Discussion of Recent Decisions

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DISCUSSION OF RECENT DECISIONS

POWER OF COURT TO SET UPSET PRICE IN FORECLOSURE SALE—DUTY AND RIGHT OF TRUSTEE TO BID FOR BONDHOLDERS.—In the recent case of *Chicago Title and Trust Company* v. *Robin,*[1] the Illinois Supreme Court has overturned much of the recent judicial legislation of the trial and appellate courts with respect to mortgage foreclosures. The Supreme Court has swept aside the Bamburg[2] and Robin[3] decisions of the Appellate Court and distinguished and greatly limited the scope of the Straus case.[4] To the innovations enunciated in those cases, principally the power of the court to set an upset price and to compel the trustee to bid for the amount of the indebtedness, the Supreme Court has said significantly: "The existence of financial panic does not warrant the setting aside of well-known rules of law to meet an alleged emergency."

The present case came up on an appeal from the Appellate Court for the First District. This case and the Bamburg case were considered together before that court, inasmuch as the facts

[1] Case No. 22885 (Ill. Supreme Ct., 1935).

[2] Chicago Title and Trust Co. v. Bamburg, 278 Ill. App. 1 (1934).

[3] Chicago Title and Trust Co. v. Robin, 278 Ill. App. 20 (1934).

[4] Straus v. Chicago Title and Trust Co., 273 Ill. App. 63 (1933).

of the two were almost identical and raised the same principles of law. Both cases involved the foreclosure of trust deeds securing large bond issues. In those cases, the court held that it had authority to fix an upset price, and to compel the trustee to bid in the property on behalf of the bondholders for the amount of the indebtedness. The Appellate Court based its decision squarely upon the Straus case.

In reversing the judgment in the Robin case, the Supreme Court absolutely repudiated the doctrine that the chancellor has authority to set an upset price, pointing out that while it is true that the approval or disapproval of a foreclosure sale rests within the discretion of the chancellor, "mere inadequacy of price alone is not cause for setting aside a judicial sale."[5] The Appellate Court had to meet this objection by attempting to bring these cases within the purview of the rule that where the conditions under which a sale is held tend to reduce or destroy competition, it is proper for the court to set aside the sale.[6] However, it becomes apparent upon inspection of cases citing the rule, that reference is not had merely to general economic conditions which apply equally to any and all judicial sales, but only to special circumstances tending to reduce or destroy competition with respect to particular sales.

The Supreme Court denies not merely the power of the chancellor to compel the trustee to bid for the stockholders, but even the right of the trustee within his own discretion to bid, and distinguishes the Robin and Bamburg cases from the Straus case upon the ground that in the Straus case the trustee is expressly empowered in the trust deed to bid on behalf of the bondholders, whereas there is an absence of any such language in the trust deeds in the other two cases. The court held that the trust deed and the bonds constitute a contract between the bondholders themselves, and between them as a group and the trustee and mortgagor, and then continued: "This court does not have the power to import into a contract other or additional provisions. To do so would be making a new contract for the parties.[7] We cannot construe a contract along the line of what we might believe would be a better contract for the parties to make, as equity vests no wide discretion in the chancellor such as would permit him to disturb contract rights of property.[8] A contract right is a property right."[9]

[5] Springer v. Law, 185 Ill. 542 (1900); Skakel v. Cycle Trade Publishing Co., 237 Ill. 482 (1909).

[6] Bondurant v. Bondurant, 251 Ill. 324, 96 N. E. 306 (1911); Smith v. Huntoon, 134 Ill. 24, 24 N. E. 971 (1890).

[7] Burt v. Garden City Sand Co., 237 Ill. 473 (1909).

[8] Merchants' Loan and Trust Co. v. Chicago Rys. Co., 158 F. 923 (1907).

[9] Kneeland v. American Loan and Trust Co., 136 U. S. 89, 34 L. Ed. 379 (1890).

