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VI. PROPERTY

REAL AND PERSONAL PROPERTY

Without doubt, the most noteworthy development in the law of real property is the action taken by the legislature with regard to methods of conveyancing. By the deletion of a few words from the Conveyances Act, the legislature has brought an end to ancient doctrines relating to the use of private seals in the case of such instruments as contracts, deeds, mortgages and the like.\(^1\) While the use of a private seal is not forbidden, and will probably continue to be so used by lawyers who slavishly follow older forms or who have established almost automatic habits of dictation, seals are no longer necessary nor will the presence thereof in any way change the construction to be given to legal instruments. It would appear, therefore, that subterfuge of the type previously practiced\(^2\) should no longer be necessary. It yet remains to be seen, however, whether common law doctrines relating to procedural distinctions between sealed and unsealed contracts will follow in the train of the changes so made with relation to deeds.\(^3\)

Lesser questions of real property law have been settled by the courts. Two oil and gas cases, for example, might be said to possess significance. In one of them, that of *United States v. Illinois Central Railroad Company*,\(^4\) the Court of Appeals for the Seventh Circuit affirmed a decision of a federal district court which had held that the nature of the grant of public lands to the railroad company was such as to permit it to extract oil and gas

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1. Laws 1951, p. 1297, H.B. 923; Ill. Rev. Stat. 1951, Vol. 1, Ch. 30, §§ 1, 9, 10, 11 and 26. A companion measure, Laws 1951, p. 1299, H.B. 924, adds Section 153b to Ill. Rev. Stat. 1951, Vol. 1, Ch. 30, although, in scope, it may have been intended to have more direct bearing in relation to contracts.

2. See Laws 1941, Vol. 1, p. 416, S.B. 450, same as Ill. Rev. Stat. 1951, Vol. 1, Ch. 30, § 34a, which enacted the fiction that a recital of sealing, in the body or in the acknowledgment of any deed, resulted in the adoption of any seal appearing thereon, including that of the notary public! The reason for this queer provision is explained in 30 Ill. B. J. 20, at p. 21, discussing S.B. 450.

3. It has been permissible for many years, in Illinois, to disregard the seal and to sue as in special assumpsit, even though, in the old days, an action of covenant would have been more proper: Dean v. Walker, 107 Ill. 540 (1888).

beneath the right of way provided the process did not interfere with fundamental railroading operations. The reviewing court added nothing to the decision of the district judge. Aside from insuring protection to those who have dealt with the railroad company in relation to its oil and gas producing activities, the case merely provides a vehicle for an application of long-settled common law concepts inherent in a base fee estate. In the other, that of *Hardy v. Greathouse*, the Illinois Supreme Court was asked to construe the nature of a reservation of a "one-sixteenth of all oils and minerals produced from the premises for fifteen years from the date of this conveyance." It indicated that no right arose in the grantor until after severance of the product from the realty, hence the language did not reserve an interest in the land itself but more nearly created a personal property interest in the form of a royalty. The court distinguished the situation before it from the one involved in *Mandle v. Gharing* on the basis that the reservation in that case ran perpetually and applied to all oil and gas produced, whereas the instant case concerned a reservation limited both as to time and quantity.

Easement rights have also been considered. While the case of *Kurz v. Blume* cannot be said to establish any new law it does present an opportunity to review doctrines relating to the extinguishment of an easement of right of way created by reservation in a grant. The ancestors in title to the parties currently enjoying the ownership of the dominant and servient estates had established the right of way but, in the intervening years, the tenants of the dominant property had made no use thereof for more than twenty years although the passageway had frequently been utilized by the tenants of the servient estate. A revival of use began when the current owner of the dominant estate erected a garage on his own land which opened on the passageway. A decree of the trial court quieting title in favor of the owner of the servient estate was reversed by the Supreme Court on the ground that a mere non-user was not enough to destroy an ease-

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5 406 Ill. 365, 94 N. E. (2d) 134 (1950).
7 407 Ill. 383, 95 N. E. (2d) 338 (1950).
ment resting in grant and that the mere use of the alley by tenants of the servient estate did not amount to an adverse possession. A claim of adverse possession for seven years under color of title with payment of taxes, made by the owner of the servient estate, was likewise held to be ineffective as the seven-year period fell partly within the time covered by the revival of the use.

The converse of that problem occurs in the case of Sottiaux v. Bean8 for there a driveway between two houses had been in existence for over forty years, the major portion of which lay on defendant’s property. It was asserted by plaintiff, the adjoining owner, that, through the continued use of the driveway, a title in fee simple had been acquired in that portion of the land which actually fell within defendant’s line. The complaint merely sought an injunction to restrain defendant from interfering with the use and damaging the pavement of the side drive but, because of the complications engendered by counterclaims and the like, the trial court entered a decree establishing a new boundary line between the lots. Again the evidence was conflicting but did tend to show that defendant’s predecessors had, from time to time, made some use of the driveway during the forty-year period although not, apparently, objecting to the use made thereof by plaintiff’s predecessors. On the strength of this testimony, the Supreme Court ruled the adverse possession, if such it was, had not been exclusive to the degree necessary to destroy the title but was sufficient to create an easement by prescription. It, therefore, reversed with a direction to enter an appropriate form of decree.

Land taken for railroad purposes customarily provides the carrier with no more than an easement of use to the extent needed9 so as not to prevent the owner of the servient estate from making use of the substrata or superincumbent airspace.10 It does not follow, however, that the carrier may not acquire the

8 408 Ill. 25, 95 N. E. (2d) 899 (1951).
10 See note in 22 CHICAGO-KENT LAW REVIEW 92 on the right to use the space over the tracks.
fee simple title with all of the attributes relating thereto. If the carrier does acquire such rights, then, according to *City of Chicago v. Sexton*, it is entitled to recover full compensation for the value of any part of the property condemned for public use and is not limited to the recovery of merely nominal damages. The city there sought to utilize a portion of the airspace over the right of way of a railroad for viaduct purposes. Judgment was entered on a jury verdict fixing damages at $1.00 on the theory that the railroad, as such, would not be hampered in its use of the right of way, hence had sustained no appreciable damage. The Supreme Court reversed the judgment and directed the granting of a new trial when it appeared the carrier owned the fee and had been able to sell portions of the airspace above its tracks at substantial prices for other uses without, in any way, interfering with its use of the surface for railroad purposes. The holding in *City of Chicago v. Lord* was not followed because, since the date of that decision, the legislature had increased the powers of railroads in respect to their ability to sell unneeded real estate, or different levels or parts thereof, so long as there was no impairment of the fundamental use. It is questionable, however, if the same result would be reached where the railroad had acquired no more than an easement, so it cannot be said that the holding in the Lord case has been entirely overruled.

