Survey of Illinois Law for the Year 1953-1954
I. BUSINESS ORGANIZATIONS

CORPORATIONS

The scope and extent of the activities which a domestic corporation may lawfully undertake has been fixed, in the main, by statute but special regulations may apply to particular classes of corporations. When the corporation is one which has been formed to carry on professional activities even more stringent regulations may be imposed to the end that the affairs of the corporation, particularly as they may affect third persons, shall be carried on only by those who possess professional competence. There is reason to believe, however, that the extent to which a corporation may engage in the practice of architecture has been broadened by the decision attained in the case of Continental Paper Grading Company v. Howard T. Fischer & Associates, Inc., wherein a declaratory judgment was sought by way of construction of the language of the Illinois Architectural Act, a statute which pur-
ports to prohibit corporations from practicing the architect's profession but permits them to contract for architectural services provided the chief executive officer of the corporation is a registered architect and the services are rendered under his personal direction and supervision. It would seem, in the light of this statute, that the amount of work which a corporation might undertake to perform would be limited by the physical capacity of its chief executive officer but the Appellate Court for the First District did there hold that the rendition of architectural services might be done under the personal direction and supervision of any registered architect whether chief executive officer or not and without regard to whether or not he enjoyed regular employment with the company. The court did not dwell in particular on the latter conclusion but the registered architect there concerned, under whose supervision the work was done, had left the company shortly after work had been commenced on the plaintiff's construction job and had continued, as an independent contractor, to supervise work on the project until its completion. The net result of the case would seem to be that a corporation could expand its business of providing architectural services by the mere process of employing additional registered architects.

The independence of a corporation as a separate entity, distinct from its directors, officers and shareholders, provides a fundamental premise underlying the law as to corporations. Acts done by the human beings mentioned, except when properly authorized, do not bind the corporation but may redound to its benefit, particularly if the corporation acts to accept such benefits. The case of *Kolin v. Leitch*, however, suggests that the corporation may enjoy the benefits of action taken by its directors even though no adoption or ratification thereof occurs, for the corporation was there allowed to offer a suggestion of damages arising from the improper issuance of a temporary injunction although it had not joined in a motion to vacate the injunction nor partici-

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pated in the appeal taken from the denial thereof by the director-defendants. The court there concerned appears to have considered the directors and the corporation to be interchangeable personalities, at least for this particular purpose.

A word of warning to corporate officers and directors may be in order as the result of the federal court decision in *Dwyer v. Tracey* although it does not affirmatively appear that the decision rendered in that case rests on Illinois law. In the subject case, the defendant, who occupied the dual role of officer and director, was hired under a contract of employment for a term of years. Before the term expired, he was given two new contracts, both to the disadvantage of the corporation as compared with the original contract. In each case the defendant was active, as director, in securing the adoption of the contracts. Although, as a matter of contract law, there may have been sufficient consideration present to make the succeeding contracts enforcible, the court held that the defendant had violated his fiduciary duty so it required him to make restitution for all salary and other advantages received in excess of the compensation set in the original contract.

Three other cases are deserving of brief comment. The case of *Gillam v. 661 Sheridan Apartments, Inc.*,⁹ should serve as a reminder that a temporary injunction to preserve the status quo may be available as an ancillary remedy in a stockholder’s derivative suit against the corporate officers and directors. The federal court, in the case of *Schmidt v. Esquire, Inc.*,¹⁰ has now reached a result in accord with that announced in the earlier Illinois case of *Schmidt v. Crowell-Collier Publishing Company*,¹¹ a case in which it was decided that a shareholder might bring a stockholder’s derivative suit only upon an order of the court having jurisdiction of the debtor’s estate in the event his corporation has been taken under the control of a bankruptcy court. It might also be noted

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⁹ 1 Ill. App. (2d) 11, 116 N. E. (2d) 91 (1953). A prior illustration may be found in the case of *Forster v. Fruin & Walker Co.*, 170 Ill. App. 89 (1912).
¹⁰ 210 F. (2d) 908 (1954).
that, in *Brothers v. McMahon*,12 it was held that a contract for the purchase of a housing unit in a co-operative apartment to be built was not a purchase of a "security" within the meaning of the Illinois Securities Law.13 That result was achieved, despite the fact that the purchaser's interest was to be represented by shares in a corporation or a beneficial interest in a land trust, inasmuch as the contract was said not to contemplate a sharing in the profits or income, if any, earned by the defendant construction company.

**UNINCORPORATED BUSINESS ASSOCIATIONS**

Insofar as the law relating to unincorporated business associations was concerned, published decisions were relatively rare, and those adding to, or altering, existing doctrines were practically non-existent. The year, however, was not a complete loss for the age-old question as to whether or not a partnership exists was regarded as determinative in two cases. The first of them, that of *Rizzo v. Rizzo*,14 is novel15 for the court there found a partnership to exist although there was not even an allegation of any particular agreement, either oral or written, between the parties. In that case, the father of the alleged partners had established a paper business and, as his four sons became old enough, they each went to work in the family business, being given a share of the profits as compensation. The father eventually retired from the business and conveyed the business site to his oldest son by an absolute deed not supported by any direct consideration. This son assumed the role of managing partner with the other sons continuing to work and to receive a share in the profits. From these facts, and certain other conduct, the court found a partner-

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12 351 Ill. App. 321, 115 N. E. (2d) 116 (1953). Leave to appeal has been denied.
13 The case was based on Ill. Rev. Stat. 1951, Vol. 2, Ch. 121 1/2, § 97(1). That statute was later repealed and has now been replaced by the Illinois Securities Act of 1953. The language thereof defining the term "security" is almost identical. See Ill. Rev. Stat. 1953, Vol. 2, Ch. 121 1/2, § 137.1 et seq.
14 3 Ill. (2d) 291, 120 N. E. (2d) 546 (1954).
15 The case does not stand entirely alone for much the same result was attained in *Van Buskirk v. Van Buskirk*, 148 Ill. 9, 35 N. E. 383 (1893).
ship relationship existed. By contrast, in *Cook v. Lauten*,\(^{16}\) the relationship was treated as one of master and servant, despite the existence of an agreement designating the parties as managing partner and junior partner when it was made to appear that the junior was to be paid no more than a fixed salary and a bonus, that the junior could be expelled at the discretion of the managing partner, and that, in the event of the death of the junior, he was to have no interest in the business other than a right to receive any unpaid salary or bonus.

The case of *Bakalis v. Bressler*\(^ {17}\) may serve to emphasize the close fiduciary relation which exists between partners for it extended the accompanying duty to cover transactions relating to leased premises in which the business was conducted as well as to matters relating to the conduct of the business itself. While there has been dictum to this effect in other Illinois cases,\(^ {18}\) no prior case appears to have reached this precise holding. The court there imposed a constructive trust over the business premises, for the benefit of the other partner, following the acquisition of the property by one partner with his own money accompanied with an immediate conveyance of the title to the purchaser's wife. The decision may have been strengthened by the fact that a term in the business lease provided that, in the event no renewal occurred, the lessor should own the goodwill and the customer list with the right to solicit former customers of the business.

An interesting joint venture problem may be found in the case of *Schnackenberg v. Towle*,\(^ {19}\) wherein two well-known lawyers became associated together in the conduct of certain tax refund proceedings, at a time when one of them was about to become a judge, under an agreement to the effect that the elected judge should assume full responsibility, in return for a share of the attorney's fee, but the active prosecution of the matter should be handled in the name of and by the other. Following the suc-
cessful termination of the tax proceedings, the active attorney collected the fee but refused to give an accounting on the theory the joint venture was an illegal one inasmuch as the judge’s participation in the matter, so it was said, would involve him in the practice of law as an attorney in a court in which he had been commissioned to sit as a judge and would also operate to violate constitutional restraints on the conduct of judges. An accounting was, nevertheless, decreed and the Appellate Court for the First District affirmed the decision when it noted that there was an absence of illegality in the agreement. On the first contention, the court said the several circuit courts of the state were distinct entities, so a judge of one circuit was not barred from appearing as a lawyer before a court in another circuit. It was also pointed out that, under Illinois law, a circuit judge, as such, was not barred from engaging in the private practice of law outside of his own court.

PRINCIPAL AND AGENT

The time period covered by this survey may be characterized as revealing a dearth of cases in the field of agency law. Although several cases dealt with problems relating to the payment of brokerage commissions, only one seems to have any novel aspects. In Levit v. Bowers, the question arose as to whether or not a property owner who had offered to pay a full commission to any broker who “successfully negotiated a sale” of the property was liable for the payment of the commission when a broker produced a purchaser who was ready, willing and able to buy even though

21 Ill. Const. 1870, Art. VI, § 16.
22 As to the wisdom of this practice, see Canon 31 of the American Bar Association’s Canons of Judicial Ethics.
23 The court cited O’Hare v. Chicago, M. & N. R. Co., 139 Ill. 151, 28 N. E. 923 (1891), and Town of Bruce v. Dickey, 116 Ill. 527, 6 N. E. 435 (1886).
24 The case of In re Richmond’s Estate, 1 Ill. App. (2d) 343, 119 N. E. (2d) 536 (1954), might be regarded as significant only because the court there relied on a presumption that an attorney at law, as an officer of the court, has authority to act for and represent the client he professes to serve. No such presumption would adhere to the ordinary principal and agency relationship.
no sale was in fact consummated because the owner refused to enter into a contract of sale. The Appellate Court for the First District held that the phrase "successfully negotiated" meant no more than the carrying out of negotiations which would end in an offer that met the terms demanded by the seller; that consummation of the sale was not required; and that the broker was entitled to the commission so earned.

LABOR LAW

Concentrated attacks appear to have been made on the constitutionality of statutory enactments by which the state may be said to have attempted to assure wage earners that they would be paid a fair and equitable wage. For example, the so-called "prevailing wage" act, 26 one designed to assure workmen employed under contracts for public works of a wage rate corresponding to that prevailing in the community for similar work, came under attack in the case of Bradley v. Casey 27 but the Supreme Court upheld the statute against the charge that the term "prevailing rate of wages" was too vague and indefinite, hence involved an undue delegation of legislative power. In contrast to prior decisions, as in Mayhew v. Nelson 28 and Reid v. Smith 29 where previous "prevailing wage" acts had been held unconstitutional for this reason, the court now appears to have changed its mind in the belief that a prevailing wage rate might be equal to the market rate or might be commensurate with a certain level bounded by a customary minimum and maximum, but at any rate was a term with a well understood meaning. The court did, however, make it clear that the statute applied only to employees of private contractors having contracts for public works and did not require the state, or any other public body, to pay prevailing wage rates to their employees. 30 At the same

28 346 Ill. 381, 178 N. E. 921 (1931).
29 375 Ill. 147, 30 N. E. (2d) 508 (1940).
30 It was indicated that the statute would have been void pro tanto if so applied for it would then be made to deal with matters not included in the title thereof: Ill. Const. 1870, Art. IV, § 13.
time it did find the last paragraph of Section 2 of the statute,\textsuperscript{31} one providing that, in a locality where a collective bargaining agreement was in effect covering wage rates for similar work, the collective bargaining rate should be considered to be the prevailing one, was unconstitutional since it did amount to an undue delegation of discretionary powers into the hands of private parties.

The second statutory enactment challenged was the one intended to provide for minimum wage standards for women and minors.\textsuperscript{32} Again, the Supreme Court, in the case of \textit{Vissering Mercantile Company v. Annunzio},\textsuperscript{33} parried the attack in an elaborate opinion, pointing primarily to the fact that oppressive wages, being those less than the fair value of the services rendered, constitute an evil likely to affect the health and welfare of women and children, hence were subject to state regulation. The court did, however, declare Section 13 of the statute\textsuperscript{34} to be unconstitutional insofar as it provided that all questions of fact arising under the statute should be decided by the Department of Labor and purported to forbid judicial review with respect to such questions for, admitting that the acts of the department in dealing with minimum wages would be essentially legislative rather than judicial in character, the denial of all judicial review as to questions of fact constituted a violation of due process requirements.

Questions pertaining to the applicability of the Unemployment Compensation Act\textsuperscript{35} were the subject of protracted litigation. In \textit{Eutectic Welding Alloys Corporation v. Rauch},\textsuperscript{36} the issue arose as to whether a sales representative for an out-of-state firm, assigned a designated territory within the state wherein he was seek to obtain orders for the firm's products, was a covered

\textsuperscript{31}Ill. Rev. Stat. 1953, Vol. 1, Ch. 48, § 39s—2. This paragraph was added by Laws 1951, p. 1493.
\textsuperscript{32}Ibid., Ch. 48, § 198.1 et seq.
\textsuperscript{33}1 Ill. (2d) 108, 115 N. E. (2d) 306 (1953). Hershey, J., wrote a dissenting opinion. Appeal to the United States Supreme Court was dismissed for want of a substantial federal question: — U. S. —, 74 S. Ct. 680, 98 L. Ed. (adv.) 566 (1954).
\textsuperscript{34}Ill. Rev. Stat. 1953, Vol. 1, Ch. 48, § 198.13.
\textsuperscript{35}Ibid., Ch. 48, § 300 et seq.
\textsuperscript{36}1 Ill. (2d) 328, 115 N. E. (2d) 898 (1953).
employee. The Supreme Court, affirming the lower court, found that the company exercised sufficient control over the sales representative so as to prevent him from being excluded from covered employment under the provisions of the statute dealing with independent contractors.\textsuperscript{37} In that connection, the court pointed to certain provisions in the contract which defined the area of work, reserved to the company the right to discharge the salesman if he handled other lines of products without consent, permitted the cancellation of the contract if the salesman violated the terms of the agreement, and provided against competition following termination. The case at hand was distinguished from the result attained in \textit{Aluminum Cooking Utensil Company v. Gordon}\textsuperscript{38} upon the basis that the contract in that case contained a specific provision abrogating company control over the sales representative's activities. Any pronouncements in the last-mentioned case which differed from those in the principal case were declared to be expressly overruled.\textsuperscript{39}

The acute problem of pre-emption of certain activities in the field of labor relations by an exercise of federal power was, in one of its aspects, made the subject of judicial determination in the case of \textit{Precision Scientific Company v. International Union of Mine, Mill and Smelter Workers}.\textsuperscript{40} The question there arose as to whether an Illinois state court had jurisdiction to interfere, by injunctive process, with an allegedly illegal strike called by a union which, although supposedly Communist-dominated, had been certified by the National Labor Relations Board as the collective bargaining representative of the plaintiff's employees and had filed an unfair labor practice charge, pending before the Board, on the ground the plaintiff had refused to bargain with it. Plaintiff admitted that it had refused to recognize the union but declared it had done so only because of the alleged domination of the union by Communists. The Appellate Court for the First

\textsuperscript{37} Ill. Rev. Stat. 1953, Vol. 1, Ch. 48, § 322.
\textsuperscript{38} 393 Ill. 542, 66 N. E. (2d) 431 (1946).
\textsuperscript{39} 1 Ill. (2d) 328 at 340, 115 N. E. (2d) 898 at 904.
\textsuperscript{40} 2 Ill. App. (2d) 531, 120 N. E. (2d) 356 (1954).
District declared that a state court had no power to issue an injunction in the specific case so long as the strike was peaceful, since the employer's refusal to recognize the certified union as collective bargaining agent amounted to an unfair labor practice over which the Board possessed exclusive jurisdiction. It did say, however, that a state court would have jurisdiction to restrain the striking union from acts of violence and intimidation, so the injunction was affirmed in part.

Employee pension plans, now so common in business and industry, would seem to be enforceable by the employees only if they have become the subject of a binding contractual obligation on the part of the employer. In the event the pension plan, instituted by the employer, provides that the entire cost of the plan is to be borne by the employer, that the employer may change or discontinue the plan, that no employee rights under the plan should arise until after annuities had been purchased, and then only against the insurance company with respect to the annuities so purchased, it would seem that the employer would have no contractual obligation to maintain the plan. This, at least, was the holding of the Appellate Court in the case of *Hughes v. Encyclopedia Britannica, Inc.*, wherein certain employees had attempted to obtain specific performance under a pension plan with intent to force the employer to keep up the purchase of annuities. The court also held that any benefit from increased employment stability which the employer would receive from instituting a pension plan of the type mentioned would not give rise to a promissory estoppel in favor of the employees.

Two other cases dealt with incidental aspects of the employment relationship. In *Stanulus v. Budd*, the Appellate Court was called upon to determine whether an untruthful statement by an employee in his employment application, one to the effect that he had never been arrested, was sufficient "cause . . . detrimental to the service" to warrant discharge of the employee in accord-

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41 1 Ill. App. (2d) 514, 117 N. E. (2d) 880 (1954). Leave to appeal has been denied.

42 1 Ill. App. (2d) 334, 117 N. E. (2d) 655 (1953). Leave to appeal has been denied.
ance with Section 28 of the Metropolitan Transit Authority Act. The court ruled in the affirmative, stating that an employer had a right to expect his employee would possess qualities of truthfulness and honesty regardless of the type of work which he would be expected to perform. In the other case, that of Book v. Napier, the Appellate Court reaffirmed the principle that an employee ought to refrain from activities which would be injurious to his employer’s interests, with a consequent forfeiture of the right to compensation if the employee should be guilty of gross misconduct, but it treated the loose talk on the part of the employee there concerned, designed to emphasize and even exaggerate his importance to the business while minimizing the employer’s ability, as not being sufficiently gross misconduct to warrant a loss of compensation.

WORKMEN’S COMPENSATION

One rather unusual factual situation was presented by the compensation case entitled Hunter Packing Company v. Industrial Commission in which case an employee, whose clothing had become dampened while at work, had gone to the toilet room of his employer and was afterward found dead with his body lying against an electric heater and his back marked by the presence of deep burns. The Supreme Court declared therein that a reasonable inference could be drawn, from the circumstances of the case, that the injuries arose out of and in the course of the employment since going to the toilet to meet the demands of nature had to be considered as an act incidental to the employment relationship.

Much more substantial were the legal questions presented during the year. A question of first impression was projected in the case of Arview v. Industrial Commission in which case an employee, who in a prior accident had lost the sight of an eye,

44 3 Ill. App. (2d) 19, 120 N. E. (2d) 244 (1954). Leave to appeal has been denied.
45 1 Ill. (2d) 99, 115 N. E. (2d) 236 (1953), noted in 1953 Ill. L. Forum 677.
46 415 Ill. 522, 114 N. E. (2d) 698 (1953).
sought to recover from his employer for a subsequent independent accident in which he suffered the loss of several other members of his body. Compensation was demanded as for a total and permanent disability as well as for a lifetime pension. The question was one as to whether or not these benefits should be paid from the special fund, created by the Workmen’s Compensation Act,\(^47\) which was administered by the State Treasurer for the benefit of handicapped workers or should be borne by the employer. The Supreme Court determined that the employer was liable to the employee only for compensation for the loss of a single member, together with a proper allowance for necessary medical and hospital services, artificial members, and temporary total disability, but that the employee should recover, from the special fund, the difference between the compensation so payable and the amount due under the statute for a permanent and total disability together with the accompanying lifetime pension there provided.

Subrogation and similar issues were also projected by a series of cases. In *Manion v. Chicago, Rock Island & Pacific Railroad Company*,\(^48\) a covered employee, injured by a third party while at work, had been paid workmen’s compensation by his employer but had also filed a common-law action against the third party for the recovery of damages, in which action the jury returned a verdict in the employee’s favor. On the day this verdict was returned, the employer filed a petition in the trial court asking that he be permitted to join in the employee’s action and that he be indemnified, under the judgment, in accordance with former Section 29 of the statute,\(^49\) for the compensation so paid. The employee-plaintiff moved to strike this petition on the ground the employer had failed to allege his freedom from being the negligent cause of the plaintiff’s injury. The lower court denied the motion and granted the employer’s petition but the Appellate Court for the Second District reversed, pointing out that Section

\(^{47}\) Ill. Rev. Stat. 1953, Vol. 1, Ch. 48, § 138.1 et seq., particularly § 138.7(f).


\(^{49}\) Ill. Rev. Stat. 1949, Vol. 1, Ch. 48, § 166. The present statute may be found in Ill. Rev. Stat. 1953, Vol. 1, Ch. 48, § 138.5(b).
29 did not specify the time and manner of determining this condition to the employer's right to indemnity. The mere fact that the employee had recovered a judgment against a third party was said not to exclude the possibility that the employer, or one of the fellow employees, might have negligently contributed to the injury.\textsuperscript{50} On the other hand, in *Hyland v. 79 West Monroe Corporation*,\textsuperscript{51} the Appellate Court for the First District held it was proper to deny to an employer the right to file a notice claiming a lien for benefits paid under the Workmen's Compensation Act\textsuperscript{52} in connection with any judgment recovered by the employee against a third person. It was also there held that the trial court had the discretionary power to deny the employer the right to intervene in the employee's common-law action, particularly where the parties thereto opposed such intervention and the employer was still paying compensation.