The supposed right of the chancellor to set an upset price is clearly gone, while the right of the trustee to bid upon behalf of the bondholders is limited at least to those cases where the trustee is expressly authorized to do so in the trust deed. In common with several other paternalistic theories designed to meet the needs of the present financial crisis, the doctrine of the Straus case has had its wings clipped. That the Straus case, along with these other theories, had various admirable attributes cannot be denied. For a time it appeared to have solved the dilemma of large bond issue foreclosures. That the doctrine was equitable and would in general have promoted a fairer distribution of the proceeds of the property in question must be conceded. However, there are many contracts in litigation which might be rewritten more "equitably" by the courts. Such terms should be supplied, not by a legislatively inclined judiciary, but by the parties to the contract or by the legislature in advance as general terms of all contracts of the class. However much the loss of the practical benefits of the Straus case may be regretted, it is gratifying to see the Illinois Supreme Court reaffirming property rights and defending such rights against the makeshift encroachments born of the depression.

G. S. STANSELL

MORTGAGEE'S RIGHT AFTER FORECLOSURE TO PROVE CLAIM IN BANKRUPTCY IN FULL WHERE BANKRUPT HAS CONVEYED SUBJECT TO MORTGAGE.—In *Ivanhoe Building & Loan Association of Newark* v. *Orr*,[1] the United States Supreme Court ruled that a creditor of a bankrupt could prove for the full amount of his debt even though he had recovered a portion of it by foreclosure of a mortgage on property originally pledged as security for the debt, but since conveyed by the bankrupt to a third party "subject to" the mortgage.

The court's own statement of the facts reads: "The owners of real estate in Newark, N. J., executed to the petitioner a bond in the penal sum of $23,000, conditioned for the payment of $11,500 secured by a mortgage on the land. The mortgagors subsequently conveyed the premises to the Eastern Sash and Door Company, which expressly assumed the mortgage debt. That company afterward conveyed to one Yavne. A default occurred, and the petitioner filed a foreclosure bill against Yavne. The amount due was found to be $10,220.96, with interests and costs. The property was sold by the sheriff and bid in by the petitioner for $100. Meanwhile the sash and door company had been adjudicated a bankrupt. The petitioner presented a claim against the estate for $10,739.94, the amount then due on the

[1] 55 S. Ct. 685, 79 L. Ed. 735 (1935).

bond less the $100 bid at the sale. It was stipulated that the mortgaged property acquired in foreclosure was worth $9,000. The referee reduced the claim to the difference—$1,739.94—and ruled the petitioner was not entitled to prove for any greater sum.''[2]

This ruling was confirmed by the district court and the circuit court of appeals. The Supreme Court reversed it, and decreed that the petitioner was entitled to prove the full amount rather than only the difference between the value of the security and the principal amount. The court acknowledged the force of the direction of the Bankruptcy Act, section 57e, that ''claims of secured creditors . . . shall be allowed for such sums only as to the courts seem to be owing over and above the value of their securities. . . .''[3]

Courts have applied this section directly on numerous occasions,[4] but it seems established that the creditor may abandon his security and prove his claim as unsecured for the full amount.[5] Of course the filing of a secured debt as an unsecured claim operates as a waiver of the security, and precludes the creditor from attempting to enforce it thereafter.[6]

But the court here held that petitioner was not a secured creditor in the terms of section 1 (23) of the Act, which declares that '' 'Secured creditor' shall include a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this Act, or who owns such a debt for which some indorser, surety, or other persons secondarily liable for the bankrupt has such security upon the bankrupt's assets.''[7] The property securing the mortgage here foreclosed had ceased to be owned by the bankrupt; thus the petitioner was excluded from the Act's definition of a ''secured creditor.''

The court cited some fifteen decisions of Federal district and circuit courts applying similar interpretations of the definition.[8]

2 55 S. Ct. 686, 79 L. Ed. 736 (1935).

3 U. S. C. tit. 11, sec. 93 (e), 11 USCA sec. 93 (e).

4 In re Hines, 144 F. 543 (1906); In re Dix, 176 F. 582 (1910); In re Baughman, 163 F. 669 (1908); In re Graves, 182 F. 443 (1910); In re J. G. Reichard & Bros., 230 F. 525 (1916); In re Bash, 245 F. 808 (1917); In re Mayer, 41 F. (2d) 856 (1930).