Future rather than present interests in land were the topic of consideration in certain other cases. In *Hollerich v. Gronbach*, for example, the court held that an unlimited power of sale given to a life tenant could not be construed to enlarge the life estate to a fee as the life tenant there concerned had no power to consume the property. The testator’s widow, as life tenant, had exercised the power shortly before her death and had attempted to bequeath the proceeds to her collateral relatives to the detriment of the rights of the remaindermen named in the testator’s will. In support of the widow’s action, it was argued

11 408 Ill. 351, 97 N. E. (2d) 287 (1951).
12 276 Ill. 571, 115 N. E. 397 (1917).
14 342 Ill. App. 242, 96 N. E. (2d) 354 (1951), noted in 3 Stanford L. Rev. 731.
that the remaindermen had only a vested interest subject to divestment by exercise of the power of sale. But the Appellate Court, relying upon Barton v. Barton and upon Cales v. Dressler,\(^\text{15}\) construed the life tenant’s unlimited power to sell as being no more than a mere power to change the form of the property. As it was still possible to trace the proceeds, they passed to the remaindermen under the testator’s will and not by way of the life tenant. In Board of National Missions v. Smith,\(^\text{16}\) however, the federal court construed a somewhat similar provision to the point where it was held to provide a power of sale so broad that the life tenant could not only change the form of the property but could also dispose of the fee and leave no remainder.

By avoiding a strained construction of a remainder limited to “my then living heirs at law,” the Supreme Court, in Boldenweck v. City National Bank & Trust Company,\(^\text{17}\) also avoided the doctrine of the worthier title, which, although without basis in the law, still survives in Illinois.\(^\text{18}\) The testator there set up two trusts; one for his widow, with cross-remainder to his son, and the other for his son, with cross-remainder to his widow. When the interests specifically set forth came to an end, the entire balances of both trusts were to vest in the testator’s “then living heirs at law,” heirship to be determined according to the Illinois laws of descent at the time of his death. The testator’s widow survived the son. On her death, her executors, seeking to enforce a claim against the testator’s estate, sued for construction of the will. A denial of the claim by the trial court was affirmed in the Supreme Court. It applied the general constructional rule of Way v. Geiss,\(^\text{19}\) one which declares that when a remainder to a class follows a prior estate, determination of membership in the class is not to be made until after the termination of the prior estate. The words “then living heirs at

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\(^{15}\) 283 Ill. 338, 119 N. E. 320 (1918), and 315 Ill. 142, 146 N. E. 162 (1925), respectively.

\(^{16}\) 182 F. (2d) 362 (1950).

\(^{17}\) 343 Ill. App. 569, 99 N. E. (2d) 692 (1951).


\(^{19}\) 280 Ill. 152, 117 N. E. 443 (1917).
law," therefore, were held to refer to the testator's heirs at law as determined on the date of the widow's death but to the exclusion of her. It was further argued by the appellant-executors that the doctrine of worthier title voided the remainder and that, as a result, the property passed to the testator's heirs at law, determined as of the date of his death, by intestacy. The court held that the doctrine of the worthier title could apply only to gifts to right heirs, i.e., those determined as of the testator's death, and that there is no rule of law to defeat the testator's intention by preventing him from limiting a remainder to his "heirs" where that word is used in some sense other than right heirs.

A gift over of the corpus upon termination of a trust was construed as vested and not contingent in Dyslin v. Wolf.20 The testator gave certain property in trust for and during the lifetime of all of his children and then provided that, upon the death of "the survivor of my children, it is my will that the said trust shall terminate and the said real estate go to my grandchildren, in equal shares, absolutely and forever." Following the testator's death, one of his five surviving children died, leaving two children. One of these grandchildren also died before the termination of the trust. In a suit by this deceased grandson's widow to construe the above clause of the testator's will, the trial court held that the deceased grandson had a vested interest in the trust corpus, subject to being opened up to admit afterborn grandchildren of the testator, and that the corpus passed to the grandson's devisee and widow, under the grandson's will. The deceased grandson's brother, as appellant, argued that the gift of the corpus to the grandchildren was contingent upon survival until the termination of the trust, applying a rule of construction that a gift postponed until the future because of the tender age of the beneficiaries is primarily for the benefit of such future beneficiaries and, therefore, contingent upon their survival to the

20 407 Ill. 532, 96 N. E. (2d) 485 (1950). The court first construed a gift of trust income, holding that, under the terms of the will as construed, where children dying before the termination of the trust left children surviving them, such grandchildren took interests which were vested and descendible, and neither terminated on their deaths nor subject to implied cross-remainders.
period set for distribution. No sufficient words of postponement were found, however. Instead, the court adverted to the constructional rule that, in such a case, where distribution is postponed solely for the purpose of letting in a life estate, the class members then have a vested remainder.\textsuperscript{21}

Inconsistent clauses were construed in \textit{Carrico v. Barker}.\textsuperscript{22} The testator there gave the residue of his property to his wife “as her own property absolutely,” but provided, in a later clause in the will, that any “property left after the death of my wife . . . to be dided [sic] equally, share and share alike between my children.” Noting that the later clause commenced with the precatory instruction “It is my hope,” and that the language there used did not contain dispositive words of clarity similar to the language used in the first clause, the court held that the later clause was insufficient to reduce the fee to a life estate.\textsuperscript{23} The fact that the later clause had been added to the typewritten sheet in the testator’s handwriting was not regarded as being so forceful an expression of the testator’s intent as to overcome this construction against precatory limitation on an absolute interest.

Another case required construction of the phrase “die leaving no issue.” The testator gave real property to his son for life, then to his children in fee simple, and further provided that if any of his children should “die leaving no issue” the property was to vest in the plaintiffs. The son died, his issue having predeceased him. In a suit by the plaintiffs against the wife for partition, the court, in \textit{Trabue v. Gillham},\textsuperscript{24} held that the words “die leaving no issue” meant “die without issue surviving the life tenant,” and not “die without ever having had issue,” as the widow contended. Distinguishing a contrary result in a case where the phrase “die without issue” had been involved,\textsuperscript{25} the

\textsuperscript{21} Fay v. Fay, 336 Ill. 299, 168 N. E. 359 (1929).
\textsuperscript{22} 408 Ill. 182, 96 N. E. (2d) 544 (1951).
\textsuperscript{23} In Edgar County Children’s Home v. Beltranena, 402 Ill. 385, 84 N. E. (2d) 363 (1949), the court held that use of similarly equivocal language was a basis for an inference that the testator merely intended to express a wish, and not to reduce a fee to a life estate.
\textsuperscript{24} 408 Ill. 508, 97 N. E. (2d) 341 (1951).
\textsuperscript{25} Tolley v. Wilson, 371 Ill. 124, 20 N. E. (2d) 68 (1939).
court based its opinion on the word "leaving," and upon the testator's dominant plan to limit the property to his own descendants.

One rule of construction which had been established in some jurisdictions but had not previously been utilized here was applied, for the first time, in the case of McGlothlin v. McElvain. The court held that, where an executory limitation fails because occurrence of the contingency has become impossible, then the prior conditional limitation becomes an absolute fee. In this case, the testator gave real property to his daughter by will. A subsequent clause provided that, in the event of the death of any children without issue surviving, their portions were to be distributed share and share alike among the children surviving. As last surviving child of all of the testator's children, the daughter died without issue. Since the clause creating the executory limitation made no provision for this possibility, construction became necessary. The testator's heirs at law contended that the daughter had only a determinable fee, and that on her death without issue, failure of the executory limitation resulted in a reverter to the heirs at law of the testator. The circuit court upheld this contention but the Supreme Court reversed. Relying on the New Jersey case of Drummond's Executor v. Drummond, and on analogies to and dictum in Post v. Rohrbach and in Quinlan v. Wickman, the upper court held that the daughter's fee was not subject to the requirement that lawful issue survive, but rather, that on failure of the executory devise, her fee became absolute, just as in the case of an executory devise void for remoteness.

