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DEATH—Actions for Causing Death—Whether or Not Victim's Consent to Illegal Abortion Producing Death Will Serve to Defeat an Action for Wrongful Death—The performance of an abortion with consent on the part of plaintiff's intestate appears to have given the Appellate Court for the Second District, through the case of Castronovo v. Murawsky, an opportunity to examine into, and decide for the first time in this state, the issue as to whether or not such a consent should serve as a defense to an action for wrongful death produced thereby. The two-count complaint filed therein charged that the decedent went to defendant's home and while there submitted to an abortion at the hands of the defendant, not a licensed or practicing physician, as the result of which, and the septicemia developing therefrom, death ensued. The first count predicated the action on the fact that the defendant's conduct was contrary to the Illinois Criminal Code. The second charged that death was occasioned by negligence and carelessness on defendant's part. A motion by defendant to dismiss the complaint was sustained in the trial court and, on appeal, the higher court affirmed this decision when it indicated that courts ought not lend their aid to those whose injuries have arisen from voluntary participation in the commission of criminal acts.

Although the decision therein was not cited in the opinion in the principal case, it is interesting to note that the case of Bonnier v. Chicago, Burlington & Quincy Railroad Company, passing through the Appellate Court for the First District, had cleared that tribunal and was pending on leave to appeal before the Supreme Court at the time the determination in this case was achieved. The Appellate Court, in the Bonnier case, had held that a plaintiff who sustained a personal injury through the act of another while himself engaged in an unlawful act did not have a cause of action against the alleged tort-feasor. The Supreme Court, however,

2 Ill. Rev. Stat. 1953, Vol. 1, Ch. 70, § 1, provides for suit whenever the act or default was such that, if death had not ensued, the party injured would have been entitled to maintain an action and recover damages in respect thereof, but also declares that the wrongdoer shall remain liable even though "the death shall have been caused under such circumstances as amount in law to felony."
3 Ibid., Vol. 1, Ch. 38, § 3.
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reversed that decision and upheld a trial court judgment for the plaintiff therein, giving as a reason therefor the proposition that, while an injured person's violation of law may be evidence of negligence on his part, a factual question would still remain as to whether or not the illegal act so performed was a proximate, or at least a concurrent, cause of the injury. That being so, the court indicated the presence of illegal conduct on the part of a plaintiff did not automatically disqualify him from seeking relief at the hands of a court.

It cannot be said that the decision in the Bonnier case settles the problem raised in the instant case for the situation is slightly different when the victim has consented to, rather than participated in, the perpetration of the acts in question. It is at this point that the issue is reached as to whether or not the consent so given should serve to defeat a cause of action. No prior Illinois case has given a direct answer to this question but, in a few jurisdictions, the rule which would deny a recovery to one who has consented to an unlawful act has been opened to permit of an exception when the act consented to involved the performance of an illegal abortion, although the majority view, illustrated by the Virginia case of Miller v. Bennett, would be to the contrary. It has been suggested that the public policy of this state should be one to deny relief in such cases, but it should be noted that the Criminal Code, at present, condemns no more than the conduct of the third person who produces the abortion and says nothing about the culpability of the victim thereof. Such being the case, there is room for an Illinois court to come to an opposite conclusion from the one achieved in this case.

5 The opinion of the Supreme Court in the Bonnier case, cited in the preceding footnote, makes no reference to the holding in the case of Gilmore v. Fuller, 198 Ill. 130, 65 N. E. 84, 60 L. R. A. 286 (1902). In that case, the plaintiff and the defendant were participating in a "charivari" party for a young married couple when plaintiff was accidentally shot by defendant. The court, relying on the principle ex dolo malo, non oritur actio, denied recovery when it found that both parties were involved in a violation of a criminal statute presently set forth in Ill. Rev. Stat. 1953, Vol. 1, Ch. 38, § 100.

6 In this connection, see Milliken v. Heddeheimer, 110 Ohio St. 381, 144 N. E. 294, 33 A. L. R. 53 (1924), and Martin v. Hardesty, 91 Ind. App. 239, 163 N. E. 610 (1928).


8 See note in 45 Ill. L. Rev. 395. The author thereof recommends that the courts should deny recovery for a willful or negligent injury arising from an illegal abortion to which the victim has given consent unless a substantial showing could be made to the effect that permitting a recovery in these instances would result in fewer abortions.

