thereon unlawful, held that the remaining sections of the so-called "Heart Balm" act\textsuperscript{26} were unconstitutional and constituted no bar to the maintenance of an action for alienation of affections. Reliance was again placed on the same constitutional provision.\textsuperscript{27} Subsequent thereto, although not technically within the period of this survey, the Illinois Supreme Court, in \textit{Heck v. Schupp},\textsuperscript{28} came to the same conclusion on the same statute and for much the same reasons. The bar may look for a flood of litigation of this character if current newspaper reports are any indication of what lies ahead.

\section*{VI. PROPERTY}

\textbf{REAL AND PERSONAL PROPERTY}

While nothing more of consequence has been said with respect to the creation or operation of future interests in land, some decisions affecting other aspects of the real property law are worthy of note. Defeasible estates in fee simple are not common, but where they are found it is important to catalog them carefully with respect to whether the defeasible estate is one upon a conditional limitation, sometimes called a fee simple determinable, or is an estate upon a condition subsequent. That fact is emphasized by the decision in \textit{Storke v. Penn Mutual Life Insurance Company}\textsuperscript{1} where an attempt was made to secure partition of a parcel of real estate based on the claim that a deed made some sixty years ago, affecting a sizeable area of valuable land in Chicago, had conveyed only a fee simple determinable estate which had automatically reverted to the heirs of the grantors upon breach of a covenant against the sale of intoxicating liquor. While the deed itself recited that in case of breach "said premises shall immediately revert to the grantors," the court found that the covenant therein operated merely as a condition subsequent, that no right

\textsuperscript{26}The case of \textit{People v. Mahumed}, 381 Ill. 81, 44 N. E. (2d) 911 (1942), had declared Ill. Rev. Stat. 1945, Ch. 38, §§ 246.3 and 246.5, unconstitutional.

\textsuperscript{27}Ill. Const. 1870, Art. II, § 19.

\textsuperscript{28}394 Ill. 296, 68 N. E. (2d) 464 (1946).

\textsuperscript{1}390 Ill. 619, 61 N. E. (2d) 552 (1945).
of re-entry had been reserved, and that partition could not be main-
tained for lack of title. The chance to acquire a title by appropriate
action based on breach of the covenant was also ruled out because
of the lapse of time.

Simultaneously with the creation of the joint tenancy involved
in the partition suit of Tindall v. Yeats, the joint tenants entered
into an agreement by which one of them was entitled to have all
the rentals and the possession of the property for the term of her
natural life. The agreement recited that it should not "in any
manner affect the joint tenancy of the said real estate nor
the legal incidents accompanying the same." Upon the death of
the one so favored by the agreement, it was claimed that the con-
tract had operated to destroy one of the essential four unities,
that of possession, so as to convert the title into a tenancy in
common. Dismissal of that contention by the trial court was
affirmed by the Supreme Court when it was determined that the
intention of the parties, as exemplified by the proviso in the con-
tact, should control. If the contract amounted to a lifetime lease
of the premises in return for assumption of the burden of paying
taxes, insurance, repairs and the like, the holding would not seem
strange for it would then be clear that the exclusive possession
was taken under the joint tenancy and not in derogation of its
terms. As that was not the apparent arrangement, it is difficult
to see how the mere agreement or intention of the parties could
save the transaction from operating to remove one of the essential
unities. While there was nothing illegal in the arrangement, the
real property law has become so stable that the parties concerned
should not be allowed to alter its consequences at will.

One of the remedies provided by the common law for waste
committed by the person in possession was the forfeiture of his
interest in the property wasted, although one authority has noted

---

2 As to the necessity therefor, see Newton v. Village of Glen Ellyn, 374 Ill. 50,
27 N. E. (2d) 821 (1940).
3 Ill. Rev. Stat. 1945, Ch. 83, § 3.
4 392 Ill. 502, 64 N. E. (2d) 903 (1946). Gunn, J., concurred specially.
5 Curtis v. Swearingen, 1 Ill. (Bresse) 207 (1826).
6 The Statute of Gloucester, 6 Edw. I (1278), first created that remedy. Some
American jurisdictions have enacted similar statutes, see Restatement, Property,
§ 199, but there is no express provision in Illinois on the subject.
that American courts are usually undisposed to enforce forfeiture\(^7\) probably because the common law remedy had become obsolescent if not obsolete long before the New World was discovered. The Illinois Supreme Court has now had occasion, in the case of *Wise v. Potomac National Bank*,\(^8\) to announce that forfeiture of the estate is not consonant with the law of this state and that remedies for waste will be confined to actions to recover damages or to injunction prohibiting future waste.\(^9\)