Another new case, that of Storkan v. Ziska, held that a determinable fee, subject to an executory bequest, was created

27 26 N. J. Eq. 234 (1875).
28 142 Ill. 600, 32 N. E. 687 (1892).
29 233 Ill. 39, 84 N. E. 38 (1908).
in personal property. Under an inter vivos trust agreement, the settlor had conveyed certain stock to a trustee in trust to pay income to the settlor for life, and then to his five children equally, giving the trustee power to sell with the consent of the children. He further provided that if the stock had not been sold within twenty-one years after his death, then the trust was to terminate and the corpus was to be divided among the children. He further provided that, in case of the death of any of said children, "then such shares coming to such deceased child or children shall descend to the heirs of such deceased child or children." One child, a daughter, died but was survived by her two sons and her brothers. By her will she gave all of her property to one son and to her three brothers in equal shares. The trustee sued for construction and, upon appeal taken to the Supreme Court, it was held that future interest concepts such as those concerning base or determinable fees and executory interests were applicable to personalty as well as to realty. Relying chiefly upon Defrees v. Brydon,31 which had involved both real and personal property, the court held in the instant case, where only personalty was concerned, that the daughter had been given a determinable fee in the stock subject to an executory bequest to her children in the event that she died before termination of the trust.

Rights arising under contracts for the sale of land continue to draw attention from the courts. The issue in Handzel v. Bassi32 was one as to whether or not a vendee had forfeited his interest in the contract because he had, in seeming violation of a covenant against assignment, made a subsidiary contract to resell the premises to a third person. The court held the covenant against assignment was merely collateral to the main purpose of the contract33 and refused to declare a forfeiture, particularly since the vendee had tendered full performance to the

31 275 Ill. 530, 114 N. E. 336 (1916).
33 The court cited Johnson v. Eklund, 72 Minn. 195, 75 N. W. 14 (1898), and Grigg v. Landia, 21 N. J. Eq. 494 (1870).
In *Favata v. Mercer,* it was held proper to deny specific performance to a vendee who, through the use of an alias, had concealed his true identity at the time of making the contract and who really wanted the property in order to harass a business competitor who rented the premises. While the deception was said not to be sufficient to constitute actionable fraud, the court regarded the buyer's conduct as being sufficiently inequitable to justify a denial of specific performance. A defaulting purchaser, on the other hand, according to *Tucker v. Beam,* may not recover payments made on account of the purchase price in the absence of a clear mutual rescission of the contract.

Several aspects of the law relating to specific performance were also considered. In *Schmalzer v. Jamnik,* it was held proper to supply the legal description, so as to make the contract complete, because the memorandum contained a reservation of the right to insert the description at a later time. The case was aided by the fact that the premises were rather fully described from the standpoint of the nature of the improvements thereon as well as referred to by street address. In addition, there was an admission by the seller, in a sworn answer to the complaint, that the property so described was the property referred to in the contract. The case of *Classen v. Ripley* also illustrates the length to which a court might go in translating the language of

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34 On the issue of tender, it appeared that the buyer had the burden of paying the price over a protracted period, with interest, but could, after paying one-half of the total, obtain a deed and give back a purchase money mortgage to run for the balance of the contract term. The complaint alleged an offer by the vendee to execute such a mortgage but also stated that the vendee "had a commitment and had borrowed sufficient money to pay the price in full," if the vendor would accept the same. The court made no mention as to the validity of the last described form of tender.

35 409 Ill. 271, 96 N. E. (2d) 116 (1951).

36 The court also found that the buyer had no right to demand a warranty deed in the absence of specific agreement to that effect, as a quit-claim deed would be sufficient to pass title: *Morris v. Goldthorp,* 370 Ill. 186, 60 N. E. (2d) 857 (1945).

37 343 Ill. App. 290, 98 N. E. (2d) 871 (1951). A more extended discussion thereof appears above under the heading of Quasi-Contracts, particularly notes 40-2 thereof.

38 407 Ill. 236, 95 N. E. (2d) 347 (1950).

39 Although a street address was given, there was no mention of the city. On that point, see *Regan v. Berent,* 392 Ill. 376, 64 N. E. (2d) 483 (1946).

40 343 Ill. App. 298, 98 N. E. (2d) 868 (1951). The Supreme Court, in 407 Ill. 350, 95 N. E. (2d) 454 (1950), had transferred the case on the ground that no issue relating to a freehold was involved in an appeal from an order denying a motion to vacate a decree dismissing the suit for want of equity.
laymen into a sufficiently adequate legal description. On the other hand, representations by the sellers' agent concerning the physical characteristics of the land, although not specially authorized by the sellers, were held sufficient, in *Handelman v. Arquilla*,\(^1\) to defeat a suit by vendors seeking specific performance when it appeared that the physical characteristics were not as represented. Furthermore, the rule of *Moore v. Gariglietti*,\(^2\) relating to the right of a purchaser to compel performance with a suitable abatement in price where the seller has some title but not all the title he contracted to sell, was held inapplicable to the situation presented in *Madia v. Collins*.\(^3\) It appeared therein that a prospective purchaser, knowing that one-half the title was held in the names of individuals and one-half in trust, submitted what was essentially a purchase offer for the whole tract. That offer was accepted, in writing, by the individual owners but was rejected by the trustee. After first attempting to secure specific performance over the whole property, the purported purchaser then switched to the theory of specific performance with abatement as to the undivided one-half held by the individuals who had signed. The court affirmed a decree dismissing the suit on the theory that no contract whatever had arisen between the parties, making it unnecessary to reach the issue regarding abatement of the price.

Two other cases dealing with aspects of conveyancing law are deserving of attention. A relatively rare problem relating to the rights of a bona fide purchaser from an heir at law, as against a devisee under a subsequently discovered and probated will, was discussed in the case of *Eckland v. Jankowski*.\(^4\) It appeared, in that case, that administration proceedings had been regularly conducted and completed on the basis that the former land owner had died intestate. Shortly thereafter, the person who was heir at law conveyed the premises to a purchaser who duly recorded

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\(^1\) 407 Ill. 552, 95 N. E. (2d) 910 (1951).
\(^2\) 228 Ill. 143, 81 N. E. 826 (1907).
\(^3\) 408 Ill. 358, 97 N. E. (2d) 313 (1951).
his deed. Some six months later, a valid will was discovered, and probated in favor of the plaintiff, who then, under the doctrine of relation back, laid claim to the property. The court affirmed a decree dismissing the suit of the devisee on the ground the purchaser had a right, at the time of purchase, to rely on the devolution of title as shown by the state of the public record. A person relying for his title on a deed signed by a minor may find comfort in the decision in the case of Shepherd v. Shepherd. That case, one involving the right of a minor to rescind a deed given during minority, is even the more remarkable because of the limited amount of time which elapsed between the time when the minor attained his majority and the beginning of the suit, in addition to the inadequacy of the acts which the court said were sufficient to amount to a ratification.