Estoppel — Equitable Estoppel — Whether Owner-Bailor is Estopped from Claiming Conversion of Automobile Against Trust Receipt Lender Who Deals with Dealer-Bailee—The plaintiff, in the case of Mori v. Chicago National Bank,1 was the owner of an automobile which he desired to sell. He delivered possession of the automobile to a used-car dealer, under a commission arrangement, for the purpose of showing the same and securing offers for its purchase but retained possession of the certificate of title.2 The dealer thereafter executed a bill of sale, a trust receipt, and a promissory note in favor of the defendant bank in return for money which it then loaned to him. The bank did not require presentation of any certificate of title or other evidence of ownership nor did it investigate any farther than to ascertain that the car was then in the possession of the dealer. Shortly thereafter the dealer absconded, whereupon the bank took possession of the automobile and refused to return it to the plaintiff upon his demand. Plaintiff secured judgment in his favor in a suit for conversion and the Appellate Court for the First District affirmed when it held that the bank’s reliance upon the dealer’s oral representations of ownership without ascertaining the facts concerning registration precluded the bank from invoking the doctrine of title by estoppel against the owner-bailor.

Illinois, like most other jurisdictions,3 has adopted the rule that, where one of two innocent persons must suffer because of the fraud of a third, the loss is generally to fall on the party who, by his imprudence, negligence, or culpability, enabled the third person to commit the fraud.4 On this basis, owners have been held to be estopped from asserting title as against bona fide purchasers for value where not only has possession been surrendered but, in addition, some other evidence of ownership or authority to sell or encumber the entrusted chattel has been provided.5 The problem becomes more acute when possession, without more, is given to a dealer selling similar chattels in the ordinary course of business. While, in Drain v. LaGrange State Bank,6 it was said that such a possession would

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2 Ill. Rev. Stat. 1953, Vol. 2, Ch. 95 1/2, § 76, requires that a certificate of title be secured as a condition precedent to registration and operation of a motor vehicle.
4 Western Union Cold Storage Co. v. Bankers’ National Bank, 176 Ill. 260, 52 N. E. 30 (1898).
5 In Mason v. Shelton, 292 Ill. App. 640, 11 N. E. (2d) 224 (1937), an owner who gave a dealer authority to sell his automobile was not entitled to repossess, as against a bona fide purchaser thereof, notwithstanding the fact that the owner limited his authorization to sell so as to retain title pending delivery of a new car by the dealer, where the purchaser was given no notice of the reservation.
6 303 Ill. 330, 135 N. E. 780 (1922).
be one of the indications of title, the court held that the mere giving of possession of chattels, absent any other evidence, would not be enough to enable the possessor to give good title for it was considered necessary, in the conduct of business affairs, that men should have this safeguard if business was to be transacted in a satisfactory fashion.\(^7\)

Other aspects and ramifications are apt to arise when possession has been delivered by manufacturers, wholesalers, or other conditional vendors to retail dealers for the apparent purpose of resale in contrast to those cases where the initial transaction is not one of sale but is, rather, a consignment, bailment or agency for a special purpose unaccompanied by any authority to sell, express or implied, or other indicia of title beyond the fact of possession. In the first of these instances, the Illinois courts have held that a condition that title is to remain in the seller until certain conditions have been met would be ineffectual as against a bona fide purchaser from the retailer\(^8\) for, to hold otherwise, would impede commercial transactions\(^9\) while making the individual buyer the possible dupe of every type of fraud.\(^10\) By contrast, in the second situation, the courts, realizing that these relationships are of equal importance to commerce,\(^11\) have said that the proper, lawful and convenient conduct of the owner should not be turned to his disadvantage.

Assuming that a basis can be established for a finding of estoppel on the part of the owner, the instant case becomes more important for it emphasizes the fact that the conduct of the one seeking the benefit of the estoppel must also be scrutinized.\(^12\) In that connection, since an automobile was involved, the question became one as to whether or not the party claiming possession adversely to the rights of the real owner should

\(^7\) See also 24 R. C. L. 375.
\(^12\) Czesna v. Lietuva Loan & Savings Association, 252 Ill. App. 612 (1929). In General Finance Corp. v. Nimrick, 319 Ill. App. 98, 48 N. E. (2d) 543 (1943), it was said that a finance company would have the burden of showing that it did not know of the owner's title, had no ready means of ascertaining the purpose for which the automobile was left with the dealer, and had relied on the dealer's appearance of ownership.
be required to show that he had demanded and inspected the certificate of title or, in the absence of such a showing, should be prevented from invoking the doctrine of estoppel. The Illinois version of the certificate of title statute appears to be an anti-theft provision for it does not make it mandatory that a certificate of title accompany the sale of an automobile before the purchaser is to be protected in his purchase. Nevertheless, it has been held that a certificate of title would furnish a ready means of ascertaining the true ownership of the automobile so a failure to get access to the certificate could well be an indication of negligence on the part of the purchaser. As a defendant in the instant case saw fit to place reliance upon the dealer's representations of ownership without making resort to a readily ascertainable means of verifying ownership, there is sound reason to preclude it from invoking the doctrine of estoppel.

