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 Prior to the expiration of the term, plaintiff was notified in writing that the property was being withdrawn from his listings, but no reason was given for the revocation of authority.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.
RECENT ILLINOIS DECISIONS

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 contractural 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.

CONTEMPT—POWER TO PUNISH AND PROCEEDINGS THEREFOR—WHETHER OR NOT AN INDIRECT CRIMINAL CONTEMPT MAY BE PURGED BY DEFENDANT'S SWORN STATEMENT DENYING UNLAWFUL INTENT—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

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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 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).  

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 386.

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, 368 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 Sussemlieh 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 See abstract opinion in Panarsky v. London Guarantee & Accident Co., Ltd., 334 Ill. App. 394, 79 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.

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 See abstract opinion in Panarsky v. London Guarantee & Accident Co., Ltd., 334 Ill. App. 394, 79 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, § 291 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.
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 that 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. 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. 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, 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. 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. 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, 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.

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.

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).

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).


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.

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 six 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 administr-

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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, a step made necessary by the Railroad Labor Act 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. 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.

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., 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 Act after having terminated the entire lease for breach of covenant, or should have requested a mandatory injunction.

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. 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 or a part thereof, vests in the lessee. 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, 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. In another, the court explicitly stated that a covenant of this type does not amount to a reservation of title in the lessor. 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. 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.

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, 180 S. W. 1011 (1917).
6 Fuller v. Rose, 110 Mo. App. 334, 85 S. W. 931 (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 prob-
lem, 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 enforcible right. The court, in the instant case,
enunciated the general rule to be that "any substantial change of posi-
tion, expenditures, or incurrence 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 per-
mittee 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.

258 (1907); Hurt v. Hejhal, 259 Ill. App. 221 (1930); People v. Thompson, 209 Ill.
App. 570 (1918).

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." Italicized. 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 . . . which it may be required to pay . . . 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. 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.

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.