Issues relating to joint tenancies also came up for consideration. A decision in a rare case, that of Welsh v. James, has placed Illinois in what might be considered a minority position with respect to the question of the effect, on a joint tenancy of real estate, of the act of one joint tenant in causing the death of the other joint tenant. The Illinois Supreme Court there held that the survivor did not hold the property on some form of trust for the benefit of the heirs of the slain person but, by reason of the inherent nature of joint tenancies and because of a constitutional prohibition against the forfeiture of an estate, was entitled to enjoy the whole estate as he had, in fact, been entitled to do from the moment of its creation. By refusing to grant leave to appeal in the case of David v. Ridgely-Farmers Safe Deposit Company, the Supreme Court has evidenced the

46 408 Ill. 364, 97 N. E. (2d) 273 (1951), noted in 29 CHICAGO-KENT LAW REVIEW 361.
47 408 Ill. 18, 95 N. E. (2d) 872 (1951), noted in 29 CHICAGO-KENT LAW REVIEW 260.
48 Ill. Const. 1870, Art. 2, § 11.
49 On somewhat similar reasoning, the Supreme Court, in Jackson v. Lacey, 408 Ill. 530, 97 N. E. (2d) 839 (1951), held that a joint tenancy had not been destroyed, despite levy and sale of the interest of one joint tenant, inasmuch as the period of redemption from the sale had not expired when the operable death occurred and no valid deed had been issued to destroy all of the unities relating to a joint tenancy.
50 342 Ill. App. 96, 95 N. E. (2d) 725 (1950). Leave to appeal has been denied.
fact that it has no desire to reopen the question it decided in the case of _In re Wilson's Estate_\textsuperscript{5} one relating to joint tenancy ownership of the contents of safe deposit boxes where the sole evidence of the joint relationship is to be found, if at all, in the terms of the lease with the proprietor of the safe deposit vault.\textsuperscript{52}

The suggestion that the legislature ought to re-examine the question has not borne fruit, but it did tinker with the statute slightly by adding another clause covering the transfer of shares of stock, or evidence of interest, in any corporation or the like which have been registered in the names of two or more persons.\textsuperscript{53} The amendment does not purport to suggest a new way of creating joint tenancies but merely purports to exonerate the corporation or entity whose transfer agent, pursuant thereto, permits a transfer of the shares by the survivor. The amendment is a companion piece to an earlier amendment relating to the payment of dividends and the like, except that it was limited to corporations authorized to do business in this state.\textsuperscript{54} There is, therefore, still reason to believe that the legislature ought to adopt a comprehensive statute on the subject.\textsuperscript{55}

**LANDLORD AND TENANT**

Options under leases permitting the lessee to purchase the demised premises are not at all uncommon but, like all options, they must be exercised with a degree of care and pursuant to their terms, without either qualification or attempt to impose additional obligations on the lessor. It became necessary, in _Gaskins v. Walz_,\textsuperscript{56} for the court to consider whether the lessee, purporting to exercise an option to purchase shortly before the expiration of his lease, had in fact demanded more than he was entitled to have by requesting the lessor to deliver an abstract

\textsuperscript{51} 404 Ill. 207, 88 N. E. (2d) 662 (1949), noted in 28 CHICAGO-KENT LAW REVIEW 258-64, 38 Ill. B. J. 228, 45 Ill. L. Rev. 288.
\textsuperscript{52} A discussion of the full issues involved in that situation appears in Kahn, "Joint Tenancies in Safe Deposit Boxes," 39 Ill. B. J. 493.
\textsuperscript{55} See, in that regard, the veto message of Governor Stevenson in relation to H.B. 687, noted in 40 Ill. B. J. 110.
\textsuperscript{56} 409 Ill. 40, 97 N. E. (2d) 798 (1951).
of title showing merchantable title in the lessor to date of the exercise of the option. The lessor, who had made a forward-looking lease of the premises to another, resisted specific performance on the ground that the lessee had failed correctly to exercise the option by the addition of that request. The court found otherwise when it noted, unlike the situation presented in *Morris v. Goldthorp,* that the first sentence of the notice of exercise of the option was complete and unqualified and mention of an abstract of title was not made until further down in the instrument. It did not, therefore, find it necessary to decide whether the lessor was obligated to furnish evidence of his title, but ordered the lessor to convey.

Most of the disputed questions relating to the law of landlord and tenant grew up out of suits to regain possession. The right of a landlord, after termination of a lease for non-payment of rent and rendition of a judgment in his favor for possession of the premises, to retain additions and improvements made by the tenant, for example, was the topic of concern in the case of *Getzendaner v. Erbstein.* The tenant there concerned, pursuant to the lease, had made improvements in the nature of tenant’s fixtures but had defaulted in the payment of rent and had been served with a writ of restitution. When the tenant thereafter attempted to remove the fixtures and was prevented from so doing by the landlord, the tenant sued as for a conversion. A motion to strike the complaint was sustained by the trial court but a majority of the Appellate Court for the First District reversed on the basis that, whatever the rule might be as to delay in removal after the term had expired by a normal lapse of time, the tenant’s right of removal continued for at least a reasonable time after judgment for possession following an unusual termination of the lease, even though produced by the tenant’s fault.

57 390 Ill. 186, 60 N. E. (2d) 857 (1945).
58 On that point, see *Turn Verein Eiche v. Kionka,* 255 Ill. 392, 99 N. E. 684 (1912).
60 O’Connell v. Fay, 186 Ill. App. 113 (1914).
Taking judicial notice of the shortage of residential quarters in many parts of the state, the Appellate Court for the First District, in Parradee v. Blinski,61 a case arising prior to the 1949 amendment to the Forcible Detainer Act,62 refused to permit the tenant to have the benefit of a stay order entered after judgment for possession had been granted except on the basis that he continue to pay the rent which had been reserved under the prior, now terminated, lease. A claim that the landlord, by accepting rent after judgment and during the interim stay of writ of restitution, had entered into a new lease was there declared to be a claim made in bad faith and one which, if tolerated, would make it impossible for trial courts "to continue the humane practice of allowing tenants a reasonable opportunity to procure new" habitations.63 The amended statute, of course, would seem to cover the situation, at least in cases of an appeal by the landlord. An acceptance of rent accruing subsequent to a known cause for forfeiture, however, under the holding in Garbczewski v. Vanucci,64 would operate to nullify a claim for possession.

Self-help in regaining the possession of leased premises may not be objectionable if accomplished by the landlord in a peaceful fashion but, according to Masters v. Smythe,65 the landlord will not be permitted to achieve that end by cutting off essential services to the demised premises, even though not specifically required by the lease, provided the same had been furnished at and prior to the making of the lease. The case is one which appears to have dealt equitably with the rights of a lessor and a lessee who had formerly been husband and wife and who, in settlement of their property rights at the time of the divorce between them, had agreed to a division of possession of their beneficially owned improved land on a landlord-tenant basis. The "landlord," claiming a breach of a covenant against possession by any one

63 The court also noted that the practice of granting a stay order of several months duration was common to the Municipal Court of Chicago. There would seem to be no legal basis for a stay order of more than five days, as Laws 1925, p. 411, was written to expire July 1, 1927, and was not revived.
65 342 Ill. App. 185, 95 N. E. (2d) 719 (1950).
other than the "lessee," had shut off electric service on learning that his ex-wife had remarried and was occupying the demised property with her new husband. As he was said to have acted unlawfully in interfering with the electric service, the "lessor" was denied rights under the lease upon partition of the property at the suit of the "lessee" part-owner.