EXECUTORS AND ADMINISTRATORS—ALLOWANCE AND PAYMENT OF CLAIMS—WHETHER DIRECTION TO EXECUTOR TO PAY REASONABLE AMOUNT FOR SUPPORT OF TESTATRIX AMOUNTS TO A LEGACY, HENCE MAKES FILING OF CLAIM UNNECESSARY—A seemingly common yet nevertheless unusual problem appears to have been presented in the recent case of In re Yocum's Estate wherein the testatrix, in the first item of her will, made the usual general direction for payment of her debts and, in the second item, provided for the division of her estate among her children equally but subsequently added a codicil amending the first item by adding a direction to the executor to pay one of the children a reasonable sum for support and care in the event the testatrix made her home with that child. Following probate of the will and codicil, a claim date was set and notice thereof was published in conformity with the statute. Subsequent thereto, a final account was filed showing payment of all claims which had been presented and listing the amount and method for distribution. Objections were filed to this account by the particular child on the premise she had not been paid, or allowed, a reasonable sum for the support and care given her mother. The trial court, at the instance of the other beneficiaries, overruled these objections on the ground the child had failed to file a

14 The case of L. B. Motors, Inc. v. Prichard, 303 Ill. App. 318, 25 N. E. (2d) 129 (1939), indicates that the statute in question is not a "recording" act which would compel a purchaser to look to the certificate of title to determine whether the seller was the owner.
claim in support of her demand for payment\textsuperscript{8} and, on appeal to the circuit court, where the cause was heard \textit{de novo},\textsuperscript{4} a similar motion to strike the objections was sustained. On further appeal, the Appellate Court for the Third District affirmed the action so taken when it said that the codicil did not indicate an intention to make the particular child a legatee with respect to the support item, hence it was necessary for her to file a claim against the estate for the allowance of this sum.\textsuperscript{5}

While it does not appear that this precise factual situation has been passed upon before in Illinois, a similar problem was presented in the Missouri case of \textit{Rowe v. Strother}\textsuperscript{6} wherein a testatrix gave direction to her executor to pay her doctor a reasonable sum for services in addition to amounts she had already paid. This direction appeared in a later paragraph of the will, the first item of which contained the customary and general direction for the payment of debts. Despite this position of the controlling language, the court, denying that the doctor was a legatee, said that the direction indicated the existence of an acknowledged debt rather than an intention to provide a legacy.\textsuperscript{7} By contrast, in the California case of \textit{Estate of Barclay},\textsuperscript{8} the controlling language was incorporated in the residuary clause of the will and, because of its position, was declared to amount to a legacy.

Faced with a choice of views on the subject, the court in the instant case preferred to base its decision on the Missouri holding, not so much because of identity in the language used or as to its location in the will but because, in the two cases, the prime factor bore strongly upon the question of intention. In that connection, the court noted that, as between members of the same family, there would be a strong presumption that

\textsuperscript{3} Ibid., Ch. 3, § 344, specifies the information which should be supplied with the verified claim.

\textsuperscript{4} Ibid., Ch. 3, § 487.

\textsuperscript{5} Ibid., Ch. 3, § 356, operating as a short statute of limitation, cut off the possibility of a late filing, so the objector would, under the holding, be entitled to no more than that portion of the estate due to her as one of the residuary legatees named in item 2 of the will.

\textsuperscript{6} 341 Mo. 1149, 111 S. W. (2d) 93 (1937).

\textsuperscript{7} In \textit{Fair v. Fair}, 46 Ohio App. 51, 187 N. E. 727 (1933), the testator’s will stated: “I direct that all my just debts and funeral expenses be paid, including in my debts a reasonable compensation to be paid to [petitioner] for caring and nursing me.” Although the court said that the petitioner was a legatee, so the only question to be decided was what would be a “reasonable” amount, it should be noted that the court did not directly face the issue presented by the instant case because, in that case, a claim had been filed against the estate. Compare this case with the holding in the earlier Pennsylvania case of \textit{In re Fehls’ Estate}, 13 Pa. Super. 601 (1900), where the court, under a will which recognized that the estate should be indebted to a son for care and support provided but which did not fix the amount of the indebtedness, nevertheless required the son to prove his claim in the ordinary way.