5 Black, H. C., Handbook of the Law and Practice in Bankruptcy (West Pub. Co., 1930), p. 395. In re Little, 110 F. 621 (1901); Stewart-Noble Drug Co. v. Bishop-Babcock-Becker Co., 62 Colo. 197, 162 P. 159 (1917); In re Interborough Realty Co., 223 F. 646 (1915).

6 In re O'Gara Coal Co., 12 F. (2d) 426 (1926); In re Luber, 261 F. 221 (1919); United States Trust Co. v. Gordon, 216 F. 929 (1914); In re Burr Mfg. & Supply Co., 217 F. 16 (1914).

7 U. S. C. tit. 11, sec. 1 (23), 11 USCA sec. 1 (23).

8 In the principal case, the court says the point here under consideration was involved and necessarily decided, though not adverted to, in Hiscock v. Varick Bank, 206 U. S. 28, 27 S. Ct. 681, 51 L. Ed. 945 (1907), reviewing

Most of these concerned debts secured by collateral pledged by a surety for the bankrupt. They are, of course, directly in point if we consider, first, that at the time it assumed the mortgage the sash and door company was primarily liable and the petitioner was a "secured creditor," since the property then did belong to the company; and, second, that after the conveyance to Yavne, title vested absolutely in him, though the company remained primarily liable for the debt. In a sense, Yavne and his property were sureties only. And in this sense the debt, as that of the bankrupt company, was not secured by any mortgage of its own property.

Clearly, the decision is important not as a novel principle of law, but rather because it appears to be the first direct expression of the Supreme Court upon this section of the Bankruptcy Act, because it touches a point likely to arise frequently in practice, and because it so clearly defines the remedies of the mortgagee in such a situation.

C. E. Fox

MAY AN OPINION BE THE BASIS OF AN ACTION IN FRAUD AND DECEIT?—The Illinois Appellate Court was confronted with a question involving fraud and deceit in the case of *Wemple State Bank* v. *Continental Illinois Company*.[1] The plaintiff alleged in its complaint that it was a corporation doing a banking business in Waverly, Illinois, a town of 1,300 inhabitants; that its capital stock was $50,000; and that it had purchased $100,000 worth of securities from the Continental Illinois Bank and Trust Company, the predecessor of defendant. The plaintiff then alleged that the defendant was its Chicago correspondent and depositary; that, at various times, the defendant undertook to advise the plaintiff with respect to the value of certain of its securities; that on September 20, 1931, the plaintiff held securities that had been purchased of defendant; that plaintiff went to defendant for information and advice; that the defendant undertook the duty

In re Mertens et al., 147 F. 177 (1906), where a creditor of the bankrupt partnership was held entitled to prove his claim in full, notwithstanding he held insurance policies on the life of one of the partners pledged as security by the partner as an individual for the partnership debt. See also In re Headley, 97 F. 765 (1899); Swarts v. Fourth Nat. Bank of St. Louis, 117 F. 1 (1902); In re Noyes Bros., 127 F. 286 (1903); In re Sweetser, 128 F. 165 (1904); Gorman v. Wright, 136 F. 164 (1905); Board of Com'rs of Shawnee County v. Hurley et al., 169 F. 92 (1909); In re Bailey, 176 F. 990 (1910); In re H. V. Keep Shirt Co., 200 F. 80 (1912); In re Thompson, 208 F. 207 (1913); Young v. Gordon et al., 219 F. 168 (1914); In re Pan-American Match Co., 242 F. 995 (1917); In re Anderson, 11 F. (2d) 380 (1926); Hampel v. Minkwitz, 18 F. (2d) 3 (1927), reversed on other grounds in 276 U. S. 299, 48 S. Ct. 308, 72 L. Ed. 582 (1928); Bankers' Trust Co. v. Irving Trust Co., 73 F. (2d) 296 (1934), cert. den. 55 S. Ct. 405, 79 L. Ed. 353 (1935).