Only one case dealt with the nature of the obligation to pay rent. A total condemnation of the demised premises under the power of eminent domain necessarily disturbs the tenant's right to remain in possession of the property and, if ousted thereby, relieves him of the obligation to pay rent. The case of Lipshultz v. Robertson, decided by the Supreme Court on certificate of importance, would indicate that, once a lease has been destroyed by acts done pursuant to an exercise of the power to condemn, the former landlord is in no position to compel the tenant to remain in possession and to abide by the covenants of the lease even though such landlord may, by virtue of a lease from the condemning authority, still be able to insure the tenant of a continuing right to possession for a further period of time. A judgment for rent according to the prime lease in effect between the parties, covering the balance of the term after the tenant had surrendered possession of the premises, was there ordered set aside on the basis that the lessor had lost the right to rent after deed had been given to the public authority and could not, except with the tenant's consent, regain that right merely by taking back a lease of the property until actual possession was needed to make the public improvement.

SECURITY TRANSACTIONS

Judicial attention to issues concerning the security of creditors may be seen in the holding of the Appellate Court for the Second District in the case of Koenig v. McCarthy. It appeared there that a sewer contractor had agreed to install a municipal

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66 Corrigan v. City of Chicago, 144 Ill. 537, 33 N. E. 746, 21 L. R. A. 212 (1893).
68 344 Ill. App. 93, 100 N. E. (2d) 338 (1951). Leave to appeal has been denied.
sewage system. The general contractor sub-let portions of the job and, in particular, contracted to purchase a quantity of pre-cast manhole rings from another to be delivered at the manufacturer’s place of business, although obviously intended to be included in the finished installation. The manufacturer, in turn, made subsidiary contracts with others but defaulted and left money owing to them. These persons gave notice of unpaid claims to the general contractor and sought a lien for their unpaid balances against moneys due under the prime contract. The general contractor sought to avoid liability on the ground the acts performed were not of the type contemplated by the Illinois Lien Act, since they were not to be done at the site of the improvement. The court, however, refused to give such an artful interpretation to the legislative purpose and held the claimants to be within the meaning of Sections 21 and 23 of the Act. It then became necessary to decide whether the claimants were entitled to enforce a lien for the full amounts due them or were limited to the unpaid balances arising under the subcontract between the general contractor and the supplier. Lacking any precedent on the point, the court came to the conclusion that the recovery had to be restricted to the unpaid balance as it would, otherwise, be equivalent to imposing a limitless liability on the prime contractor and would penalize him for the financial follies of others.

Lacking any precedent in Illinois on the subject, the federal district court concerned with the case of *Dorsey v. Reconstruction Finance Corporation* had to turn to the field of real estate mortgages to find a suitable analogy to settle the question as to whether or not a pledgee, after suit in debt on the principal contract had become barred by limitation, could realize on the collateral security for purpose of obtaining satisfaction of the amount loaned. The court indicated, on motion for summary judgment in a case brought to recover damages for an alleged

70 Reliance was placed on the holding in *Thurber Construction Co. v. Kemplin*, 81 S. W. (2d) 103 (Tex. Civ. App., 1935).
71 96 F. Supp. 31 (1951).
wrongful handling of the collateral securities, that the Illinois view on the subject was to the effect that whenever the debt was barred the security contract was likewise barred, thereby depriving the pledgee of the right to seek satisfaction from the collateral. Although the court recognized that this rule would not be the one applied to a real estate mortgagee who, upon default, had entered into possession, it professed to see a distinction in a case where the pledgee remained in possession of the collateral but did nothing to realize thereon, since the latter was said not to be applying the rents and profits toward the extinguishment of the debt. Despite this, the court indicated that the pledgor would gain a hollow victory at best as, in all probability, he would be denied the right to recover the collateral until such time as the debt had been paid or he had made tender thereof.

Legislation on the general subject now (1) permits a professional engineer or a land surveyor to claim a mechanic’s lien for the services which he might render for the land owner or on his property; (2) directs a satisfied mortgagee or a trustee under a deed in trust by way of a mortgage to give a written release of the mortgage, on request, in lieu of marking the same satisfied upon the margin of the record; (3) purports to validate foreclosure proceedings based on real estate mortgages executed during the period from 1917 to 1921, which mortgages, according to the law then in force, should have been foreclosed by sale after the expiration of the period of redemption rather than by the method currently in vogue; and (4) exempts chattel mortgages given by public utilities, when given in conjunction with real estate mortgages in the fashion provided by the Public Utilities Act, from the requirements which otherwise would attach to mortgages of that character.

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72 See, for example, Brown v. Bookstaver, 141 Ill. 461, 31 N. E. 17 (1892).
75 Laws 1917, p. 538. The statute was repealed in 1921: Laws 1921, p. 500.
Every trust case starts with a query as to whether the steps taken by the settlor were sufficient to bring a valid trust into existence. The case of *Ross v. Ross*\(^7^9\) provides another example of the factual variations in which that problem might appear. It appeared therein that the plaintiff's husband, at a time when he was threatened by bankruptcy proceedings, conveyed a tract of real estate to his sister as trustee. Ten years later, upon his request, she reconveyed the land to him by deed but the deed was not placed of record. About two years thereafter, plaintiff's husband and the sister executed a trust agreement relating to the property, under which agreement the sister was supposed to hold the property for the benefit of her brother, the plaintiff's husband, for and during his life with remainder over on his death to plaintiff. The trust agreement was written on a standard printed form but with many changes in the printed text, particularly one which struck out the portion having reference to a subsequent acquisition of property by the trustee, and words were substituted indicating that the sister, as trustee, had previously acquired the title to the trust property. A typewritten form of acknowledgment similar to that used in a deed, including a release and waiver of homestead, was executed by all the parties before a notary public. On the death of the plaintiff's husband, plaintiff demanded a conveyance of the legal title to the property from the sister who refused on the ground that, by her earlier deed, she had effectively reconveyed the property to her brother, despite his failure to record that deed, and that the trust agreement was ineffectual to revest the title in her, for which reason, being without legal title, she could not be a trustee.

The Supreme Court held that the earlier unrecorded deed had effectively placed the legal title to the property in the grantee for the deed was in statutory form, had been delivered by the grantor, and had remained in the grantee's possession and control. On the other hand, the trust agreement, although not con-

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\(^7^9\) 406 Ill. 598, 94 N. E. (2d) 885 (1950), noted in 39 Ill. B. J. 354.
taining the usual words of grant, evidenced the intention of the parties that the legal title to the property should be revested in the sister as trustee. So far as equity was concerned, this was sufficient, for a good title may be conveyed in equity by a writing lacking in the necessary formalities required of deeds or, for that matter, without any writing. The evidence also disclosed that the sister, after the death of her brother, in a letter to the plaintiff, had admitted that she held the title to the property. For these reasons, she was not allowed to change her conduct after litigation had been begun and the trust was enforced.