\textsuperscript{8} 152 Cal. 753, 93 P. 1012 (1908).
the services rendered by one to the other would be gratuitous in character unless an express contract to the contrary was made to appear. The present case, therefore, should serve as a reminder that it is essential to use clear and appropriate legal terminology in the drafting of wills if the true intention is to prevail for ambiguous directions, which may be indicative but are lacking in definiteness, will not suffice.

GAMING — CRIMINAL RESPONSIBILITY — WHETHER MERE RECEIPT OF MONEY BET AND MEMORANDUM WITH RESPECT THERETO BUT WITHOUT ANY RECORDING THEREOF CONSTITUTES VIOLATION OF STATUTE AGAINST BOOK-MAKING — A significant point for law-enforcement officials appears to have been made through the medium of the recent case of People v. Lloyd. It appeared therein that an Illinois sheriff, suspecting the presence of possible organized book-making operations in his county, arranged with a private detective agency to entrap the suspected gambler. Pursuant to arrangement, a female operative of the detective agency handed to the defendant, suspected of gambling, a sum of money and a slip of paper on which had been written the name of a race horse and the number and date of the race in which it was entered. The defendant examined the memorandum, folded it up, and placed it, with the money, in his pocket but said nothing nor made any written record of the transaction. The defendant was arrested shortly thereafter and, on demand, surrendered the note and the money to the sheriff. Tried on an information charging violation of an Illinois statute making it an offense to keep a "book, instrument or device" for the purpose of "recording or registering" bets or wagers upon the result of any "trial or contest of skill, speed or power of endurance of man or beast," the defendant was found guilty on a jury verdict and sentenced to pay the maximum fine and to be imprisoned for a period in the county jail. On defendant's appeal to the Appellate Court for the Second District, a misdemeanor being involved, the conviction was reversed, without remand, when that court decided the acts charged to the defendant were insufficient to satisfy the elements of the crime charged.

Interest in the decision so achieved is generated not so much from the fact that the case is the first of its kind from the factual standpoint but also because it tends to illustrate the inadequacy which exists in the effectuation of the legislative purpose at the time it enacted the statute.

3 Ibid., Ch. 38, § 780½.
there interpreted. Notice has previously been taken of the fact that neither the state constitution⁴ nor the Criminal Code⁵ contains a total prohibition on all forms of gambling.⁶ Such regulations as do exist have, more nearly been directed at the professional type of gambler, rather than the casual or occasional wagerer, with the general result that these provisions have been given a narrow instead of a liberal construction.⁷ Viewed in that light, the decision in the instant case appears to be a correct one for, unlike the situation found in the case of People v. Semmler,⁸ the defendant at hand neither used a "book, instrument or device" nor recorded or registered any bet, other than as he may have done so mentally. It is evident, then, that the statute in question possesses certain inherent weaknesses⁹ and could well bear amendment. If amended, it should provide that, among other things, the mere acceptance of a bet by one who makes an occupation of that activity should be deemed to be a crime.

**Insurance — Mutual Benefit Insurance — Whether By-law of Mutual Organization for Payment of Death Benefit in a Stated Sum in Case of Death of Member Creates an Enforceable Obligation** — A significant principle to be considered in the construction of mutual benefit, trade union, or similar insurance plans appears to have been given credence by the decision in the recent case of Davis v. Chicago Truck Drivers, Chauffeurs and Helpers Union of Chicago and Vicinity, Local 705.¹ The plaintiff therein, claiming as the designated beneficiary, sued to recover the amount of a stated death benefit provided for by the rules and regulations of the defendant trade union of which her husband had been a member in good standing. The defendant, by answer, set up the rules and regulations of the association² to defeat recovery, together with a special defense that

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⁴ Ill. Const. 1870, Art. IV, § 27.
⁶ See note in 30 Chicago-Kent Law Review 148-54 on the subject of the validity of "not for profit" lotteries.
⁷ See, for example, People v. Dorman, 415 Ill. 385, 114 N. E. (2d) 404 (1953), aff'ring 347 Ill. App. 317, 106 N. E. (2d) 842 (1952), wherein Ill. Rev. Stat. 1953, Vol. 1, Ch. 38, § 130, was declared not to extend to the point of making a conspiracy to keep book into a felony.
⁸ 345 Ill. 272, 178 N. E. 100 (1931). In that case, the court held that the defendant's use of pieces of cardboard, on which had been written certain numbers and names of horses, was sufficient to show that the defendant kept a book. See also annotation in 153 A. L. R. 464.
⁹ See comment in 48 Northwestern L. Rev. 239 for other suggested deficiencies in the statute.
¹ 3 Ill. App. (2d) 230, 121 N. E. (2d) 353 (1954).
² The union rules and regulations specified that, among other things, upon the death of a member, "a benefit of Twenty-five Hundred ($2,500) Dollars shall be paid ... The payment of such death benefit is a matter of organizational privi-
the deceased had committed suicide,\(^3\) contending that the payment of benefits was a matter of organizational privilege and welfare to be granted or denied wholly within the discretionary province of the union. Judgment was, however, pronounced in favor of the plaintiff on a jury verdict for the stated amount after defendant’s motions for judgment n\*on ob\*st\*ante ve\*red\*icto and for new trial had been overruled. The Appellate Court for the First District affirmed this judgment on the basis that the presence of a stated amount, and the absence of any provision forbidding suit,\(^4\) in the defendant’s regulations served to make the provision for the payment of death benefits into a legally enforceable one.

