields of law. As has already been shown, it is important in determining individual rights for purposes of taxation and trusts. But it is not limited to those fields. It can readily be seen that it is important also in the matter of descent since, if an equitable conversion of realty into personality has been effected, the interest thus created would pass to the personal representative of the deceased rather than to the heirs at law. It may also have a direct bearing upon the right of an individual to maintain a partition proceeding where it would be essential that the party seeking partition should have either an equitable or legal interest in the land as such. So, too, it is an element for a creditor to consider in determining whether his attachment should be made pursuant to the law pertaining to personal property or to real property. The doctrine is important enough, therefore, to merit specific reason for its nonrecognition. If the decision in the principal case was intended to apply only to the tax question involved, the court should have so stated. There is a danger that the case may be used as authority for something not intended.

F. C. Visser

TORTS—INTERFERENCE WITH OR INJURIES IN PERSONAL RELATIONS—WETHER OR NOT THIRD PERSONS ARE LIABLE FOR MALICIOUSLY INTERFERING WITH A CONTRACT TO MARRY SO AS TO CAUSE BREACH THEREOF—An interesting and novel question became the subject of litigation in the case of Brown v. Glickstein, recently decided by the Appellate Court for the First District of Illinois. The complaint therein alleged, among other things, that the defendants, two brothers and a sister of plaintiff's fiancee, had maliciously induced a breach of contract to marry existing between plaintiff and the principal defendant. The lower court sustained a motion


2 One count, not involved in the appeal, charged the principal defendant with breach of promise to marry. The statute which, at one time, declared the bringing of such suits to be criminal having been declared unconstitutional in other respects, it can no longer be deemed effective although not expressly repealed: Ill. Rev. Stat. 1951, Vol. 1, Ch. 38, § 246.1 et seq. Subsequent legislative revision on the point has been limited in character: Ill. Rev. Stat. 1951, Vol. 1, Ch. 68, §§ 34-47.
to strike the complaint and the suit was dismissed as to these defendants. The Appellate Court, on plaintiff's appeal, affirmed the decision, holding that a malicious interference with a contract to marry may not be regarded as actionable as against close relatives. It thereby established, for the first time in this state, what constitutes an exception to the general rule on the subject.

Tort liability for interfering with contractual obligations originally applied only in those cases where the relationship of master and servant was affected for, at one time, only the enticing away of the apprentice or employee of another was deemed to be a legal wrong. In 1853, however, the doctrine was extended by the precedent-making case of *Lumley v. Gye* to the point where interference with the general contractual relationships of others became classed as torts even though the relationship of master and servant was not present in its usual form. That rule having been sanctioned by the English Court of Appeal in the case of *Bowen v. Hall*, liability thereafter reached to the point where, under the general rule now prevailing, anyone who, otherwise than in the enforcement of his own rights, procures a breach of a general contract may be held in damages to the injured party. The right to perform, and to have performance, under the ordinary form of contract being deemed a property right, interference therewith will expose the wrongdoer to liability for all injuries suffered in the breach of such a contract.

There is a difference, however, between ordinary contracts and agreements to marry for the latter, at least at one time, operated to create a status which could not be rescinded or changed by mere agreement; resulted in a merger of the legal identity of the parties; called for the application of different tests regarding capacity; and were not protected against state legislation which would tend to impair contractual obligations. It has, therefore, come to be the generally accepted American view that there should be an exception by reason of which there is no liability simply for an interference with an agreement to marry.

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7 Bloom v. Bohemians, Inc., 223 Ill. App. 269 (1921). The rule has been held applicable to interference with construction contracts, Angle v. Chicago, St. P. M. & O. R. Co., 151 U. S. 1, 14 S. Ct. 240, 38 L. Ed. 55 (1893), as well as to agencies for the sale of goods, Raymond v. Yarrington, 96 Tex. 443, 72 S. W. 580, 62 L. R. A. 982, 97 Am. St. Rep. 914 (1903), to note but two illustrations.

8 In general, see Vernier, American Family Laws (Stanford University Press, 1931), Vol. 1, § 14, p. 51.

9 The annotation in 47 A. L. R. 442 lists the cases so holding.
Judge Cooley once stated the exception in the following words: "The prevention of a marriage by the interference of a third person, cannot, in itself, be a legal wrong. Thus if one, by solicitations, or by the arts of ridicule or otherwise, shall induce one to break off an existing contract of marriage, no action will lie for it, however contemptible and blamable may be the conduct. But a loss of marriage may be such a special injury as will support an action for slander or libel, where the party was induced to break off the engagement by false and damaging charges not actionable per se." It is interesting to note that he cites no direct authority, for the only cases he listed were all more nearly in the nature of suits for slander tending to produce the breaking off of the contract to marry plaintiff. As a consequence, his statement has been exposed to criticism on the ground it is wholly without basis. It did, nevertheless, become the foundation for the doctrine of non-liability that has developed in the United States, and has since been justified on the ground that engaged persons should be free to take advice from their relatives and friends and the latter should have a right to give advice without fear of incurring liability.

A distinction in language has been made where the suit is against a parent rather than a mere stranger to the person who broke the engagement. In such cases, courts are prone to speak in terms of an absolute, or a lawful right to advise. In Minsky v. Satenstein, for

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14 Homan v. Hall, 102 Neb. 70, 165 N. W. 881, L. R. A. 1918C 1195 (1917).
15 Conway v. O'Brien, 269 Mass. 425, 169 N. E. 491, 73 A. L. R. 1448 (1926). See also, in that regard, Ryther v. Lefferts, 232 App. Div. 552, 250 N. Y. S. 699 (1931). A suit based on a theory of seduction and alienation of affections would, according to Davis v. Condit, 124 Minn. 365, 144 N. W. 1089, 50 L. R. A. (N. S.) 142, Ann. Cas. 1915B 544 (1914), have to fail for lack of the essential right to consortium, a right which would not be present until the marriage had, in fact, taken place. See also Stifter v. Boehm, 124 Misc. 55, 206 N. Y. S. 157 (1924). A promise to pay money if one of the engaged persons would break the engagement was, however, held to be invalid in Attridge v. Pembroke, 235 App. Div. 101, 256 N. Y. S. 257 (1932), on the ground the contract was opposed to public policy.
18 Overholts v. Row, 152 La. 9, 92 So. 716 (1922).
19 6 N. J. Misc. 978, 143 A. 512 (1928).
example, another case of first impression, the court held that a parent
would not be liable for inducing a breach of contract to marry, not even
if the advice was motivated by express malice, so long as the parent was
not guilty of saying anything slanderous or libelous in character. It was
there intimated that if the speaker had only a qualified right, motive
could be inquired into and such a person could be held liable for an
injury resulting from malice,20 but the statement was no more than obiter
dictum and represents a view not yet attained by any American court.21

While there has been a total absence of American cases allowing
recovery for inducing a breach of a contract to marry, whether against
a parent, a rival lover, or a mere meddler, a few instances of recovery
may be found in the Canadian reports. Cases from Quebec may be ruled
out because of the civil law rules there followed,22 but in the case of
Gunn v. Barr,23 where suit was brought against a brother of the breaching
party, an Alberta court adopted an earlier statement of Lord Macnaghten
to the effect that "a violation of legal right committed knowingly is a
cause of action, and that it is a violation of a legal right to interfere with
contractual relations recognised by law if there be no sufficient justifica-
tion for the interference."24 An argument predicated on the idea that at
least a conditional privilege should have been extended to a collateral
relative gained support only in a dissenting opinion.