Two points with respect to easements have been determined. In *Makemson v. Wheaton Trust & Savings Bank*,\(^10\) the facts showed that the trustee in a foreclosure suit had disclaimed any easement or right to use an alley as an appurtenance to the mortgaged premises, which disclaimer had apparently been made for the purpose of affecting the sale price, deterring prospective bidders from bidding at the sale, and also to create a deficiency so that the mortgagee would be entitled to collect the rentals during the redemption period. The mortgagee, having purchased at foreclosure sale under a decree which specifically denied the existence of an easement, subsequently sought to have the court declare that an easement for use of the alley, having been included in the lien of the mortgage, was an appurtenance to the mortgaged premises accruing to their benefit. The claim as to the existence of the easement was denied when the court pointed out that a purchaser at foreclosure sale takes only the title covered by the mortgage lien to the extent that it was ordered sold by the decree. The mortgage having been merged in the decree, the purchaser's rights in the property were limited to the decree and the master's deed based thereon.

In the other case, that of *Lesch v. Krause*,\(^11\) application was made to a court of equity to restrain the owner of land from inter-

---

\(^7\) Tiffany, Real Property, 3d Ed., Vol. 2, § 649.

\(^8\) 393 Ill. 357, 65 N. E. (2d) 767 (1946), cause transferred 327 Ill. App. 203, 63 N. E. (2d) 531 (1945).

\(^9\) Ill. Rev. Stat. 1945, Ch. 28, providing for the reception of the common law, as it existed in the fourth year of James I, into the law of this state has apparently been narrowed to mean only so much of the common law as was then currently in full force and effect.

\(^10\) 391 Ill. 365, 63 N. E. (2d) 377 (1945).

\(^11\) 393 Ill. 124, 65 N. E. (2d) 370 (1946).
ferring with the use, by some of his neighbors, of a roadway extend-
ing across the property. The principal question was whether or
not there was adequate proof of a private easement or right of
way by prescription over defendant's land. The plaintiffs ad-
duced the testimony of several witnesses; the defendant offered
none. While the burden was on the plaintiffs to establish that the
use was uninterrupted, exclusive, continuous and under a claim of
right for a period of twenty years, they were aided by the rule
that where the right of way has been used openly, uninterruptedly,
continuously and exclusively for a period of more than twenty
years, and there is no evidence to show the origin of the way, there
is a presumption of a right or grant from long acquiescence of the
party upon whose land the way is located.\(^\text{12}\)

A decree which not
only determined that the plaintiffs had a prescriptive right but
also provided that they should be allowed to do such things as
were necessary to preserve the use of their easement through the
making of necessary repairs was affirmed.

One issue concerning the estate of homestead was raised dur-
ing the year. It was held, in \textit{Leffers v. Hayes},\(^\text{13}\) that a wife, having
an inchoate right of homestead similar to an inchoate right of
dower, is a necessary party to a proceeding for the enforcement
of a mechanic's lien\(^\text{14}\) based upon a contract made by the husband
and that, once she has been made a party, it is error to dismiss
her from the suit for jurisdiction should be retained to adjudicate
her rights in the property.

While no problems of conveyancing law have been noted, there
is one case of significance regarding the use of the remedy of
specific performance. The option granted in \textit{Smith v. Farmers' State Bank of Alto Pass}\(^\text{15}\) called for conveyance of a fee simple
title and the furnishing of a guarantee policy. When the vendee
exercised the option, the vendor discovered that it held only a life


\(^\text{13}\) 327 Ill. App. 440, 64 N. E. (2d) 768 (1946).

\(^\text{14}\) Ill. Rev. Stat. 1945, Ch. 82, § 11. See also Weston v. Weston, 46 Wis. 130, 49 N. W. 834 (1879).