It could have been remarked, over thirty years ago, that a turning point had been reached in the Illinois law relating to trade union and similar benefit plans when the Supreme Court decided the case of Kelly v. Brotherhood of Railroad Trainmen\(^5\) for it then placed Illinois squarely in line with the weight of authority elsewhere.\(^6\) Despite earlier cases to the contrary,\(^7\) the rule thereby became one which denied the existence of a legally enforceable right in the event the claim was not specifically provided for in the certificate but had to be addressed to the systematic benevolence of the association. Even so, recognition was there accorded to the possibility that contractual rights could arise, particularly where the benefit certificate (1) called for the payment of a precise sum (2) on the happening of a specified event and (3) contained no prohibition against suit.\(^8\)

Most union benefit plans drafted since then, except those wherein the cost has been placed at the employer’s door, have been studiously drawn

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\(^3\) The question of suicide as a bar to recovery was disposed of by verdict of the jury that the deceased was insane at the time he took his life, hence was incapable of knowing the nature or consequences of his act. On this point, see the case of Central Mutual Life Ins. Ass’n v. Anderson, 195 Ill. 135, 62 N. E. 838 (1902).

\(^4\) A further regulation to the effect that the organization should not be subject to “any claim, suit, garnishment or attachment by any person” on account of any direction respecting the manner of “disbursing” death benefits was treated as being inapplicable to a suit by the beneficiary for the stated amount.

\(^5\) 308 Ill. 508, 140 N. E. 5 (1923).

\(^6\) See annotation in 29 A. L. R. 250.

\(^7\) Bond v. Grand Lodge, Brotherhood of Railroad Trainmen, 165 Ill. App. 490 (1911); Convery v. Brotherhood of Railroad Trainmen, 190 Ill. App. 490 (1911). See also annotation in 27 A. L. R. 869.

\(^8\) The holding in Railway Passenger and Freight Conductors Mutual Aid & Benefit Ass’n v. Robinson, 147 Ill. 138, 35 N. E. 188 (1893), was distinguished, rather than overruled, at the time of the decision in the Kelly case, cited in note 5 ante. It is interesting to note that no mention is made, in the opinion in the instant case, of the holding in the Robinson case.
to avoid the semblance of any contractual rights. As a result, benefits under such plans have been paid, if at all, only when union officials have seen fit. Moreover, at times when benefit funds have been threatened with depletion, many of the plans so drafted were rescinded, not without some grumbling on the part of those who had made more or less enforced contribution thereto. It is possible that some of this dissatisfaction may have been accorded notice by the court concerned with the instant case for it seized on the presence of the precise factors mentioned above as evidence of the existence of contractual rights whereas other language in the certificate purportedly forbade the taking of this view. It would appear, then, that if union benefit plans are to be regarded as no more than matters of organizational privilege, they must be scrupulously drawn to avoid any semblance to insurance certificates, whether of fraternal or of commercial character, or else be treated for what they are, i.e., contracts between the union and its members.

JOINT TENANCY—SURVIVORSHIP—WHETHER PAROL EVIDENCE IS ADMISSIBLE TO CONTROVERT RIGHT OF SURVIVORSHIP BASED ON WRITTEN JOINT TENANCY AGREEMENT RELATING TO PERSONALITY—The decedent's executor, in the recent case of In re Schneider's Estate, claimed that he was entitled to recover from an alleged surviving joint tenant certain funds which had been deposited in two joint savings accounts. It appeared that the decedent, being in ill health and desirous that someone in addition to himself should be able to withdraw money in the event he became too ill to make personal withdrawals, entered into certain written joint savings account agreements with the respondent. It was also admitted by the respondent that all the funds on deposit in the accounts had been owned by the decedent prior to and at the time they were so deposited. Following the death of the decedent and withdrawal of the funds by respondent, the executor petitioned for a citation to discover assets, which citation, after a full hearing, was dismissed and the respondent discharged. On trial de novo, over objection, evidence of the foregoing facts was admitted and it was then adjudged that the funds in the accounts were the property of the decedent and the respondent was ordered to account for the same. On further appeal, that judgment was affirmed by the Appellate Court for the First District when it acknowledged the right of the

1 2 Ill. App. (2d) 560, 120 N. E. (2d) 353 (1954). Leave to appeal has been granted.