A constructive trust question was raised in the case of *Ridgely v. Central Pipe Line Company*, wherein two brothers, George and Homer, had operated a farm as partners. Homer advised George, one day, that a certain tract of land could be bought at a favorable price. They agreed to an equal joint purchase but, at the direction of Homer, only George was named as grantee in the deed. The land so acquired was operated in conjunction with the principal farm, with taxes and other expenses being paid out of partnership funds and all income from the sale of crops carried to the credit of the partnership account. Subsequent to dissolution of the partnership, George refused to convey a one-half interest in the land to Homer. The Illinois Supreme Court approved Homer's request to have his brother declared a constructive trustee over an undivided one-half interest in the property. Although a mere breach of an agreement to convey land or to hold land for another would be insufficient to create a constructive trust, the court indicated the situation would be different where the agreement arose out of a fiduciary relationship and the failure to comply with the terms of the agreement constituted a breach of trust and confidence. As the brothers had been partners, hence in a fiduciary relationship to one another, it was proper to raise a constructive trust for it was not neces-

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80 Two cases dealing with aspects of the constructive trust doctrine appear elsewhere in this survey. The case of Welsh v. James, 408 Ill. 18, 95 N. E. (2d) 872 (1951), is noted under the heading of Real and Personal Property, particularly note 47, ante. A discussion of the holding in Lowe Foundation v. Northern Trust Co., 342 Ill. App. 373, 96 N. E. (2d) 881 (1951), is presented hereafter in connection with Wills and Administration, particularly note 99, post.

81 409 Ill. 46, 97 N. E. (2d) 817 (1951).
It is necessary that the parties so standing should occupy the positions of grantor and grantee. Equity, looking to substance rather than to form, could grant relief against the abuse of confidence and the particular way in which the transaction arose was immaterial.

A claim to a resulting trust was advanced, in *Peters v. Meyers*, under a set of facts which disclosed that a wife had acquired real estate with her own funds but had later voluntarily conveyed the property, without consideration, to an intermediary who, in turn, conveyed the premises to the wife and her husband as joint tenants. The Supreme Court indicated that the voluntary conveyance did not give rise to a resulting trust in favor of the wife, or her heirs, even though she had furnished the entire consideration.

Little has been said by the courts in recent years regarding the powers of trustees. In the case of *Decatur Monument Company v. New Graceland Cemetery*, the settlor had conveyed real estate to trustees with the power to manage, improve, develop, lease, sell, mortgage, convey, or make other disposition of the premises so acquired to the end that a cemetery might be established on the same. A question arose as to whether the trustees had the power, under these provisions, to engage in the incidental business of buying and selling monuments and markers to be placed on graves located in the cemetery. The Appellate Court answered the question in the affirmative by simply stating that the proposed conduct was not inconsistent with the express or implied powers given to the trustees.

By the terms of the trust instrument involved in *Wilson v. Daley*, the trustee was permitted a deduction equal to ten percent of the gross receipts from the trust property in each year as compensation for its management. A question arose as to whether the trustee would be entitled, in addition, to reimburse-

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82 408 Ill. 253, 96 N. E. (2d) 493 (1951).
84 A good discussion of charitable trusts, particularly those pertaining to the perpetual care and beautification of cemeteries, may be found in *Stubblefield v. Peoples Bank*, 406 Ill. 374, 94 N. E. (2d) 127 (1950).
85 342 Ill. App. 633, 97 N. E. (2d) 596 (1951). Leave to appeal has been denied.
ment for the expenses of automobile travel, telephone, postage, and clerical assistance incurred in the administration of the trust. The Appellate Court reached the conclusion that the trustee was not so entitled as the expenses were, in no sense, extra-ordinary but were of a kind required in the usual course of administration, which the settlor must have contemplated would be covered by the rather generous allowance which had been made for services.

Legislative addition has been made to the statute dealing with powers of trustees. Under a new provision, a trustee may cause stocks, bonds, and other trust property to be registered and held in the name of a nominee, without mention of the trust in any instrument or record constituting the evidence of title thereto, unless otherwise provided by the trust instrument. The trustee is declared liable for the acts of the nominee with respect to any investment so registered, is required, at all times, to keep records which must show the ownership of the investments by the trustee, and must keep all stocks, bonds, and similar investments in his possession and control but separate from his individual property.

WILLS AND ADMINISTRATION

Although fundamental doctrines relating to the law of wills have gone unchanged, two cases calling for the construction of testamentary language are noteworthy. In one of them, that of Lavin v. Banks, the testator had bequeathed "all monies on deposit in my name in any bank or banking institution" to his wife. A sum of cash was found, after testator's death, in the testator's safe deposit box. To determine whether the contents of the box came within the description of "monies on deposit," three of the testator's sons, both individually and in their capacity as executors, sued for construction. The trial court found against the wife but the Appellate Court for the First District favored her on the ground that an ordinary testator would not distinguish

between banks and deposit companies. The Supreme Court, on leave to appeal, reversed the Appellate Court and approved the trial court decision by holding that safe deposit box contents could not be said to be "on deposit" within the meaning of the provision in question.

The other case, that of Page v. Wright,\(^8\) involved a construction of the testator's intention as to the incidence of certain federal estate taxes.\(^9\) The testator had there provided that his executor should pay all taxes levied by the proper authorities in the course of the administration of his estate without deduction from any of the legacies.\(^10\) He gave his widow, who was a life beneficiary as to that portion, a general testamentary power over part of the corpus of a trust which he had created. After the testator's death, his estate was duly administered and closed and all federal taxes, including those relating to the trust property subject to the power, were paid.

The widow thereafter died testate, leaving a will by which she appointed part of the property in question to the plaintiff, her daughter by a former marriage.\(^11\) As residuary legatee under her mother's will, this daughter bore the burden of expenses and taxes on her mother's estate\(^12\) and then cast about for some way to shift the burden. Relying upon the rule that an appointee is a beneficiary under the will of the donor of the power,\(^13\) she

\(^8\) 342 Ill. App. 352, 96 N. E. (2d) 634 (1950).
\(^9\) The case of In re Geatty's Estate, 408 Ill. 383, 97 N. E. (2d) 307 (1951), noted in 29 CHICAGO-KENT LAW REVIEW 283 and 39 Ill. B. J. 518, dealing with the amount of credit to be granted against an Illinois inheritance tax on local assets for estate taxes imposed and debts incurred by the estate of a non-resident decedent, is discussed below under the heading of Taxation, particularly note 52.
\(^10\) Article 10th of the testator's second codicil read: "I direct that my said Executor shall pay out of the principal of my estate, any and all governmental charges, taxes or liens imposed upon my estate, or the interests of any beneficiaries under my Will and codicils thereto by any law of any state or country relating to the transmission of property as the same are found to be payable . . . in the course of the administration of my estate. . . ." Italics added.
\(^11\) While the validity of the appointment was not questioned, it does not appear whether it was based upon a residuary gift or upon an express exercise of the power.
\(^12\) In the absence of contrary evidence, the testator is presumed to have intended that residuary gifts should abate in favor of general gifts: In re Illopoulos' Estate, 328 Ill. App. 389, 66 N. E. (2d) 183 (1946). See also Ill. Rev. Stat. 1951, Vol. 1, Ch. 3, § 447.
sought to recover the taxes allocable to the property appointed to her from the residuary legatee under the donor's will. A decree dismissing her complaint was affirmed by the Appellate Court. Granted that, as a matter of property law, the plaintiff was a "beneficiary" under the donor's will, it was nevertheless held that the taxes paid on the widow's, or donee's, estate were not taxes paid "in the course of administration" of the donor's estate. It was, therefore, held that the burden of the federal estate tax should be left where the statute had placed it unless the testator's intention to vary such incidence was made clear.95

The decision seems sound, for while tax concepts frequently differ from those of property law, a construction of the term "my estate" from the tax lawyer's standpoint would seem to be more nearly in accord with the testator's probable intent, inasmuch as taxes will be levied on that basis.