In the application of rules of this nature, one is led to question
whether the American view has attained an equitable result. Granted that
a parental right to advise should be recognized, should probably be abso-
lute in character, and should not be subject to inquiry, is it not enough
to allow others no more than a conditional privilege? Rival lovers who

20 A full discussion of the difference between absolute and qualified rights, and
eamples thereof, is contained in an annotation in 29 L. R. A. (N. S.) 869.

21 It could be observed that the defendants in the instant case were only collateral
relatives, yet the court said "... no cause of action will lie ... for causing a breach
of contract to marry, even though instigated maliciously." 347 Ill. App. 488 at 487,
107 N. E. (2d) 267. Italics added.

22 In Internoscia v. Bonell, 28 Que. Super. 58 at 60 (1905), Judge Doherty said:
"I can see no reason why the father is not responsible for the damages resulting
from the breach of promise to marry on the part of his minor child, in precisely
the same way that he is responsible for the damages caused in any other way by
such minor child." See also Delage v. Normandeau, 9 Quebec Q. B. 93 (1899),
where the suit was against the father for inducing the breach, with a second count
predicated on a statute creating vicarious liability. While the attempt to hold the
father liable failed, the court did say it was dismissing the appeal "without,
however, affirming as one of the motives that a father is never responsible for a
breach of promise by his minor daughter." The Louisiana case of Overholtz v.
Row, 152 La. 9, 92 So. 716 (1922), decided in a jurisdiction where a similar
vicarious tort statute is present, held the statute to be inapplicable in suits of this
nature.


have in good faith brought about a reconsideration by one of the parties to the contract, as well as relatives and friends acting without malice, could be protected. At the same time, parties to the contract would be afforded a safeguard against meddlers who, with malicious intent, induce a breach of the engagement. No dire harm to public policy would appear to be imminent if contracts of this type were to be given the same protection as is accorded to business contracts. The holding in the instant case would, then, appear to be more harsh than it ought to be, particularly from a court free to write its own views on a matter of first impression.

R. Fortunato
RECENT ILLINOIS DECISIONS

BROKERS—EMPLOYMENT AND AUTHORITY—WHETHER OR NOT BROKER, ACTING UNDER EXCLUSIVE AUTHORITY TO SELL REALTY, MAY RECOVER AGREED COMMISSION AFTER OWNER PERSONALLY NEGOTIATED THE SALE THEREOF—In the case of Nicholson v. Alderson,1 plaintiff had been employed as defendant's exclusive agent to secure a buyer for a piece of realty under an agency agreement to last for a period of ninety days. Prior to the expiration of the term, plaintiff was notified in writing that the property was being withdrawn from his listings, but no reason was given for the revocation of authority. Upon ascertaining that the defendant, after notice and within the term, had negotiated a sale of the property, plaintiff brought suit, seeking the commission previously agreed upon. Defendant filed a motion for summary judgment, contending that his obligation to pay commissions was obviated by the written notice of revocation given to plaintiff. This motion was sustained and judgment went against plaintiff. Upon appeal therefrom, the Illinois Appellate Court for the Third District was thereby called upon to determine whether, on these facts, a licensed real estate broker, acting under a written instrument designated as an exclusive listing agreement,2 could maintain a suit for commissions. By affirming the judgment for defendant, that court held that, as the agreement was not one coupled with an interest, it was revocable at the will of the principal and the most plaintiff could expect to recover was his actual damage but not the agreed commission.

Surprisingly enough, no case involving similar facts seems to have reached the appellate tribunals of the state up to this point, but the decision logically follows on other Illinois cases dealing with the broker-customer relationship and should serve to clarify the law regarding the liability of the principal. A written contract between a principal and a real-estate broker, giving the latter power for a definite period, to negotiate for the sale of property is more than a mere offer for a unilateral contract. It is, in fact, an executory contract but one, if not coupled with an interest, of revocable character,3 except that there is generally no absolute right to revoke in the sense that the revocation could never be wrongful.

2 The gist of the agreement sued on was, that in consideration of plaintiff's promise to use his efforts to promote the sale of the real estate, he should have the exclusive right to sell the property for a period of ninety days. The instrument further provided that "if any sale or exchange" of the property was consummated "during this period" as a result of the plaintiff's or any other person's efforts, that the plaintiff would receive an agreed commission. Italics added.
Possessed of the power to revoke and terminate the broker’s agency, and this whether the agreement was to continue for a definite period or was declared to be irrevocable, the principal makes his revocation of authority effective by giving notice to the broker. Having done so, the principal may be obligated (1) to pay the agreed rate of compensation; (2) to pay a reasonable sum on a quantum meruit basis; or (3) pay no more than damages depending on the circumstances of the particular case. The broker is entitled to the first measure of recovery if the property is withdrawn from the market by its owner only a few hours before an eligible purchaser, found by the broker, has agreed to buy the property, for a revocation under such circumstance would amount to a bad-faith repudiation of a contractual obligation, after the broker had already performed his side of the agreement. Conversely, he would be entitled to a quantum meruit recovery only if the terminated services had been, in some respect, beneficial to the owner. Absent either of these, the instant case indicates that the discharged broker is entitled to no more than damages to be measured by the expense incurred or money expended in the attempt to sell the property prior to receipt of notice of termination of the agency. He should, therefore, make certain that his complaint proceeds on an appropriate theory if he expects to be successful in his action.

The contempt question dealt with in People v. Gholson grew out of a proceeding in which one of the defendants, a chiropractor, was charged with a violation of the Illinois Medical Practice Act. Before trial thereon opened, the defendant and his wife, who was joined as a co-defendant in the contempt proceedings, distributed prejudicial literature among the prospective jurors. On the day of the trial, defendants also had a motorcade accompany them to the courthouse, the occupants of which then packed the courtroom. Thereupon a contempt citation was filed to which the defendants responded

4 R. C. L., Brokers, § 8, pp. 252-3.
5 The agreed rate clearly controls if no notice has been given: Schwartz v. Akerlund, 240 Ill. App. 480 (1926).
9 Dicta in Pretzel v. Anderson, 162 Ill. App. 538 (1911), where the exclusive agency was to run until the expiration of a ninety-day notice period, appears to have been confirmed.
by a verified answer denying unlawful intent. They further contended that such response to a charge of indirect criminal contempt was conclusive upon the court and completely purged them of such contempt. The trial court refused to so rule and found the defendants guilty. On appeal to the Appellate Court for the Second District, the ruling of the lower court was upheld. The Illinois Supreme Court, after granting further leave to appeal, also affirmed.