2 Ill. Rev. Stat. 1953, Vol. 1, Ch. 76, § 2, requires that an agreement of this character be "signed by all said persons at the time the account is opened."

3 Ibid., Vol. 1, Ch. 3, § 335.

4 Ibid., Vol. 1, Ch. 3, §§ 484 and 487.
executor to introduce parol evidence to explain that the joint tenancy agreements were executed solely for the convenience of the decedent, who had made the only deposits in the accounts, thereby leading to the defeat of the ordinary inference as to rights of survivorship which normally attend upon the making of agreements of this character.

While the precise factual situation presented in the instant case is not novel, the decision achieved therein is significant for the case represents the first holding in which an Illinois court has deemed it proper to allow the use of parol evidence to controvert express provisions contained in a written joint savings agreement. Generally, in such cases, one of two theories is relied upon to determine the rights of the surviving co-depositor; the gift theory or the contract theory. The first of these would permit the introduction of parol evidence or the use of any appropriate presumption to determine whether the decedent actually had an intent to bestow title by way of gift on the surviving co-depositor. By contrast, a reliance upon the contract theory would generally preclude the admission of parol evidence in the event the deposit agreement was complete and unambiguous on its face and no fraud, undue influence, or mistake was present. This latter view was accepted by the Appellate Court in the case of Cuilini v. Northern Trust Company, which case might be said to represent the prevailing theory in this state up to the time of the holding in the instant one. Rejecting the principle there applied, the court now expresses no sense of reluctance in stating that the rule previously followed was an unjust one which operated to disregard the equitable rights of the parties, thereby making the law into an instrument of injustice. It is doubtful, however, that the court was intending to express a dislike for the parol evidence rule in general, so the decision may have to be held within the narrow bounds of the joint tenancy relationship.

5 See note in 43 Ill. L. Rev. 872 wherein a number of prior Illinois cases have been considered.
6 The case of Kane v. Johnson, 397 Ill. 112, 73 N. E. (2d) 321 (1947), treats with the right to question the effect to be given to a deed conveying real estate in joint tenancy.
7 Taylor v. Grimes, 223 Iowa 821, 273 N. W. 898 (1937); Stiles v. Neschwander, 140 N. J. Eq. 591, 54 A. (2d) 767 (1947). It should be noted that the respondent herein expressly disclaimed the right to hold the funds in question as an executed gift.
8 In re Estate of Koester, 286 Ill. App. 113, 3 N. E. (2d) 102 (1936).
9 335 Ill. App. 86, 80 N. E. (2d) 275 (1948). Leave to appeal was there denied.
PLEADING—MOTIONS—WHETHER COURT MAY DECIDE DISPUTED FACT QUESTIONS AT HEARING ON MOTION TO DISMISS—A procedural question concerning the proper application of Subsection 3 of Section 48 of the Illinois Civil Practice Act was recently presented to the Appellate Court for the Second District in the case of Kovalik v. Baldwin. Plaintiff had there instituted a suit, with demand for jury trial, against four defendants seeking to declare a sale of certain securities to be null and void for violation of the Illinois Securities Law. Subsequent to the filing of answers and replies thereto and prior to trial, one of the defendants changed his attorneys. This defendant then filed a verified motion for permission to withdraw his answer and for leave to file a verified motion to dismiss the complaint, in which motion it was alleged that the plaintiff had released the particular defendant from any and all liability. Plaintiff responded with a verified answer to the latter motion in which each allegation thereof, including a charge of execution of the release, was denied. The trial court, without hearing evidence, sustained the motion to dismiss the suit as to this defendant. On plaintiff's appeal, the Appellate Court reversed this decision, declaring that the Civil Practice Act provision was clearly applicable and that, under the terms thereof, the trial court was bound to deny the motion to dismiss without prejudice because disputed questions of fact were involved.