[1] 279 Ill. App. 224 (1935).

and promised to advise the plaintiff concerning all securities contained in its portfolio; that the defendant advised the plaintiff as to all of its securities, except certain Insull gold debentures, for which it had no opinion. The plaintiff then alleged that the defendant had an opinion; that it knew that the Insull securities had a low book value; that all of the assets of the Insull utilities were pledged to the defendant bank and New York banks to secure collateral loans made to the Insull company; that the defendant knew that if it were to advise the plaintiff to sell, it would cause the market price of said securities to decline further; that instead, they refrained from advising plaintiffs, thereby impliedly recommending that plaintiff hold said securities; that plaintiff did not sell said securities, to its own damage. The first, second and fourth counts were substantially the same; however, in the third count, the plaintiff alleged that the defendant advised plaintiff not to sell. The defendant demurred to all counts. The lower court sustained the demurrer and the Appellate Court upheld the ruling of the lower court.

The court, in its opinion, held that as between vendor and vendee, there is a certain amount of "puffing" and prevarication allowed by the seller; and that therefore, the plaintiff had stated no duty upon which he had a right to rely.

In *Vulcan Metals Company* v. *Simmons Manufacturing Company,*[2] the Circuit Court of Appeals held that an opinion is a fact, and may be a very relevant fact; that the expression of an opinion is the assertion of a belief, and that if stated by one having knowledge superior to that of the other person, it is actionable. Matters of opinion which might not otherwise be the basis of an action for fraud and deceit, are sometimes fraudulent, as, for example, where the party falsely stating his opinions has superior means of knowledge.

In *Hedin* v. *Minnesota Medical and Surgical Institute,*[3] the court stated that an opinion may be actionable; that if one makes a statement of his belief in such terms that it amounts to an acknowledgement of a fact, he is liable; that if the opinion is designedly false, or advantage is taken of the other party in a manner which is clearly oppressive, without negligence on the part of the latter, there may be fraud, although the statement is only in the form of an opinion; that false statements as to the value of property, where relied upon, are representations of fact and not opinions.

In *Kenner* v. *Harding,*[4] the defendant sought to sell plaintiff a piece of land. The defendant represented to plaintiff that one

[2] 248 F. 853 (1918). See also Snively v. Meixsell, 97 Ill. App. 365 (1901).

[3] 62 Minn. 146, 63 N. W. 613, 35 L. R. A. 417 (1895). See also 2 Cooley on Torts, sec. 361.

[4] 85 Ill. 264 (1877). See also Spencer Bower on Actionable Misrepresentation.

Delay was desirous of purchasing the same from defendant. The defendant, by prearrangement with Delay, influenced the latter to represent to plaintiff that he desired to purchase the land in question, which statements were in fact false and merely resorted to in order to induce plaintiff to make the purchase. The plaintiff did act to his detriment. The court stated that the general rule of law was that the mere statements of the vendor as to the value of the land were not, of themselves, such evidence of legal fraud as would authorize a recovery, but that a different rule applied to a case where the statement came from a third party, not known to have any interest in magnifying the value of the land; that the plaintiff had a right to rely and expect that he would get an honest representation from others; that he was not required to anticipate that they were in conspiracy with the defendant to deceive him.

In *Medbury and others* v. *Watson*,[5] the court stated that the distinction between representations made by a seller to the buyer and those made by a third person to the buyer is marked and obvious; that in the one instance, the buyer is aware of his position; that he is dealing at arm's length with the owner of the property whose aim it is to secure a good price, and whose interest it is to put a high estimate upon his estate; that his object is to put the purchaser in such a state of mind as to induce him to purchase; that in the other instance, the one who makes the false statement has no object to gain; that he stands in the situation of a disinterested person, in the light of a friend, who has no motive or intention to depart from the truth, and who thus throws the vendor off his guard and exposes him to be misled by the deceitful representations. It was held that the plaintiff could recover.