By directly overruling the defense of purgation by oath, the court abandoned a doctrine previously followed in this state, but which has been discarded in most other jurisdictions. This defense, which applied only in cases of indirect criminal contempt, was developed for use where ambiguity in the interpretation of the facts charged to be a contempt of court could be determined by the contemner's statement of intent or the absence thereof. Developed as a reaction to the Star Chamber Court and its methods, the defense was a perversion of canon law, which worked to emasculate the inherent power of a court because it allowed the contemner to trade the slight risk of a trial for perjury to overcome the court's power to punish for contempt. The lower courts respected the defense but held it inapplicable to the instant case because there was said to be no ambiguity in the facts. The Supreme Court disagreed in that regard but, going to the heart of the matter, flatly declared that the doctrine of purgation by oath would no longer be followed. By so doing, it established directly what it had done indirectly in other prior cases, for while lip service has been given the doctrine, its full use has often been prevented by a denial of ambiguity in the facts.

CRIMINAL LAW—NATURE AND ELEMENTS OF CRIME AND DEFENSES IN GENERAL—WHETHER THE ILLINOIS RECKLESS HOMICIDE ACT IS CONSTITUTIONAL—The defendant, in People v. Garman, was charged in a multiple-count indictment with wrongfully causing the death of a passenger in his automobile as the result of defendant's reckless operation thereof.

3 People v. Rongetti, 344 Ill. 107, 176 N. E. 292 (1931); People v. McLaughlin, 334 Ill. 354, 166 N. E. 67 (1929); People v. McDonald, 314 Ill. 548, 145 N. E. 636 (1924).

4 Clark v. United States, 289 U. S. 1, 53 S. Ct. 465, 77 L. Ed. 993 (1932); 17 C. J. S., Contempt, § 83b, p. 108.

5 In general see Curtis, "The Story of a Notion in the Law of Criminal Contempt," 41 Harv. L. Rev. 51 (1921).

6 People v. Doss, 382 Ill. 307, 46 N. E. (2d) 984 (1943); People v. Parker, 374 Ill. 524, 30 N. E. (2d) 11 (1940); People v. Severinghaus, 313 Ill. 456, 145 N. E. 222 (1924).

1 411 Ill. 279, 105 N. E. (2d) 636 (1952).

2 The indictment consisted of eight counts, one for driving while intoxicated, three for involuntary manslaughter, one for reckless homicide couched in statutory language without specification, and three charging reckless homicide in separately specified ways. The verdict and conviction was based on the last three counts
After conviction, defendant sought review by the Illinois Supreme Court on the ground the statute underlying the prosecution was unconstitutional on the theory it was too vague and uncertain to sufficiently define an offense. The Supreme Court, however, affirmed the conviction when it reached the conclusion that the statute was valid on the basis the legislature had a right to use terms already possessed of an accepted meaning when describing or creating a new statutory offense without being obliged to redefine such terms.

The extreme difficulty experienced in securing convictions for the common-law felony of involuntary manslaughter in automobile cases led to the enactment of so-called "reckless homicide" statutes in many American jurisdictions under which the offending driver may be punished for a misdemeanor. These statutes, typically, do not define the new offense in precise words but generally, as in Illinois, declare it to be a crime for one to drive "a vehicle with reckless disregard for the safety of others" so as thereby to cause a death. For that reason, some of these statutes have been challenged on the ground of an alleged failure to define a crime with certainty but, to date, all such challenges have failed, for the words used therein have come to possess a well-defined common law as well as statutory meaning. Such being the case, it should not be deemed surprising to find the Illinois Supreme Court able to achieve the decision it did in the instant case without substantial difficulty.

alone, as the jury expressly found the defendant not guilty of driving while intoxicated or of involuntary manslaughter.

3 Direct review was proper, despite the fact the conviction was for a misdemeanor, by reason of Ill. Rev. Stat. 1951, Vol. 2, Ch. 110, § 199, dealing with review in cases involving the validity of a statute.


5 Ill. Const. 1870, Art. II, § 2, was relied on. It contains the familiar due process clause.

6 The court also decided that the acquittal on the charge of involuntary manslaughter did not operate, by way of double jeopardy, to prevent conviction for reckless homicide as the two offenses were said to be separate and distinct. On that point, see People v. Allen, 368 Ill. 368, 14 N. E. (2d) 397 (1938), noted in 16 CHICAGO-KENT REVIEW 396.

7 Twenty-five such statutes are tabulated in a note appearing in 30 CHICAGO-KENT LAW REVIEW 155 (1952), particularly p. 156, note 4.


11 See, for example, People v. Green, 365 Ill. 242, 13 N. E. (2d) 278, 115 A. L. R. 348 (1938), wherein the court held what is now Ill. Rev. Stat. 1951, Vol. 2, Ch. 95½, § 145, dealing with the offense of reckless driving, to be valid against a similar attack.
DEATH—ACTIONS FOR CAUSING DEATH—WHETHER A COMPLAINT FOR PERSONAL INJURY, FILED THE DAY OF BUT AFTER DEATH OF INJURED PARTY, MAY BE AMENDED TO STATE A CAUSE OF ACTION FOR WRONGFUL DEATH—A strange turn of events, developing out of the case of Vukovich v. Custer,\(^1\) required the Appellate Court for the Second District to pass upon the validity of a complaint filed the same day as, but after, the death of the injured person which was later amended to substitute the legal representative as plaintiff and corrected to state a cause of action for wrongful death. The original plaintiff had been injured in an automobile collision involving two other persons. Suit was begun on April 25, 1946, naming such persons as defendants but service was obtained on only one of them. As a matter of fact, and probably unknown to the attorney who filed the suit, the injured person had died early in the morning of the day on which the suit was begun. Just short of one year after institution of the suit, after suggestion of the death, permission was given to substitute the legal representative as plaintiff and to file an amended complaint changing the cause of action to one for wrongful death.\(^2\) Thereafter, service was had on the other defendant who then moved to strike the amended complaint and dismiss the suit. His motion having been sustained, the legal representative appealed, but the judgment was affirmed on the ground that the proceeding was a nullity from the beginning for lack of a real person to maintain the suit. It was also intimated that, if such had not been the case, it would have been improper to amend anyway as the amendment would state an entirely different cause of complaint from the one originally intended.\(^3\)

On the first aspect of the question presented, that is whether or not a suit is a nullity if the purported plaintiff should be dead at the moment of institution thereof,\(^4\) the court was correctly guided by the principle that capacity to sue exists only in persons in being and not in those who

\(^1\) 347 Ill. App. 547, 107 N. E. (2d) 426 (1952). Leave to appeal has been granted.

\(^2\) The one-year limitation on wrongful death actions, fixed by Ill. Rev. Stat. 1951, Vol. 1, Ch. 70, § 2, is measured from the date of death rather than from the date of the injury causing death. See comment in 19 Chicago-Kent Law Review 181 (1941), particularly p. 184, notes 22-3. On the point of the right to add new parties defendant by amendment filed after the limitation period has expired, see note in 24 Chicago-Kent Law Review 170 (1946).