\(^\text{15}\) 390 Ill. 374, 61 N. E. (2d) 557 (1945). Decree pursuant to mandate therein was subsequently affirmed in 392 Ill. 456, 64 N. E. (2d) 879 (1946).
estate and a contingent remainder and could give no adequate protection to the purchaser except by depositing a substantial portion of the sales price in escrow. It declined to do so, but tendered a warranty deed which was refused. When the vendee sued for specific performance, the trial court denied equitable relief upon the ground that hardship in, if not utter impossibility of, performance was sufficient to warrant such a decree. That decree was reversed by the Supreme Court when it concluded that there is no hardship or oppression in compelling a vendor to do what he has agreed to do under a contract fairly entered into. There is some occasion to think, however, that an antecedent mistake as to private legal rights such as was here present should have warranted a denial of specific performance, leaving the vendee to recover only damages for breach of contract.10

Only one case during this period contained anything of novelty with respect to doctrines of the law regarding personal property. In the case of In re Thompson's Estate17 dispute arose over the validity of a purported gift causa mortis of a policy of life insurance on the donor's life unaccompanied by any formal assignment or substitution of beneficiaries. The trial court held that such a policy could not be the subject of a gift even though donative purpose and manual surrender were clearly present. The Appellate Court reversed in favor of the donee on the ground that the property involved was essentially the same as a negotiable note, a certificate of stock, or a savings bank passbook, all of which may be made the subject of a gift without formal assignment.18 The fact that the donee merely acquired an equitable title was treated as unimportant inasmuch as the insurance company had honored the policy by payment to the administrator and the probate court was regarded as sufficiently a court of equitable jurisdiction to settle the rights of the parties.19

16 An excellent discussion of the cases on this subject may be found in a note to the Smith case appearing in 13 U. of Chi. L. Rev. 211.
17 328 Ill. App. 103, 65 N. E. (2d) 131 (1946), noted in 34 Ill. B. J. 536. Appeal therein has been dismissed.
18 See 38 C. J. S., Gifts, § 98.
19 In re Estate of Cunningham, 324 Ill. App. 210, 58 N. E. (2d) 57 (1944).
LANDLORD AND TENANT

The majority of the cases in this field of the law which merit any discussion have had to do with regulations imposed under the Emergency Price Control Act. In Bochner v. Rosen, for example, the plaintiff-landlord had secured the necessary eviction certificate from the Rent Director but, when he attempted to secure possession through action, the court found that, by accepting rent after the expiration of the lease, he had given the tenant an option to retain possession for an extended period. During the extended period the landlord served another notice of termination and, at the expiration thereof, commenced a second forcible detainer action. It was held that the eviction certificate, granted because the landlord desired to occupy the premises personally, was still in force and it was unnecessary to procure another and later one to support the second suit.

In Nofree v. Leonard, however, the Illinois Appellate Court was faced with the necessity of defining what was meant by “good faith” in Section 6(a) (6) of the Rent Regulations, providing that a landlord may secure possession of premises if he seeks in good faith to recover possession of such accommodations for the immediate use and occupancy as a dwelling for himself. Holding that the plaintiff’s evidence made out at least a prima facie case in that regard, the court indicated that the term good faith could only be reasonably construed as meaning “an honest desire by the owner of the housing accommodations to recover possession thereof for immediate use and occupancy as a dwelling for himself and that said owner legitimately required said housing accommodations to live in.” It further indicated that the rent regulations did not make the attitude or conduct of the owner toward the tenant whom he sought to dispossess any criterion of the good faith required if, in fact, the landlord desired and legitimately needed the premises as a dwelling for himself.

The case was followed shortly thereafter by the decision in

---

21 327 Ill. App. 143, 63 N. E. (2d) 633 (1945).
22 327 Ill. App. 143 at 147, 63 N. E. (2d) 633 at 655.
Scharf v. Waters\textsuperscript{23} which, instead of defining good faith, placed the burden of proving good faith on the plaintiff-landlord despite the claim, based on earlier Illinois cases,\textsuperscript{24} that good faith is to be presumed until the contrary is shown. The Appellate Court brushed aside this contention on the theory that the language of the rent control regulations would not permit of such a construction.\textsuperscript{25}

By the time the case of Lakowski v. Kustohs\textsuperscript{26} had come to trial, the regulations discussed in the Nofree case had been amended so as to require the landlord to prove that he owned the housing accommodations prior to October 20, 1942, and that he had either an “immediate compelling necessity to recover possession of such accommodations for use and occupancy as a dwelling for himself,” or else had “served during the period of the war emergency in the Armed Forces of the United States,” and in good faith sought possession for his own occupancy. In holding that the plaintiff was not entitled to recover possession, the court pointed out that the burden was on the plaintiff, a non-veteran, to prove by a preponderance of the evidence that he not only sought in good faith to recover possession for immediate use and occupancy as a personal dwelling but also that he had an immediate compelling necessity for such occupancy.