A case very similar to the Illinois Appellate decisions was decided by the Federal court in *Nevada Bank of San Francisco* v. *Portland National Bank*.[6] The plaintiff brought an action in fraud and deceit. Hazen, the cashier of the defendant bank, wrote a letter addressed to the plaintiff, containing a false statement concerning the financial condition of one of the defendant's depositors. This was done in response to a request on behalf of the plaintiff. The defendant was a creditor of the person under inquiry. In order to make the plaintiff extend a loan to the third party, which money would then be credited to the indebtedness held by the defendant, the defendant misrepresented the condition of the third person to the plaintiff. In the second count, the plaintiff alleged that defendant recklessly made such statements. The complaint was demurred to, but the court held that the plaintiff had made out a cause of action. The

[5] 47 Mass. 246 (1843). See also Britton v. Brewster, 2 F. 160 (1880).
[6] 59 F. 338 (1893). But see Randolph v. Allen, 73 F. 23 (1896).

upper court sustained the lower court and held that where one who is not the purchaser or seller makes misrepresentations, the other party is not dealing with the prior party at arm's length and that such opinions are statements of fact upon which the plaintiff may rely.

In view of the decisions of Illinois and other jurisdictions, the Illinois Appellate case appears erroneous. The defendant in the appellate case was neither seller nor purchaser, and it made such statements to one who had a right to rely thereon. The defendant occupied a position something akin to a fiduciary relationship. The plaintiff was a small town bank which sought the defendant's advice because the defendant was in Chicago, the financial center of the middle west, and also because of the fact that it was the plaintiff's Chicago correspondent and depositary.

In the light of all the facts alleged in the declaration—which must be taken as true on demurrer—the demurrer should have been overruled.

W. J. J. WAHLER

DISTRIBUTION TO INCOME AND CORPUS OF RETURNS FROM TRUST INVESTMENTS.—When securities are placed in trust by a settlor, unless provision is made to the contrary, it is generally held that the life tenant is entitled to the nominal income from the investment even though the securities were purchased above par, and although they were priced at a premium when the trust began.[1] If the trustee purchases the securities after the creation of the trust, however, a problem arises as to whether the tenant should receive the nominal or actual yield.

The Supreme Judicial Court of Massachusetts recently had a perplexing problem to solve in the case of *Old Colony Trust Company* v. *Comstock*.[2] Under the will of William C. Winslow it was provided that the trustee should pay to the testator's daughter, during her life, the net income from the trust. The controversy involved only securities purchased by the trustee, some above and some below par. Three questions were raised by the appeal:

1. Is the life tenant entitled to the full dividend return of preferred stocks that are callable at less than the purchase price?
2. What part of the nominal income from bonds purchased above par goes to the life tenant and what part belongs to corpus, especially where the amount paid is in excess of the call price?

[1] Boston Safe Deposit & Trust Co. v. Williams, 195 N. E. 393 (Mass., 1935); Ballantine v. Young, 76 N. J. Eq. 613, 75 A. 1100 (1910); In re Connecticut Trust & Safe Deposit Co., 80 Conn. 540, 69 A. 360 (1908).

[2] 195 N. E. 389 (Mass., 1935).

3. If the bonds are purchased below par, is the life tenant entitled to the actual yield, or is he limited to the nominal return?

The trustee had purchased at more than par value preferred stocks which were callable on ninety days' notice from any dividend date at a figure less than the purchase price. Part of the dividend was withheld as an amortization fund to insure the retention of the principal of this investment. The plan under which the trustee proposed to operate would reduce the accounting value of the stock to the call price within a period of five years. It was held that the trustee was not justified in withholding part of the dividends. The court said on this point, "We think the factors respecting this callable stock were too vague to justify the application of amortization. There is no fixed term for it to run and no call date." No authority was cited to support the contention, nor has the writer been able to find any case directly in point.

In the same trust, a number of the bonds were purchased at a premium and some of them in excess of the call price. On this point the court held that the trustee should retain out of each interest payment an amount sufficient to amortize the amount in excess of the call price to the call date of the bond, and the balance in excess of the par value to the maturity of the bond. Kentucky, Pennsylvania, and the District of Columbia oppose the amortization of premiums out of interest and place the loss resulting from sale or maturity of the premium bonds on trust capital.[3] The great weight of opinion is, however, that the life tenant should assume the burden of the premiums.[4]