\(^3\) Ill. Rev. Stat. 1951, Vol. 2, Ch. 110, § 170, dealing with amendment of pleadings, permits amendment of a complaint for the purpose of sustaining “the claim for which it was intended to be brought.”

are dead or not yet born, hence an action begun in the name of a non-existent person is null and void. No amount of amendment could validate such a proceeding. On the second point, however, there may be some doubt. Certainly, under the former practice, it was improper to amend a personal injury proceeding so as to convert it into a wrongful death action, particularly if the latter grew out of the acts charged in the former, for the first abated with the death of the original party, and the other was regarded as a new and different cause of action, running in favor of a different party and predicated on a statutory right rather than one conferred by common law. With the adoption of the present Civil Practice Act, however, there is reason to believe that it should be unnecessary to abate the first action and to require the filing of a new suit in a case of this character for the prime purpose of either claim would be to make the defendant respond for the single fault on his part and, but for the circumstance of the death of the original plaintiff, no amendment would be needed. The degree of liberality with respect to amendment which has been shown since the Civil Practice Act was adopted, in order that the case might be "speedily and finally determined according to the substantive rights of the parties," would seem to support that result.

GARNISHMENT—CONDITIONAL JUDGMENT ON DEFAULT AND SCIRE FACIAS THEREON—WHETHER OR NOT DEFAULT JUDGMENT MAY BE ENTERED AGAINST GARNISHEE WHO APPEARS BUT FAILS TO ANSWER—Plaintiff, in the case of Chicago Catholic Workers Credit Union v. Rosenberg, obtained a judgment by confession against the principal defendant and, after an execution had been returned unsatisfied, served a demand in


6 Dicta in Susemiehl v. Red River Lumber Co., 376 Ill. 138, 33 N. E. (2d) 211 (1941), would so indicate, but the primary issue therein dealt with the applicable measure of recovery.

7 Fease v. Rockford City Traction Co., 279 Ill. 518, 117 N. E. 83 (1917), illustrates the former procedure.

8 Although, under Ill. Rev. Stat. 1951, Vol. 1, Ch. 70, § 2, the wrongful death action is brought by the legal representative of the deceased person, he acts more nearly as a statutory trustee for the widow and dependent next of kin, rather than for the benefit of the dead person's estate.

9 Although, under Ill. Rev. Stat. 1951, Vol. 1, Ch. 70, § 2, the wrongful death action is brought by the legal representative of the deceased person, he acts more nearly as a statutory trustee for the widow and dependent next of kin, rather than for the benefit of the dead person's estate.

See abstract opinion in Panarsky v. London Guarantee & Accident Co., Ltd., 334 Ill. App. 394, 70 N. E. (2d) 525 (1948), where the amended complaint proceeded on an entirely different theory to that stated in the original complaint. It should be noted that the decision in the wrongful death case of Friend v. Alton R. R. Co., 283 Ill. App. 366 (1936), while rendered after the adoption of the Civil Practice Act, in fact turned on the earlier law of procedure.

1 346 Ill. App. 215, 104 N. E. (2d) 568 (1952). Burke, P. J., wrote a dissenting opinion to the effect that the judgment was a final one, hence sufficient to support an appeal.
garnishment upon the defendant and his employer. An affidavit for garnishment was then filed and interrogatories and a summons to the employer were served on the garnishee. The latter, after appearing and obtaining an extension of time in which to answer, failed to answer and a default judgment was entered against the garnishee for the full amount of the original judgment. More than ninety days after the entry of such judgment, the garnishee moved to vacate the same on the ground that it was void as being contrary to the provisions of the Illinois Garnishment Act. The judgment was vacated and leave was given to the garnishee to file an answer. Plaintiff appealed to the Appellate Court for the First District, contending that the judgment, being final in character, could not be vacated after the expiration of thirty days except pursuant to appropriate procedure. Plaintiff's appeal, however, was dismissed on the ground that the judgment against the garnishee, being conditional, could be vacated at any time, hence there was no final judgment to support the appeal.

In discussing the question of whether or not the judgment of the lower court against the garnishee was final or conditional, the court had occasion to examine the pertinent provisions of the Illinois Garnishment Act as it applied to the facts before the court, i.e. in a case where the garnishee appeared but failed to file an answer. One section of the statute declares that when "any person shall have been summoned as garnishee . . . and shall fail to appear or make discovery . . . the court . . . may enter a conditional judgment against such garnishee for the amount of the plaintiff's demand . . . and thereupon a scire facias shall issue . . . commanding such garnishee to show cause why such judgment should not be made final." It should be noted that, according to the statute, no more than a conditional judgment is to be rendered if (1) the garnishee fails to appear, or (2) having appeared, fails to answer; the final judgment being deferred until after service of scire facias. The provision in question had been interpreted, in Carter v. Lockwood, to permit the

2 Such demand is required by Ill. Rev. Stat. 1951, Vol. 1, Ch. 62, § 14, whenever an attempt is made to garnishee unpaid wages.

3 Ill. Rev. Stat. 1951, Vol. 1, Ch. 62, § 8. The garnishee claimed that, at best, the judgment should have been no more than conditional in character.

4 Ill. Rev. Stat. 1951, Vol. 1, Ch. 37, § 376, relating to practice in the Municipal Court of Chicago, correlates with ibid., Vol. 2, Ch. 110, § 196, dealing with state courts, on the point of the procedure to be followed to vacate a final judgment more than thirty days after its rendition.

5 Ibid., Vol. 2, Ch. 110, § 201, requires that the judgment be a final one to support an appeal. An order vacating a judgment is not the same as one granting a new trial. The latter, while not final, is appealable: Ill. Rev. Stat. 1951, Vol. 2, Ch. 110, § 201 and § 259.22.

6 Ill. Rev. Stat. 1951, Vol. 1, Ch. 62, § 8. Italics added. If the garnishee appears and answers, proceedings are then to be had as in other cases.

7 15 Ill. App. 73 (1884).
entry of final judgment if the garnishee appeared but defaulted with respect to filing an answer, but the holding therein had been exposed to criticism, at least by inference, on the basis of language in other cases.\(^8\)

The instant case, by its insistence upon a following of the plain language of the statute, must be regarded as reversing the decision of the Carter case for it is now declared that an appearance and an answer are both prerequisite to the entry of a final judgment. If either one is lacking, the court can enter no more than a conditional judgment until after service of the scire facias writ.

**Judges—Powers of Successor as to Proceedings Before Former Judge—Whether or Not a Reviewing Judge Who Has Not Participated in the Majority Decision May Join with the Minority to Grant a Rehearing and Reverse the Original Decision—In the case of Glasser v. Essaness Theatres Corporation,\(^1\)** heard in the Appellate Court for the First District, the reviewing court, as then constituted, decided that the trial court had erred and reversed its decree, with one appellate judge dissenting. Before a petition for rehearing could be filed, the concurring judges were transferred and two other judges took their place.\(^2\) The court, as so reconstituted, then granted a rehearing and substituted a new opinion for the original determination under which the trial court judgment was affirmed, thereby projecting a question as to the power, as well as the policy, of a successor appellate judge acting to review a decision of his predecessor, particularly when the latter was available and competent to act in the case.\(^3\)

On that score, the majority of the new court recognized the doctrine that a successor judge is, and should be, precluded from changing the judgment of his predecessor, especially where the earlier judgment is based on the merits and is of final character.\(^4\) They were, however, of

\(^8\) In Motor Car Securities Corp. v. Schockley, 233 Ill. App. 346 (1924), one declaring it proper to treat the judgment against the garnishee as conditional and not final, the court actually found an absence of appearance by the garnishee. See also T., W. & W. Ry. Co. v. Reynolds, 72 Ill. 487 (1874), where it was said that a special plea to the jurisdiction of the court was not a full appearance, hence could support no more than a conditional judgment.