The holding in Liberty National Bank of Chicago v. Kostelitz,\textsuperscript{27} the last of the significant OPA cases, seems especially harsh. The plaintiff bank therein had taken title to a piece of improved

\textsuperscript{23} 328 Ill. App. 525, 66 N. E. (2d) 499 (1946).
\textsuperscript{24} Gochenour v. Logsdon, 375 Ill. 139, 30 N. E. (2d) 666 (1940); Sexson v. Barker, 172 Ill. 361, 50 N. E. 109 (1898); Stubblefield v. Borders, 92 Ill. 279 (1879); McClagg v. Heacock, 34 Ill. 476, 85 Am. Dec. 327 (1864).
\textsuperscript{25} The case would probably never have arisen if ill-feeling had not existed between the landlord and the tenant. It seemed, however, that the tenant had recovered treble damages against the landlord for an overcharge in rent prior to the bringing of the instant action. Thereupon the landlord, presumably in good faith (?), sought to recover possession of the premises for immediate use and occupancy by herself. Plaintiff won in the trial court on motion for summary judgment. The Appellate Court seized upon the circumstances, shown by affidavit, that several real estate men were endeavoring to sell the property for plaintiff; that a “For-Sale” sign had been fixed in a conspicuous place on the front of the dwelling; and that plaintiff personally collected the rent, as evidence which might very well nullify any claim of good faith. The case was returned for jury trial.
\textsuperscript{26} 328 Ill. App. 557, 66 N. E. (2d) 487 (1946).
\textsuperscript{27} 329 Ill. App. 244, 67 N. E. (2d) 876 (1946).
property as trustee. The *cestui que trust*, desiring to obtain possession of one of the apartments, obtained an eviction certificate which was issued in the name of the beneficiary. All requisite notices having been served and the tenant still remaining in possession, the plaintiff trustee brought summary action for possession, relying on the eviction certificate. Judgment for plaintiff was reversed by the Appellate Court upon an indefensible technicality, to-wit: that since the plaintiff was the only person who could bring the forcible detainer action, the eviction certificate had to be issued in its name and it could not benefit from the certificate secured by the beneficiary.

Attention was called last year to the decision of the Appellate Court in the case of *Leonard v. Autocar Sales & Service Company*\(^2\) which had dealt with the effect of the condemnation of a temporary use of demised premises, short of the unexpired term, upon the tenant's obligation to pay rent. When the case reached the Illinois Supreme Court, upon certificate of importance, that court affirmed the tenant's liability.\(^2\) While the decision no doubt resulted in great hardship to the tenant, who had been obliged to purchase other facilities, there is no question but what, under existing legal theories pertinent thereto, the rule announced is correct.

The case of *South Parkway Building Corporation v. Theatre Amusement Company*\(^3\) posed a rather difficult problem. The plaintiff and the defendant therein had entered into a five-year lease on certain theater property, which lease gave the defendant-lessee an option to renew. After possession had been taken, the parties entered into a supplemental agreement granting the tenant a more favorable method for figuring the rent. That agreement purported to set up a method of computing the rent from the date thereof to the expiration of the original term. The tenant exercised the option and continued in possession under the renewal

---

\(^2\) 325 Ill. App. 375, 60 N. E. (2d) 467 (1945), noted in 24 *Chicago-Kent Law Review* 56.

\(^3\) 392 Ill. 182, 64 N. E. (2d) 477 (1946), noted in 24 *Chicago-Kent Law Review* 275, 46 Col. L. Rev. 633, 34 Ill. B. J. 402, and 40 Ill. L. Rev. 558.

\(^3\) 328 Ill. App. 447, 66 N. E. (2d) 437 (1946). Leave to appeal has been denied.
term but paid rent only on the basis of the supplemental agreement. Lessor then sought to recover an alleged deficit in rentals, predicing its claim on the idea that the original rent schedule was applicable during the renewal period. Recovery was, however, denied. Had the court been prone to construe the supplemental agreement strictly it could readily have found that, being for a fixed stated period, the agreement was to die by its own limitations upon the expiration of the original term. The contrary holding may have been to some extent influenced by the theory that the landlord was estopped as it had had many opportunities to point out its views of the matter, inasmuch as the tenant had been furnishing monthly statements such as were required by the supplemental agreement but would have been unnecessary under the original terms of the lease, but had not done so.