A possible solution to problems of the character thus noted may be seen in the outcome of the case of *Geneva Construction Company v. Martin Transfer & Storage Company*.\textsuperscript{53} That action had originally been instituted by the employer under the first paragraph of former Section 29 of the Workmen's Compensation Act which, after the filing of the suit, was declared unconstitutional in another case.\textsuperscript{54} The employer, who had paid compensation, then amended the complaint against the third person who had caused the employee's injuries to state a cause of action for subrogation which the Appellate Court for the Second District upheld on the ground that the general doctrine of subrogation should be sufficient to enable the employer to maintain such a suit without regard to the existence, or non-existence, of a statutory provision on the point. As modern views relating to subro-

\textsuperscript{50} The court also declared that, if the employer proved such freedom, he would be entitled to full reimbursement and would not be required to share proportionately in the costs and attorney's fees incurred by the employee in his suit against the third party.
\textsuperscript{51} 2 Ill. App. (2d) 83, 118 N. E. (2d) 636 (1954). Leave to appeal has been denied.
\textsuperscript{52} Ill. Rev. Stat. 1953, Vol. 1, Ch. 48, § 138.5(b).
\textsuperscript{53} 351 Ill. App. 289, 114 N. E. (2d) 906 (1953). Leave to appeal has been allowed.
\textsuperscript{54} Ill. Rev. Stat. 1949, Vol. 1, Ch. 48, § 166, was declared unconstitutional in *Grasse v. Dealer's Transport Co.*, 412 Ill. 179, 106 N. E. (2d) 124 (1952), noted in 30 CHICAGO-KENT LAW REVIEW 375.
gation extend to cover every instance wherein one person, not being a mere volunteer, has paid a debt for which another is primarily liable, the court expressed the belief that the principle should govern the three-cornered relationship between employer, employee and tort-feasor.\textsuperscript{55}

Time periods within which accident notices must be given, and claims filed, have been a frequent source of litigation.\textsuperscript{56} It was said, in \textit{Railway Express Agency v. Industrial Commission},\textsuperscript{57} however, that the statutory requirement for making application for compensation within one year after the injury\textsuperscript{58} could be either expressly or impliedly waived by the employer. Also possessing an ameliorating effect is the decision in the case of \textit{Union Asbestos Company v. Industrial Commission},\textsuperscript{59} a proceeding based on the Occupational Diseases Act.\textsuperscript{60} It was there said that an application for death benefits on behalf of the dependents of a deceased employee would be timely and proper,\textsuperscript{61} if the employee had been awarded compensation under the statute during his life-time but had died pending an appeal from such award, provided the application for death benefits was made within one year from the date of payment of compensation to the administrator of the deceased employee’s estate following upon a final adjudication as to the original award.

Interpretation has been provided, by the case of \textit{Shell Oil Company v. Industrial Commission},\textsuperscript{62} for the proviso contained in former Section 8(d) of the Workmen’s Compensation Act\textsuperscript{63} as

\textsuperscript{55} The case also dealt with the right of the employee, after the normal period of limitation had expired, to join with the employer, by amendment, for the purpose of enforcing the employee’s common-law claim against the third person for the negligent tort inflicted. A discussion of this aspect of the case appears below. See Section III hereof, particularly note 25, first series.

\textsuperscript{56} See, for example, a note in 30 \textit{CHICAGO-KENT LAW REVIEW} 287 discussing the case of \textit{International Harvester Co. v Industrial Commission}, 410 Ill. 543, 103 N. E. (2d) 109 (1951).

\textsuperscript{57} 415 Ill. 294, 114 N. E. (2d) 353 (1953).

\textsuperscript{58} Ill. Rev. Stat. 1953, Vol. 1, Ch. 48, § 138.6(c).

\textsuperscript{59} 415 Ill. 367, 114 N. E. (2d) 345 (1953).

\textsuperscript{60} Ill. Rev. Stat. 1953, Vol. 1, Ch. 48, § 172.36 et seq.

\textsuperscript{61} Ibid., Ch. 48, § 172.41(c).

\textsuperscript{62} 2 Ill. (2d) 590, 119 N. E. (2d) 224 (1954).

amended in 1949, a provision which allows the entry of an award if an employee should sustain an accidental injury resulting in a fracture of a vertebra and a loss of function of the back. The Supreme Court there held that the fracture did not have to be of an accidental nature for a surgical removal of part of a vertebra, when necessitated by an accidental injury, would be sufficient to constitute a fracture within the meaning of the applicable provision.

One remaining decision, that reached by the Appellate Court for the First District in the case of *Hayes v. Marshall Field & Company*, 64 might be noticed. The plaintiff there concerned, a department store employee, got a cinder or particle of dust in her eye while at work. She went to the company doctor who probed her eye and, in so doing, pierced the eyeball and caused a loss of sight. The plaintiff filed a common-law action for damages against both the employer and the physician. The court upheld a dismissal of the suit as to both defendants, declaring that the injury was one compensable under the Workmen’s Compensation Act. The case is noteworthy because, in a closing paragraph of the opinion discussing the liability of the doctor, the court there indicated that the doctor was a co-employee as to whom the statute made no distinction hence, when the statute served to bar a common-law action against the employer, it operated to bar suit against the fellow employee also.

II. CONTRACTS

Relatively little has occurred in the field of general contract law but the question of whether a written agreement of mutual release could be considered as an accord and satisfaction was before the Appellate Court for the First District in the case of *Stoner v. Stoner*. 1 In that case, one brother had, some years before, obtained a decree for the payment of a large sum of money

64 351 Ill. App. 329, 115 N. E. (2d) 99 (1953), noted in 32 CHICAGO-KENT LAW REVIEW 361.

1 351 Ill. App. 304, 115 N. E. (2d) 103 (1953), noted in 42 Ill. B. J. 516. Leave to appeal has been denied.
against another brother. Three years after the decree, the brothers met at the office of an attorney and signed a mutual release agreement which recited that certain controversies had arisen between the brothers; that certain amounts and properties had been accepted in satisfaction; and that each thereby released the other from all claims. The controversies referred to related to matters arising from a family business. At that time, the decree creditor was paid a small amount of cash but did give the debtor a full satisfaction of the judgment mentioned in the decree. This satisfaction piece was not filed of record until some time later. Upon the filing thereof, the creditor brother then filed a petition alleging that he received the cash as no more than a partial satisfaction of the judgment; that this was insufficient consideration for the satisfaction; and that the decree should be reinstated except as to the amount so paid. At first blush, the discrepancy in the amounts concerned would seem to be so great as to deny the right to call the small cash payment an accord and satisfaction for the greater amount admittedly due. Nevertheless, both the trial and the reviewing court denied the petition, probably because of an inability to overlook the fact that the brothers had been in business together for more than thirty years and had had a series of controversies which had been disputed, litigated, settled, and sometimes revived. As no one could be expected to fully understand all the underlying motives, inducements, and intangible considerations involved in a family transaction, the court felt that it should equitably decline to interfere.

In the only other general contract case worthy of brief mention, that of Jackson v. First National Bank of Lake Forest, the plaintiff, a lessee of commercial property held in trust by the bank for the benefit of a co-defendant, had fallen and been injured by the breaking of a defective hand-rail on the steps leading to the basement of the leased premises. The action was predicated

2 The opinion of the Appellate Court in the case of Jackson v. First Nat. Bank of Lake Forest, 348 Ill. App. 69, 108 N. E. (2d) 36 (1952), was discussed in 32 CHICAGO-KENT LAW REVIEW 75-6.

upon negligence but the defense relied on an exculpatory clause in the lease intended to free the lessor from "all liability arising from failure to repair . . . defects in railings; or for any act or omission or negligence of the lessor." A judgment notwithstanding a verdict for plaintiff was affirmed as no negligence on the part of either defendant was said to have been shown. The plenary character of the exculpatory clause, and the fact that the lease covered commercial property, must have been important items of consideration for the existence of a rusted and defective hand-rail would seem to impute negligence to some one. It is important to note, therefore, that a public policy which has often been invoked against contractual limitations on liability for common-law negligence was there held to be inapplicable.4

Doctrines having bearing on the law relating to specialized types of contracts, or quasi-contractual obligations, are discussed separately hereafter under appropriate classifications.

BILLS AND NOTES

Two cases in this category may be said to have added something to the law relating to bills and notes although neither produced vital changes. In one of them, that of Barrett v. Continental Illinois National Bank & Trust Company,5 an Illinois court was called upon to construe, for the first time, the word "forgery" as that term is used in the statute relating to liability for forged and raised checks.6 Against the contention that the term covered only the making of a false instrument and excluded the false making of an instrument, the court concluded that the definition should be co-extensive with that provided in the Criminal Code7 and the

4 Public policy aspects may be noted in two other cases. The case of Dwyer v. Treacy, 118 F. Supp. 289 (1954), involving a corporation employment contract, is discussed above. See Section I, Business Organizations, note 8. The case of Friedman v. Agudath Achim North Shore Congregation, 351 Ill. App. 413, 115 N. E. (2d) 70 (1954), dealing with the validity of provisions against disinterment in a contract for a burial lot, is discussed hereafter. See Section III, Civil Practice and Procedure, note 49, first series.

5 2 Ill. App. (2d) 70, 118 N. E. (2d) 631 (1954).


7 Ibid., Ch. 38, § 277.
cases decided thereunder. In the light thereof, the word "forgery" would comprehend both situations, so the court held that the bank in question enjoyed a protection under the statute in a case where the instrument was drawn by a person without authority even though such person had signed his own name.

In the other case, that of *Ellithorpe v. Pioneer Trust & Savings Bank*, the question was raised as to whether title had passed where a negotiable instrument, payable to order, was delivered without endorsement. Heretofore, it has been recognized that title may pass in such a case either by way of gift or under Section 49 of the Uniform Negotiable Instruments Act, provided that, in the last-mentioned instance, the transfer is made for value. In the case in question, the transfer had been made pursuant to an order of the United States District Court entered in connection with an action which was later dismissed with prejudice to the rights of the plaintiff therein, said plaintiff being the one whose title was here placed in issue. Manifestly, no gift was intended, and there does not appear to have been any value given. Nevertheless, the court, in an unsatisfactory opinion, held that title had passed since the delivery was said to have been made with the intent to transfer title. The facts in the case did not appear to comply with either of the recognized channels for transferring title to unendorsed order instruments, although the court made reference to both, so the case would seem to suggest that a third mode for transferring title may have been developed. In any event, further clarification in this area would appear to be necessary as the intent with which delivery has been made has, heretofore, been considered relevant only in cases involving purported gifts.

8 *People v. Mau*, 377 Ill. 199, 36 N. E. (2d) 235 (1941); *People v. Kubanek*, 370 Ill. 646, 19 N. E. (2d) 573 (1939).
9 2 Ill. App. (2d) 253, 119 N. E. (2d) 393 (1954). Leave to appeal has been denied.
10 See, for example, *Collins v. Ogden*, 323 Ill. 594, 154 N. E. 701 (1926), and *Rothwell v. Taylor*, 303 Ill. 226, 135 N. E. 419 (1922).
Certain important words of the Insurance Code relating to the effect to be given to misrepresentations in life insurance policy applications\(^{12}\) came before the Appellate Court for the Second District in the case of *Asselborn v. State Farm Life Insurance Company*,\(^{13}\) a suit in which the beneficiary recovered. The insured in question had died soon after the issuance of a policy. The policy application asked the usual questions as to health and satisfactory answers had been given. On a trial without a jury, the court found that the insured had made inaccurate answers but could find no evidence of intent to deceive. On the basis of this finding, plus the fact that the insurer's knowledge of the actual situation was at least as great as that of the insured, it was said that the claim of the beneficiary had to prevail. The case, while not exactly startling, does reflect a degree of liberal interpretation in favor of the insured.

A sharp contrast to the holding in the last-mentioned case would appear to be provided by the decision of the federal Court of Appeals for the Seventh Circuit in the case of *Matusek Academy of Music v. National Surety Corporation*,\(^{14}\) an action by an insured to recover under the terms of a burglary insurance policy. The contract contained a provision to the effect that loss would be covered only if the burglar alarm system on the premises was in working order at the time. An officer of the plaintiff admitted that the alarm system was not working at the time of the burglary but endeavored to justify the condition by referring to the fact that the plaintiff had a contract for the maintenance thereof with a third party. The court, upholding a denial of recovery, responded by saying that the policy measured the rights of the parties and the exclusion clause was clear and unambiguous so the contract was susceptible of but one interpretation.

\(^{12}\) Ibid., Vol. 1, Ch. 73, § 766.

\(^{13}\) 1 Ill. App. (2d) 104, 116 N. E. (2d) 902 (1954), noted in 1954 Ill. L. Forum 131. Leave to appeal has been denied.

\(^{14}\) 210 F. (2d) 333 (1954).
The same court was asked, in the case of *Hawkeye Security Insurance Company v. Myers*, to consider a novel argument offered on behalf of a respondent to a declaratory judgment proceeding instituted by an automobile liability insurance carrier in which a declaratory judgment was sought to the effect that the carrier was not liable, under a policy it had issued to one Myers, for damages suffered by a victim of Myers' careless driving. The policy had been issued to cover a Pontiac car. Myers had traded this automobile for a Hudson and then sought an endorsement on the policy to cover the operation of the Hudson without informing the carrier of the fact of the accident, which happened after the trade but before the request for endorsement. The endorsement had been given at a time when the carrier was still ignorant of the fact that an accident had occurred. Additional factors justifying non-coverage at the time of the accident, such as failure to give proper notice and failure to co-operate, were also relied on. It was at this juncture that the respondent then brought forth his novel argument to the effect that, under the Illinois Safety Responsibility Law, the liability of a carrier becomes absolute upon the occurrence of an accident causing injury to a third person, regardless of breaches by the insured of conditions relating to notice and co-operation. This argument had been sustained in a New Hampshire case based upon a statute of that state, but the court held that since, under the Illinois law, no policy had been filed with and accepted by the Secretary of State as proof of financial responsibility the provisions of the Illinois statute were inapplicable.

While on the subject of automobile liability insurance, mention might also be made of the holding of the Appellate Court for the Fourth District in the case of *Piper v. State Farm Mutual Automobile Insurance Company*. The insured there endeavored

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15 210 F. (2d) 890 (1954).
16 Ill. Rev. Stat. 1953, Vol. 2, Ch. 95 1/2, § 58b et seq.
to secure reimbursement from the insurer for amounts paid out in effecting voluntarily settlements with persons who had been injured in a collision with the insured automobile. The policy provided that no action should lie against the company unless the insured’s obligation to pay had been determined by judgment or by written agreement to which the company was a party. Although the plaintiff had judgment in the trial court, the judgment was reversed upon appeal. The decision, although novel, could hardly have been otherwise.

SALES

The ability of one lacking title to transfer ownership of personal property to a third person by sale or the like became the subject of discussion in the case of Mori v. Chicago National Bank. In that case, an owner of a car, desiring to sell the same, left it with a used car dealer under an arrangement whereby the dealer was authorized to procure bids in return for a commission in the event a bid so procured was accepted and a sale completed. This dealer gave the defendant bank, with whom he had maintained prior business relationships, a bill of sale for the car as well as a trust receipt and a promissory note for money then borrowed. After the dealer had absconded and the defendant had taken possession of the car, the owner filed an action as in trover, claiming a conversion of his property. The bank defended that the owner was estopped to assert his ownership. Accepting it to be a well-established principle that an owner would be precluded from asserting his ownership only if he had entrusted possession of an article to an agent together with an express or implied authority to sell the chattel or had clothed the agent with other indicia of ownership, the court decided the owner could recover unless an estoppel could be established. On this point, it declared that the conduct of the one claiming the benefit of an estoppel would be as important as the conduct of the owner. Since the defendant bank had been negligent in failing to demand production of the certificate of title to the car at the time of the loan, the claim of

estoppel was defeated. Although the validity of a sale would not be dependent upon the surrender of a title certificate, the failure on the part of an automobile purchaser to demand and to get such a certificate could have important consequences.

The decision of the Appellate Court for the Fourth District in the case of Heimsoth v. Falstaff Brewing Corporation is noteworthy for, in that case, the particular court seems to have taken a more reasonable attitude toward actions directed against manufacturers, based upon alleged breaches of implied warranties of fitness in relation to food products in sealed containers, offered for human consumption, than had been evidenced in the earlier case of Williams v. Paducah Coca Cola Bottling Company. Seemingly relaxing the great burden of proof which it had previously settled upon the plaintiff-consumer, the court denounced the granting of a directed verdict for the defendant-manufacturer in an instance where the trial court had reasoned that a possibility of tampering with the container and the food contents was present. The Appellate Court declared that where such a possibility could not normally and reasonably be expected, or was not probable upon the basis of the evidence adduced, it would be improper to direct a verdict and the issue should be left to the jury. On the other hand, the Appellate Court for the First District, in Shaw v. Swift & Company, decided that a trial court should have granted a directed verdict for the defendant-manufacturer in a case involving the alleged unwholesomeness of food where the matter of a possible contamination of the food product while still in the hands of the manufacturer was based upon inferences drawn from mere speculation and conjecture.

Another warranty question was projected in the case of Dixon v. Montgomery Ward & Company Inc., wherein the printed

20 Ill. Rev. Stat. 1953, Vol. 2, Ch. 95 1/2, § 76, dealing with certificates of title, merely forbids the operation within the state of unregistered vehicles. It is not a true "evidence of ownership" statute.
portion of a contract furnished by the seller covering the sale of a furnace provided that the seller would not be liable for any damage caused by a defective installation of the furnace and that the installers were the purchaser’s agents. The court refuted the seller’s argument of non-liability for faulty installation by referring to a typed portion of the contract which contained the statement ‘‘install in workmanlike manner,’’ stating that, in such an instance, the typed portion would prevail over the printed part. It also appeared therein that the purchaser had had nothing to do with the installation and the installers were hired and paid by the seller.

QUASI-CONTRACTS

Contractual obligations arising by operation of law, rather than by act of the parties, have generally been enforced under the description of quasi-contracts on the theory that it would be unjust to allow one to receive and to retain benefits without making some form of restitution. It would, however, be ridiculous to urge that an implied contract should be found to exist in an area where the law, by specific fiat, forbids the making of an express contract or where it requires compliance with certain conditions precedent to the formation of a binding obligation. For these reasons, in Greene v. City of Danville, the Appellate Court for the Third District affirmed the action of a trial court in dismissing a suit against a municipality, as in general assumpsit, when it appeared that the plaintiff, owner of land which had been used by the municipality as a parking lot under an oral agreement between plaintiff and the mayor, had failed to observe the customary amenities with respect to the making of municipal contracts. Holding that the city could not be estopped from denying liability in the face of an express statutory mandate declaring its ineffective contracts to be null and void for all purposes, the court reached the result

25 See 351 Ill. App. 75 at 89, 114 N. E. (2d) 44 at 47.
26 350 Ill. App. 440, 113 N. E. (2d) 348 (1953). Leave to appeal has been denied.
28 Ibid., § 15 — 3, states: ‘‘Any contract made . . . in violation of the provisions of this section shall be null and void . . . and no money . . . shall be paid on account thereof.’’
that no quasi-contractual liability arose despite the admitted receipt by the municipality of benefits in the form of the use it had made of the plaintiff's property.29

The converse rule would seem to be the one to be applied, however, where legally imposed conditions precedent to the making of enforceable contracts, as in the statute of frauds situations, have been enacted for the protection of private persons. One who has received benefits and then relies on the statute of frauds as a reason for not performing his oral promise may be compelled to make suitable restitution.30 If, by contrast, he has furnished benefits but later repudiates the oral agreement, although the other is willing and able to perform, he may not, according to the case of Turner v. Katz,31 utilize a quasi-contractual remedy for the recovery of that which he has given for then the tendency would be to use the statutory protection as a sword rather than a shield. The plaintiff there, who had made a cash down payment as lessee under an oral agreement for the making of a long-term lease,32 lost in his effort to secure the return of his deposit when it appeared that the lessor-defendant was willing to enter into a binding written lease.33

Illustration of the length to which the law might go in formulating quasi-contractual obligations, particularly when the moral aspects of the situation possess a strong appeal, may be found in the case of Shaver v. Brierton.34 One child who had expended

29 Compare this case, however, with the holding in the case of DeLeuw, Cather & Co. v. City of Joliet, 327 Ill. App. 453, 64 N. E. (2d) 779 (1946), where compensation on a quasi-contractual basis for the benefit received was ordered paid from the proceeds of a federal loan rather than from general funds of the municipality. The requirement for the making of a prior appropriation was there deemed to be inapplicable.