A question relating to the admissibility of extrinsic evidence regarding a mistake in both a will and a trust was presented in the case of Continental-Illinois Bank & Trust Company v. Art Institute.96 By the fourth article of his will, the testator gave the remainder of his estate to a bank as trustee to add to and administer as part of an amendable inter vivos trust. He made reference therein to the trust agreement by date as well as to an amendment thereto made in 1943, but omitted reference to certain intervening trust amendments. In all, the trust agreement had been amended seven times. One such amendment, made in 1934, had substituted the Shriner's Hospitals and others as beneficiaries in lieu of the Art Institute. Two years later, the Art Institute was reinstated as a beneficiary but no mention of that fact was made in later amendments and codicils although specific reference by date was made to six of the seven amendments.

The claims of the Shriner's Hospitals and the Art Institute being inconsistent, the executor bank filed a complaint seeking

95 See, on that point, United States Trust Co. of New York v. Sears, 29 F. Supp. 643 (1939).
96 341 Ill. App. 624, 94 N. E. (2d) 602 (1950). Subsequent to the period of this survey, the Illinois Supreme Court affirmed the holding: 409 Ill. 481, 100 N. E. (2d) 625 (1951), noted in 40 Ill. B. J. 187. A further comment will appear in the March, 1952, issue of the CHICAGO-KENT LAW REVIEW.
a construction of its duties under both the will and the trust agreement. Extrinsic evidence of the mistaken omission was received over objection and a decree was rendered giving effect to the 1936 trust amendment. Two questions were raised on appeal from that decree, to-wit: (1) whether the 1936 amendment was expressly or impliedly revoked by the testator’s failure to make reference to it in the 1945 amendment, and (2) whether the 1936 amendment applied to property passing under the will as well as to the original trust res. The Appellate Court for the First District affirmed, holding, on the first issue, that the 1936 amendment to the trust was not revoked by the testator’s failure, thereafter, to make reference to it.

On the second issue, the court decided that the trust instrument, with its several amendments, had become incorporated in the 1943 will and the 1945 codicil thereto so as to apply to all property of the testator. The omission of reference, in the later codicil of 1945, to the 1936 amendment to the trust agreement was held to be no more than an “error of description” for the correction of which the introduction of extrinsic evidence was permissible. The result is a surprising one, not so much because of a revocable inter vivos trust was held to have been incorporated into a will by reference but because of the admission of parole evidence to prove and explain what the testator may have intended but what he had, in fact, omitted to say.

The right of an intended legatee or devisee, from whom a gift had been diverted by the wrongful interference of a third party, to sue for the damage caused thereby was presented in the case of Lowe Foundation v. Northern Trust Company. It appeared there that plaintiff, a non-profit corporation, had been

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97 The court did make note of the fact that there were no Illinois cases which had passed on the point but also noted that the parties had not urged the question: 341 Ill. App. 624 at 635, 94 N. E. (2d) 602 at 608. It did, however, tacitly permit the incorporation by reference to operate. According to Koeninger v. Toledo Trust Co., 49 Ohio App. 490, 197 N. E. 419 (1934), an amendable trust agreement may be properly incorporated as it stood at the date of the will, but that amendments made thereafter, unless made in conformity with statutory requirements relating to wills, could not be so incorporated.


named as beneficiary of a substantial gift in the decedent's holographic will.\textsuperscript{1} The defendant, who had been the testator's attorney, incorrectly stated to testator that a gift of that size would exhaust the estate. As a consequence, the due execution of a will making the same gift was prevented. The plaintiff sought to recover the alleged intended legacy on either of three alternative theories, to-wit: (1) by contesting probate on the ground of undue influence, (2) by impressing the property with a constructive trust in favor of the plaintiff, and (3) by proving its injury in a tort action against the attorney who had committed the alleged wrongful interference.

The Appellate Court for the First District disposed of the first theory on the ground that the plaintiff had no "interest" sufficient to entitle it to contest the probate inasmuch as it had never been a legatee under any valid probated will of the testator.\textsuperscript{2} As to the availability of providing equitable relief in the form of a constructive trust in favor of the intended legatee, a new question in Illinois, the court was skeptical but did not express itself conclusively. It recognized that relief had been given in cases where a devisee or legatee, by unlawful interference with the making of a will, had diverted property to himself, but noted statements to the effect that there had to be some intentional misconduct by the alleged trustee himself before any such relief would be given.\textsuperscript{3} It likewise avoided the necessity of deciding whether the plaintiff had a cause of action in tort for the alleged wrongful interference with the making of a will by finding the absence of that scienter or reliance on which to base a claim of

\textsuperscript{1} Holographic wills, if not attested, are not valid in Illinois: Ill. Rev. Stat. 1951, Vol. 1, Ch. 3, § 194.

\textsuperscript{2} Only an "interested person" may file a complaint to contest the validity of a will: Ill. Rev. Stat. 1951, Vol. 1, Ch. 3, § 242. A legatee under a former will whose interest has been diminished by a subsequent will has been said to be sufficiently "interested" to contest probate, although not an heir at law of the decedent: Wilson v. Bell, 315 Ill. App. 418, 43 N. E. (2d) 162 (1942).

\textsuperscript{3} See Ashton v. McQueen, 361 Ill. 132, 197 N. E. 561 (1935), citing Ryder v. Ryder, 244 Ill. 297, 91 N. E. 451 (1910). Neither case, however, involved a will. But see Brennan v. Perselli, 353 Ill. 630 at 636, 187 N. E. 820 at 822 (1933), where the court said that property obtained by one through the fraudulent practices of a third person would be held under a constructive trust for the person defrauded even though "the person receiving the benefit is innocent of collusion. If such person accepts the property, he adopts the means by which it was procured . . . ."
The troublesome point in the case relates to the use of constructive trust doctrines as a basis for relief where the intended beneficiary has been deprived of an inheritance, in favor of another, through the fraud of a third party. Although that question is apparently a new one in Illinois, it seems quite clear that a court would give relief against one who, by his own wrong, obtained a gift which interfered with that intended for another.\(^4\) Reluctance to extend the rule to cover cases wherein the property has been received by the wrongful misconduct of a third party is sufficiently evident to make this remedy more doubtful. Despite some authority to the contrary,\(^6\) however, the recent cases would seem to favor the development of such a remedy\(^7\) and, as refusal to grant relief in the third-party fraud cases could lead to a circumvention of the orthodox constructive trust rule, it would seem that Illinois would do well to grant that form of relief in a proper case.

Attention should also be given to some cases relating to matters of probate administration and the like. In the case of *In re Estate of Balicki,*\(^8\) for example, the attesting witnesses testified positively that the testator had not signed or acknowledged the will in their presence. One of them also stated that no oppor-

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\(^4\) Scott, Trusts, Vol. 3, § 489.4, p. 2371. Cases of this general type have been collected in an annotation in 11 A. L. R. (2d) 813.