One section of the Landlord and Tenant Act provides for criminal prosecution against an owner or agent who refuses to rent residence quarters to another because the prospective tenant has children under the age of fourteen years. In *People v. Metcoff*, a conviction for violation thereof was attacked on the ground that the statute was unconstitutional. The court found it unnecessary to pass on the constitutional question because it decided that the evidence was insufficient to sustain the charge. It appeared that the complaining witness had talked over the telephone twice with the accused, at both of which times it was charged that the accused had refused to rent the apartment because there were children involved, but the witness neither knew the accused nor could she identify his voice. That evidence was clearly insufficient to support conviction. The statute, therefore, must still face a real test of its validity.

SECURITY TRANSACTIONS

Some previously unsolved problems over the rights of the creditor class to enforce their security devices have been considered and determined. Although it had been decided quite early in

---

31 Ill. Rev. Stat. 1945, Ch. 80, § 37.
32 392 Ill. 418, 64 N. E. (2d) 867 (1946).
this state, for example, that, as between the several makers of a note, it could be shown that the obligation of one of them was really that of surety, even though the note itself declared that "all signers of this note are principals," no question had arisen until now as to whether the same rule would be applied between one of the makers and the payee. It has now been decided, in Chandler v. Chandler, that, in line with analogous situations, one who signed in the capacity of surety but who, by the terms of the note, declared himself to be a "principal," would be denied the right to contradict the terms of the note as against the payee.

The compensated surety who receives several annual payments of premiums on a surety bond is often faced with the claim that each payment creates a new, distinct and cumulative liability for each year the bond remains in force. That claim is usually met with the argument that the liability is a single and continuing one and can never exceed the figure named in the penalty clause. Judging by the decision in Montgomery Ward & Company, Inc. v. Fidelity & Deposit Company of Maryland, the latter view will prevail if the bond contains no express expiration date on the theory that it was the intention of the parties to so limit the obligation without regard to the number of premiums paid thereon. A specific provision against cumulative liability would serve to obviate the danger of an opposite holding.

Recognized legal principles of the law of real estate mortgages seem to have been misapplied, however, in the case of Harrison v. Harrison where the majority judges in the Appellate Court came to the conclusion that a deed, absolute in form, could not be shown to be a mortgage because the parties thereto had entered into a

33 Ward v. Stout, 32 Ill. 399 (1863).
36 Foy v. Blackstone, 31 Ill. 538, 83 Am. Dec. 246 (1863), prevents the maker from showing an oral contemporaneous agreement making the note payable on a contingency. See also Miller v. Wells, 46 Ill. 46 (1867).
simultaneous written repurchase agreement which, the judges felt, precluded investigation into the underlying facts. By giving to the separate agreement the effect of a mere option to repurchase, the court arrived at the result that the original grantor lost his chance to regain the property when he permitted the option period to expire without taking action. A careful analysis of the separate agreement, however, would seem to indicate that it was not a pure option but, in fact, a binding contract to repurchase for an amount of money equal to the sum “advanced” to the original grantor. The circumstances of the transaction were enough like the familiar absolute-deed-in-lieu-of-a-mortgage situation to warrant the admission of oral testimony to show the true state of affairs. By excluding such testimony, the court has seemingly provided a way for lenders to defeat the right of redemption.

Any confusion that may have existed by reason of the fact that there are two statutes of limitation applicable to mortgage transactions should be eradicated by the holding in the case of McCarthy v. Lowenthal. The plaintiff therein sued to foreclose a mortgage more than ten years after its maturity date. A motion by the mortgagor to dismiss the suit on the ground that it was barred by the older of the two limitation statutes was sustained. Plaintiff contended, on appeal, that the older provision had been repealed by implication when the legislature enacted Section 11b of the Limitations Act. That claim was rejected when the Appellate Court found no repugnancy between the two sections and provided an explanation of the legislative purpose in enacting the newer statute. Old Section 11 was held to control the rights of the original parties to the mortgage, so that the mortgage lien is to be regarded as enforcible between them until more than ten years have elapsed from its maturity date or the maturity of any

40 If it were a mere option, that result would be clearly correct: Council v. Bernard, 319 Ill. 392, 150 N. E. 272 (1926).
41 The Illinois Supreme Court, in Illinois Trust Co. v. Bibo, 328 Ill. 252, 159 N. E. 254 (1927), once indicated that any doubt in a collateral agreement should be resolved in favor of a mortgage transaction rather than a sale.
extension thereof, without regard to any recording provisions. Section 11b, on the other hand, with its requirement of recordation, is to be regarded as operating only in favor of third persons who might deal with the mortgaged premises without knowledge that the ancient mortgage has been kept alive by unrecorded extension agreements.