32 The lease, by Ill. Rev. Stat. 1953, Vol. 1, Ch. 59, § 2, should have been in writing.

33 The case was complicated by a dispute as to whether or not the cash paid was to cover rent under an oral short-term lease, to be followed by a written lease for a longer term, or was to be applied toward the rent due on the latter. If the former, plaintiff got all he had bargained for, hence was not entitled to restitution. If the latter, he was at fault for refusal to execute the long-term lease when the writing was tendered to him for signature. In that case, plaintiff would be acting in an inequitable fashion, hence not entitled to equitable assistance.

money in the support of an indigent parent was there permitted to secure contribution from another child, after appropriate notice and demand, on the theory the plaintiff had been forced to discharge the defendant’s obligation for him, hence was entitled to reimbursement at least as to a proportionate part of the expense so incurred. In order to find that the defendant was under an obligation to support, the Appellate Court for the Second District seized upon language in an Illinois statute creating a reciprocal obligation between parents and children to provide for the support of each other. Laudable as the holding might be, for certainly no one child should be burdened with the obligation of support while others go free, it is doubtful if the statute possesses the effect purportedly given to it for it merely directs that an action to compel support shall be instituted by certain designated public officials and says nothing about inter-family responsibilities.

One other case might be mentioned, that of Chicago, Rock Island & Pacific Railway Company v. United States, not so much for its novelty as for the fact that it provides emphasis on the point that, while contribution between joint tort-feasors is not generally permitted in Illinois, one who has been forced to honor a secondary liability, as to an injured employee, may secure quasi-contractual reimbursement for amounts so paid out from the person primarily responsible for the harm. The fact that the plaintiff and the defendant were each only vicariously liable, and that the defendant was the sovereign government, was said to be of no significance in placing the ultimate burden where it rightly belonged. This rather liberal treatment given to the subject matter merely serves to add emphasis to the proposition that the whole of the legal doctrine which relates to indemnification and contribution is sadly in need of a complete and thorough re-examination.

37 A general discussion of the Illinois law with respect to contribution appears in a comment in 32 CHICAGO-KENT LAW REVIEW 298. Several workmen’s compensation subrogation and indemnification cases are discussed above. See Section I, Business Organizations, notes 48 to 55.
III. CIVIL PRACTICE AND PROCEDURE

AVAILABILITY OF REMEDIES

Little of consequence has arisen during the course of the year regarding the jurisdiction to be exercised by the various courts which comprise the judicial department of the State of Illinois. It might be noted, however, as in the case of People ex rel. Holzapple v. Ragen,¹ that the Illinois Supreme Court, despite an apparent constitutional mandate to the contrary,² still refuses to take original jurisdiction in habeas corpus proceedings in the event a factual, rather than a legal issue, is presented by the record.³ Any ambiguity as to the jurisdiction of the Municipal Court of Chicago which may have been engendered by a seeming conflict between the statutory descriptions relating to first and fourth class cases⁴ was resolved, in the case of Secco v. Chicago Transit Authority,⁵ in favor of the idea that the court in question may entertain personal injury cases where the amount involved does not exceed $5,000, although the maximum jurisdictional limit as to other types of fourth class cases remains at $1,000.

For that matter, venue problems were also rare but, in the case of Iowa-Illinois Gas & Electric Company v. Perrine,⁶ a question was raised as to whether or not a public utility which owned property and did business in Rock Island County might sue there to enjoin the Illinois Commerce Commission from interfering with, or suspending the operation of, a proposed rate schedule which had been filed in the office of the commission in Sangamon County and on which schedule some action had been taken by the

² Ill. Const. 1870, Art. VI, § 1, states that the Supreme Court "shall have original jurisdiction in cases relating to ... habeas corpus."
³ The court relied on the decision in People ex rel. Jones v. Robinson, 409 Ill. 553, 101 N. E. (2d) 100 (1951), which was criticized in 30 CHICAGO-KENT LAW REVIEW 282.
⁶ 351 Ill. App. 195, 114 N. E. (2d) 572 (1953). Appeal has been dismissed.
body in Cook County. Challenging jurisdiction under a special appearance, the commission urged that the suit belonged in either Sangamon or Cook County, since none of the defendant commissioners resided in Rock Island County, on the theory the "transactions" out of which the action arose, i.e. the filing of the rate schedule, occurred in the first of these counties or else that "some part thereof," i.e. the suspension order, had been entered in the second of them. Analogy was made to the statutory provision with respect to venue in injunction proceedings designed to stay actions at law.  

The Appellate Court for the Second District, nevertheless, following comparable holdings in other jurisdictions in like cases, sustained venue in Rock Island County by placing the basis of the suit one stage farther back. It rested the decision on the idea that the controlling "transaction," out of which the dispute arose, was one related to the ownership and use of the utility property as well as its threatened confiscation, the situs of which clearly lay in the county where the suit had been instituted.

Acquisition of jurisdiction over the parties is about as important to litigation as is the presence of a court empowered to hear and determine the controversy. Significant in this regard is the holding achieved in two cases dealing with substituted methods for service of process in suits arising out of the operation of automobiles on the highways of the state.  

In the first case, that of Ogdon v. Gianakos, retroactive effect was given to the 1949 amendment to the statute in question so as to make the same applicable to a resident who had been involved in a highway collision prior to the passage of the amendment but who had, before suit and service, departed from the state. The opinion of the Supreme Court therein would indicate a shift from the agency theory, once

8 See Smith v. Williams, 160 Fla. 580, 35 So. (2d) 844 (1948), and Montana-Dakota Utilities Co. v. Public Service Commission, 111 Mont. 78, 107 P. (2d) 533 (1940).
10 Ibid., Ch. 952, § 23.
used to support statutes of the kind in question against constitutional attacks, to a "power" theory stemming from the state's right to control acts occurring within its borders. The other case, one entitled *Dart Transit Company, Inc., v. Wiggins*,¹² held that service under the statute was not confined to actions *ex delicto* but might be utilized in suits designed to procure reimbursement, as by way of general assumpsit, for money paid out in connection with highway accidents, and was available for use by non-resident as well as resident plaintiffs.¹³

The sufficiency of the summons, or the service thereof, was challenged in two cases. In *Wessel v. Eilenberger*,¹⁴ the complaint described the several defendants both as individuals and as occupying varied representative capacities but the summons named these several defendants as individuals only. These defendants, as individuals, responded to the merits of the case but lost and then urged that the decree was invalid for lack of jurisdiction over them in their several representative capacities. The court appears to have achieved a common-sense result in holding the summons and service to be sufficient under the circumstances, but does appear to have done some violence to procedural law by passing over, without comment, the fact that the defendants had filed answers in abatement with regard to the jurisdictional points involved.¹⁵

In the other case, that of *Tomaszewski v. George*,¹⁶ a default judgment was set aside, after term time,¹⁷ when it was made to appear that the alleged service took the form of delivering a copy of the

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¹² *1 Ill. App. (2d) 126, 117 N. E. (2d) 314 (1954),* noted in *42 Ill. B. J. 656* and *1954 Ill. L. Forum 351.*

¹³ Language in the case of *Jones v. Pebler*, 371 Ill. 309 at 313, 20 N. E. (2d) 592 at 594 (1939), to the effect that the legislative intent was one designed to "secure compensation for injuries to local residents," was declared to be too restricted in character.


¹⁶ *1 Ill. App. (2d) 22, 116 N. E. (2d) 88 (1953).*

¹⁷ Use of a petition in the nature of a writ of error *coram nobis*, based upon Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 196, was held to be a proper way to raise the question.
summons to the defendant’s wife in defendant’s absence\textsuperscript{18} but, despite a statement to the contrary in the return, it was not clearly shown that a copy of the summons was thereafter mailed to the defendant as is the requirement of the statute.\textsuperscript{19} Since the action was one of \textit{in personam} character, rigid and full compliance with the statute was declared to be essential.\textsuperscript{20}

Jurisdiction may, of course, be acquired by the defendant’s voluntary submission, as by general appearance, in which case jurisdictional defects may be overlooked. The case of \textit{Liberty National Bank of Chicago v. Vance}\textsuperscript{21} might be considered important in that respect for in that action a judgment had been taken, by confession, against a lessee and an assignee of the lessee. The assignee moved to vacate the judgment on the basis that she had both defenses and counterclaims to the suit for rent but the trial court denied relief with regard thereto. On appeal, she urged for the first time that jurisdiction over her had not been obtained since, by the assignment, she had agreed to assume no more than liability for the rent due or to become due and had not become a party to the warrant of attorney to confess judgment for lack of suitable language to that effect. The reviewing court agreed with this contention and found the original judgment by confession to be void but then proceeded to point out that the assignee’s participation in the merits of the case had constituted a general appearance in the cause so it was only necessary to vacate the original judgment and thereafter return the case for entry of a new and valid judgment.

Some new points have been made with reference to the opera-

\textsuperscript{18} The deputy sheriff testified that he delivered the summons to the defendant’s wife while she was talking to two or three other women “on the sidewalk about ten or fifteen feet away from her residence.” Query, is this the same as leaving the summons at defendant’s place of abode?

\textsuperscript{19} Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 137, specifies the conditions imposed by law on substitute service.

\textsuperscript{20} Mention might be made of the fact that, in \textit{Welch v. Downs}, 1 Ill. App. (2d) 424, 118 N. E. (2d) 51 (1954), it was held that service by publication in an Ohio proceeding to revive an earlier Ohio judgment was inadequate to bind an Illinois resident, even though he had personally participated in the original proceeding, inasmuch as the revivor proceeding was one of \textit{in personam} character and personal service of process in Ohio would have been needed to make the revived judgment valid and enforceable in this state.

\textsuperscript{21} 3 Ill. App. (2d) 1, 120 N. E. (2d) 349 (1954).
tion of applicable statutes of limitation and the effect they may possess on the time within which to bring suit. By its holding in the case of *Orlicki v. McCarthy*, the Appellate Court for the First District has aligned itself with the views expressed by the Appellate Court for the Fourth District, on the question as to whether or not the 1949 amendment to the Dram Shop Act, which prescribes a two-year limitation on dram shop actions, possesses retroactive effect. The issue is one which will eventually be resolved by the mere passage of time, for the Supreme Court does not appear to have done anything to resolve the matter. The holding of the Appellate Court for the Second District in the case of *Geneva Construction Company v. Martin Transfer & Storage Company*, a case dealing with the right of a court to permit the addition of new parties to assert additional claims in a pending suit after the period for bringing an original suit has expired, does appear to be destined for further examination. The court there, in a proceeding by an employer for reimbursement of funds expended for compensation benefits paid its injured employee, allowed the employee, more than two years after the injury, to intervene in the pending action against the party at fault for the purpose of participating in the recovery as well as in asserting new claims against the defendant. The holding of the Illinois Supreme Court in the case of *Fitzpatrick v. Pitcairn*, dealing


25 351 Ill. App. 289, 114 N. E. (2d) 906 (1953). Leave to appeal has been granted.

26 Ill. Rev. Stat. 1953, Vol. 2, Ch. 83, § 15, directs that actions for damages for injuries to the person shall be commenced within two years next after the cause of action accrues.

27 The employee's failure to take more prompt action may have rested on the fact that the decision in Grasse v. Dealer's Transport Co., 412 Ill. 179, 106 N. E. (2d) 124 (1952), declaring a portion of the Workmen's Compensation Act which forbade suit by a covered employee to be unconstitutional, was not achieved until some time after the employer had begun its suit. Following that decision, the employee appears to have sought, by intervention and amendment, to assert his common-law action against the third-person defendant and the employer's action was amended to seek reimbursement.

with the converse of the problem as it relates to the right to add new parties defendant to a pending action after the limitation period has expired, would seem to militate against the decision in question.

Differences between varying periods of limitation with respect to suits on written and oral contracts as well as differences in the nature of the defendant’s possession of land as tenant under a written lease and a holdover tenancy provoked an interesting limitation problem in the case of Eilers v. Eilers. The defendant there concerned had taken possession of farm lands under a one-year written lease calling for both a cash and a share-crop rental, with express provision for renewal at the same terms “by endorsement thereon.” At the end of the term, the tenant remained in possession, without any endorsement having been made on the written lease, and so continued until suit was brought, some seven years later, for an accounting. To this suit, the defendant interposed a number of defenses but particularly urged that recovery was barred on the entire claim for failure to bring suit within five years. On appeal from a decree ordering an accounting, the Appellate Court for the Third District held that, as the written lease had not been effectively renewed, the ten-year statute applied to rent falling due in the first year of possession whereas the five-year statute applied to the periodic terms created by implication from the holding over, to be measured from the end of each such period rather than, as the defendant had urged, being made applicable from the inception of the first of the periodic tenancies.

Inasmuch as the right to secure trial by jury in an appropriate case has bearing on the availability of remedies and is a matter usually given attention at the outset, it would appropriate to note here that, in the case of Reese v. Laymon, the Supreme

31 According to Dixon v. Niccols, 39 Ill. 372 (1866), rent is not due, particularly if payable in crops, until the end of the term in the absence of agreement or proof of custom to the contrary.
32 See Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 188, as to the time for making the demand for jury trial.
Court indicated that a complete reversal had occurred in the former practice under which it had been possible, following appellate review, to make a belated demand for jury trial in the event the cause was remanded for new trial. The court there held that, without regard to any further steps which might be taken in the case, if jury trial was not demanded at the outset the privilege thereof would be forever and totally waived.

Issues concerning the proper parties to litigation came before the courts in several instances. In only one case, that of Strader v. Board of Education, could it be said that anything was discussed with respect to parties plaintiff and then only as to those who seek to intervene in pending litigation. The court there did, however, draw some important distinctions between intervenors who wish to participate on the side of the plaintiff and those who, after intervention, might be more nearly regarded as defendants. If acting in the latter capacity, and to the end that a "complete determination of the controversy" might be procured, the court said that intervenor-defendants should be permitted to set up new claims and bring in new parties, provided so doing would not unduly interfere with or delay the original proceeding, especially if to do otherwise would be likely to engender a multiplicity of actions.

Insofar as parties defendant were concerned, the case of Ylonen v. Ylonen reiterates the proposition that all beneficiaries under a land trust would be necessary parties to a suit to partition the trust res but the court there did note that, as between beneficiaries over whom the court had jurisdiction, the action might proceed to the solution of their rights even though other bene-

34 See, for example, Osgood v. Skinner, 186 Ill. 491, 57 N. E. 1041 (1900).
36 Some aspects of the problem with particular emphasis in workmen's compensation proceedings have been previously noted. See Section I, Business Organizations, notes 48 to 55.
37 They would, generally, under the rule of Hairgrove v. City of Jacksonville, 366 Ill. 163, 8 N. E. (2d) 187 (1937), be obliged to accept the case as they find it at the moment intervention is permitted.
39 2 Ill. (2d) 111, 117 N. E. (2d) 98 (1954).
ficiaries, being non-resident, had not been brought under the control of the court, hence could not be regarded as bound by the decree. An excellent illustration of the beneficial purpose underlying Section 24(1) of the Civil Practice Act, which provides for joinder of defendants in the alternative, may be found in the case of American Transportation Company, Inc. v. U. S. Sanitary Specialties Corporation, wherein a lessee combined claims against its sub-tenant, its landlord, and certain strangers on the theory that one or the other was responsible for the loss sustained. The count against the sub-tenant rested on an alleged breach of contract; the one against the lessor charged a constructive eviction; and the one against the strangers was based on a tortious trespass to the premises. A motion to strike the complaint for an alleged misjoinder of claims and parties, under which it had been urged that there was no common ground in the several claims to warrant the inclusion of all of them in one suit, had been sustained in the trial court but the Appellate Court for the First District reversed on the theory the plaintiff had the right, in view of the alternative character of the several claims, to have the question of ultimate liability on the part of the respective defendants decided in the one case.

By far the most outstanding development in procedural law, although technically one not falling within the limits of this survey, has been produced as the result of the final outcome of the case of Johnson v. Moon, a case concerning the right to use a species of third-party practice in a law action so as to permit the bringing in of new parties under a counterclaim filed by the original defendant. The Appellate Court for the First District had there determined that, except as the Civil Practice Act had preserved older ideas with regard to the introduction of new parties under a counterclaim based upon a former cross-bill in equity, there was nothing in the present statute to support the

41 2 Ill. App. (2d) 144, 118 N. E. (2d) 793 (1954).
42 3 Ill. (2d) 561, 121 N. E. (2d) 774 (1954), reversing 1 Ill. App. (2d) 6, 116 N. E. (2d) 96 (1953).
development of a system of third-party practice, so it sustained the dismissal of the counterclaim as to those who were not parties to the original action. The Supreme Court, however, on leave to appeal, reversed these holdings and reinstated the counterclaim in the apparent belief that, at least to some degree, third-party practice was authorized by Section 25 of the Civil Practice Act in order to bring about that "complete determination of the controversy" which, if separate suits had been filed, could have been accomplished under a proper consolidation of the separate cases for trial at one and the same time. The startling interpretation so given appears to contradict the belief which has been held until now that there is need for specific provisions authorizing the use of, as well as regulating, third-party practice.

Nothing has been done to change the established course of the law with regard to the nature of legal remedies but issues with regard to the scope of equitable and statutory remedies do still arise. In that connection, although it is a well-established principle that equity will exercise jurisdiction over the disinterment of the bodies of deceased persons, two new cases dealing with problems of that nature are of some interest. While both emphasize the general rule that, in each disinterment case, the wishes of those nearest to the deceased person by reason of relationship or association, together with the wishes of the deceased, the interests of the public, and the tenets of the religious organization in whose cemetery the deceased is buried should be taken into consideration, the decision in Fischer's Estate v. Fischer points out that the body of the deceased person forms no part of the estate so that a probate court would lack a general equity jurisdiction over the subject of interment and disinterment of human bodies. In the

44 The right to use a counterclaim as between the original parties is clearly defined in Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 162.
46 Ibid., Ch. 110, § 175.
47 Compare, for example, Fed. Civ. Pro. Rule 19(b), dealing with the addition of parties who ought to be included if complete relief is to be accorded, with Fed. Civ. Pro. Rule 14, regulating third party practice. A similar comparison may be noted in Sections 193 and 193-A of the New York Civil Practice Act. See also 28 Chicago-Kent Law Review 1 at p. 33.
48 1 Ill. App. (2d) 528, 117 N. E. (2d) 855 (1954).
other case, that of Friedman v. Agudath Achim North Shore Congregation,\textsuperscript{49} it appeared that the deceased person had purchased a burial lot in a cemetery owned by a religious organization whose tenets prohibited disinterment. The purchase contract and the certificate issued thereunder referred to the rules of the religious faith in question and provided that these rules should be observed. The Appellate Court for the First District held that such a purchase contract, prohibiting disinterment, was not contrary to public policy and, being lawful, should be protected by a court having general equitable jurisdiction in the event a disinterment of the body of the deceased purchaser of the cemetery lot was attempted. A desire on the part of the relatives of the lot owner to place their departed one in a more beautiful and modern cemetery was not there regarded as being of sufficient substance to disturb the scene of last repose.

Cases involving attempts to compel specific performance of oral agreements are seldom successful. In Weiss v. Beck,\textsuperscript{50} wherein the plaintiff sought to secure specific performance of a verbal adoption contract, the Supreme Court reiterated the principle that specific performance of such an oral contract should not be granted unless the proof as to the existence and terms of the contract was clear and convincing. The court rejected the more flexible and to some extent more desirable rule prevalent in some other jurisdictions which takes the position that a verbal adoption agreement may be proven by facts and circumstances sufficient to raise an implication that the contract was actually made, which implication, in turn, may find corroboration in the conduct of the parties.

Aspects of injunction practice were discussed in three cases. In one of them, that of Callahan v. Holsman,\textsuperscript{51} the question arose as to whether the verification of a complaint upon which a temporary injunction had been granted was correctly worded. A majority of the judges of the Appellate Court for the First Dis-

\textsuperscript{49}351 Ill. App. 413, 115 N. E. (2d) 553 (1953).
\textsuperscript{50}1 Ill. (2d) 420, 115 N. E. (2d) 768 (1953).
\textsuperscript{51}351 Ill. App. 1, 113 N. E. (2d) 483 (1953), noted in 32 Chicago-Kent Law Review 186. Robson, P. J., wrote a specially concurring opinion.
strict rejected an argument based on the alleged insufficiency of the language used on the ground that it would require the court to indulge in primitive and outdated formalism. The concurring judge, pointing to a long line of decisions, some of which had been rendered by the Supreme Court, wherein a technical attitude had been taken with regard to verifications of the type involved, urged that an Appellate Court lacked authority to overrule or disregard these contrary decisions. In the second case, that of Kolin v. Leitch, where a temporary injunction had been wrongfully issued against the board of directors of a non-profit corporation which operated a school, it was said that the fact that the name of the school corporation had not been joined with the names of the directors in the motion to dismiss the injunction would not preclude the school, as the actual party damned within the meaning of Section 12 of the Injunction Act, from recovering damages for the wrongful issuance of the injunction. The third case, that of Material Service Corporation v. Hollingsworth, emphasizes the power equity courts possess to uphold justice and good conscience for it was there said that an equity court had an inherent power, for equitable reasons, to modify or even revoke a permanent injunction, if that should be required to meet changing conditions either of law or fact.