\(^1\) 346 Ill. App. 72, 104 N. E. (2d) 510 (1952). Friend, J., wrote a dissenting opinion. Leave to appeal has been granted. The case of Weinrob v. Heintz, 346 Ill. App. 30, 104 N. E. (2d) 534 (1952), involves the same question and achieves a similar result.

\(^2\) Power to assign judges to the Appellate Court is vested in the Supreme Court: Ill. Rev. Stat. 1951, Vol. 1, Ch. 37, §§ 29, 45 and 52.

\(^3\) The two concurring judges were merely transferred to other divisions of the court. They were not returned to duty as circuit judges: Ill. Rev. Stat. 1951, Vol. 1, Ch. 37, § 54.

\(^4\) Garrett v. Peirce, 84 Ill. App. 31 (1899).
the opinion that such rule did not apply because the original judgment in the instant case had not become final since the petition for rehearing had not yet been acted upon.\textsuperscript{5} It therefore considered it to be the duty of the successor judges to pass on the petition as it was said to present questions separate from, and independent of, those considered in the prior judgment, as well as being one calling for a decision by the court and not by any particular group of judges.\textsuperscript{6} The majority refused to be guided by the federal rule, one to the effect that no rehearing is to be granted unless a member of the court who concurred in the judgment should desire it,\textsuperscript{7} on the ground it might be a practical rule in the federal system, where judges are appointed for life, but would be an impractical one in Illinois where the entire membership of an Appellate Court is subject to change every three years.\textsuperscript{8} As the law was said to favor the action taken, the majority refused to go into the matter of the propriety of granting the petition for rehearing on the ground that issue possessed no more than academic importance.

The dissenting judge, on the other hand, laid stress on the fact that, as the purpose of a petition for rehearing is to call to the attention of the majority the point, or points, supposed to have been overlooked or misunderstood by them in arriving at their decision, such a petition would be meaningless to one who had not previously considered the case.\textsuperscript{9} Much of his argument, however, dealt with the propriety of the situation presented by the action taken in the instant case. Inasmuch as, by general rule, a mere change in the membership of an appellate tribunal ought not be made the basis for reopening questions in the same case which have once been settled,\textsuperscript{10} there is reason to criticize the practice of the majority for, if allowed to continue, it could result not only in confusion but could be fraught with dangerous implications.

\textsuperscript{5} Ill. Rev. Stat. 1951, Vol. 2, Ch. 110, § 259.32, indicates that a petition for leave to appeal to the Supreme Court will not be entertained unless it shows that the judgment of the Appellate Court has become final through "denial of a petition for rehearing" or by lapse of time.

\textsuperscript{6} The court considered the issue as being analogous to that involved in a motion for a new trial which is presented for the first time to the successor judge after the expiration of the term of the original trial judge. On that point, see People ex rel. Hambel v. McConnell, 155 Ill. 192, 40 N. E. 608 (1895).

\textsuperscript{7} See Ambler v. Whipple, 90 U. S. (23 Wall.) 278, 23 L. Ed. 127 (1874), and Brown v. Aspden's Adm'rs, 55 U. S. (14 How.) 25, 14 L. Ed. 311 (1853).

\textsuperscript{8} Ill. Rev. Stat. 1951, Vol. 1, Ch. 37, § 29.

\textsuperscript{9} See Rule 13 of the Appellate Court for the First District. It should be proper to note that, after a transfer such as occurred in the instant case, there could be no quorum of the original court left to pass on the petition for rehearing: Ill. Rev. Stat. 1951, Vol. 1, Ch. 37, § 31. The Supreme Court should, when making assignments, take this fact into consideration.

\textsuperscript{10} The case of Cordner v. Cordner, 91 Utah 474, 64 P. (2d) 828 (1937), contains the most complete discussion on this point.
Labor Relations—Mediation, Conciliation, and Arbitration—Whether or Not a State Court Has Jurisdiction to Entertain an Action for Reinstatement of Discharged Railroad Employee Where Union Contract Provides for Grievance Procedure—In the recent case of Keel v. Terminal Railroad Company, the plaintiff filed a complaint in two counts, the first of which asked for damages for the breach of an employment contract and the second, labeled as a separate count in equity, asked that the plaintiff be reinstated to his job with back wages for an allegedly wrongful discharge. The jury awarded plaintiff damages for breach of contract and recommended reinstatement to the job. On motion for new trial, the trial judge disregarded the recommendation but entered judgment for the damages. The defendant appealed from this judgment to the Appellate Court for the Fourth District, which court reversed the decision and remanded the case with leave to the plaintiff to amend his complaint so as to make it clearly one for damages only, a matter within the cognizance of a state court, or else to secure reinstatement under the theory that his employment was continuing, in which case a following of the grievance procedure of the National Railroad Adjustment Board would be the only proper approach.

The problem presented appears to be the first of its kind to be passed upon by a reviewing tribunal in Illinois although the decision is consistent with the determinations reached in what would seem to be the only other cases involving the exact problem. The question before the court was one as to whether or not a state court would possess jurisdiction to hear both of the problems involved in the case or, lacking jurisdiction to hear one of them, would then lack jurisdiction to hear any part of the case in the absence of an amendment to the complaint. Viewed simply as a suit for damages for breach of contract, the court would clearly have jurisdiction. On the other hand, if the plaintiff did not wish to consider the contract breached but regarded it as a continuing one, the court would then be unable to act as the plaintiff had not exhausted his administra-

2 The contract had been entered into between the defendant employer and the union to which plaintiff belonged for the benefit of the union members.
tive remedies,⁷ a step made necessary by the Railroad Labor Act⁸ which created the National Railroad Adjustment Board and gave it exclusive primary jurisdiction over the construction of union contracts and of other problems concerning the future relations of railroad employees and their employers.⁹ Either alternative would require plaintiff to make an election between clearly inconsistent remedies. By suing as he did, plaintiff evidenced a desire to take under both or, stated differently, to avoid making the election. By reversing the judgment in plaintiff's favor and remanding the cause for further proceedings, the court forced plaintiff to make his election, as he should have done at the outset of the case. The eventual outcome of the matter was thereby left to depend on the choice made. Forcing an election between inconsistent judicial remedies has long been the practice of courts. It is novel, but sound, to see the same attitude being invoked where the inconsistency exists between a judicial remedy on the one hand and an administrative remedy on the other.¹⁰

**LANDLORD AND TENANT—PREMISES, AND ENJOYMENT AND USE THEREOF—WHETHER OR NOT RIGHT TO POSSESSION OF EXTERNAL WALLS OF A DEMISED PREMISE PASSES TO LESSEE—**

In the recent case of 400 North Rush, Inc. v. D. J. Bielzoff Products Co.,¹ there was a lease of the sixth and seventh floors of an office building wherein defendant-lessee had covenanted not to erect any outside advertising signs without the consent of the lessor. When, thereafter, lessee erected such a sign without permission, the lessor, alleging an unlawful entry and withholding of said external wall, brought a forcible entry and detainer proceeding to recover that part of the demised premises and received judgment. An appeal was taken by the lessee to the Appellate Court for the First District. That court, after determining that the right to possession in the aforementioned wall was in the lessee, held that a forcible entry and detainer proceeding was not the proper action and reversed judgment. The court indicated that the lessor should have proceeded under the Landlord and Tenant Act² after having terminated the entire lease for breach of covenant, or should have requested a mandatory injunction.