The decision in *Hemenway* v. *Hemenway*[5] left the position of the Massachusetts court on this subject somewhat doubtful for a time. It was held in that case that the trustee was not justified in taking out of the gross income an amount sufficient to reimburse the estate for the premiums paid. The court, however, made it clear that they were not laying down a sweeping principle. It was pointed out that premiums may be paid either for security of capital or for a higher interest rate. Whatever doubt may have existed as to the propriety of amortizing bond premiums was removed by the decision in *New England Trust Company* v. *Eaton*.[6] It was there unequivocally held that it is the duty of

[3] Hite v. Hite, 93 Ky. 257, 20 S. W. 778 (1892); In re Penn-Gaskell's Estate, 208 Pa. 346, 57 A. 715 (1904); American Security & Trust Co. v. Payne, 33 App. D. C. 178 (1909).

[4] Ballantine v. Young, 76 N. J. Eq. 613, 75 A. 1100 (1910); In re Gartenlaub's Estate, 185 Cal. 648, 198 P. 209 (1921); In re Well's Estate, 156 Wis. 294, 144 N. W. 174 (1913); Furniss v. Cruikshank, 230 N. Y. 495, 130 N. E. 625 (1921); Curtis v. Osborn, 79 Conn. 555, 65 A. 968 (1907).

[5] 134 Mass. 446 (1883).

[6] 140 Mass. 532, 4 N. E. 69 (1886).

the trustee to keep the capital intact and to amortize the premiums out of the interest. The Court of Appeals of New York in *In re Stevens*[7] said, "In the absence of a clear direction to the contrary, where investments are made by the trustee, the principal must be maintained intact from loss by payment of premium on securities having only a definite time to run." Following this line of reasoning, although the point has apparently never been decided before, the court in the principal case seems justified in holding that the amount paid in excess of the call price was rightfully amortized to the call date of the bonds.

It was contended by the life tenant that if the burden of the premiums would fall on her, she should have the benefit of the purchases made at a discount. The court decided according to the weight of authority and according to the rule laid down in *New England Trust Company* v. *Eaton* that the life tenant is not entitled to the increment on the bonds that were purchased by the trustee below par. The court said, "No decision, so far as we are aware, supports the contention of the life tenant. There are several authorities rejecting it after consideration." Holmes in his dissenting opinion in *New England Trust Company* v. *Eaton* said, "I do not see why it does not follow that if a bond is bought below par, the tenant for life is equally entitled to the annual increment on the interest received by him as the bond gradually reaches maturity." It may be that the life tenant is going too far in insisting on a portion of the increment at each interest date because it is not certain that the bonds will be paid at maturity. However, when the face value of the bond is realized, the life tenant should logically be entitled to the amount of the discount to compensate her for the amount of the income she had to forego during the life of the bond. If the life tenant is not entitled to share in the increment in bonds purchased below par, it would be much to her advantage to have the funds invested in securities selling at or above par. When the securities of a company sell below par, it may be attributed to the fact that the interest rate is too low, or the security upon which the investment rests is doubtful, or both. If a company has a credit rating that would enable it to do financing at 5 per cent, logically the yield would be 5 per cent even though the interest rate was above or below that figure. On this assumption, if the company desired to sell securities that would mature in twenty years, and bear interest at the rate of 4½ per cent, the price at which they could be marketed would be $93.72. In that event the life tenant would be entitled to only 4½ per cent, and the corpus would make a gain of $6.28 on every $100 invested. If the same company desired to make the interest rate 5 per cent or more, the life tenant would be entitled to a return of 5 per cent.

[7] 187 N. Y. 471, 80 N. E. 358 (1907).

The court admits the logic of the life tenant's contentions, but holds that as a practical matter, the accumulated bond discounts ought not be paid to the life tenant as income, because, since it is the duty of the trustee to keep all the money invested, there is no fund out of which the accumulation from discount could be made.

W. R. MACMILLAN

WHEN THE TRIAL JUDGE MAY CORRECT A REPORT OF PROCEEDINGS.—In the recent case of *Weinstein* v. *Morris*[1] the Illinois Appellate Court for the First District has given an interpretation to sections of the Civil Practice Act and rules of court with reference to amending a report of proceedings, which is of interest only to the extent that it is the first expression by an appellate court on this point.