Statutory remedies with equitable aspects also received attention at the hands of the courts. The necessity for an "actual controversy" to support use of a declaratory judgment proceeding was noted in the case of Spalding v. Granite City with the court there concluding that, as the plaintiff would not be affected by the statute which he had claimed was unconstitutional, no "controversy" existed between the parties, hence it was improper for the plaintiff to seek declaratory relief. In Jones v. Hodges,

54 415 Ill. 284, 112 N. E. (2d) 703 (1953).
56 415 Ill. 274, 113 N. E. (2d) 567 (1953).
57 2 Ill. App. (2d) 590, 119 N. E. (2d) 806 (1954). Leave to appeal has been denied.
however, the court approved the granting of affirmative relief to a defendant in a declaratory judgment proceeding, thereby indicating that actions of the kind in question may move beyond the diplomatic level of a mere declaration of rights and may end up being as effectively adversary and bitter in character as is true of the older remedies. Mention might also be made of the fact that, in Pierce v. Pierce, the statute with regard to suits for partition was construed so as to permit the use of such an action as between lessees under a long-term lease. Feudal distinctions between real estate and chattels were there discarded in favor of a more modern approach to the subject.

PREPARATION OF PLEADINGS

Very little has been said concerning the content, the form, or the manner of setting forth the claim in the complaint upon which the civil action is based. While Section 43(2) of the Civil Practice Act specifically permits the use of a degree of alternative pleading it should be noticed that this privilege is subject to the qualification that the alternative method is to be used only when the party is "in doubt as to which of two or more statements of fact is true." It was, therefore, held to be error, in the case of Church v. Adler, for a plaintiff to allege, in one count of a malpractice complaint, that she would be "sick, sore, lame and disordered for the rest of her life" and, in a second alternative count, to charge that, as the result of subsequent surgery made necessary by the defendant's malpractice, she had "regained her health," since it was clear that the plaintiff could not be "in doubt" with respect thereto.

The bar should also be advised,
from the holding in the case of *Curran v. Harris Trust & Savings Bank*\(^6\) that the principle which requires pleading, proof and judgment to coincide and be mutually self-supporting, like a three-legged stool, is still the law of this state. It was there held to be error to make an award of attorney's fees, even though the contract in question so provided, because no mention of the supporting facts had appeared in the complaint,\(^5\) nor had the point been mentioned in the prayer for relief.

Insofar as issues regarding the preparation of defensive pleadings were concerned, the holding in the case of *DeLude v. Rimek*,\(^6\) while changing the law as to trial procedure, does nothing to settle the question as to whether or not a defendant in a tort action is entitled to plead, by way of answer, the existence of a covenant not to sue a co-tort-feasor in support of an effort to procure a benefit from the amount paid for such covenant. As efforts to inject the question by way of petition after verdict have produced contrary results,\(^6\) it would seem to be advisable for the defendant to raise the issue by answer.\(^6\)

An answer containing a denial of execution of a written instrument, provided the denial is verified in accordance with Section 35(2) of the Civil Practice Act,\(^6\) will serve to generate an issue as to the genuineness of the instrument but, under the rule of *Niehaus v. Niehaus*,\(^7\) the denial will not force the party relying on the instrument to sustain the burden by common-law proof of execution, as by attesting or transaction witnesses, if

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\(^5\) The issue actually arose under a counterclaim but, for this purpose, the same must be regarded as a complaint: Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 162(3).


\(^6\) See also Burns v. Stouffer, 344 Ill. App. 105, 100 N. E. (2d) 507 (1951), which deals with the way by which an issue may be raised in the event a covenant not to sue is procured by one of the defendants after trial has been begun.


\(^7\) 2 Ill. App. (2d) 484, 120 N. E. (2d) 66 (1954).
other proof can be aided by appropriate presumptions. A clear distinction does exist between a purely defensive answer and new matter which may be contained therein but which is intended to be not merely an affirmative defense but rather to possess affirmative operation for, in the last-mentioned instance, a counterclaim should then be utilized, following the line of an old-fashioned cross-bill in equity. The case of Pliley v. Phifer would indicate, nevertheless, that a decree granting affirmative relief to a defendant would be proper, even though the answer failed to include a counterclaim, if the plaintiff fails to make seasonable objection to the form of the answer. The decision is, however, one which should be confined to the particular facts for, if the decree had been reversed, the court would have ended up holding a sum of money with no one being entitled thereto.

Two cases dealing with the verification of original pleadings possess enough significance to merit attention. In the case of Callahan v. Holsman, the question was one as to the technical sufficiency of an affidavit to a complaint for injunctive relief which affidavit had been challenged on the ground that it was not possible to determine therefrom which allegations in the complaint were absolutely verified and which ones were only qualifiedly so treated, hence it would have been difficult, if not impossible, to base a prosecution for perjury thereon. The Appellate Court for the First District, speaking lightly as to the perjury aspect, found the verification sufficient. In Loraitis v.

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71 See, for example, Ill. Rev. Stat. 1953, Vol. 2, Ch. 98, §§ 31 and 36, as to presumptions which attend upon negotiable instruments.
74 1 Ill. App. (2d) 398, 117 N. E. (2d) 678 (1954). See also Jones v. Hodges, 2 Ill. App. (2d) 509, 119 N. E. (2d) 806 (1954), for a similar holding as to the sufficiency of an answer in a declaratory judgment proceeding to support affirmative relief where no seasonable objection had been made.
75 The general rule on the point is illustrated by the case of Curran v. Harris Trust & Savings Bank, 2 Ill. App. (2d) 355, 119 N. E. (2d) 483 (1954), discussed above, this section, note 64.
Kukulka, however, the Supreme Court upheld a punishment for contempt based upon a false verification of an answer even though, by law, no verification was required because it was offered to an unsworn complaint. A contention that constitutional rights were invaded was answered by saying that the defendant had voluntarily given up his privilege to remain silent by swearing to his answer, hence had to swear truthfully.

Most of the pleading disputes grew out of efforts to amend pleadings which, for one reason or another, had proved to be inadequate. The proffered amendment to the complaint filed in the case of Milewski v. Milewski, an amendment designed to enlarge the scope of the action from a suit for separate maintenance to one to impress a trust for the plaintiff’s benefit in certain assets belonging to the principal defendant who had died after the suit had been instituted, was held properly rejected by reason of the limited character of the initial suit plus the fact that the principal proceeding had become moot. On the other hand, in Ray v. Starr, it was decided that an amendment to a complaint was necessary and should have been allowed, to permit the plaintiff to set forth a written agreement as an exhibit or to provide an explanation for a failure so to do, when, at the time of the filing of the original complaint, the plaintiff appeared not to have known of the existence of the writing.

After an amendment has been permitted, questions might well arise as to whether or not the amended case would be open to attack from the standpoint of a defense that the claim is barred, particularly where the amendment comes after the limitation period has expired. A liberal construction was given,

78 1 Ill. (2d) 533, 116 N. E. (2d) 329 (1953), noted in 32 Chicago-Kent Law Review 266.
79 351 Ill. App. 158, 114 N. E. (2d) 419 (1953). Leave to appeal has been denied.
80 See the case of Petta v. Petta, 321 Ill. App. 512, 53 N. E. (2d) 324 (1944), noted in 22 Chicago-Kent Law Review 281, with respect to the right of a court, in a separate maintenance proceeding, to decide questions concerning the property rights of the spouses.
83 See above, this section, note 25, for a discussion of the case of Geneva Const. Co. v. Martin Transfer & Storage Co., 351 Ill. App. 289, 114 N. E. (2d) 906 (1953), in which leave to appeal has been granted, where the issue was one as to the right to add new parties by an amendment filed after the limitation period had expired.
in the case of Rossler v. Liberty National Bank of Chicago,\textsuperscript{84} so as to permit the amendment to relate back,\textsuperscript{85} and thereby avoid a defense that the action was barred, for it was clear that the amended cause grew out of the same occurrences as those described in the original complaint.\textsuperscript{86} The issue in the case of First Securities Company of Chicago v. Schroeder\textsuperscript{87} was not quite so apparent for the plaintiff, suing on a promissory note, had made one amendment to assert its claim as assignee and then filed another which changed the theory for recovery to an entirely different one but was given judgment under the principle of relation back. The case does, however, serve to illustrate the presence of a degree of confusion on the part of the Appellate Court for the First District since reliance was placed therein on provisions of the Civil Practice Act whereas the case had been instituted in the Municipal Court of Chicago, hence should have been governed by the procedural rules thereof.\textsuperscript{88}

Assuming that a pleading amendment of some sort is necessary, the decision in the case of Soverino v. Baltimore & Ohio Railroad Company\textsuperscript{89} should serve as a warning that permission to amend must be obtained before final judgment, except as Section 46(1) of the Civil Practice Act may authorize a later amendment to make the pleadings conform to the proof adduced at the trial,\textsuperscript{90} so that, if the judgment has been entered as under a decision on a motion to dismiss the suit, the party may not thereafter compel the court to vacate the judgment simply for the purpose of entering an order granting permission to the party

\textsuperscript{84} 351 Ill. App. 289, 118 N. E. (2d) 621 (1954). Leave to appeal has been denied.

\textsuperscript{85} Ill. Rev. Stat. 1953, Vol 2, Ch. 110, § 170(2).

\textsuperscript{86} A tenant had there sued a landlord to recover for personal injuries caused when a stairway in the demised premises collapsed. The original complaint charged a negligent failure to repair whereas the amended complaint, filed to conform pleadings to proof, charged a negligent albeit gratuitous repairing on the part of the landlord.

\textsuperscript{87} 351 Ill. App. 173, 114 N. E. (2d) 426 (1953).

\textsuperscript{88} It should be noted that Rule 43 of the Municipal Court of Chicago is identical with Ill. Rev. Stat. 1953, Vol 2, Ch. 110, § 170 so reliance on the latter provision did not constitute serious error. It is suggested, however, that courts and lawyers should be alert to notice that differences do exist between procedural methods in state courts and those followed in the Municipal Court of Chicago.

\textsuperscript{89} 2 Ill. App. (2d) 357, 119 N. E. (2d) 494 (1954).

\textsuperscript{90} Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 170 (1).
for the filing of amended pleadings. Timely action, therefore, is essential. In that connection, it might also be mentioned that the case of *Salitan v. Neff Feed Company*\(^{91}\) supports the view that, where the amendment is one to make the pleadings conform to the proofs, hence one which might be made even after a judgment has been rendered, the amendment must still be made in the trial court and prior to appeal\(^{92}\) and may not be attempted before the reviewing tribunal.

**THE TRIAL OF THE CASE**

Antecedent to the trial itself, some questions may be generated regarding such things as summary judgment procedure, pre-trial discovery and the like. On the first of these points, it may be noted that, under Section 57 of the Civil Practice Act,\(^{93}\) summary judgment procedure is available only in those instances enumerated in the statute and then only in relation to actions "at law or in equity." It was, therefore, asserted in the case of *Barkhausen v. Continental Illinois National Bank & Trust Company*\(^{94}\) that a motion for summary judgment would be improper in a declaratory judgment proceeding since the same was neither a suit at law nor a proceeding in equity but one purely of statutory cognizance.\(^{95}\) The Appellate Court for the First District, however, reached the conclusion that the end sought to be achieved, to-wit: to facilitate litigation and expedite trial procedure, was as desirable in a declaratory judgment proceeding as in any other type of action and, finding no express statutory prohibition to the contrary, approved the use of a motion for summary judgment in the case before it.

Pre-trial discovery and deposition practice was involved in two rather important cases. One of them, that of *Pink v. Demp-*

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\(^{91}\) 351 Ill. App. 127, 114 N. E. (2d) 320 (1953).
\(^{92}\) See *Bollaert v. Kankakee Tile & Brick Co.*, 317 Ill. App. 120, 45 N. E. (2d) 506 (1942), noted in 21 CHICAGO-KENT LAW REVIEW 244.
\(^{95}\) Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 181.1, creates the right to secure declaratory relief.
sey, was caught up in last year's survey as it was decided within a few days after the survey period closed. It is worth mentioning again that the court there held that the taking of a pre-trial discovery deposition from an otherwise incompetent claimant against a decedent's estate did not operate to waive the witness' disqualification. In the other, that of *Harch v. Illinois Terminal Railroad Company,* the plaintiff began suit in a state court to recover for personal injuries allegedly sustained in an accident covered under the federal Boiler Inspection Act. The defendant moved for an order to compel plaintiff to submit to a pre-trial physical examination in the manner directed by Rule 35 of the Federal Rules of Civil Procedure but this motion was denied. The Appellate Court for Fourth District held that no error had occurred in this respect inasmuch as no state rule on the subject was in existence nor had any such discovery been required by any local precedent and the federal rule on the point was specifically made controlling only to suits begun in, or transferred to, federal courts.

In the realm of evidence law, at least as the same relates to proof in civil cases, no new decisions of any real significance have been achieved but the case of *DeLude v. Rimek* has im-

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96 350 Ill. App. 405, 113 N. E. (2d) 334 (1953), noted in 32 Chicago-Kent Law Review 190. Leave to appeal has been denied.
98 The case was noted later in 6 Stan. L. Rev. 358 and 40 Va. L. Rev. 71.
1 351 Ill. App. 272, 114 N. E. (2d) 901 (1953). Leave to appeal has been denied.
5 Matters of evidence peculiar to criminal cases are discussed in Section IV, Criminal Law and Procedure, particularly notes 50 to 66 thereof, post.
6 Mention could be made of the case of People v. Dolgin, 415 Ill. 434, 114 N. E. (2d) 380 (1953), noted in 1954 Ill. L. Forum 336, actually a criminal prosecution based on an alleged violation of Ill. Rev. Stat. 1953, Vol. 2, Ch. 120, § 453 et seq., for the effect it might have by way of implementing the "public document" exception to the hearsay rule. It was there held proper to admit into evidence a photo-static copy of a letter from the Department of Revenue to the manufacturer of certain tax meter stamping machines approving the design of the stamp as an appropriate extension of the evidence rule.
portant bearing on an issue of trial procedure in tort actions where a covenant not to sue has been given one of the tort-feasors and another tort-feasor desires to have the benefit, by way of credit against the ultimate recovery, for the amount paid for such covenant. It was there decided that proof regarding the covenant was irrelevant, inadmissible, and likely to prejudice the outcome of the case, hence should not be permitted to reach the jury. Recognizing that the amount so paid should be deducted from the ultimate recovery, the Appellate Court for the First District said it was the function of the jury to find the total damage sustained but that it was the function of the judge, upon application made after verdict, to determine the amount by which the verdict should be reduced. It was, therefore, held to be prejudicial error to submit this issue to the jury.

Once trial has been begun, the plaintiff is, by Section 52 of the Civil Practice Act, very properly limited in relation to his right to dismiss the proceedings or to procure a voluntary nonsuit. It was urged, in the case of Perry v. Waddelow, that this section did not control in a forcible entry and detainer proceeding inasmuch as actions of that type were exempted from the operation of the Civil Practice Act but the court decided otherwise in the light of a provision in the Forcible Entry and Detainer Act which was designed to assimilate the practice in suits under that statute with the general practice in state courts. The case of Wilhite v. Agbayani is also important on the point for it was there held that the principles which control a plaintiff who desires to take a voluntary nonsuit are equally applicable to a defendant

8 See Aldridge v. Morris, 377 Ill. App. 369, 86 N. E. (2d) 143 (1949), noted in 27 CHICAGO-KENT LAW REVIEW 313. See also 29 CHICAGO-KENT LAW REVIEW 54.
12 Ibid., Vol. 1, Ch. 57, § 11.
13 The specific provision in Ill. Rev. Stat. 1953, Vol. 1, Ch. 57, § 17, dealing with dismissal of the suit as to one or more of the defendants and the plaintiff's right to take judgment as to the others, was held not to be in pari materia with Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 176, regulating a complete voluntary nonsuit.
14 2 Ill. App. (2d) 29, 118 N. E. (2d) 440 (1954), noted in 32 CHICAGO-KENT LAW REVIEW 339. Leave to appeal has been denied.
who desires to procure similar relief with regard to a counter-
claim. The court also there declared that a trial or hearing would
have been commenced, within the meaning of the applicable statute,
if not as soon as the jury had been called for examination then
certainly by the time the jury had been selected and sworn to try
the issues, even though no evidence had been introduced or testi-
mony taken.

The degree of control which the trial court may exercise with
respect to the trial and the ensuing judgment was also made the
subject of investigation. In that connection, the common-law con-
cept that a trial court judgment, whether against one or more
defendants, was a unit which had to stand as rendered or had to
be set aside in toto\textsuperscript{15} was reviewed in the case of \textit{Chmielewski v. Marich}\textsuperscript{16} with the result that older ideas on the subject were
forced to yield to more modern views. The case was one in which
several defendants had been joined in a dram shop proceeding
and a default judgment had been pronounced against all of them
for failure to offer a contest. The defendants later filed separate
motions in the trial court under Section 72 of the Civil Practice
Act\textsuperscript{17} to vacate the default judgment. One of the defendants relied
upon his minority and the absence of representation by a guardian
\textit{ad litem}. The others pleaded an alleged non-negligent oversight
on the part of an insurance company which should have under-
taken a defense of the action.\textsuperscript{18} Finding that the minor defendant
was entitled to relief, the trial court vacated the judgment as to
him and then, apparently considering itself bound by the common
law concept since no specific authority appeared in the Practice
Act to the contrary,\textsuperscript{19} proceeded to reverse the judgment as to the
other defendants also. Following appeal from this action, the

\textsuperscript{15}The former practice is illustrated by the case of Livak \textit{v. Chicago & Erie R. Co.}, 299 Ill. 218, 132 N. E. 524 (1921).
\textsuperscript{17}Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 196.
\textsuperscript{18}On this point, the court found a lack of diligence to be present, relying on the
\textsuperscript{19}Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 216, specifically authorizing \textit{"partial"}
reversals, is designed to enumerate the powers of reviewing, rather than \textit{nisi prius},
tribunals.
Supreme Court held that, except where the requirements of justice dictated otherwise, both trial and reviewing courts possessed authority to vacate or reverse a judgment in part while retaining or affirming an existing judgment as to other parts or persons. Dictum which had been expressed in the case of Minnis v. Friend was there held to prevail over direct decisions to the contrary in several intervening cases wherein the point appears to have been overlooked.

It should also be noted that an application to vacate a judgment taken by confession must, according to Supreme Court Rule 26, be accompanied by the defendant’s affidavit disclosing the presence of a prima facie defense on the merits. While there is authority, in that rule, for the plaintiff to file counter-affidavits, the case of Lietz v. Ankrom would indicate that the issues thus created are not to be resolved by the trial judge, as might be the case with respect to motions made under Section 48 of the Civil Practice Act for it is then the function of the judge to do no more than determine, as a matter of law, whether there is an apparent prima facie defense and, if so, to then set the matter for hearing on the controverted affidavits and other pleadings which may have been interposed. Denial of a motion to open up a judgment by confession was there reversed inasmuch as the trial judge had acted to deal with the merits of the cause simply on the basis of the affidavits so filed, described by the Appellate Court as being a “vicious” practice in view of the fact the several affiants were not subject to cross-examination.

Normally, the judgment of the trial court, when pronounced and if not subjected to review, would afford a basis for the final disposition of the cause under familiar principles relating to the doctrine of res judicata. In that connection, the case of Voss.


Truck Lines v. Pike, one of the few truly significant procedural decisions achieved during the year, is important for the court because it was asked to determine the conclusiveness of a judgment which did not directly involve a full application of the doctrine of res judicata but did carry overtones on the subject. The complicated factual situation therein revealed a series of controversies growing out of a highway collision between a truck and a tractor-trailer unit in which one of the drivers died. The suit in question started out as a property damage claim by the owner of the trailer and the bailee thereof, who owned the tractor, to recover for damage to the equipment. It was directed against the truck owner, as employer, and the representative of the estate of the deceased truck driver, as employee. In the meantime, a separate personal injury suit had been filed by the driver of the tractor-trailer unit against the truck owner, in which certain counter-claims had been interposed, and this suit had been decided by a judgment in favor of the plaintiff therein. A motion for summary judgment was then made in the instant case predicated on the ground that all factual issues had been resolved adversely to the defendants there concerned by the verdict and judgment in the interim suit and, as a consequence, nothing remained to be tried as between the instant parties. The trial court, relying on an estoppel by verdict, granted this motion but the Appellate Court for the Third District reversed when it concluded that all issues had not been so resolved since it was still possible that the plaintiffs may have been guilty of contributory negligence although it had been affirmatively established that their driver was not so guilty. The line of demarcation between the several cases and the varied holdings with respect to the right of employer and employee to have the benefit of, or be exposed to detriment from, the outcome of suits instituted by or against the other is not an easy one to draw. The Appellate Court for the Second District, in the case of Banas v. Jensen, appears to have achieved a somewhat


26 The cases are noted in a comment in 32 Chicago-Kent Law Review 145.

comparable result except that there the survivors of an automobile accident were held not to be in any way estopped by a verdict in favor of the other driver in a wrongful death action filed by an administrator in their behalf and based upon the death of a member of their family produced by the same collision.