A careful analysis of the subsection in question discloses that it possesses a dual character, enabling either of the parties to the litigation to seek a favorable ruling under its provisions. But, at the time the legislature gave to the courts of the state a degree of discretion to decide disputed questions of fact on motion practice, it did, at the same time, take this discretion away in those cases (1) where a disputed question of fact

4 Ibid., Vol. 2, Ch. 121½, § 96 et seq. The statute was repealed and replaced by ibid., Ch. 121½, § 137.1 et seq., but existing causes of action were preserved by ibid., Ch. 121½, § 137.16.
5 It was urged, on appeal, that it was error for the trial court to allow the defendant to withdraw his answer and enter a motion to dismiss since the issues had been formed and the case was ready for trial. The court, on the basis of the decision in Morris v. Goldthorp, 390 Ill. 186, 60 N. E. (2d) 857 (1945), disposed of this contention by indicating that, in the absence of a showing that the appellant had lost some rights or had been damaged in some way, the trial court had not abused the wide discretion vested in it.
6 Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 172(1)(g), authorizes the use of a motion when "the claim or demand set forth in the plaintiff's pleading has been released."
existed provided (2) the action was one at law and (3) the opposite party had demanded that the case be submitted to a trial before a jury. While use has been made of this practice in a number of prior cases, the instant case appears to be the first in which the operative effect of the aforementioned limitation has been squarely involved and in which a genuine controversy had been generated by the presence of contradictory affidavits. By deciding the case as it did, the court saved the statute from being exposed to any possible criticism on the ground that it violated the constitutional right to trial by jury in law actions. A contrary holding might well have opened the door for the disposition of cases on affidavits only, a practice to be condemned in view of the fact that the several affiants would not be exposed to such tests as to credibility and the like as is afforded by an opportunity for cross-examination.

**Trusts—Creation, Existence, and Validity—Whether Settlor-Trustee’s Reservation of Incidents of Ownership in Trust Res Requires Invalidation of Inter-vivos Trust as an Attempted Testamentary Disposition**—The line of demarcation between a valid inter-vivos trust and an attempt to make a testamentary disposition without complying with the statutory requirements for the execution of wills was again

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8 Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 172(2), authorizes the use of a motion to dismiss by the plaintiff in the event the defendant has filed a counterclaim.

9 See, for example, the cases of Hummel v. Cardwell, 335 Ill. App. 337, 81 N. E. (2d) 381 (1948); Skidmore v. Johnson, 334 Ill. App. 347, 79 N. E. (2d) 762 (1948); and Chandler Society v. Shenk, 334 Ill. App. 373, 79 N. E. (2d) 757 (1948). These suits were in equity, where trial by jury would be permitted, at best, only in the event the chancellor exercised a discretion to that end. No constitutional issue with respect to a right to trial by jury could be developed in cases of that character.

10 In the wrongful death case of Fitzpatrick v. Pitcairn, 371 Ill. 203, 20 N. E. (2d) 280 (1939), noted in 17 CHICAGO-KENT LAW REVIEW 372, the plaintiff’s counter-affidavits were deemed to be insufficient to generate a debatable issue of fact, hence it was held proper to dispose of the case on motion practice. A similar result appears to have been attained in an action on the bond involved in Marshall v. New Amsterdam Casualty Co., 318 Ill. App. 636, 48 N. E. (2d) 804 (1943), abst. opin. In Sacks v. American Bonding Co. of Baltimore, 340 Ill. App. 564, 92 N. E. (2d) 510 (1950), a denial of the right to use motion practice with supporting affidavits against a counterclaim was upheld because the ground relied on was not included within Section 48(1) of the Civil Practice Act, but the court did say that it would have been proper to deny the motion anyway inasmuch as a jury demand was pending in the case.


12 See also the case of Leitz v. Ankrom, 350 Ill. App. 437, 113 N. E. (2d) 184 (1953), wherein the court expressed itself forcefully on the matter of disposing of a motion to vacate a judgment by confession on the basis of conflicting affidavits which had been filed pursuant to Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 259.26.

put in dispute in the recent case of Farkas v. Williams.\(^2\) The suit was one brought by the administrators of an estate to determine the validity of certain unwitnessed documents purporting to be declarations of trust signed by the decedent which were found, along with certain applications for corporate capital stock which formed the corpus of the trust, in the safety deposit box of the decedent. The applications for the stock stated that the shares were to be issued in the decedent’s name as trustee for the defendant Williams, an employee of the decedent who had lived on the decedent’s premises and had been paid “some kind of salary.” In the accompanying declarations of trust, the settlor reserved to himself the right to receive all dividends paid during his lifetime for his personal use, to vote the shares, to sell or otherwise deal with the stock,\(^3\) to change the beneficiary, and to revoke the trust, but did declare that, upon his death, the title to the stock and the right to all further dividends should vest absolutely in the beneficiary. The cause having been submitted upon the pleadings and a stipulation as to the facts, the trial court rendered a decree for the administrators. Upon appeal, the Appellate Court for the First District affirmed this decree on the ground no trust arose since the decedent, during his lifetime, had absolute dominion over the property involved, performed no duties as trustee, and owed no equitable obligations to the beneficiary. As the instruments also failed to meet the requirements for a valid will, the attempted disposition of the decedent’s property necessarily failed.