TRUSTS

An interesting case of error on the part of a chancellor, in which fundamental principles of trust law were involved, was presented in Continental Illinois National Bank & Trust Company of Chicago v. Sever. The testator there concerned had left a sum of money in trust to establish a technological institution of learning in Missouri. The terms of the will permitted a wide discretion on the part of the trustee as to the location of the institution and also as to the choice of using an existing institution or constructing an original school from the ground up. The bank, as trustee, filed a bill for construction of certain parts of the will and for guidance and direction in many particulars. Upon hearing, the chancellor entered a decree appointing a committee of three men to consider applications by existing institutions as prospective beneficiaries of the educational trust and to make recommendations to the court, but jurisdiction was retained for further consideration of various aspects of the case. About a year later, the committee presented their recommendations. One member indicated that he had selected St. Louis University; the other two members recommended Washington University. The trustee, in the exercise of the power conferred by the trust, selected the latter. The chancellor, nevertheless, found that the purposes of the charitable trust could be carried out only under the doctrine of \textit{cy pres}; that the trustee was without discretion under the circumstances, and that the selection of Washington University as beneficiary by the trustee was without force or effect. His decree was reversed in the Appellate Court and the Illinois Supreme Court sustained that reversal, saying that courts of equity would not interfere with the exercise

of discretionary powers of a trustee in the absence of fraud, bad faith, or abuse of discretion. Neither the pleadings nor the facts, therefore, left any room for the application of the *cy pres* doctrine.

**WILLS AND ADMINISTRATION**

Few problems arise concerning the application of the law of wills, but when they do they usually involve not only matters of some rareity but also questions of considerable importance. In *Brady v. Paine*,46 for example, the testator had devised his undivided one-half interest in certain premises to his daughters subject to a life estate in favor of his wife. Subsequent to the making of the will, but prior to his death, testator entered into a voluntary partition of the tract with his co-tenants whereby he gained an interest in severalty. Upon his death, followed shortly after by the death of his widow, certain of his heirs claimed that this voluntary partition had worked at least a partial ademption of the devise. It was held, in one of the few decisions to be found on this point, that no ademption had occurred since no new estate had been created by the partition.

Three other cases required the court to determine the nature of the interest created by the terms of the will. In *Douds v. Fresen*,47 a codicil purported to give the residue of the estate to certain named persons "as tenants in common and by the entireties with the right of survivorship." No common-law estate by the entireties was possible since the devisees were not husband and wife and, generally speaking, the right of survivorship is not an incident to a tenancy in common. It was, nevertheless, held that since there was a clear expression of intent to create an estate with that right as an incident, the intention had to be given effect. In another case, that of *Tolman v. Reeve*,48 the will provided that if a son married and was survived by a widow she should have the right to occupy certain real estate during her widowhood. That provision was held insufficient to prevent the vesting of title in

47 392 Ill. 477, 64 N. E. (2d) 729 (1946).
48 393 Ill. 272, 65 N. E. (2d) 815 (1946).
others named in the will within the period fixed by the rule against perpetuities as the son’s widow acquired no estate but merely a right of occupancy.49 A direction contained in the will involved in the case of Bowman v. Austin,50 to the effect that the devised premises should be kept intact during the lifetime of certain devisees, was held effective to preclude the possibility of partition or sale.

Except where the testator’s will operates to work an equitable conversion, land devised passes immediately upon the testator’s death to the devisee. One consequence of this general rule is illustrated by the decision in the case of Meppen v. Meppen.51 The executor there sought to hold the devise subject to a debt owed by the devisee to the estate. It was held that the sole remedy of the executor was to reduce the indebtedness to judgment and to proceed against the devisee’s interest by levy. If the rights of other judgment creditors of the devisee should intervene, the executor’s chances of collecting the debt are apt to be extinguished.