DAMAGES

Prior mention has been made of the holding in the case of DeLude v. Rimke\textsuperscript{28} so it is important to note here simply that, on the issue of the right of a tort-feasor to claim credit for amounts paid by another for a covenant not to sue, the court refused to limit the application of the rule to those who were truly joint tort-feasors and guilty of a breach of the same duty but instead indicated that relief by way of mitigation of damages was open to all concerned in the one tort, provided the liability arose out of the same circumstances, even though the bases for liability rested on different duties.

Much more remarkable was the result achieved in the case of Childers v. Modglin\textsuperscript{29}. The suit in question was one by a spouse and the ten children of a person who had sustained a permanent injury as the result of becoming intoxicated in taverns operated by the defendants. Liability was predicated on the Dram Shop Act\textsuperscript{30} with the several plaintiffs each seeking to recover individual damages not in excess of the sum of $15,000. The defendants moved to compel the plaintiffs to amend the complaint so as to make the maximum aggregate recovery as to all plaintiffs subject to the $15,000 limit, which motion was sustained by the trial court. Following a judgment dismissing the suit when plaintiffs refused to amend, an appeal was taken to the Appellate Court for the Fourth District and it was there decided that the statutory damage limitation was to be construed so as to permit each injured plaintiff to recover up to, but not to exceed,

\textsuperscript{28} 351 Ill. App. 460, 115 N. E. (2d) 561 (1953). See above, this section, notes 66 and 7, second series.
\textsuperscript{29} 2 Ill. App. (2d) 292, 119 N. E. (2d) 519 (1954).
the sum of $15,000 without regard to the existence of other claimants or to the number of defendants. That interpretation, the court said, was dictated by the fact that the statute created an independent cause of action in favor of each near relative or the like named in the statute rather than a class or joint action for their benefit as is true under the statute dealing with wrongful death cases. The extent of a particular tavern-keeper's liability is, therefore, to be determined by the number of statutory beneficiaries and the number of suits brought rather than by the number of persons whom he may cause, or permit, to become intoxicated while on his premises.

It seldom happens that any doubt exists as to the persons entitled to collect damages, most of the cases turning on questions relating to whether or not there is liability, and, if so, as to the proper measure of recovery. Brief mention might, therefore, be made of the case of Kolin v. Leitch where the point was urged that a corporation should not be permitted to offer a suggestion with respect to damage, following dissolution of a temporary injunction, inasmuch as it had made no motion to vacate the same nor had it prosecuted any appeal therefrom. Judgment in favor of the corporation was affirmed when it was made to appear that all appropriate steps had been taken by the several members of the board of directors of the corporation even though they appeared to have acted more on behalf of themselves, being co-defendants in the case, than on behalf of the entity.

APPEAL AND APPELLATE PROCEDURE

Relief from a trial court judgment comparable to that which might be obtained on review before a higher tribunal may sometimes be obtained in the trial court by a motion in the nature of a writ of error coram nobis. If a proceeding of this nature

31 Ibid., Vol. 1, Ch. 70, § 2.
34 Ibid., Vol. 2, Ch. 110, § 196.
is undertaken more than five years after the judgment,\textsuperscript{35} the case of \textit{Petition of Stern}\textsuperscript{36} would indicate that new process would be required,\textsuperscript{37} accompanied by proper service, and that jurisdiction to vacate the judgment for errors of fact would not be obtained by mere service of notice, particularly not where service was had by mail on opposing parties then resident in another state. If the motion is seasonably presented then, according to the case of \textit{Schnable v. Tuma},\textsuperscript{38} it may be utilized on equitable grounds, even in an action at law, to correct such mistakes as an error in the return of process, for example in case the return should indicate that actual personal service had been obtained when in fact this was not so.

Assuming that an appeal to a higher tribunal is the proper method to pursue, it should first be noticed that an appeal will generally lie only from a "final" order of a lower court.\textsuperscript{39} Nothing has been said to disturb the existing rules which bear on the degree of finality present in an order of a trial court but the case of \textit{Eckhardt v. Hickman}\textsuperscript{40} possesses significance on the question of whether or not it would be proper for the Supreme Court to grant leave to appeal from a decision of an Appellate Court which decision, instead of serving to put all questions to rest, had remanded the cause for a new trial. Upon finding that the Appellate Court had, quite properly, reversed a judgment notwithstanding a verdict and that Supreme Court Rule 22 did not require that alternative motions for judgment or for new trial be presented simultaneously under penalty of waiver if not so presented, the Supreme Court then found the Appellate Court de-

\textsuperscript{35} The statute cited in the preceding footnote contains a five-year period of limitation except as to persons under disability.


\textsuperscript{37} It is not clear whether the new process would be an ordinary summons, issued pursuant to Section 5 of the Civil Practice Act, or would be something akin to a writ of error authorized by Section 91 thereof. See also Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 259.62.

\textsuperscript{38} 351 Ill. App. 486, 115 N. E. (2d) 574 (1953).


\textsuperscript{40} 2 Ill. (2d) 98, 116 N. E. (2d) 873 (1954).
cision to be lacking in the essentials of finality\textsuperscript{41} so it dismissed an appeal which it had previously granted on plaintiff's petition.\textsuperscript{42}

Once the appeal has been providently taken, time begins to run against the appellant for, under Rule 36 of the Supreme Court,\textsuperscript{43} he is then under an obligation to file the record on appeal within sixty days or face the penalty that his appeal will be dismissed in the event no proper extension of time has been granted. The case of \textit{McDonald v. McDonald}\textsuperscript{44} is important in that connection for it indicates that the sole authority of the trial judge to grant extensions of time is limited to extensions for the purpose of allowing a belated filing of a report of the proceedings at the trial. Once that report has been filed with the trial judge, any further extensions must be granted, if at all, by the reviewing tribunal, not by the trial judge. As a consequence, the appeal taken therein was dismissed although the appellant had filed the record within the time fixed by a trial court order but at a time which, unfortunately, fell beyond the normally allotted date, because the purported extension of time was held to be invalid for lack of authority to grant the same.

The scope of jurisdiction to be exercised by a reviewing tribunal is generally well understood,\textsuperscript{45} but there is occasion, judging by the outcome of the case of \textit{Kelly v. Winkler},\textsuperscript{46} to remind the bar

\textsuperscript{41} The court relied on Kavanaugh v. Washburn, 387 Ill. 204, 56 N. E. (2d) 420 (1944).

\textsuperscript{42} See also Olson v. Chicago Transit Authority, 1 Ill. (2d) 83, 115 N. E. (2d) 301 (1953), where an appeal from the Appellate Court to the Supreme Court, after leave to appeal had been granted, was likewise dismissed in a situation where the Appellate Court had reversed and remanded a cause for new trial and the plaintiff had not filed a certificate, in the form required by Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 199 (2) (c), to the effect that, on the new trial, no or additional evidence would be adduced. An attack on the constitutionality of the statutory provision for an alleged discrimination between plaintiffs and defendants was not sustained as the court found a distinction existed between a truly final order and one which, absent the certificate, was not final.

\textsuperscript{43} Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 259.36(2) (a).

\textsuperscript{44} 351 Ill. App. 452, 115 N. E. (2d) 567 (1953).

\textsuperscript{45} Mention has previously been made of the holding in the case of Chmielewski v. Marich, 2 Ill. (2d) 598, 119 N. E. (2d) 247 (1954). See above, this section, notes 16 to 21, second series. That case, in effect, held that a trial court, as well as a reviewing tribunal, possessed authority to vacate a judgment in part while retaining the judgment as to other parts or persons.

\textsuperscript{46} 351 Ill. App. 145, 114 N. E. (2d) 335 (1953), noted in 32 \textit{CHICAGO-KENT LAW REVIEW} 180.
that, if any amendment in the trial court proceedings is necessary, such amendment must occur in the trial court for, despite language in the Civil Practice Act to the contrary, the several Appellate Courts must act solely on the record as presented and may do nothing to permit an amendment thereof. An effort there made to correct an erroneous approval of a trial court order was rejected with the result that the appeal had to be dismissed since the order appealed from was, on the face of the record, a consent order.

ENFORCEMENT OF JUDGMENTS

Following upon rendition of a judgment, the creditor may pursue a variety of remedies to procure the collection thereof. He may, for example, institute citation proceedings under Section 73 of the Civil Practice Act but, according to the case of Guest v. Guest, if he does so, he may not turn the same into a proceeding equivalent to a creditor's bill so as to reach property the title to which is held by a third person. He may, likewise, utilize a garnishment proceeding but again subject to the limitation that the garnishee be a person who is "indebted" to the judgment debtor for if, as between them, no judgment or agreement exists whereby the claim has become one of liquidated character that remedy is not available. It was for this reason that garnishment was denied in the case of Brock for use of Baumgarte v. Logan inasmuch as the claim sought to be reached appeared to be one growing out of a demand by the judgment debtor against the garnishee for failure

47 Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 216(a), purports to authorize the reviewing court to "exercise all or any of the powers of amendment of the trial court."

48 They may, of course, permit an addition to the record in the event that there has been an omission.

49 See also Salitan v. Neff Feed Co., 351 Ill. App. 127, 114 N. E. (2d) 320 (1953), where it was held that, in the event an amendment to a pleading was necessary to make the same conform to the proofs, the amendment had to be made in the trial court and could not be done by motion before the reviewing tribunal.

50 Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 197(2), as supplemented by Ch. 110, § 259.26A.

51 351 Ill. App. 148, 114 N. E. (2d) 326 (1953). Leave to appeal has been denied.


to procure an insurance policy on a truck which had been concerned in the principal cause of action, which claim had neither been reduced to judgment nor made the subject of a specific agreement as to the amount of coverage to be obtained.

Issues relating to garnishment as well as the right to use a body execution were concerned in the case of *Airo Supply Company v. Page*.\(^{54}\) It appeared there that the judgment debtor, while in the creditor’s employment, had embezzled funds received as a book-keeper, had suffered a term of imprisonment by reason thereof, had been adjudged guilty in a civil suit to recover the amount so embezzled, which judgment included a finding of malice so as to support a body execution,\(^{55}\) but had later succeeded in having this judgment vacated and a simple judgment substituted therefor. Following his release from prison, the judgment debtor had instituted bankruptcy proceedings and had procured a discharge. He then sought to defeat a later garnishment proceeding based on the civil judgment under the theory the discharge in bankruptcy was an effective guard against the same but the Appellate Court for the First District reversed a decision in his favor on the ground that, despite the absence of a finding of malice, the principal defendant was not the “honest debtor” entitled to relief but was, rather, one to be treated as a person who had obtained funds by defalcation while acting in a fiduciary capacity,\(^{56}\) hence not entitled to be protected by the discharge in bankruptcy.

A judgment creditor’s attempt to procure satisfaction of his judgment under a complaint in the nature of a creditor’s bill collided with claims advanced by a third-party contract beneficiary in the case of *Pliley v. Phifer*.\(^{57}\) The assets in question constituted the debtor’s share in a former partnership which had been dissolved by agreement prior to the principal judgment with the liquidating partner retaining the debtor’s share for the purpose of satisfying certain of the debtor’s obligations, including therein

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\(^{57}\) 1 Ill. App. (2d) 398, 117 N. E. (2d) 678 (1954).
a claim due a certain bank on outstanding notes held by it, executed by the judgment debtor for non-trade indebtedness, which were then in default. The issue so produced required a determination not only of the question of priority between the judgment creditor and the bank but also whether or not the agreement between the former partners amounted to a non-revocable third-party beneficiary contract in favor of the bank which was not a contracting party but had generally been informed of the arrangement and had "relaxed" its efforts to obtain satisfaction because of the presence thereof. The trial court found for the plaintiff but the Appellate Court for the First District reversed when it concluded that the arrangement, in effect, amounted to a prior assignment in favor of the bank which took precedence over plaintiff's judgment and execution. It should be noted, however, that no fraud or fraudulent conveyance was involved.

While the decision turned on Ohio law, the case of Welch v. Downs is worth mention for it illustrates certain of the problems a judgment creditor may face in the event he seeks to obtain local enforcement on a foreign judgment. The plaintiff therein had originally obtained an Ohio deficiency judgment in a mortgage foreclosure case wherein the defendant, although not an Ohio resident, had filed a general appearance. No attempt was made to revive this judgment until more than twenty years after its rendition, during all of which time the debtor had remained a non-resident of Ohio. Notice with respect to the revival proceeding was given by publication. Thereafter the creditor sued in Illinois on the Ohio judgment so revived but was met with a claim that the original judgment was barred under a five-year Illinois limitation statute, that it had not been kept alive by reason of the debtor's absence from the state, and that the service by publication in the revival proceeding was inadequate inasmuch as the proceeding was one of in personam character, requiring the use of personal service in Ohio, rather than a suit in rem. The Appellate Court for the Third District, affirming a judgment for the debtor,

59 Ill. Rev. Stat. 1953, Vol. 2, Ch. 83, § 16, has been construed to be applicable to suits on foreign judgments: Davis v. Munie, 235 Ill. 620, 85 N. E. 948 (1908).
indicated that the steps taken may have been sufficient to give the Ohio judgment a renewed effect in Ohio as against an Ohio resident but were inadequate to bind the Illinois resident as to whom the original judgment had long since become barred.  

IV. CRIMINAL LAW AND PROCEDURE

There is no indication that the Illinois reviewing tribunals had fewer criminal cases to consider this year than in former years, but the list of cases in which new points of law were concerned was relatively small and most of those on the list dealt with procedural questions. Among those concerned with substantive definitions of criminal conduct are the related cases of People v. Dorman and People v. Balkin in which the defendants concerned were prosecuted for having violated that section of the Criminal Code which prohibits conspiracies to commit illegal acts injurious to the public trade, health, morals, police, and the administration of public justice. In the first of these cases, the alleged illegal act forming the basis of the conspiracy was the conduct of bookmaking; in the other, the alleged illegal act concerned the selling of horse-meat without the required labeling. In each instance, the illegal act charged as the basis of the conspiracy was of the grade of misdemeanor whereas the crime of conspiracy ranks as a felony. The question presented, therefore, was one as to whether or not a confederation formed to make book or to engage in the illegal distribution of horse-meat constituted a conspiracy as defined in the Criminal Code. In each instance, the rule of eiusdem generis was applied with the result that the phrase "illegal act injurious

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60 The court placed a degree of reliance on the analogous case of Sutton v. Hole, 349 Ill. App. 219, 110 N. E. (2d) 455 (1953).
2 351 Ill. App. 95, 113 N. E. (2d) 813 (1953).
4 Ibid., Ch. 38, § 336.
5 Ibid., Ch. 562, § 248, prohibits the possession of meat of the varieties named therein unless the same is "plainly labeled or tagged with the words 'Horse Meat'."
6 That rule directs that where general words follow specific words in a statute, the general words must be construed to include only those things of the kind indicated by the specific words.
to public trade, health, morals, police or the administration of justice” was held to be limited in meaning and to refer only to those illegal acts specifically mentioned, hence did not apply to the basic acts concerned in the two cases.

The crime of receiving stolen property was reviewed in the case of People v. Holtzman and the opinion therein rather precisely states the law in Illinois on the subject. The facts of the case were that the defendant had purchased seven shirts from one Reynolds for $1.00 each, which shirts, reasonably worth $20.00, previously had been stolen from a department store by Reynolds and were identifiable by a brand mark on the collars. The court held that the prosecution would be obliged to prove (1) that the property had, in fact, been stolen by a person other than the one charged with receiving it; (2) that the one charged with receiving it had actually received the property stolen or aided in concealing it; (3) that the receiver knew the property was stolen at the time of receiving it; and (4) that he received the property for his own use and to prevent the owner from again possessing the same. Although the prosecution could not prove, by direct evidence, the existence of defendant’s guilty knowledge that the goods were stolen, circumstantial evidence to the effect that the property was purchased for substantially less than the reasonable worth thereof, the defendant’s knowledge that Reynolds was then presently under indictment for grand larceny, and the defendant’s evasive tactics when his place of business was searched, were deemed to be sufficient to carry the burden of proof for the state. In so ruling, the court announced that it was not necessary to show actual guilty knowledge by the receiver but proof of circumstances sufficient to induce a belief in a reasonable mind that the goods were stolen would satisfy the requirement.

Along the same general line, it should be noted that an ele-

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8 Among the specific crimes mentioned in the statute are such offenses as boycotting, blacklisting, obtaining money under false pretense, as well as the common law offense of conspiring to commit a felony.
10 1 Ill. (2d) 562, 116 N. E. (2d) 358 (1953).
ment of criminal intent is required in the crime of possessing burglar’s tools with intent to commit a felony.\textsuperscript{11} The only prior interpretation of this statutory crime had indicated that the proof of intent had to be something more than an inference which might be drawn from the mere possession of instruments commonly used by burglars,\textsuperscript{12} but the question as to the type of intent needed was there, necessarily, left open. In the case of \textit{People v. Taranto},\textsuperscript{13} the defendant had been indicted and convicted under the statute for having burglar’s tools in his possession with intent to break into the dwelling house of one Dana Summers and to commit larceny therein.\textsuperscript{14} The prosecution had failed to prove that the defendant intended to break into the particular dwelling mentioned in the indictment but the circumstantial evidence did warrant a finding that the defendant intended to commit the crime of larceny. The question was raised as to whether or not the state had to prove the precise intent stated in the indictment. The question was answered in the negative on the theory that the statute did not require an allegation in the indictment of an intent to break into any particular building; that any allegation to that effect was immaterial; and that only material allegations had to be proven beyond a reasonable doubt. It should be noted, however, that the court did not say that the prosecution, under the statute, was relieved from proving the existence of a specific intent to commit a felony for it is clear that the presence of a general intent would not be sufficient.\textsuperscript{15}

The degree of participation in the crime of murder which would be necessary to constitute an accused person as being a principal was considered in the case of \textit{People v. Grilec}.\textsuperscript{16} The testimony there presented indicated that the defendant had been

\textsuperscript{11} Ill. Rev. Stat. 1953, Vol. 1, Ch. 38 § 87.
\textsuperscript{12} See \textit{People v. Taylor}, 410 Ill. 469, 102 N. E. (2d) 529 (1951), noted in 30 CHICAGO-KENT LAW REVIEW 278.
\textsuperscript{13} 2 Ill. (2d) 476, 119 N. E. (2d) 221 (1953).
\textsuperscript{14} The defendant was indicted on two counts. The second count alleged an attempt to commit burglary but the defendant was found not guilty on this count.
\textsuperscript{16} 2 Ill. (2d) 538, 119 N. E. (2d) 232 (1954).
at hand during the commission of the crime and, by his words and conduct, had signified his approval of, and encouragement in, the perpetration thereof.\textsuperscript{17} Although the testimony as to the defendant's presence at the time was contradictory and the evidence indicating the defendant's approval was sketchy at best, the court was of the opinion that, in the event the evidence was believed by the jury, the proof was sufficient to show an aiding and abetting. The court was careful to note that presence alone would have been insufficient.

Two other minor points might be noted. Whether the element of secret confinement, proof of which is necessary to sustain a charge of kidnapping,\textsuperscript{18} would be satisfied when the victim was being confined in an automobile moving over the public highways was discussed in the case of \textit{People v. Bishop}.\textsuperscript{19} The court did not decide the question, but it did clearly state, in the opinion, that there well could be a secret confinement in such a situation. The case of \textit{People v. Lackaye}\textsuperscript{20} indicates that the offense of keeping a house of ill fame\textsuperscript{21} extends to the maintenance of an establishment where homosexuals congregate for the offense is not limited simply to houses where illicit relationships between members of opposite sexes occur.