The precise point made is that the trial judge may amend the report of proceedings to show the truth even after it has been signed by another judge pursuant to the authority given under the rules,[2] when for one of the specified reasons the trial judge himself was not available at the time of the signing. In this case, the trial judge was absent at the time the report of proceedings was presented, and another judge of the same court signed it. Subsequently, the trial judge corrected the certificate by adding matters which should have been included and by showing that the trial judge was absent at the time the statement of proceedings was presented to a judge of the same court. Even under the old practice, a bill of exceptions which did not properly show what transpired at the trial could be amended.[3] By applying the section of the Civil Practice Act[4] which empowers the appellate court to allow amendments to correct the record at any time, the court finds that it properly allowed the amendment to the report of proceedings in the instant case.

J. E. BRUNSWICK

SIGNATURE OF FOREMAN OF GRAND JURY AS DIRECTORY, NOT MANDATORY.—The recent case of *People ex rel. Merrill* v. *Hazard*[1] holds that the provision in the statute requiring the foreman of the grand jury to sign every indictment[2] is directory, not mandatory. Failure to sign does not make the judgment void so that it may be attacked by habeas corpus, but is a technical defect and can only be reached by a writ of error. The petitioner in the

[1] 281 Ill. App. 12 (1935).
[2] Smith-Hurd's Ill. Rev. Stat. (1935), Ch. 110, par. 259.36 (c).
[3] C. M. & St. P. Ry. Co. v. Walsh, 150 Ill. 607 (1894).
[4] Smith-Hurd's Ill. Rev. Stat. (1935), Ch. 110, par. 216 (c).

[1] 361 Ill. 60, 196 N. E. 827 (1935).
[2] Smith-Hurd's Ill. Rev. Stat. (1935), Ch. 78, par. 17.

case brought habeas corpus proceedings to be released from the Illinois Reformatory on the ground that the proceedings under which she was held were a nullity, in that the indictment, while otherwise regular, was not signed by the foreman of the grand jury, although it was inscribed "a true bill." A motion to quash had been overruled and while a motion in arrest of judgment was pending, the court recalled the grand jury and permitted the foreman in open court to sign his name on the indictment. The petitioner claimed that the failure to sign was jurisdictional and that therefore the judgment could be attacked by habeas corpus.

The court affirmed the rule that habeas corpus cannot be used to question a judgment unless such judgment was null and void for lack of jurisdiction—that the proper method of attack on formal defects is by writ of error. The court then said that the failure of the foreman to endorse the indictment was not fatal because that requirement is directory only and merely matter of form for the convenience of the court.

The court stated that it expressly overruled a case of one hundred and ten years standing, that of *Nomaque* v. *People*.[3] In the Nomaque case there had been no finding of any kind on the indictment, which of course would render it void. Further, it was not signed by the foreman. The essential requisite is that the foreman write the finding as a true bill, and where that is lacking, the proceedings may be attacked by habeas corpus. The present case holds that a mere failure to endorse his name thereon cannot be held fatal. The facts of this case can be clearly distinguished from those of the Nomaque case. Nevertheless, under the facts of the latter case there were two points decided—the necessity of an indorsement on the indictment, "a true bill," and the necessity of a verification of this finding by the foreman of the grand jury over his signature. On this latter point the case of *Nomaque* v. *People* is expressly overruled.

HELEN W. MUNSERT

EFFECT OF PROVISION IN WILL FOR EMPLOYMENT OF A NAMED ATTORNEY UPON EXECUTOR'S RIGHT TO SELECT ANOTHER.—This problem was presented for the first time to an Illinois Appellate Court in the recent case of *Conlan* v. *Sullivan*.[1] This court, following the precedent laid down by a long line of English and American cases, held that such provision is not mandatory upon the executor.