Most of the decisions during this period involved aspects of procedural or similar difficulties which might be encountered in the administration of estates. It became necessary, for example, in the case of In re Abell’s Estate,52 to determine whether the preferential right to administer an estate, conferred by Section 96 of the Probate Act,53 must yield to a discretion on the part of the court if it should appear that the person entitled to preference has an adverse or hostile interest to the estate which he seeks to administer. The Appellate Court concluded that the statute was not mandatory in character and permitted the exercise of discretion.54

49 The case also illustrates the wisdom of incorporating a clause in the will, designed to prevent an unintentional violation of the rule against perpetuities, directing that if any provision is susceptible of interpretation as creating an estate of longer duration than is permitted thereby, such provision shall be revoked as to the period of time beyond that permitted by law. A clause to that effect was held valid: 393 Ill. 272 at 290, 65 N. E. (2d) 815 at 823.
50 393 Ill. 593, 67 N. E. (2d) 168 (1946).
51 392 Ill. 30, 63 N. E. (2d) 755 (1945), noted in 24 CHICAGO-KENT LAW REVIEW 354. It was also held that the executor could not, by notation in the inventory, transpose a loan transaction into an advancement by declaring that the note was given as evidence of an advancement.
52 329 Ill. App. 73, 67 N. E. (2d) 524 (1946).
54 The court relied on Dennis v. Dennis, 323 Ill. App. 328, 55 N. E. (2d) 527 (1946), noted in 23 CHICAGO-KENT LAW REVIEW 266.
Section 44 of the Probate Act\(^5\) codifies the doctrine that an attesting witness who is also a beneficiary may be compelled to testify to establish the will but forfeits his legacy, with certain exceptions, unless the will is otherwise duly attested by a sufficient number of other witnesses. A question arose, in *Tolman v. Reeve*,\(^5\) as to whether a contingent remainderman to an estate created by the original will, and who was not a witness thereto, lost the benefits of the will because he served as a witness to a codicil. The court concluded that, as he took nothing by the codicil, the mere fact that he was a witness thereto did not bar him from his legacy under the original will.

Another case dealing with the attestation of a will is that of *In re Lagow's Will*\(^5\) in which the court found it necessary to construe, in part, Sections 87 and 88 of the Probate Act.\(^5\) The will there sought to be probated was a foreign will which had already been refused probate in Indiana. The proponents apparently endeavored to make proof of the foreign will in this state under the first of the statutory methods, which sanctions probate "when proved in this State in the manner provided by the law of this State for proving wills executed in this State."\(^5\) It was held that, as the proponents had failed to establish that the testator had signed the will in the presence of the attesting witnesses or had acknowledged it to the witnesses as being his act and deed,\(^5\) it was error to admit the will to probate. The court also noted that an attestation clause reciting due execution, while entitled to weight in determining whether the will was duly executed, is not conclusive and will not, alone, prevail over the positive testimony of the subscribing witnesses, particularly where the will has been mutilated before being offered for probate.

Upon appeal to the circuit court from an order admitting, or refusing to admit, a will to probate, the proponent may introduce

\(^5\) 393 Ill. 272, 65 N. E. (2d) 815 (1946).
\(^5\) Sub nom. Anderson v. Lagow, 391 Ill. 72, 62 N. E. (2d) 469 (1945), noted in 34 Ill. B. J. 270.
\(^5\) Ibid., § 240(1).
\(^5\) Ibid., § 221.
an authenticated transcript of the testimony of the attesting witnesses taken at a hearing on the question of probate pursuant to Section 71 of the Probate Act. It was claimed, in *Brooking v. Brooking*, that the transcript there offered did not amount to an authenticated one because merely certified to by the court reporter, the county judge, and the county clerk. Upon reference to Section 2(g) of the Probate Act, the transcript was held to be competent evidence. It was also urged that it was the duty of appellees to produce the attesting witnesses or show why they were unable to do so, consonant with the decision in *St. Mary's Home for Children v. Dodge*. The court, however, held that that decision had been overruled by Section 71 of the act. It also indicated that the proper order by the circuit court, if it determines that the will should be admitted to probate, is not to order the will admitted but rather to reverse and remand the case to the lower court with directions.

The complaint in *Frese v. Meyer* presented a case for the setting aside of a will on two counts, one charging the making of mutual wills pursuant to an agreement between the testator and his wife, the other charging undue influence. The first of these claims does not warrant trial by jury, so the trial court ordered that count to be tried without a jury although a jury trial was subsequently had as to the issues created by the second count. That practice was held proper in the light of Section 44 of the Civil Practice Act.