In the realm of criminal procedure, it would first be appropriate to consider the related cases of \textit{People ex rel. Gilbert v. Babb}\textsuperscript{22} and \textit{People ex rel. Millet v. Babb},\textsuperscript{23} wherein the Illinois Supreme Court was confronted with an interpretation problem arising under the statute relating to fugitives from justice.\textsuperscript{24} This statute implements provisions of the United States Constitution\textsuperscript{25} and at-

\textsuperscript{17} Ill. Rev. Stat. 1953, Vol. 1, Ch. 38, § 582, defines the conduct required of an accessory before the fact.
\textsuperscript{18} Ibid., Ch. 38, § 384.
\textsuperscript{19} 1 Ill. (2d) 60, 114 N. E. (2d) 566 (1953), cert. den. — U. S. —, 74 S. Ct. 278, 98 L. Ed. (adv.) 174 (1953).
\textsuperscript{20} 1 Ill. (2d) 618, 116 N. E. (2d) 359 (1953).
\textsuperscript{22} 415 Ill. 349, 114 N. E. (2d) 358 (1953), noted in 42 Ill. B. J. 248.
\textsuperscript{23} 1 Ill. (2d) 191, 115 N. E. (2d) 241 (1953), noted in 3 DePaul L. Rev. 289.
\textsuperscript{24} Ill. Rev. Stat. 1953, Vol. 1, Ch. 60, § 1 et seq.
\textsuperscript{25} U. S. Const., Art. IV, § 2.
tendant federal legislation\textsuperscript{26} and establishes two procedures by which a fugitive may be apprehended and extradited to the demanding state.\textsuperscript{27} In the first case, the fugitive contended that, once proceedings had been commenced before a judicial officer under the quasi-judicial method of extradition, the governor had no right to issue a direct writ of extradition, pursuant to the executive method, until proceedings before the court had been completed. On finding that the fugitive had waived further court proceedings by asking for, and receiving, a hearing before the governor on the executive writ of extradition, the court held that any question as to the propriety of the action taken had been removed from the case. In the other case, the fugitive had not waived further court proceedings but it was held that the issuance of a governor's rendition warrant, in compliance with the executive method, precluded further judicial hearings. It is clear, therefore, that the two methods for extradition described in the state statute are not exclusive of one another.\textsuperscript{28}

The case of \textit{People} v. \textit{Hammond}\textsuperscript{29} appears to have bearing on the subject of the jurisdiction which a state court may exercise over criminal acts committed against federal property located within the state. The defendant there concerned had been indicted and convicted for burglarizing an office maintained by the United States Government for use by the Department of Internal Revenue located in Cook County.\textsuperscript{30} The defendant, on writ of error, urged that the state was without jurisdiction to punish because the offense charged was committed on and against federal property. It was, however, held that in the absence of a showing by the defendant of the existence of an exclusive federal jurisdi-

\textsuperscript{26} 18 U. S. C. A. § 3182 et seq.

\textsuperscript{27} Sections 1 and 2 of the Illinois statute set forth the so-called executive mode for extradition based upon a direct application for a writ of extradition made by the demanding state to the governor of the asylum state. Sections 3 and 4 thereof provide for a second, or so-called quasi-judicial method, based upon a complaint under oath presented to any judge, justice of the peace or police magistrate.

\textsuperscript{28} It may be noted that the alleged fugitive is entitled to a hearing upon application for a writ of habeas corpus under either procedure.

\textsuperscript{29} 1 Ill. (2d) 65, 115 N. E. (2d) 331 (1953), cert. den.—U. S.—, 74 S. Ct. 380, 98 L. Ed. (adv.) 238 (1954).

\textsuperscript{30} The prosecution was based on Ill. Rev. Stat. 1953, Vol. 1, Ch. 38, § 84 et seq.
tion, the state had concurrent jurisdiction with the federal government at least in cases where the criminal act was also a violation of state law. Such being the case, the state court sentence was affirmed.

Little of consequence has been decided with regard to the technical form of, or allegations in, the indictment on which the criminal prosecution is based. One of three defendants, jointly charged with robbery in **People v. Erwin**, attempted to argue that an interpolated phrase in the body of the indictment, one which charged a co-defendant with being armed at the time, had operated to make the balance of the allegations of the indictment applicable solely to the armed person, thereby causing it to fail to charge any crime on the part of the particular defendant. The court refused to give any credence to the argument, pointing out that well-recognized rules of punctuation governed the situation before it.

In another case, that of **People v. Schrader**, a three-count indictment charged a burglary of premises belonging to a corporation but also contained a count for larceny of personal property belonging to a named individual without specific reference to the fact that the offenses were committed simultaneously or that the personalty so stolen had been removed from the burglarized premises. A motion to quash for misjoinder of offenses was denied but, at the ensuing trial, the jury found the defendant guilty of burglary only, thereby impliedly bringing in a verdict of not guilty as to the larceny. The defendant nevertheless sought review on the ground he had been prejudiced by the alleged misjoinder but his conviction was affirmed when the court indicated that, nothing being alleged to the contrary, the presumption would be that the several offenses were parts of, or related to, the same transaction, hence the counts had been properly joined.

**Footnotes:**

31 Even where exclusive jurisdiction over lands within the state has been yielded to the federal government, it has been customary to preserve a degree of state authority. See, for example, Ill. Rev. Stat. 1953, Vol. 2, Ch. 143, §§ 14, 21, 27, 32, 34 and 36.


33 But see **People v. Hallberg**, 259 Ill. 502, 102 N. E. 1005 (1913), to the effect that a joint indictment may be turned into a single one through the use of singular, rather than plural, language.

The decision in the case of *People v. Yeargai* would also appear to have lightened the burden of the prosecution in charging certain of the narcotic offenses. The defendant argued the indictment was insufficient for failure to negative certain exceptions in the nature of the potential offense, relying on an earlier case which had so required. Noting that the statutory phrasing of the offense had, in the meantime, been changed and a specific provision added which placed the burden on the defendant to prove that he was entitled to the benefit of the exception, the court was able to reject the earlier holding and find the indictment before it sufficient to sustain the conviction. Brief mention might also be made of the case of *People v. Moretti* for the light it sheds on the power of a trial court to appoint a special prosecutor to present matters to the grand jury whenever the official state’s attorney is, or may be, disqualified to act.

An important decision of interest in counties where the population exceeds 140,000 but is less than 250,000 was announced on writ of error in the case of *People v. Johnson*. The defendant there concerned had challenged the validity of the array on the ground the prospective trial jurors had not been selected in conformity with the provisions of the Jury Commissioners Act, a statute which, by amendment in 1939, had been made applicable to counties of the size mentioned, although the panel had been chosen in compliance with the Jurors Act, a statute still applicable in the smaller counties of the state. It had been decided, in *People v. Nordell*, that a grand jury of the county selected by the latter rather than the former method was not invalid because the two statutes were regarded as supplementing each other, at least

35 3 Ill. (2d) 25, 119 N. E. (2d) 752 (1954).
40 2 Ill. (2d) 165, 117 N. E. (2d) 91 (1954).
42 Ibid., Ch. 78, §§ 1-23.
43 414 Ill. 375, 111 N. E. (2d) 555 (1953).
until the county acted to operate under the jury commissioner system. Since the county in question had not yet so elected, the conviction in the Johnson case was affirmed on the ground that the principle controlling with respect to grand juries was equally applicable to trial juries. A mere increase in county population, therefore, will not result in any wholesale invalidation of indictments or convictions.

The defendant in a criminal case is not only entitled to a trial by a properly constituted jury but he is also guaranteed a speedy trial which, as to persons held without bail, has been defined by legislative enactment to be a trial commencing within four months from the date of commitment, with certain exceptions. Reliance was placed on this "four term" act by the defendant in the case of People v. Rogers under a set of facts showing detention in Cook County for over two months, followed by a surrender to Lake County authorities when it appeared that venue of the offense properly belonged in Lake County, accompanied by a further period of detention of less than four months in duration in the last-named county but aggregating a total period of incarceration slightly in excess of six months. His motion for discharge was held properly denied on the ground the first county lacked jurisdiction for any purpose so the only significant but insufficient period of detention had occurred in Lake County. Inasmuch as the detention, in whatever county, is for the benefit of the state at large, there is some reason to believe that the state should be required to act more promptly, or take the consequence of its failure so to do, within the over-all period prescribed by the legislature to prevent the possibility of harassing an accused person.

More successful from the defendant's standpoint was the outcome of the case of People v. Tamborski, a case in which the

46 415 Ill. 343, 114 N. E. (2d) 398 (1953).
47 The court relied on the case of People v. Stillwagon, 373 Ill. 211, 25 N. E. (2d) 795 (1940), a case involving substantially similar facts.
48 415 Ill. 466, 114 N. E. (2d) 649 (1953).
prosecution sought to excuse its failure to begin the trial within the four-month period on the ground the delay was caused by time necessarily taken to hear and rule on certain other defensive motions for discharge based upon other alleged failures to prosecute promptly. The court indicated that the delay was not sought by the defendant who was, in fact, insisting upon a prompt trial, nor was he the cause of the delay since his motions could have been disposed of more expeditiously. As a consequence, it was held that the defendant was entitled to have his conviction reversed and to be set at liberty.

Certain issues of proof and trial procedure are of such nature that they can only arise in connection with criminal prosecutions, being foreign to civil cases. In that category are those issues which may be generated when a defendant seeks to exclude or suppress proof secured as the result of an alleged illegal search and seizure. Noteworthy among the new holdings in that connection is the decision in People v. Dolgin, a case wherein a search was conducted, under a warrant issued for the purpose, by a member of the state highway police department specially assigned to the Department of Revenue to investigate violations of the Cigarette Tax Act. Objection to the search and seizure was based on the theory the warrant was in the nature of civil process, hence could not be executed by a highway policeman, but the court, treating the policeman as a "peace officer" and the warrant as a form of criminal process, sustained the seizure and a conviction based thereon.

Search without a warrant also breeds problems, as is illustrated by two cases. In the first, that of People v. Tillman, certain police officers, acting on suspicion provoked by an anony-

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49 Ill. Rev. Stat. 1953, Vol. 1, Ch. 38, § 746, provides for an extension of time in the event the delay "shall happen on the application of the prisoner."


52 Ibid., Vol. 2, Ch. 120, § 453.1 et seq.

53 Ibid., Vol. 2, Ch. 121, § 307.16, specifying the powers of such officers, states: "No person employed under this Act . . . shall serve or execute civil process."

mous telephone call, went to a hotel room used as defendant's residence and, on gaining entrance through a partly-opened door, made an arrest. They thereafter searched the bed on which defendant had been sleeping at the time and under the mattress thereof found narcotics. The evidence so obtained was held to be lawfully admitted on the theory the search of the bed following the arrest was not an unreasonable one under the circumstances, the bed being, in a fair sense, no more than a projection of the person of the defendant. By contrast, in the case of People v. Albea, another narcotics case, it was held, for the first time in this state, that the prosecution could not have the advantage of testimony supplied by a human being who had not been known to exist until after the illegal search had been made since the case, in principle, was identical with those cases in which papers, documents, records, or other property had been obtained in an unconstitutional fashion.

Somewhat related to the problem of suppression of evidence is the matter of securing the return of fingerprint records, photographs, and other police-file data in the event the accused person is acquitted or released without being convicted. This has, at times, been accomplished by means of an order of court entered at the time of discharge and in conjunction with the criminal proceeding. The case of Maxwell v. O'Connor notes that relief of this character may not be obtained by a subsequent petition presented to another court, even though such court possesses jurisdiction over criminal matters. The decision, beyond noting that the right sought to be protected partakes more nearly of the nature of a right of privacy to be enforced, if at all, in a civil case before a civil court, distinguished the situation before it from the one involved when evidence illegally seized has been ordered suppressed.

56 Ill. Rev. Stat. 1953, Vol. 1, Ch. 38, § 780e, directs that such matter shall be returned.
57 1 Ill. App. (2d) 124, 117 N. E. (2d) 326 (1953).
58 See note in 25 Chicago-Kent Law Review 166 to the Indiana case of State ex rel. Mavity v. Tyndall, 224 Ind. 364, 66 N. E. (2d) 755 (1946), dealing with the right to use mandamus for this purpose.
A seeming inconsistency with respect to proof of the age of a defendant charged with rape might be noted from a superficial comparison of two cases decided about the same time. A conviction was reversed in one of the cases, that of People v. Rogers,\(^{59}\) because the sole proof as to age rested on the defendant's extra-judicial confession plus such inference as the jury might draw from observation of the defendant's person at the trial, neither of which was regarded as being legal evidence on the point. In People v. Ventura,\(^{60}\) however, where no evidence of any kind bearing on the defendant's age was introduced by the prosecution, the conviction was affirmed when the court said that the responsibility rested on the defendant to prove that he was under the age referred to in the statute.\(^{61}\) The two cases may be distinguished on the fact that the first involved a charge of statutory rape, where the age of the parties is an unquestionable element of the corpus delicti,\(^{62}\) whereas the second dealt with the offense of forcible rape\(^{63}\) and the defendant had made proof on the point unnecessary by a judicial confession in the form of a plea of guilty. Whatever the rule may be with respect to inferences or presumptions relating to age, the case of People v. Meier\(^{64}\) makes it clear that, on a charge of being an habitual criminal, a presumption will be indulged in that there was not only a prior conviction but that the accused was also incarcerated thereunder\(^{65}\) and the burden is on the defendant to prove the contrary.\(^{66}\)

\(^{59}\) 415 Ill. 343, 114 N. E. (2d) 398 (1953).

\(^{60}\) 415 Ill. 587, 114 N. E. (2d) 710 (1953).


\(^{62}\) Wistrand v. People, 213 Ill. 72, 72 N. E. 748 (1904).

\(^{63}\) The rule of People v. Schultz, 260 Ill. 35, 102 N. E. 1045 (1913), was there affirmed.

\(^{64}\) 3 Ill. (2d) 29, 119 N. E. (2d) 792 (1954).


\(^{66}\) The case is also authority for the rule that the jury need do no more than find that the defendant "has been heretofore convicted" of the earlier offense by name without being obliged to set forth the details thereof in the verdict. See also People v. Pitts, 401 Ill. 154, 81 N. E. (2d) 442 (1948).
Notice could also be taken of the procedural problem involved in the case of *People v. Kirkendoll*, a case in which a negro defendant had requested the court to instruct the jury that it was the duty of the jury "to consider the prisoner's case as if he were a white man, for the law is the same as to both white and colored men, there being no distinction in principles in respect to color," but which request had been denied. Pointing to the fact that, ninety-nine years earlier, it had approved the giving of an instruction containing identical language, the Supreme Court declared the refusal constituted substantial error, saying that "practical justice" dictated the necessity for a new trial.

Sentencing procedure was made the subject of inquiry in several cases. In one of them, that of *People v. Molz*, criticism was addressed to the conduct of the trial judge on the probation hearing in that no specific order had been entered denying probation, although a full hearing had been had prior to the time the sentence order itself was entered. Recognizing that an order granting probation would be essential to preserve jurisdiction, the Supreme Court nevertheless held that, although a formal order denying probation might be desirable to complete the record, the act of the trial court in imposing sentence was sufficient to operate as a denial of the application for probation, so the alleged error was, at best, a harmless one. An inadvertent and involuntary absence of the defendant from the court-room at the moment of sentence was the point of error relied on in the case of *People v. Kirilenko*. The court agreed that error had been committed in this respect, for the defendant had a right to be present at this important stage of the proceeding, but the reversal of the judgment did little to favor the defendant for the case was remanded with a direction to set the record aside only as far back

67 415 Ill. 404, 114 N. E. (2d) 459 (1953), noted in 34 Bost. U. L. Rev. 95.
68 See Campbell v. People, 16 Ill. 17 (1854).
69 415 Ill. 404 at 411, 114 N. E. (2d) 459 at 462.
70 415 Ill. 183, 113 N. E. (2d) 314 (1953).
72 People v. Cahill, 300 Ill. 279, 133 N. E. 228 (1921).
73 1 Ill. (2d) 90, 115 N. E. (2d) 297 (1953).
as the point at which the error occurred, leaving all anterior proceedings to stand in full force and effect. Mention having been made last year of the Appellate Court holding in People v. Davis, a case dealing with the power of the judge, rather than the jury, to impose punishment in case of a violation of the Motor Vehicle Act; it is proper to note here that the Supreme Court, on writ of error, affirmed the holding therein on the ground the sentencing provisions of the Criminal Code were inapplicable and, for want of other legislative direction, common-law principles would have to control.

Indeterminate sentence being now an established policy in this state for most offenses, it has become the duty of the trial court to fix minimum and maximum limits upon the period of imprisonment specified in the judgment order. A slight grammatical error in that respect will, according to the holding in People v. Wall, be insufficient to require reversal. It was there said that a sentence for armed robbery to run for "not less than one (1) year or life" did not amount to two alternative determinate sentences but was the equivalent of a minimum-maximum sentence "for one (1) year or for life," hence was well within applicable statutory limits. More startling, however, is the decision in the case of People v. King, also an armed robbery case but one which included a charge of murder growing out of the same occurrence. The sentence there imposed specified a minimum term of 199 years and a maximum of imprisonment for life which, the defendant

76 Ibid., Vol. 1, Ch. 38, § 754a.
77 People v. Davis, 1 Ill. (2d) 597, 116 N. E. (2d) 372 (1954).
79 3 Ill. (2d) 11, 119 N. E. (2d) 780 (1954).
81 1 Ill. (2d) 496, 116 N. E. (2d) 623 (1954), noted in 42 Ill. B. J. 512. Maxwell, J., wrote a specially concurring opinion on the ground a defendant has no right to insist upon the specification of any minimum term and may complain only if the maximum sentence exceeds the prescribed limit.
82 A sentence to death on the murder charge was reversed because the court believed the defendant had pleaded guilty thereto on an erroneous reliance upon a promise of leniency with respect thereto.
urged, was far from an indeterminate sentence since the alleged minimum exceeded the ordinary life span, thereby operating to make parole impossible. Inasmuch as a "life for life" sentence had been condemned in *People v. Westbrook*, there was reason to believe that a stated term measured in years which would exceed a normal lifetime was likewise open to criticism. The Supreme Court, nevertheless, affirmed the sentence when it refused to "speculate upon the life expectancy of those convicted of crime in determining the propriety of the sentences which have been imposed upon them." The way would, therefore, seem to have been made clear for the imposition by trial courts of what are, essentially, determinate sentences leading to permanent incarceration despite an apparent policy to the contrary.

The workings of the Post Conviction Hearing Act are further illustrated by two recent holdings. In one case, that of *People v. Wakat*, the alleged errors at the original trial were said to consist in the use of an extorted confession and the knowing use by the prosecution of perjured testimony. These charges were established, to the satisfaction of the court hearing the post-conviction petition, by new evidence not previously submitted, as the result of which a new trial was ordered. The prosecution, on writ of error, claimed that neither investigation into issues previously litigated nor the receipt of new evidence were permissible in connection with post-conviction proceedings but the Supreme Court, following the rationale of *People v. Jennings*, refused to give any mechanical application to the doctrine of *res judicata* and, in addition, indicated that the hearing court was required to use any proper procedure, including the admission of

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83 411 Ill. 301, 103 N. E. (2d) 494, 29 A. L. R. 1341 (1952).
84 1 Ill. (2d) 496 at 503, 116 N. E. (2d) 623 at 626.
85 Except as relief may be obtained pursuant to Ill. Rev. Stat. 1953, Vol. 1, Cr. 38, § 801.1.
87 415 Ill. 610, 114 N. E. (2d) 706 (1953), noted in 1953 Ill. L. Forum 655.
88 The writ of error is usually not available for use by the prosecution but, as a post-conviction hearing is essentially a civil proceeding in the nature of a writ of error *coram nobis*, it would appear that the prosecution, under Ill. Rev. Stat. 1953, Vol. 1, Ch. 38, § 832, should be entitled to seek review of an adverse decision.
89 411 Ill. 21, 102 N. E. (2d) 824 (1952).
new evidence if relevant, in the discharge of its duty to ascertain whether there had been a denial of constitutional right at the first trial. In the other case, that of People v. Joyce, the primary issue concerned dealt with the question as to whether or not the prosecution was entitled to seek review of an order vacating an earlier conviction or was obliged to await the outcome of the new trial so granted. Upholding the right of the prosecution to secure an early review, the Supreme Court then proceeded to consider whether any ground for post-conviction relief existed in the case. In that regard, the court indicated the convicted defendant had no reason to complain of an instruction, originally given at the instance of the prosecution, which had informed the jury that they were judges of both the law and the facts, even though such an instruction was later held to be manifestly erroneous, since the instruction was actually harmless in its operation. As the giving of the instruction would have been inadequate to procure reversal on direct review, it was treated as being equally inadequate for the purpose of post-conviction relief.