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⁸ 45 U. S. C. A. §§ 151 et seq.
It is clear that, in the instant case, the plaintiff was under a duty to show his right of possession in the disputed wall as the action of forcible entry and detainer is solely a possessory one.\(^3\) Strangely enough, in view of the amount of litigation in other jurisdictions, there have been no previous Illinois decisions on the question of which party receives the right to use the outside walls of leased premises. The general rule seems to be that in the absence of any stipulation to the contrary, the exclusive right to use the external walls, in the case of a lease of a building for business purposes\(^4\) or a part thereof, vests in the lessee.\(^5\) While this case appears to support this view, the court did not consider what effect, if any, the lessee's covenant not to erect a sign had on this issue. This question has arisen elsewhere and, in an early Missouri decision,\(^6\) it was held that the right that a lessee receives in an external wall is a mere incident to, and is not part and parcel of the premises demised. Consequently, the effect of a restrictive covenant not to erect an outside sign was to keep title and control of the wall in the landlord. Presumably, then, under this doctrine the plaintiff in the instant case could have maintained his action. But more recent decisions have taken the position adopted by the Appellate Court. In one decision, where a lessee had covenanted not to erect an outside sign, the court held that the lessee still possessed sufficient interest in the wall to enjoin the lessor from renting the space to a third party.\(^7\) In another, the court explicitly stated that a covenant of this type does not amount to a reservation of title in the lessor.\(^8\) Thus, the decision reached by the Appellate Court supports the more modern rule and logically supplements the Illinois law that a lease passes the incidents of, as well as the principal to, the premises demised.\(^9\) A landlord may still protect himself in the use given to the outside walls of his leased property by incorporating restrictive covenants in the lease. But his remedies will be restricted to those arising out of a breach of condition rather than those intended to protect his possessory rights in the demised property.

\(^3\) Meier v. Hilton, 257 Ill. 174, 100 N. E. 520 (1913).
\(^4\) It is doubtful that this rule would apply to dwelling houses as such use of an external wall would be inconsistent with a reasonable enjoyment of the property. See the dictum in Kretzer Realty Co. v. Thomas Cusack Co., 196 Mo. App. 596, 190 S. W. 1011 (1917).
\(^6\) Fuller v. Rose, 110 Mo. App. 334, 85 S. W. 331 (1905).
MUNICIPAL CORPORATIONS—POLICE POWER AND REGULATIONS—

WHETHER BUILDING PERMIT GRANTED UNDER ZONING ORDINANCE IS REVOKED BY A SUBSEQUENT AMENDATORY ZONING ORDINANCE—The Appellate Court for the First District, in the case of Deer Park Civic Association v. City of Chicago,¹ considered whether or not a building permit had become revoked by the passage of an amendatory zoning ordinance which took effect subsequent to the time when the permit had been granted. One of the defendants therein, owner of land acquired for commercial development, applied for and received a permit to erect a manufacturing building in an area zoned for commercial and manufacturing use. The city then had under consideration, and subsequently adopted, an amendatory zoning ordinance which rezoned the area for family dwelling purposes but this amendment did not become effective until fifteen days after the permit had been granted. The principal defendant, in the meantime, had incurred considerable liability under contracts entered into before the permit had been granted and, during the period from the date of the issuance of the permit to the effective date of the amendment to the ordinance, had made extensive improvements on the property. After the amendment became effective, the plaintiff, an association of resident property owners, sought a declaratory judgment to the effect that the principal defendant had no vested right in the building permit and that such permit had been revoked. This defendant filed certain counterclaims and received judgment in its favor in most respects. On plaintiff's appeal, and defendant's cross-appeal from part of the judgment, the Appellate Court affirmed on the ground the change in the zoning ordinance did not operate to affect vested rights which had been acquired in the building permit.

At first glance, the question raised in this case does not seem to present an unusual problem nor does it result in an unreasonable solution, but considering the fact that zoning problems in a city as large as Chicago are not new, it is surprising that the problem, in this particular form, has never arisen previously.² Cases presenting factual situations similar to the one at hand can be found but the relief in those instances

¹ 347 Ill. App. 346, 106 N. E. (2d) 823 (1952). Leave to appeal has been denied.
² In Metropolitan Life Ins. Co. v. City of Chicago, 402 Ill. 581, 84 N. E. (2d) 825 (1949), the court rejected a change in a zoning scheme, as unconstitutional when applied to the particular case, apparently on the ground the property owner had acquired a vested right on the basis of conditions in existence at the time the property was acquired for a specific, and then valid, purpose. The case was not one, however, in which any steps had been taken to secure a permit or to commence making improvements.
typically was granted on the basis of an equitable estoppel which had arisen to prevent the city from establishing rights contrary to those of the several petitioners, for in those cases no permits had been granted but the petitioners had proceeded with the construction, or alteration, in reliance upon affirmative acts of the city. These cases do point the way, however, to the answer to the question which forms the crux of the problem, to-wit: when does a permittee acquire a vested right by virtue of his permit?

The law seems well established in other jurisdictions that the permit in itself does not vest any peculiar rights or immunities in the permittee, consequently the question arises as to what is necessary, in addition to the permit, to create an enforceable right. The court, in the instant case, enunciated the general rule to be that "any substantial change of position, expenditures, or incurring of obligations under a building permit entitles the permittee to complete the construction and use the premises for the purpose authorized irrespective of subsequent zoning or changes in zoning." It follows therefrom that the question can be answered only in the light of the facts and circumstances of each particular case, as it would lie within the domain of the court to determine whether the permittee had sufficiently altered his position so as to become entitled to protection. It is interesting to note, in that regard, that most of the work involved in the instant case had been done in partial performance of contracts entered into after application for the permit but before issuance thereof. Inferentially, therefore, it would seem to be unnecessary that the applicant should await until the permit is issued before incurring obligations, but it would be necessary that the acts be done in reliance upon the probability that the permit will be granted.


4 See, for example, Call Bond & Mortgage Co. v. Sioux City, 219 Iowa 572, 259 N. W. 33 (1935); Brett v. Building Commissioner of Brookline, 250 Mass. 73, 145 N. E. 269 (1924); City of Omaha v. Glissmann, 151 Neb. 895, 39 N. W. (2d) 828 (1949).