Some will construction cases have also involved procedural points. In *Chambers v. Appel*, for example, certain admissions of fact which had been made in the probate proceedings and in

---

61 Ibid., § 223.
62 391 Ill. 440, 63 N. E. (2d) 476 (1945).
63 Ill. Rev. Stat. 1945, Ch. 3, § 152(g), defines an "authenticated" copy as "a certified copy when the office in which the record of the original is kept is in this state."
64 257 Ill. 518, 101 N. E. 46 (1913).
66 392 Ill. 59, 63 N. E. (2d) 768 (1945).
67 Ill. Rev. Stat. 1945, Ch. 3, § 244.
68 Ibid., Ch. 110, § 168.
69 392 Ill. 294, 64 N. E. (2d) 511 (1946).
discarded pleadings were held not to be in the same category as admissions contained in the pleadings which form the basis of the action or defense. While the former are to be construed as admissions against interest they are not conclusive, as an estoppel against the party making them, but may be explained or contradicted. In Hayden v. McNamee, the Supreme Court, seeking to construe a will, took judicial notice from its own records of a number of attempts to destroy contingent remainders, by merging the life estate with the reversion, arising in the vicinity of the place where the will was executed. That fact enabled the court to determine that the testamentary language was used with intent to prevent such a destruction since the practice appeared to be so common as to have come to the knowledge of the testator or at least to that of the attorney who drafted his will.

The prayer for relief in the complaint filed in Jackman v. Kasper sought a construction of a will, modified by two codicils, in the fashion desired by the plaintiff. It was held proper, even in the absence of counterclaim for different relief, for the court to decree the proper construction, whether that construction was the same as or different from that prayed for. The court also noted that, when endeavoring to arrive at the true meaning and intention of the testator, it should incline against a construction which would give a double portion to one person to the partial exclusion of others whose claims were equally meritorious. It was also held proper, in Continental Illinois National Bank & Trust Company v. University of Notre Dame, to deny a motion for continuance because of the absence of a legatee on military service when it appeared that such legatee was an incompetent witness and could not have testified even if he had been present. An element of estoppel also entered into the decision.

The case of Sims v. Powell might be mentioned for it shows


71 393 Ill. 496, 66 N. E. (2d) 678 (1946).

72 327 Ill. App. 567, 63 N. E. (2d) 127 (1945), reversed in 394 Ill. 584, 69 N. E. (2d) 301 (1946), not in this survey.

73 390 Ill. 610, 62 N. E. (2d) 456 (1945).
that the probate courts, in citation proceedings under Section 183 and 185 of the Probate Act, do not have jurisdiction to determine title to real estate. When acting to vacate its own orders, however, a court of probate exercises equitable jurisdiction, according to Barnard v. Michael, so it is governed by the same equitable practice and rules as would control a court of equity when vacating a decree more than thirty days after its entry.

On appeals to the circuit court, taken under Sections 330 and 332 of the Probate Act, certain fees and costs must be paid within a limited time as a condition precedent to the maintenance of the appeal. The case of McClelland v. Gorrell's Estate would indicate, however, that where it is not possible to ascertain the correct amounts to be paid it is sufficient to furnish a blank signed check with authority to complete the same, so long as the check is honored on presentation for payment. The common sense nature of such a ruling is obvious.

The ordinary legatee is entitled to interest on the amount of his legacy if the same is not promptly paid. The case of In re Eliopulos' Estate, however, holds that the same rule applies even though the delay in paying the legacy was caused by the conduct of the legatee in filing a suit to contest the will.

One other little point may be noted. According to Bennett v. Chicago & Eastern Illinois Railroad Company, the lien of an attorney for legal services rendered does not attach to a fund recovered by an administrator for the benefit of the heirs of the deceased person, but rather is directed against the one who caused the wrongful death. The attorney must, therefore, direct his claim against such person if his rights have been ignored after proper notice.

74 Ill. Rev. Stat. 1945, Ch. 3, §§ 335 and 337.
75 392 Ill. 130, 63 N. E. (2d) 858 (1945).
76 Ill. Rev. Stat. 1945, Ch. 3, §§ 484 and 486.
77 327 Ill. App. 224, 63 N. E. (2d) 884 (1945). Leave to appeal has been denied.
80 327 Ill. App. 76, 63 N. E. (2d) 527 (1945).