V. FAMILY LAW

The much publicized "cooling-off" provision which had been added to the Divorce Act in 1953 became the object of judicial scrutiny in the case of People ex rel. Christiansen v. Connell. It will be recalled that, by this addition, it was necessary for any individual desiring to institute an action for divorce, separate maintenance or annulment to file a declaration of such intention at least sixty days prior to the filing of a complaint, during which interval, voluntary conciliatory conferences could be held between

90 I Ill. (2d) 225, 115 N. E. (2d) 262 (1953).
91 See People v. Bruner, 343 Ill. 146, 175 N. E. 400 (1931).
92 People v. Fedora, 393 Ill. 165, 65 N. E. (2d) 447 (1946).
93 The court also indicated that an incarcerated defendant could hardly be expected to procure even so much as a "bystander" bill of exceptions to support direct review, hence could not be held to have waived any right to complain of the conviction by reason of his failure to secure relief in the more direct fashion customarily utilized.

2 Ill. (2d) 332, 118 N. E. (2d) 262 (1954), noted in 42 Ill. B. J. 714.
the parties with the court acting as mediator. In that mandamus proceeding, it was urged that the statute was unconstitutional inasmuch as (1) it denied an individual free and prompt access to the courts,\(^3\) and (2) it attempted to impose non-judicial functions upon judicial tribunals.\(^4\) Following an adverse judgment, the petitioner appealed directly to the Supreme Court because a constitutional issue was involved and that court reversed when it decided that the provision in question did violate constitutional guarantees. An argument to the effect that, since the right to a divorce or separation was based upon a legislative grant and did not rest on the common law, the legislature could impose any limits it wished was refuted on the premise that, as soon as a judicial remedy has been created, constitutional safeguards become applicable thereto. As to the attempt to cast the court in the role of mediator, a contention was made that this function was judicial in character, being closely analogous to the pre-trial conference,\(^5\) but the court did not agree, pointing to the fact that the pre-trial conference occurs after jurisdiction has been obtained through the filing of an initial pleading whereas the conference envisioned by the "cooling-off" provision was to be held before any action had been instituted.

A goodly number of decisions this year involved questions concerning rights to alimony and support. One of these, that achieved in the case of Pope v. Pope,\(^6\) revolved around a full faith and credit issue in relation to a foreign decree. It appeared therein that an Illinois wife had secured a separate maintenance decree from an Illinois court which had been followed by a Nevada divorce obtained by the husband as on default. The husband ceased making support payments and, on the wife's petition for the recovery thereof, he contended that he was no longer obligated to pay because of his Nevada decree, urging that the Illinois court had to give full faith and credit thereto since the domiciliary jurisdiction of the Nevada tribunal had not been

\(^3\) Ill. Const. 1870, Art. II, § 19.
\(^4\) Ibid, Art. III.
\(^5\) Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 182a and § 259.23A.
\(^6\) 2 Ill. (2d) 152, 117 N. E. (2d) 65 (1954).
contested. The lower court upheld the husband's argument but, on direct appeal, the Supreme Court reversed, saying it was only necessary to give credit to the Nevada decree to the extent that the tribunal of that state had jurisdiction over the cause. While that decree might be regarded as producing a valid determination with reference to the marital status of the parties, it was said not to affect the wife's rights under the prior separate maintenance order, especially since the Nevada court lacked personal jurisdiction over the wife and had not attempted to adjudicate her rights in that respect.

Another and somewhat analogous problem, but one as to alimony rather than separate maintenance, was the concern of the Appellate Court for the First District in the case of Linneman v. Linneman. The plaintiff there had obtained an Illinois divorce and was allowed periodic alimony. She remarried in Illinois and then became a resident of California where she obtained an annulment of her second marriage on the ground of the impotency of her second spouse. Upon the refusal of her first husband to renew alimony payments, the plaintiff sought a contempt citation and relied on the California annulment decree as establishing the fact that a valid second marriage had never been contracted. The trial court refused to recognize this argument and, upon appeal, the Appellate Court affirmed. It rested this conclusion upon the fact that, according to the conflict of laws theory, the validity of a marriage is to be determined by the laws of the state wherein the marriage was celebrated. As Illinois does not recognize impotency as impairing the original validity of a marriage, it followed that the plaintiff had contracted a valid second marriage and her right to alimony from the first husband had ceased.

An alimony decision of first impression may be found in the case of Larson v. Larson, a case wherein a husband had

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8 There would appear to be no inherent power to grant an annulment on the ground of impotency since it is not a civil disability. As a result, jurisdiction to do so, where a claim of fraud could not be sustained, would have to be established by statute. In Illinois, the only power granted to the judiciary in that regard is the jurisdiction to grant an absolute divorce: Ill. Rev. Stat. 1953, Vol. 1, Ch. 40, § 1.

92 Ill. (2d) 451, 118 N. E. (2d) 483 (1954).
obtained a default divorce on the ground of desertion under a decree which waived the plaintiff’s right to alimony but was silent as to the rights of the defendant. Subsequent thereto, a petition was filed by the defendant requesting an allowance of alimony upon highly equitable grounds. The trial court entered the requested order, basing its authority to do so upon the present Illinois statute which allows a subsequent award of alimony even though the rights so to do was not reserved in the original divorce decree. The husband, claiming that his constitutional rights had been impaired, appealed directly to the Supreme Court but that tribunal took the position that, as the provision in question provided for notice and an opportunity to be heard, the statute was consistent with due process requirements and valid. It, therefore, approved the award of alimony.

The decision in *Hurt v. Hurt* establishes the fact that one under an obligation to pay for child support can only terminate that obligation upon a proper application to the court ordering the support, even though rights of visitation had been impaired or denied. The plaintiff there concerned had obtained a divorce with custody of the minor child and a weekly sum for its support. She subsequently removed the child from the jurisdiction without court permission, whereupon the defendant father ceased making support payments. When the plaintiff petitioned to recover the arrearages, the defendant answered that, under the circumstances, his obligation under the decree had been automatically terminated. The lower court upheld the defendant’s argument but, upon appeal to the Appellate Court for the First District, the judgment was reversed on the ground the mere absence of the child from the jurisdiction did not terminate obligations under the decree and that a parent, in such a situation, would have to appear before the court and seek a modification of the decree if he desired to secure relief.

Also related to parental rights and obligations is the converse obligation of the child to aid in the support of the parent

which formed the prime issue in the case of *Shaver v. Brierton*. The case was unusual in that the suit was one instituted by the plaintiff against her brother in an attempt to procure contribution from him for money she had expended in support of an indigent mother. While the common law did not recognize any such responsibility as was there sought to be enforced, many states, including Illinois, have altered this view by statute. The Illinois statute specifically provides for the enforcement of the statutory obligation by means of a suit begun by certain designated public officials but says nothing about the right of one child to sue another for contribution. The Appellate Court for the Second District, however, held the statute to be sufficiently broad to support a proceeding of the type in question and it affirmed a judgment awarding contribution.

Infants rights also received some attention during the year with the result that the Supreme Court, in *Amann v. Faidy*, reversed the position it took over fifty years ago on the question of the right of an infant to maintain a suit to recover for injuries sustained prior to birth and, by the decision therein, placed Illinois on the side of a growing minority view which permits suits of that character. In view of the protection which the law affords to property and similar rights given unborn children, the court said it was inconsistent not to recognize actionable rights for physical injuries negligently inflicted prior to birth. By contrast, in *Burstein v. Milliken Trust Company*, the Appellate Court for the Third District went back over fifty years to strike down an adoption decree, on which the parties had relied and under which a partial distribution of an estate had been made to the

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16 350 Ill. App. 462, 113 N. E. (2d) 339 (1953). The Supreme Court, on leave to appeal, reversed the decision for failure to accord a trial *de novo* in conformity with Ill. Rev. Stat. 1953, Vol. 1, Ch. 3, § 487, but did not examine into the question as to the validity of the adoption proceeding: 2 Ill. (2d) 243, 118 N. E. (2d) 293 (1954).
supposedly adopted child, when it was made to appear that the natural mother of the child had given no consent to the adoption because of her insanity and, as the law then read, could not, for the same reason, be made a defendant to an adoption proceeding.17

VI. PROPERTY

REAL AND PERSONAL PROPERTY

On the subject of the acquisition of present rights by way of title to land in Illinois, it might be noted that when the Illinois Supreme Court undertook to examine into the background situation which could lead to a conveyance in the form of a joint tenancy,1 so as to permit the finding of a resulting trust of some sort which could operate to contradict the normal consequence of a joint tenancy, it opened the door to unsettling influences which might have been prevented had the parties been held to the strict form of the conveyance utilized. Two more illustrations of this fact are provided by the cases of *Paluszek v. Wohlrab*2 and *Merschat v. Merschat*.3 In each of these cases, a conveyance in joint tenancy form, under which the surviving joint tenant claimed full ownership of the property, was attacked by a person claiming through the deceased joint tenant in an effort to show, by the nature of the contribution made by each of the grantees at the time of acquisition, that no true joint tenancy had arisen, as a consequence of which a resulting trust ought to be declared. In the first case, it was urged that, because the nominal joint tenants, a brother and sister, had furnished unequal portions of the purchase price, they should be treated more nearly as tenants in

17 Compare the holding therein with the more recent decision in *People ex rel. Nabstedt v. Barger*, 3 Ill. (2d) 511, 121 N. E. (2d) 781 (1954), not in the period of this survey, wherein the provisions of Ill. Rev. Stat. 1953, Vol. 1, Ch. 4, § 4—1, and Ch. 23, § 206, were held constitutional and sufficient to authorize a guardian, appointed for the purpose, to give consent to an adoption in a case where one of the natural parents was mentally ill. These provisions, of course, were inapplicable to the situation presented in the principal case as they were not added to the statute until 1953.

1 See *Kane v. Johnson*, 397 Ill. 112, 73 N. E. (2d) 321 (1947).

2 1 Ill. (2d) 363, 115 N. E. (2d) 764 (1953).

3 1 Ill. App. (2d) 429, 117 N. E. (2d) 868 (1954). Leave to appeal has been denied.
common enjoying fractional shares in the same proportion but the court, absent any basis for inferring the existence of a gift between the parties, nevertheless sustained the joint tenancy as being one which had been deliberately chosen by the grantees to effectuate their purpose.

In the other case, wherein certain business premises had been acquired by two brothers under a land trust agreement as joint beneficiaries but not as partners, in which building one of the brothers operated a drug store, the widow of the druggist brother succeeded in establishing her contention that, by reason of the contributions she had made toward the cost of acquisition, she was entitled to assert an interest in the premises as against her brother-in-law who had claimed the whole thereof as the surviving joint tenant. If either case indicates anything, it would be that parties who are about to take title in joint tenancy, except where an inference of a gift might arise, should preserve complete and independent proof of the entire circumstance and of their purpose so as to make resort to litigation unlikely or unsuccessful. If they do not, they will take a chance that the joint tenancy arrangement may prove to be a futile one.

Two other cases may be said to be of minor importance. In the case of Chicago Park District v. Downey Coal Company, in certain general real estate taxes had become a lien on real estate between the filing of a petition for condemnation of the property and the time when an award was entered. The amount of the award was deposited with the county treasurer with the condemnor arguing that the award should be reduced by the tax so levied. The Supreme Court, however, held that, while title would not vest in the condemnor until the award was determined and paid, the title so vested would relate back to the date of the filing of the petition, with the tax burden as between the new and former owners being determined in accordance therewith. The difficulty


5 In a prior decision, that of City of Chicago v. McCausland, 379 Ill. 602, 41 N. E. (2d) 745 (1942), the same result had been reached in a condemnation proceeding brought under Ill. Rev. Stat. 1953, Vol. 1, Ch. 24, § 84.
experienced in making merchantable title under a deed issued pursuant to a tax sale is illustrated by the case of *Gaither v. Lager.* In that case, the plaintiff’s assignor had purchased the defendant’s land at a tax sale conducted under the provisions of the so-called Scavenger Act. Plaintiff thereafter served statutory notice on the defendant and then brought an action for possession, with the Supreme Court reversing a judgment for plaintiff because the notice did not disclose the year or years in which the taxes had been assessed nor did it show whether the land was sold for general taxes or special assessments.

Aspects of conveyancing law were considered in three recent cases. The first, that of *Petta v. Host,* concerned a deserted wife who appeared some three years after her wandering husband had died and claimed an interest, as spouse, in real estate which had passed from the hands of a devisee to the defendant, a bona fide purchaser for value. The Supreme Court affirmed a decision of the lower court which was adverse to the wife on the ground that the defendant had acted in good faith, had paid a valuable consideration, and had a right to rely on the public records in the probate proceeding which gave no hint of the widow’s interest.

An interesting and novel legal problem involving the Illinois statute relating to frauds and perjuries confronted the Illinois
Supreme Court in the second case, that of *Rose v. Dolejs*. The plaintiffs there had entered into a contract to purchase certain real estate, the price to be paid in three installments. Before the second installment became due, the residence on the premises was destroyed by fire. Plaintiffs and the vendor thereupon orally agreed to extend the time of the second payment, and to accelerate the third payment, in order to permit the plaintiffs to devote their resources to a rebuilding of the residence. The vendor thereafter assigned his interest to the defendant who, when the original date of the second installment arrived without payment, declared a forfeiture. Plaintiffs sued to restrain defendant from interfering with their possession. The enforcement of the agreement as an oral modification of a real estate contract would ordinarily have entailed no difficulty but, when the agreement was construed by the court to be an independent, oral contract, it then fell afoul of the one-year clause. In a novel approach to the problem, the Supreme Court held that a detrimental reliance by the plaintiffs operated to estop the defendant from asserting the non-compliance with the statute as justification for his action.

An illustration of the discretion which a court of equity may exercise in granting or denying specific performance of a real estate contract may be found in the third case, that of *Kukulski v. Boda*. Relief was there denied to a real estate purchaser by the Supreme Court on the ground that the consideration was inadequate as well as because of the fact that the vendor was intoxicated, or otherwise mentally ill, at the time he signed the contract sought to be enforced.

13 1 Ill. (2d) 280, 116 N. E. (2d) 403 (1953), noted in 1954 Ill. L. Forum 153.
14 An oral extension of the time for closing of a real estate deal has been enforced on the theory that the original terms of the contract have been waived: Kissack v. Bourke, 224 Ill. 352, 79 N. E. 619 (1906).
16 The court admitted that inadequacy of consideration alone would not be a sufficient reason for denying specific performance. The precise point does not appear to have been previously decided in Illinois.
17 Passing attention might be called to the case of *Brothers v. McMahon*, 351 Ill. App. 321, 115 N. E. (2d) 116 (1953), in which leave to appeal has been denied. It was there determined that a contract to purchase a housing unit in a co-operative apartment was not a “security” within the meaning of Ill. Rev. Stat. 1953, Vol. 2, Ch. 121½, § 97 (1).
Only two of the cases concerning aspects of the law as it relates to future interests are worthy of mention here.18 The first, that entitled Community School District No. 4 v. Booth,19 concerned a testamentary trust wherein it was provided that, upon termination of certain life estates, the residue of the estate should go to the Board of Education of a certain school district for the erection and equipment of a school building. It was claimed that the rule against perpetuities had been violated by the testator's inclusion of a condition precedent to the effect that an equal amount had to be contributed by the Board of Education,20 an event which might not occur within normal time limits. The Supreme Court held that the condition was one precedent to enjoyment, not to the vesting of the estate, hence no violation of the rule against perpetuities had occurred.

The second case, that of Farmers State Bank & Trust Company v. Mangold,21 was one wherein the Supreme Court struck down a conditional power of appointment on the ground the condition was devoid of effective meaning. The testator there concerned had devised a life estate to his widow with a remainder to two named girls "providing they do that which is right," but otherwise to be distributed as the widow might see fit. The widow, by will, sought to exercise the power of appointment thus created by reducing the share of one of the girls and eliminating the claims of the other in favor of other named legatees and devisees. The court concluded, after an opinion which tabulated a large number of cases wherein similar or related conditions had been imposed, that the testator's language was ineffective to limit the remainder over, hence the widow was deprived of any power to deal with the property. The net result, judging by the purported facts, was to vest the estate in persons whom the

18 Certain other cases in this category are noted hereafter, this section, notes 74 to 78, under the heading of Wills and Administration.
19 1 Ill. (2d) 545, 116 N. E. (2d) 161 (1953).
20 Preferring not to decide whether the rule against perpetuities was applicable to charitable trusts, the court assumed for purpose of the argument that it was applicable.
21 415 Ill. 602, 114 N. E. (2d) 797 (1953).
testator, had he lived, might well have regarded as not being proper objects for his bounty.

Except for those cases dealing with the law of sales, discussed elsewhere,22 little of significance has been determined with reference to legal doctrines controlling rights in personal property. A problem regarding bailments under the Uniform Warehouse Receipts Act23 arose in the case of Mercantile Trading Company v. Roth,24 wherein the bailee, operator of a public storage warehouse, sought to be relieved from liability for failure to redeliver all the goods on demand on the ground he had, prior to issuance of certain non-negotiable storage receipts, acquired an interest in the non-delivered goods. The receipts bore no notation of the bailee's alleged interest, a statement clearly required by the language of the uniform statute,25 but it was urged that this provision applied only to negotiable warehouse receipts, hence did not control in the particular case. The Appellate Court for the First District, deeming the statute to be one declaratory of a long-established policy to protect depositors against any temptation on the part of warehousemen toward overreaching, stated that the statute was applicable to all types of receipts issued by public warehouses and, the proprietor being otherwise unable to justify the failure to surrender everything demanded of him, imposed a judgment against him for the worth of the missing articles.

There is reason to believe, however, that superficial holdings of personal property, such as bank deposits, in joint tenancy form may not always carry with such holdings the normal incidents of rights of survivorship.26 The surviving joint tenant in Holmes v. Mims27 was permitted to retain the proceeds of the joint account,

22 See ante, Section II, Contracts, notes 19 to 25.
25 Ill. Rev. Stat. 1953, Vol. 2, Ch. 114, § 234, states: "Warehouse receipts . . . must embody [a statement] . . . if the receipt is issued for goods of which the warehouseman is owner, either solely or jointly or in common with others, [of] the fact of such ownership."
26 Cases relating to joint tenancies in real property are noted above, this section, notes 1 to 3.
27 1 Ill. (2d) 274, 115 N. E. (2d) 790 (1953).
against the claim of the widow of the deceased joint tenant that
the arrangement had been set up in fraud of her rights, when it
was made to appear that the fund was the product of the combined
efforts of both of the joint tenants.\textsuperscript{28} By direct contrast, it was
held, in the case of \textit{In re Schneider's Estate},\textsuperscript{29} that parol evidence
might be offered to explain the purpose of the parties there con-
cerned in entering into a written joint-tenancy deposit agreement\textsuperscript{30}
and, it being made to appear that the arrangement had been
created solely for the convenience of the decedent who had furn-
ished the entire fund, the survivor was required to account for
the disposition he had made of the proceeds. The holding in the
earlier case of \textit{Cuilini v. Northern Trust Company}\textsuperscript{31} was regarded
as being inapplicable and inappropriate since it tended to dis-
regard the equitable rights of the parties and made the law into
an instrument for unjustice.

\textbf{LANDLORD AND TENANT}

That ancient enigma known as a covenant running with the
land, puzzling to lawyers and students alike, received further con-
sideration in the case of \textit{Liberty National Bank of Chicago v. Vance},\textsuperscript{32}
although the court did not there specifically mention the
term by that name. The case was one in which a lessor sued the
lessee and the lessee's assignee for rent in arrears, taking a de-
fault judgment pursuant to a provision in the lease authorizing
confession of judgment. A petition to vacate the judgment as to
the assignee was allowed because the clause in question was held
not to bind the assignee in the absence of express language to that
effect in the assignment. This result would also necessarily follow
from a logical application of the general principle that a covenant

\textsuperscript{28} The court refused to consider the possible illegality of the intermarriage of
the joint tenants, made void by reason of the subsequent setting aside of a divorce
between the deceased joint tenant and the plaintiff in the instant action, as having
no bearing on the question before it.
\textsuperscript{29} Sub nom. Link v. Ralston, 2 Ill. App. (2d) 560, 120 N. E. (2d) 353 (1954).
\textsuperscript{30} Leave to appeal has been granted.
\textsuperscript{31} Ill. Rev. Stat. 1953, Vol. 1, Ch. 76, § 2, requires the joint-tenancy agreement to
be "signed by all said parties" at the time the account is opened.
\textsuperscript{32} 3 Ill. App. (2d) 1, 120 N. E. (2d) 349 (1954).
must touch and concern the land if it is to be made binding on those who come into privity of estate with the lessor.

A much more difficult question was involved in the case of Pierce v. Pierce, a case wherein one of the common lessees sought to partition a leasehold estate of long-term duration. The pertinent statute provided for the partition of "lands, tenements, and hereditaments," which terms would not, in the eyes of the common law, have included leasehold interests, they being more nearly in the category of chattels real. The Appellate Court for the First District, however, noting a number of instances in which leaseholds had been, by statute, included in the same general category as real estate, held that the language was broad enough to permit partition of long-term leaseholds, treating the situation before it as something akin to an action to dissolve a partnership.