5 347 Ill. App. 346 at 351, 106 N. E. (2d) 823 at 825.

6 The court, in the instant case, found substantial work had been done under the permit in the form of rough grading, digging excavations for foundations and footings, installing underground sewer, drainage, water and gas lines, and also installing form work for column and line wall footings and foundations.

7 The court said: "This partial performance of contracts made in reliance on the probability that the permit would issue and pursuant to substantial obligations relating directly to the purpose of the permit is, we think, sufficient to give rise to a vested right." Italics added. 347 Ill. App. 346 at 353, 106 N. E. (2d) 823 at 826.
TRUSTS—EXECUTION OF TRUST BY TRUSTEE OR BY COURT—WHETHER FEDERAL CAPITAL GAINS TAX SHOULD BE CHARGED TO INCOME OR TO CORPUS

The peculiar terms of the trust agreement involved in the case of United States Trust Company of New York v. Jones gave rise to a problem concerning the proper allocation of a federal capital gains tax which had been assessed on profits arising from the sale of certain shares of corporate stock belonging to the trust corpus. Following the determination of the tax liability, the trustee applied for a construction of the trust instrument as to the proper application of the tax burden and was met by the contention of the income beneficiaries that if the tax was charged to income it would defeat the settlor's intention to provide for their support. The chancellor, as a matter of law, directed payment of the tax from the beneficial income and, on appeal from that decision, the Appellate Court for the First District affirmed.

Prior to the decision in the instant case, the decisions in Illinois quite generally held that, as a capital gain would normally belong to corpus, the burden of taxation should fall where the substantial benefit was received in the absence of contrary provision in the trust instrument. If, however, the settlor directed otherwise, his instructions had to be followed, so the door was left open for holdings of the character found in Home for Crippled Children v. Boomer wherein the court approved a charging of

1 346 Ill. App. 365, 105 N. E. (2d) 122 (1952). Leave to appeal has been granted.
2 26 U. S. C. A. §§ 22(a) and 162(b).
3 Article 6 of the agreement provided: "Out of the income... trustee shall pay all taxes... in respect to any part of the principal... under any present or future law of the United States... all such taxes... being charged as a lien on the said income, and in case of deficiency... upon the principal of the trust estate." Italics added. 346 Ill. App. 365 at 368, 105 N. E. (2d) 122 at 124.
4 The opposition appears to have come more nearly from the fact that, as it would be necessary to accumulate income for several years to meet the capital gains tax obligation, the result would be to pile normal income tax on top of the capital gains tax as the accumulated income would be subject to current income taxes during the period of accumulation. No such additional tax burden would exist if other capital assets were used to discharge the capital gains tax and a saving of normal income taxes might even result.
5 Vanetta v. Carr, 229 Ill. 47, 82 N. E. 267 (1907); DeKoven v. Alsop, 205 Ill. 309, 68 N. E. 930, 63 L. R. A. 587 (1903).
6 The distribution of real estate taxes and special assessments, as between life tenants and remaindermen, is discussed in Warren v. Lower Salt Creek Drainage District, 316 Ill. 345, 147 N. E. 248 (1925). As to the proper application of inheritance taxes, see Northern Trust Co. v. Buck & Rayner, 263 Ill. 222, 104 N. E. 1114 (1914). Income tax questions are discussed in Young v. Illinois Athletic Club, 310 Ill. 75, 141 N. E. 369, 30 A. L. R. 985 (1923).
7 While a capital gains tax is classed as a tax on "income" arising from the sale of capital assets, it is not strictly a tax on "real" income: Industrial Trust Co. v. Winslow, 60 R. I. 61, 197 A. 185 (1938).
8 320 Ill. App. 541, 51 N. E. (2d) 830 (1943).
attorney’s fees and trial costs against income on the basis the settlor there
had so intended, although such would not be the normal incidence of
burdens of that character. The instant case, in the light of the settlor’s
express language on the point, adds nothing to that view but it does
include a novel contention that one result of such a decision might pro-
duce a violation of the statute prohibiting an unlawful accumulation of
trust income.9 As the court found that there was no direction to provide
a reserve to meet future capital gains taxes and none of the accumulated
income was to be added to corpus, it deemed the statute inapplicable. The
case does, however, come perilously close to other situations wherein un-
lawful attempts have been made to provide an indirect benefit for the
corpus by an accumulation of income made at the expense of the income
beneficiaries.10

9 Ill. Rev. Stat. 1951, Vol. 1, Ch. 30, § 153, contains the familiar provisions of the
Thelluson Act on this point. The contention rested on the fact that, as the trust in
question had been created in 1916, the twenty-one year period of permissible accumu-
lation had long since expired, so that any further accumulation would be improper.

10 See Ellis v. King, 336 Ill. App. 298, 83 N. E. (2d) 367 (1949), to the effect that
the principal of a mortgage must be paid out of corpus, not income. In Hascall v.
King, 162 N. Y. 134, 56 N. E. 515 (1900), it was held improper to accumulate income
beyond the statutory period for the purpose of retiring a mortgage on the trust
property.
BOOK REVIEWS


In the form of a systematic review of both the common law rules and their statutory counterparts relating to the law of homicide, Professor Moreland has here presented a concise and coherent statement of existing law together with his recommendations for a model statute on the subject. A brief historical introduction, dealing with the law of homicide prior to the eighteenth century, is followed by an examination of each of the forms of common law homicides, that is intentional murder, negligent murder, the felony murder, the killing of an officer while resisting arrest, voluntary manslaughter, and involuntary manslaughter. His analysis of statutes dealing with these crimes, and with negligent homicide arising from the operation of a motor vehicle, is followed by a discussion of possible defenses. Copious footnotes and ample cross references illustrate and integrate the points considered in the text while the accompanying tables and index make cited material readily available.

According to the author, the term "malice aforethought" must go because, having many meanings, it is a source of confusion. In its place, he would substitute the phrase "deliberate and premeditated intent," defining the latter carefully. Further, he indicates a belief that the felony murder doctrine, as such, should be eliminated, suggesting, as a transitional step, a statute which would confine the doctrine to cases involving arson, rape, robbery, or burglary, and providing for the punishment of this form of homicide as second degree murder. He joins with other authorities in attacking the doctrine that the unintentional killing of an officer while resisting an arrest should be treated as a murder and would, instead, place criminal responsibility not upon the lawfulness or unlawfulness of the act but solely upon the wantonness or barbarousness of the particular act for which the defendant is being held responsible.

Most welcome to lawyers and judges alike should be the inclusion of a careful examination of the law of criminal negligence in manslaughter. The need for an accurate definition of criminal negligence at this level of homicide is demonstrated, beginning at page 62, by the discussion of the variety of unsatisfactory pegs on which convictions have been hung. As the author states, at page 120, "'judges have not frankly faced the issue whether criminal negligence is objective or subjective.'" Having examined the cases, and with the tort standard in mind, the author offers a proposed statute which would define criminal negligence in terms of conduct "recklessly disregardful" of life or property, utilizing the standard
of the reasonable man. The objective standard thus employed is supported on the ground that "societal harm," not moral wrongdoing, is the thing involved.