\(^5\) In *Ramsdel v. Moore,* 153 Ind. 393, 53 N. E. 767 (1899), a husband who had dissuaded his wife from making a will in favor of the plaintiff upon a representation that he would see to it that the plaintiffs obtained the property, was held as a constructive trustee. The same principle was followed in *Willa v. Willa,* 342 Ill. 31, 173 N. E. 768 (1930), a case concerning an inter vivos transaction wherein title to real estate was obtained fraudulently.

\(^6\) In *Dye v. Parker,* 108 Kan. 304, 194 P. 640 (1921), rehearing denied 108 Kan. 305, 195 P. 590 (1921), the court refused to impose a constructive trust upon an heir who had not been a party to the deceit. In *Powell v. Yearance,* 73 N. J. Eq. 117, 67 A. 892 (1907), one of two co-tenants promised, as devisee, to hold in trust for another person. The court held that the constructive trust was to be imposed only upon the share of the party making the fraudulent promise.


\(^8\) *408 Ill. 84, 96 N. E. (2d) 516 (1951),* noted in 39 Ill. B. J. 378 and 40 Ill. B. J. 183. The case, however, merely affirms the principle announced in *Spangler v. Bell,* 300 Ill. 152, 60 N. E. (2d) 864 (1945).
tunity had been given to read the attestation clause which contained a contrary recital. While the Supreme Court agreed that an attestation clause constitutes prima facie evidence of due execution, and that testimony of subscribing witnesses tending to impeach a will should be received with caution, it held the attestation clause before it was not conclusive on the issue of due execution and that evidence to impeach was there sufficient for that purpose.

Another case, that of Eckland v. Jankowski, will serve to clarify the effect of a judicial declaration of heirship. A predecessor in defendant's chain of title had been declared to be the decedent's heir. On the strength of that record, a series of purchasers for value had dealt with the property. The subsequent discovery and probate of a will made by the decedent in favor of the plaintiff, normally effective to transfer title, was held inoperative to deprive the purchasers of their title as they were said to have a right to rely upon the record as to heirship.

Although the problem might have been foreshadowed by an earlier decision, the Supreme Court, in the matter of In re Donovan's Estate, for the first time was faced with the precise question as to whether acts done by an executor, while serving as such subsequent to his election to renounce his spouse's will, could serve to estop him from asserting his rights under the renunciation. The testatrix's husband had there accepted appointment as a co-executor and, in the performance of this office, had joined with the other co-executors in the filing of an inventory. Shortly thereafter, the spouse-executor filed his renunciation of the pro-

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9 Brelie v. Wilkie, 373 Ill. 409, 26 N. E. (2d) 475 (1940).
13 Ibid., Ch. 3, § 205.
14 In Kerner v. Peterson, 368 Ill. 59, 12 N. E. (2d) 884 (1938), it was held that a widow who had accepted office as executrix without bond and had acted in that capacity, as well as testamentary trustee, was not estopped to renounce her husband's will one day before the expiration of the time permitted by law for that purpose.
visions of the will intended for his benefit and elected to take his statutory share. Notwithstanding this election, he continued to work with the co-executors, joined in a conveyance of real estate, filed a federal estate tax return and a fiduciary income tax return, and did other acts needed in the administration of the estate, as well as claimed and received compensation for his services as co-executor. His co-executors, whose shares under the will would be diminished by the renunciation, filed a partial report asking for a declaration that the renunciation had thereby been waived and that the spouse-executor should be estopped from asserting a right to a statutory share in the estate. Although the probate court sustained objections to this report, the circuit court, on trial de novo, held in favor of the co-executors.

The Supreme Court, in turn, reversed the circuit court and affirmed the order of the probate court on the ground that none of the husband's acts as executor, done subsequent to the filing of his renunciation, operated to estop him from claiming his rights according to law. Once the election had been made, it operated as a complete bar to all of his rights as a legatee or devisee under the will to the point where, except with court permission, he would not be permitted to retract.\(^\text{16}\) Such being the case, the court felt it would not be possible for him to abandon his election unintentionally. The decision seems to be completely in accord with the purpose of the statutory provisions relating to renunciation, that is, to permit the surviving spouse to take in a manner most advantageous to him or her.\(^\text{17}\) It also reinforces that purpose by permitting the spouse to implement the choice by seeing to it that the estate is properly and effectively administered.\(^\text{18}\)

\(^{16}\) While filing of the renunciation needs no approval of the court, according to Sippel v. Wolff, 333 Ill. 284, 164 N. E. 678 (1928), it may be withdrawn only if filed under a mistake as to one's legal rights or as to the effect of the renunciation, and then only provided the rights of innocent third parties are not thereby prejudiced: Hanson v. Clark, 236 Ill. App. 496 (1927).

\(^{17}\) See Golden v. Golden, 393 Ill. 536, 66 N. E. (2d) 662 (1946).

\(^{18}\) Although a renunciation is said to "obliterate" the provisions of the will made for the spouse, it does not destroy other parts of the will: Sueske v. Schofield, 376 Ill. 431, 34 N. E. (2d) 399 (1941). Such being the case, it would seem as if the clause designating an executor should stand, unless appointment, or continued service, is thereby made conditional upon an absence of renunciation. It is true
The principal legislative change in probate law, one relating to the right of a surviving spouse to take dower, should operate to render obsolete the rule of *Bruce v. McCormick*. By the addition of a new section to the Probate Act, a surviving spouse who hereafter makes a conveyance of real estate, or of all interest therein, prior to the time when the right to claim dower would be barred, is thereby estopped from electing to take dower. As a necessary corollary, other changes have been made in the statute to make it clear that the surviving spouse is immediately vested with an estate in fee simple to be divested only upon the taking of prompt and proper steps to elect the lesser dower estate and is assured of a right to claim dower, if that is desired, in those cases where the decedent left no descendants, parents or close kin, thereby filling out what otherwise would have been an incomplete pattern. The changes should prove a welcome and beneficial addition to the law for they have added certainty and stability to titles as well as provided the surviving spouse with a more ready market for property.

Other changes had occurred in that personal representatives are now authorized to file joint income tax returns with the spouse of any decedent or ward; the investment powers of executors and administrators have been enlarged provided the decedent has not made a contrary direction in the will; a conservator or guardian need no longer provide bond to cover the that one who serves as a witness to a will may not also claim to be an executor thereunder by reason of his “interest” in the will: Jones v. Dreiser, 238 Ill. 183, 87 N. E. 295 (1909). But the situation may be distinguished on the ground the provisions barring a witness from taking as a beneficiary, Ill. Rev. Stat. 1951, Vol. 1, Ch. 3, § 195, are designed to prevent overreaching.

19 396 Ill. 482, 72 N. E. (2d) 333 (1947), noted in 25 *Chicago-Kent Law Review* 324. It was there held that a widow’s quit-claim deed, executed before the right to claim dower had been barred by lapse of time, was ineffective to pass title as it was said that no title would vest in the widow until the possibility of taking dower had, in fact, become barred.


value of timber or improvements on the ward’s estate;\textsuperscript{26} dram shop actions have been added to the list of actions which survive;\textsuperscript{27} public conservators and guardians, as well as public administrators, may now be appointed in each county;\textsuperscript{28} the statute relating to costs in veteran’s proceedings has been enlarged;\textsuperscript{29} and the sections relating to incompetents have been changed to bring the terminology thereof into conformity with the Mental Health Act.\textsuperscript{30}

\textit{(To be continued)}