The case of Eilers v. Eilers also reaches an unusual result in a landlord-tenant relationship, although the result might equally well follow in the wake of any contract of analogous nature. The defendant in that case had gone into possession of certain premises under a written lease for one year and continued in possession for approximately six more years. The landlord then brought a suit for an accounting for the entire period of the tenancy only to be faced with a claim that the action was barred by limitation. Relying on a recent decision of the Supreme Court, the Appellate Court for the Third District first concluded that the continued possession after the expiration of the written lease did not constitute a renewal of the old lease but created a brand new tenancy from year to year. It then followed, almost as a matter of course, that relief could be had for the period covered by the written lease as well as for the five years immediately preceding the filing of the suit, but that the action pertaining to the intervening period was barred since it was not based on a

33 351 Ill. App. 336, 115 N. E. (2d) 107 (1953), noted in 32 Chicago-Kent Law Review 265. Leave to appeal has been granted.
written instrument nor had it been revived by the continued occupation of the premises.

In order to make this part of the survey complete, it should be noted that the Supreme Court, in *Jackson v. First National Bank of Lake Forest*,\(^\text{38}\) affirmed an earlier decision of the Appellate Court wherein it had been held that an exculpatory clause in a lease, designed to protect the landlord from liability for defects in the premises, would not violate public policy, hence could be relied on to defeat a cause of action asserted by an injured tenant.

**SECURITY TRANSACTIONS**

Issues relating to real estate mortgage security law were treated in three cases. In two of them, the pertinent questions called for interpretation of the statute limiting the time for the filing of foreclosure actions.\(^\text{39}\) In that connection, it was said, in the case of *Zyks v. Bowen*,\(^\text{40}\) that an action would not be barred, as between the original parties, provided the debt remained otherwise enforceable, even though nothing had been done to record the several written extension agreements. Earlier cases in point,\(^\text{41}\) decided prior to 1941, were said to be in no way affected by legislative amendments made at that time. Much the same rationale was followed in the case of *Niehaus v. Niehaus*,\(^\text{42}\) except there the mortgagee had taken, and kept, possession of the premises for over thirty years in an effort to remedy the defaults and the mortgagors had departed from the state and had never returned.\(^\text{43}\) A claim of laches, offered to defeat the foreclosure action, was also rejected.

\(^{38}\) 415 Ill. 453, 114 N. E. (2d) 721 (1953), noted in 42 Ill. B. J. 241, affirming 348 Ill. App. 69, 108 N. E. (2d) 36 (1952). The Appellate Court holding had been noted in 32 CHICAGO-KENT LAW REVIEW 75.


\(^{40}\) 351 Ill. App. 511, 115 N. E. (2d) 577 (1953). Leave to appeal has been denied.


\(^{42}\) 2 Ill. App. (2d) 484, 120 N. E. (2d) 66 (1954).

\(^{43}\) Ill. Rev. Stat. 1953, Vol. 2, Ch. 83, § 19, provides for an exception where the debtor "departs from and resides out of the state."
More complicated from the factual standpoint, but not especially difficult from the legal standpoint, was the issue raised in the mortgage assumption case entitled *Barkhausen v. Continental Illinois National Bank & Trust Company*. It appeared therein that, following reorganization, a large Chicago office and theater building had become encumbered as security for a substantial bond issue in favor of the former bondholders. The operating corporation, with permission of its shareholders, sold the premises to a land trust, in which the plaintiffs were beneficiaries, with the trustee thereunder, not individually but as trustee, assuming the pre-existing mortgage indebtedness. When default occurred and threats were made to impose personal liability on the plaintiffs for a contemplated deficiency on the theory that they, being beneficiaries of the land trust, were entitled to manage and control the property, hence had become personally bound on the indebtedness for lack of an exculpatory clause, the plaintiffs sought a declaratory judgment as to the nature of their obligations, if any. The trial court, on motion for summary judgment, found an absence of liability for lack of an express personal assumption agreement; the Appellate Court for the First District held otherwise, entering judgment against plaintiffs for the amount of the indebtedness due, adopting views heretofore expressed in the case of *Schumann-Heink v. Folsom*; but the Supreme Court, not in the period of this survey, reversed and reinstated judgment in favor of the plaintiffs when it concluded that it was the clear intent of all the parties that the plaintiffs should risk no more than their initial investment in the property and the use of a "dummy" or "strawman" in the transaction was clearly appropriate to achieve that purpose. The holding in the case, if


45 The action was based on Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 181.1.


47 A substantial portion of the opinion is devoted to the question as to whether or not the court could grant relief for an alleged mutual mistake of law, based on the plaintiff's argument that, if the assumption agreement was binding on them, it was executed and delivered as a result of such mistake and should be reformed. While more or less dictum, the opinion expresses some strong views on the subject which might foreshadow an overturning of the distinction heretofore prevailing with respect to mistakes of fact in contrast to mistakes of law.
nothing more, should stimulate an increase in the use of the land trust device as a means by which to avoid personal liability from assumption of existing mortgage indebtedness.

Unlike the mechanic's lien situation presented last year in the case of Samms v. Chicago Title & Trust Company, wherein the contesting lien claimants directed their several claims against the improved real estate, the more recent case of Robertson v. Huntley & Blazier Company dealt with problems of priority of lien, as between the federal government on the one hand and some unpaid mechanics on the other, in a fund of money due from the owner under a general contract for the improvement of the premises in question. By the terms of the contract, the owner agreed to pay the balance of the price on completion of the project. The general contractor defaulted and was adjudged a bankrupt at a time when he owed money for work done by subcontractors and also for income and other taxes. The federal government acted first to assert a lien on the contract proceeds but the subcontractors, whose agreements antedated the tax liens, thereafter perfected their mechanic's liens in accordance with statutory requirements. Upon the filing of an interpleader action by the owner, accompanied by a deposit in court of the balance admittedly due, the several claimants presented their claims with the federal government asserting a priority by reason of its earlier filing of notice. It was held, however, that the mechanics were entitled to be paid first inasmuch as their liens, while inchoate, were "preserved" rather than "perfected" by the later filing, particularly since the government had no better right in the matter than the general contractor himself would have been entitled to assert. As the contractor could have prevailed only upon furnishing an affidavit that all labor and material had been paid for in full, the government's claim was relegated to the

48 349 Ill. App. 413, 111 N. E. (2d) 172 (1953), noted in 32 CHICAGO-KENT LAW REVIEW 78.
51 Ibid., Ch. 82, §§ 5 and 32. The building contract in question also contained a provision to this effect.
balance of the fund remaining after the mechanics had been paid and the owner's property had been cleared of potential liens against it.52

Insofar as security devices in personal property were concerned, notice might be taken of the holding of the United States District Court in the case of In re Beale,53 which case dealt with the validity of a chattel mortgage given to secure an installment note the final payment date on which extended beyond statutory limits.54 The court, treating with the problem for the first time since the statute was last amended, held the mortgage was not void ab initio and, as a consequence, considered the lien created thereby as enforceable at least to the extent enforcement was sought during the statutory period. By inference, it could be gathered that the lien would be deemed to cease upon the expiration of the statutory period even though the debt might not then be due.

Some interesting overtones concerning equitable pledges would appear to be involved in the case of Pliley v. Phifer,55 a case wherein a liquidating partner agreed to hold the distributive share of a retiring partner for the benefit of the latter's bank creditor, already secured by a collateral note, but which arrangement was attacked by a later judgment creditor of the retiring partner who attempted to reach the fund so held by a creditor's bill. The decision, however, turned on third-party creditor-beneficiary contract doctrines, so the issue of priority as between the earlier equitable pledgee and the later legal lien claimant was not considered56 other than to note that the equitable claimant had acquired vested rights in the fund.

52 The limiting effect of a notice of lien, filed pursuant to Ill. Rev. Stat. 1953, Vol. 2, Ch. 82, § 24, is adequately illustrated by the case of Roth v. Lehman, 1 Ill. App. (2d) 94, 116 N. E. (2d) 413 (1953), where a statement that the sub-contractor had been hired to provide a cement block foundation was deemed inadequate to cover a large amount of additional work which, the sub-contractor urged, had been done pursuant to a subsequent oral authorization.


54 Ill. Rev. Stat. 1953, Vol. 2, Ch. 95, § 4, fixes a five-year limitation on maturity.


Lenders operating under trust receipt devices, particularly those lending on the security of automobiles, should give particular attention to the case of *Mori v. Chicago National Bank.*\(^{57}\) It was there held that lenders of that character would be denied the right to assert estoppel against a true owner, in case money had been loaned to and trust receipt security taken from the bailee in possession of an automobile, so long as the owner had done nothing more than surrender possession of the car to the bailee and particularly so where the owner had retained the certificate of title.\(^ {58}\) The lender was there said to be negligent in relying on the bailee’s oral representation of ownership without making resort to the certificate of title as a readily ascertainable means of determining whether the assertion was a true one or not.

**TRUSTS**

In refreshing contrast to the rigid rules of proof required by the Supreme Court for the establishment of resulting trusts\(^ {59}\) are the pronouncements of the Appellate Court for the First District in the case of *Merschat v. Merschat.*\(^ {60}\) Although the court there denied any intention to relax the stringent rules heretofore required, it did actually indicate, in the opinion therein, that a preponderance of evidence leading to a reasonable conclusion that a resulting trust had come into being would be sufficient to support the declaration of the existence of such a trust. It was also there pointed out that a realistic conception of modern real estate transactions, wherein many of the incidents of title are frequently held by “strawmen” or nominees, should lead to a proper understanding and weighing of the admonitions found in earlier decisions with respect to the proof required in resulting

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58 Ill. Rev. Stat. 1953, Vol. 2, Ch. 95 1/2, § 76, requires that a certificate of title be obtained as a condition prerequisite to a license to operate the car but the statute does not expressly make the certificate evidence of ownership, as is true in some states.

59 See, for example, the case of Johnson v. Johnson, 1 Ill. (2d) 319 at 324, 115 N. E. (2d) 617 at 619 (1953).

60 1 Ill. App. (2d) 429, 117 N. E. (2d) 868 (1954). Leave to appeal has been denied.
trust cases. Ideas to the effect that real estate was the principal source of wealth and political power and that a conveyance of real estate "constituted a ceremonial of great dignity and importance," were said to be notions which could no longer be upheld in this day and age.

Some cases dealing with charitable trusts deserve mention. In the case of Catholic Bishop of Chicago v. Murr, the Supreme Court determined, for the first time in this state, that a deed conveying land for use as a cemetery operated to create a charitable trust so as to make it clear that a condition in the deed which prohibited alienation of the property would be valid. The court there distinguished the case before it from one for the establishment of a trust for the upkeep of a private grave. As the latter trust would lack public character, it could not qualify as a charitable trust. Other interesting discussions of charitable trusts, as well as of the *cy-pres* doctrine, may be found in the cases of Community Unit School District v. Booth and First National Bank of Chicago v. King Edward's Fund.

Questions pertaining to the proper administration of a trust or the scope and extent of a trustee's powers often form a source of litigation. In that regard, a problem of first impression was decided by the Supreme Court in the case of Barnhart v. Barnhart. The issue was there raised as to whether a person having a contingent interest in a trust estate was entitled to demand an accounting from the trustee at any time as a matter of right. The court answered in the negative, declaring that the scope of the contingent remainderman's interest would be confined to the protection and preservation of the trust property, permitting a suit against the trustee only if some waste or mismanagement can be charged. According to the decision of the Appellate Court in

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61 1 Ill. App. (2d) 429 at 440, 117 N. E. (2d) 868 at 873.
62 3 Ill. (2d) 107, 120 N. E. (2d) 4 (1954).
63 1 Ill. (2d) 545, 116 N. E. (2d) 161 (1953).
64 1 Ill. App. (2d) 338, 117 N. E. (2d) 656 (1954). Leave to appeal has been denied.
65 415 Ill. 303, 114 N. E. (2d) 378 (1953).
the case of In re Gleeson's Will, however, there is no reason in law why a testator may not appoint a contingent remainderman to act as testamentary trustee if that should be his wish. The case of Hallin v. Hallin would also indicate that a trustee may lease trust property only for the duration of the trust, unless a lease for a longer term is expressly authorized, would be reasonable under the circumstances, or is essential for the proper administration of the trust.

The one remaining case, that of Anderson v. Elliott, found the Appellate Court reiterating two well-known exceptions to the general rule that the beneficiaries under a trust are necessary parties in all suits by or against the trustee and involving the trust property. The first exception pertains to those instances where the beneficiaries, although not made parties, are properly represented in the proceedings by the trustee, or by other persons, so that their interests receive adequate protection. The second exception exists in those cases where the number of beneficiaries is so great that the expense and delay of bringing them all into court would be burdensome. If, in such a situation, the trustee representing them is made a party, direct participation by the beneficiaries in the proceedings will not be necessary yet a decree affecting their interests would be considered binding upon them.

WILLS AND ADMINISTRATION

The difficulties involved in drafting will provisions which clearly reveal the testator’s intention have been illustrated by two recent cases. In the first, that of Brunt v. Osterlund, a specific legacy was made and immediately followed by a provision that the bequest would be forfeited should the legatee contest the validity of the will. When the legatee failed to appear and defend an otherwise unsuccessful will contest suit, the executrix

argued that this circumstance should result in a forfeiture of the legacy. The Appellate Court for the Second District, rejecting this contention, decided that the forfeiture provision referred only to affirmative action, hence did not become operative under the negative conduct involved in the case. A more subtle problem of construction came before the Appellate Court for the Third District in the case of In re Yocom's Estate. The testatrix there concerned had executed a codicil to that clause of her will dealing with the payment of debts which amendment directed that a reasonable amount be paid to a daughter to cover care and support provided for the testatrix. Having permitted the statutory period for filing a claim to pass without filing any claim, the daughter then sought to share in the estate in regard to the expense of support as a legatee. Finding no authority in Illinois, the court relied heavily upon the decision in a Missouri case, leading to the conclusion that the testatrix had not intended to make her daughter a legatee in this connection.

Even though the testator's intention is clear, the court may, in at least one instance, refuse to enforce the provisions of the will if the circumstances make enforcement unreasonable. Such was the holding in the case of Fischer's Estate v. Fischer, wherein the testator directed burial in one cemetery and the widow, in ignorance of the clause, had buried testator in another. The Appellate Court for the First District affirmed lower court dismissal of a petition by the executrix to disinter the body, partly because the court to which the petition was addressed lacked jurisdiction in the matter.

In instances where the intention is not as clear as in the last-mentioned case, rules of construction are alluded to in order that the court may determine what the testator meant by the words he used. One such rule of construction declares that, in the

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72 1 Ill. App. (2d) 528, 117 N. E. (2d) 855 (1954).
73 It was indicated that a probate court would have no general equitable jurisdiction over the interment or disinterment of human bodies whereas a circuit court, exercising original equitable powers in the matter, would have constituted the proper forum for the controversy.
absence of a plainly manifested intention to the contrary, the words "'heirs at law,' when used in a will, are words used to designate those persons who will answer this description at the death of the testator and this will be so even where a gift of a life estate precedes the bequest to the heirs at law.\textsuperscript{74} The two late cases of \textit{Barnhart v. Barnhart}\textsuperscript{75} and \textit{Sloan v. Beatty}\textsuperscript{76} would, however, appear to have cast doubt on the application of this rule. In the first case, the testator, by will, established a trust in favor of his widow and son. The will provided that, in the event the son predeceased the widow, the corpus of the trust, upon the death of the widow, was to go to the descendants of the son, but if there were none, then to testator's heirs at law. The son predeceased the widow leaving no descendants. Collateral heirs claimed that the term "'heirs at law'" should be determined at the termination of the widow's life estate. The widow maintained that she was entitled to the corpus of the trust because the phrase "'heirs at law'" described the heirs of the testator at his death and she, being such an heir, would take in preference to more distant relatives named in the statute of descent and distribution. The Supreme Court rejected the widow's argument and held that it was the intention of the testator that the words "'heirs at law'" should mean those of his heirs who were living at the time of the termination of the life estate in the widow. There is doubt whether the will in question expressed a plain intention to this effect, particularly since there is authority for the proposition that, when a life tenant is also one of the heirs of the testator, this fact would not establish an intention to exclude the life tenant from the class designated to take the remainder.\textsuperscript{77}

The rule of construction referred to above was further limited in the second of the cases, that of \textit{Sloan v. Beatty}.\textsuperscript{78} The testator there had devised a life estate to his wife and, upon her death,

\textsuperscript{74} Kellett v. Shepard, 139 Ill. 433, 28 N. E. 751 and 34 N. E. 254 (1891).
\textsuperscript{75} 413 Ill. 303, 114 N. E. (2d) 378 (1953).
\textsuperscript{76} 1 Ill. (2d) 581, 116 N. E. (2d) 375 (1953).
\textsuperscript{78} 1 Ill. (2d) 581, 116 N. E. (2d) 375 (1953).
to his children in fee-tail, which, by operation of law, gave the grandchildren of the testator a remainder interest. The will further provided that, if none of testator's grandchildren survived their parents, then the property was "to go to the nearest next of kin." This phrase was construed as an executory devise limited after a vested remainder in fee. The court assumed the phrase to refer to testator's next of kin and then ruled that it was the testator's intention that "nearest next of kin" should be construed to mean those answering the description at the termination of the last life estate. When so holding, the court conceded that the will was ambiguous to the extent that construction was required but denied an application of the rule that use of the phrase "heirs at law" should designate those who answered that description at the death of the testator. The rule was said not to apply for two reasons: (1) the rule applied to "heirs at law" and was not in point in a case involving "nearest next of kin," and (2) the word "then" as used in the will was an adverb of time, denoting when the next of kin were to be determined, and not a reference designating the event upon which the executory devise was to take effect.

The case of In re Edwards Estate raised an issue as to the revocability of a joint and mutual will made between husband and wife in an instance where the will had not been offered for probate upon the prior death of the wife. The contestants offered evidence that the will was not valid as to the wife because of incapacity, arguing that a joint and mutual will which would not be valid as to one subscriber was not valid as to the other. The court ruled that evidence to this effect was properly excluded since the will had not been offered for probate upon the wife's death where the issue could then have been considered. Finding that the will had been entered into pursuant to a binding contract, the court was forced to conclude that it was irrevocable and binding as to the husband's estate.

Certain aspects of the law pertaining to the administration of estates were also made the subject of inquiry. The question as
to whether or not an executor who had been given a power to
sell realty might also grant an easement over the property had
not been decided in this state prior to the holding in *Billerbeck v. Collins*.
Chief Justice Schaefer, speaking for the Supreme Court
in that case, recognized the rule that a power of sale would not
give an executor power to mortgage, lease, option or exchange the
property, but held that the executor had an implied power to
create a necessary easement in order to give the intended effect
to the power granted by the testator.

The extent of the jurisdiction of an Illinois probate court
came up for analysis in the case of *Quevedo v. Union Pacific Rail-
road Company*.
In that case, a federal district court, apparently
without direct precedent in Illinois law, decided that a probate
court had no jurisdiction over a right of action for wrongful death,
other than to assure proper distribution of the proceeds, so it
was held that an order of a probate court approving the settlement
of such a claim, as well as a subsequent order vacating the settle-
ment, was not binding upon the federal court.

The nature of an appeal from an order of a probate court,
generally made the subject of a trial *de novo*, was discussed in
two cases. In the first of them, that of *Burstein v. Millikin Trust
Company*, the Supreme Court indicated that it would be error
for the circuit court to attempt to decide an appeal from the
probate court on motion without first having conducted a hearing
and receiving testimony inasmuch as the circuit court does not
exercise a reviewing function of the nature performed by an
appellate tribunal but is required to grant a complete hearing
without regard to any trial which may have been held in the court
below. In the other, that of *In re Brett’s Estate*, the Appellate
Court for the Third District held that it would be proper for the
circuit court to award an additional allowance for executor’s

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80 3 Ill. (2d) 116, 120 N. E. (2d) 10 (1954).
attorneys fees from the estate, to cover the work involved in defending an appeal for trial de novo, on the ground that, while there is no direct authority in point, it was a matter of simple equity and fairness that the executor should not be compelled to bear this expense from his own pocket.

A brief word of warning might be uttered to executors, administrators, and the like, based on the holding in the case of *Wessel v. Eilenberger*, to the effect that they should not lightly disregard civil process which may be issued in the individual name of the legal representative, and served personally, without disclosing that such person has also been sued in a representative capacity. It was there decided that jurisdiction would be acquired, by a summons of the kind mentioned, over the person named in both his individual and representative capacity, particularly where the complaint contained appropriate allegations describing the defendant in both capacities.

*(To be continued)*

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