Prior to the holding in the instant case, the courts of Illinois, as in the case of Kelly v. Parker\(^4\) and subsequent cases,\(^5\) appear to have been extremely liberal in their effort to uphold the validity of inter-vivos trusts even though the settlor may have reserved large powers over the trust property. Despite this, the court concerned with the instant case purported to distinguish the situation before it from the ones found in these

\(^2\) 3 Ill. App. (2d) 248, 121 N. E. (2d) 344 (1954). Leave to appeal has been granted.

\(^3\) It was provided that, in the event of a sale or redemption of the stock or any part thereof, the trust was to terminate as to the stock so sold or redeemed, with the decedent being entitled to use the proceeds so created for his own use.

\(^4\) 181 Ill. 49, 54 N. E. 615 (1899). The settlor there had executed a deed conveying certain realty to trustees but reserving the right to use, occupy, manage, control, improve, lease, mortgage, or sell and convey the premises. In addition, he reserved the right to enjoy all rent and profit as if he were the owner in fee simple, together with the right to revoke the conveyance and all trusts created. The court, Magruder, J., dissenting, upheld the validity of the trust.

earlier cases\(^6\) and, having done so, then turned to cases from other jurisdictions\(^7\) and the works of text writers\(^8\) for support. The decision in that respect is an interesting one for the court, while exercising equitable jurisdiction, seemingly took great pains to bring in a decision which would hardly appear to be based on equitable principles of fairness and right dealing when considered from the standpoint of its effect upon the defendant.

In that connection, it might be noted that the Pennsylvania case of *In re Tunnell's Estate*,\(^9\) cited by the court in support of its decision, is itself distinguishable. While it is true that the attempted inter-vivos trusts there considered were invalidated, it was not because they involved attempts to make testamentary dispositions without a proper compliance with statutory requirements for the execution of wills but because there was a lack of sufficient proof as to the intent of the settlor to create trusts in the first place. In much the same way, the emphasis given to one passage in a text on the law of trusts to the effect that, unless the beneficiaries acquire an interest in the property prior to the settlor's death, the transaction would be clearly testamentary and invalid in the event of a failure to comply with the requirements of the statute of wills,\(^10\) tends to override other statements made by the same author. It has been said, for example, that if an owner of property "transfers it in trust to pay the income to the settlor for life and on his death to pay the principal to others, the settlor reserving also the power to revoke the trust at any time as long as he lives," such a trust would not be testamentary for the reservation of a power of revocation would not prevent the creation of a trust in the lifetime of the settlor, and the beneficiary would, at once, acquire a "future interest" although it would be an interest "subject to be divested by the exercise of the power."\(^11\) The mere fact that the settlor

\(^6\) The Kelly case, cited in note 4 ante, was distinguished on the ground the deed in that case purported to be an absolute transfer to the trustees as of the time of its execution rather than one which was not to take effect until after the grantor's death. The Gurnett case, cited in note 5 ante, was distinguished on the basis the corporate trustee there concerned would have active duties to perform when the proceeds of certain insurance policies, intended to compose the corpus of the trust, came into its hands.


\(^9\) 325 Pa. 554, 190 A. 906 (1944).


\(^11\) Ibid., Vol. 1, § 57(1), p. 336. A comparable provision appears in Restatement, Trusts, Vol. 1, p. 174, comment (b). In another section, Scott states: "The extent of the interest of the beneficiary must be definitely ascertained at the time
made himself the trustee in addition to reserving a life interest and a power of revocation should, likewise, not be enough to render the trust invalid or testamentary in character.\(^\text{12}\)

There is reason to believe, then, that the court had ample authority and precedent upon which it could have upheld the validity of the arrangement involved in the instant case but, while conceding the correctness thereof, it was not persuaded thereby. It remains to be seen whether the decision will prove to be an isolated one or will be a forerunner of a movement to turn away from the liberal tendency previously displayed. If there is opportunity for choice between the two, the preference would be in favor of the first of these views.

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\(^{12}\) See annotation in 32 A. L. R. (2d) 1270, particularly p. 1280.