As with the felony murder doctrine, so also with the misdemeanor-manslaughter doctrine, Professor Moreland believes present concepts should be done away with, principally because, being based on the "unlawful act" idea, that doctrine has also been the source of much confusion and does not evaluate the relative dangerousness of the defendant to society. Cases coming within the doctrine would, under his proposed scheme, stand or fall under the tests of criminal negligence for murder and manslaughter respectively. Various defenses, including those of self-defense and of insanity, are treated and a model insanity statute has been suggested, one intended to employ the several McNaghten rules on the point but also including the concept of degrees of insanity.

On the whole, the treatise has been carefully prepared, is thoroughly documented, and is readable as well as precise. Adoption of the orthodox pattern on the subject facilitates correlation of the contents of this book with other well-known standard works on homicide. Only the course of time could provide a test for the author's model statute, but it is evident that his review of existing authorities, his rejection of unsound doctrine, and his efforts to sift modern attempts at codification, have resulted in the production of a treatise which, revealing the excellence of the author's scholarship, should become a work of great utility.

R. K. Larson


Biographical works dealing with the lives of Chief Justices, Supreme Court judges, eminent lawyers, and even with those of common attorneys, have been issued by the score, but a publication dealing with the experiences of a nisi prius judge may be considered something of an anomaly, particularly when it is one written and published by a living member of the trial bench of one of America's most densely populated counties. This book is even the more noteworthy for it is not simply a chronological account of a man's birth and growth, or a journal of his day-to-day actions, so much as it is a fascinating, candid, behind-the-bench record of impressions gathered from ten years of varied trial court experience. Written primarily for laymen, and only secondarily for lawyers, the book nevertheless furnishes an intimate and helpful message for all who may have occasion to appear before a trial judge.
Hundreds of pages have been written on the point of the appropriate way to try a case, to present evidence, to cross-examine successfully, to argue to a jury, or on court-room conduct in general. Too frequently, such works, if not merely anecdotal in character, deal with their subject matter from the viewpoint of the trial attorney, hence seldom consider the effect such efforts may have on the presiding judge. Not least among the merits of this work, then, is the fact that through it the author provides the other side of the story as he reveals the thoughts which race through the mind of the judge while he observes the court-room scene from his elevated position. The book is not lacking in those revealing anecdotes, both personal and impersonal to the author, which often become the means whereby to drive home important lessons. Stories do here abound, illustrating those influences which could play on a court, touching the difficulties which may be encountered with lawless jurors, concerning the inadequacies of trial procedure, and narrating the dangers to be found in lawyers' tricks. They furnish, however, no more than the frame around which to present the many sound utterances of judicial wisdom.¹

Trial term in a substantial court in any large county brings many diversified cases up for hearing. Any judge who has been torn over a custody hearing, who has pondered the best solution for a large reorganization, who has struggled with exaggerated claims regarding personal injury, or who has groped for the intention of contracting parties, will endorse the remark of the author that, so considered, the lot of the judge is not an enviable one. Such judges will, of course, agree that there are compensating factors but how many others realize the full scope of the trial judge's responsibility or count the hours of effort entailed in the proper discharge thereof. If they would learn, the answer is here available in as interesting a form as has ever before been presented.


Six chapters of this book, devoted to a review of state experience in the investigation of alleged communistic activity believed intended to overthrow democratic government, provide a report on the actions, the

¹ The judge occasionally nods. See, for example, page 322 where his Honor states: "Then to bed, where I read a few pages of an erudite article in a current law school review. As usual, this was an irresistible soporific, so I soon turned off the bed lamp and went to sleep." Or consider page 329, where it appears that by the time the judge had disposed of some motions he was ready for bed. In the words of the author, "Although I was tired, my brain was spinning too rapidly to augur well for a restful night. So I dipped into a Law Review article, which soon produced the usual and desired effect." Some law review, touched at a sensitive point, may call him to account for misusing its pages as a sleep-inducer!
achievements, if any, and the by-products of state investigative committees in Maryland and New York in the east, in California and Washington to the west, and Illinois and Michigan in the central area. Each report, though prepared by a different author, tends to disclose a discouraging picture of overzealousness run riot to the point where democratic freedoms would appear to have suffered more from danger within than without, from partisans than from enemies, while the country has been exposed to a witch-hunt of greater ferocity than anything developed in the early days of Salem, albeit one far less productive of tangible result. These reports provide a commentary on committee techniques, on committee practices, and on the methods of the opposition, which should be read by all citizens, although they might have been brought up to date before republication occurred.

The final chapter of this book, prepared by a well-known worker in the field of civil liberty, serves to summarize the lessons to be learned from these attempts to root out disloyalty toward the American form of government. At the same time, the editor points to what better could have been done. A "slight enlargement of calm and common sense," he indicates, should accomplish far more than a piling up of bulwark after bulwark in the form of statutes, often of doubtful validity, directed against opinions and associations rather than concentrating on actions. Some of these statutory proposals, he notes, border on the ludicrous, such as the one that all school buses, in a parade of blatant patriotism, should be painted in red, white and blue stripes. Others he considers to be more offensive in their sterile approach to what he thinks should be a program of affirmative character. The vapidity of a requirement for an oath, so frequently made the basis of current recommendations, backed with no more than the doubtful sanction of a prosecution for perjury, could hardly be said to fill the bill. Statutory direction for removal from office, or for

1 The record of state achievement, as opposed to claim, reads a little like the story of the small girl who burst into the house exclaiming about the "million cats in our back-yard." Pressed for details, she replied "There's at least a thousand!" Challenged still further, she ended up by saying "Well, there's our cat and the one from next door!"

2 The chapter on New York by Dean Chamberlain of Columbia College, for example, represents a condensation of his Loyalty and Legislative Action (Ithaca, New York, Cornell University Press), published in 1951, at which time the Feinberg Law of that state was still before the courts. The later history is now disclosed in the more recent decision in Adler v. Board of Education, 342 U. S. 485, 72 S. Ct. 380, 96 L. Ed. 517 (1952). It could also be pointed out that the Ohio law requiring an oath from a recipient of unemployment compensation benefits and a California ordinance imposing a similar test on public employees have received judicial examination. See note in 29 CHICAGO-KENT LAW REVIEW 255-60 (1951), on Dworken v. Collopy, 91 N. E. (2d) 564 (Ohio Com. Pleas, 1950), and Garner v. Board of Public Works, 98 Cal. App. (2d) 493, 200 P. (2d) 958 (1950). The decision in the last mentioned case was subsequently affirmed in 341 U. S. 716, 71 S. Ct. 909, 95 L. Ed. 1317 (1951).
the denial of other governmental benefits, borders perilously close to interference with a constitutional freedom to believe even the unpopular thought. So also as to other suggestions which have been made, but the book should be left to speak for itself.

One other valuable feature is to be found in the form of two appendices. The first of these classifies the several types of state law regarding subversion and subversive activities. The other depicts the extent to which, state by state, such measures have been adopted. The whole, therefore, forms a scholarly work likely to operate as a corrective in an area where much of what has been written and said has been the product of inquisitorial vehemence rather than founded on fact.