The plaintiff as the executor of the will of Charles H. Sullivan, filed a bill in equity praying for a construction of the following provision: "I hereby request my executors and trustees . . . to employ my friend, Frank A. O'Donnell, as their attorney in the

[3] 1 Ill. (Breese) 145 (1825).
[1] 280 Ill. App. 332 (1935).

administration of my estate, and to pay him such compensation as may be proper for such services or advice as he may be requested to render, and shall render service in the administration of my estate.'' The lower court held for the defendant on the grounds that this provision ''constitutes a command to the Executors and Trustees to employ said Frank A. O'Donnell as their attorney during the administration of said estate, and that a trust was created in favor of Frank A. O'Donnell.'' On appeal this decree was reversed.

In its decision, the Appellate Court did not go into the underlying theory of this question but turned to the settled authority and found that sufficient in itself to overrule the lower court. Two conclusions are given. First, this is an attorney-client relationship, in which the client always has the right of discharging the attorney.[2] Second, the provision canont be mandatory regardless of the words used. The latter statement the court supported by a review of the leading cases on this point,[3] concluding, ''The law appears to be that a trustee or executor is not bound to employ an attorney even though the will uses such words as 'direct,' 'command,' or 'appoint.' In the instant case the words used are expressive of nothing more than a mere request.'' Although the decision could be supported on the ground alone that the language was precatory, the result would have been the same if mandatory language was used.

The lower court found that the provision created a ''trust.'' If this is a trust, it must be one of two kinds, either a trust created for the benefit of the defendant attorney, or a single provision in the whole trust which is created especially to benefit the cestui que trust, and only incidentally for the defendant. The first alternative is obviously impossible, for the essential element of a trust res is completely lacking and without this no trust can exist.[4] The second alternative, even though it were sustainable, can be of no value to the defendant, for the cestui alone is the only person capable of enforcing this provision. The defendant as an incidental beneficiary would have no enforcible right vested in him.[5] thus, upon the theory of trust alone the

[2] Citing 6 Corpus Juris 676-678.

[3] Citing In re Thistlethwaite, 104 N. Y. S. 264 (1907); In re Ogier's Estate, 101 Cal. 381, 35 P. 900 (1894); Young v. Alexander, 16 Lea (84 Tenn.) 108 (1885); Hibbert v. Hibbert, 3 Mer. 681, 36 Eng. Rep. 261 (1808); Williams v. Corbett, 8 Sim. 349, 59 Eng. Rep. 138 (1837); Foster v. Elsley, 19 Ch. Div. 518 (1881); Shaw v. Lawless, 5 Cl. & Fin. 129, 7 Eng. Rep. 353 (1838); Finden v. Stephens, 2 Ph. 142, 41 Eng. Rep. 896 (1846); Jewell v. Barnes' Admrs., 110 Ky. 329, 61 S. W. 360 (1901). "Testamentary Directions to Employ," by Austin Wakeman Scott, 41 Harv. L. Rev. 709.

[4] Bogert on Trusts, Vol. I, sec. 182, which refers back to sec. 111.

[5] "Testamentary Directions to Employ," by Austin Wakeman Scott, 41 Harv. L. Rev. 713, and cases there cited.

decision of the lower court cannot be sustained.

If this is not a trust, the next question is, may the defendant have specific performance of this provision? Has the testator created a positive obligation upon the executor to employ the defendant? To use the word "employ" is to admit immediately that, as between the executor and the lawyer, a relation of attorney and client exists. This will necessarily disprove the trust theory. In this situation then, the defendant is seeking specifically to enforce a master and servant relation. In finding the answer to this contention, the position of the trustee must first be ascertained. The trustee has been given the complete legal title of this estate to administer; in administering this estate he is given certain discretionary powers; in exercising this power rightly, he will not be liable to the estate, but if he has acted unwisely and has committed a breach of trust, he is liable. To construe this liability in relation to the proposition maintained by the defendant, one thing clearly stands out. If the trustee in taking the advice of the attorney has proceeded rightly in his administration, the attorney may be compensated, but his right to compensation will arise through the right of the trustee to collect from the estate. It is based on the theory of exoneration. But if the advice of the attorney has caused a breach of the trust, the trustee has no right of exoneration; he stands liable to the estate. For the courts will not say that this provision in the trust is such that the trustee may hide behind the acts of the attorney.[6] The testator, then, has not created a provision binding the estate, but he has attempted to create a binding personal relationship of attorney and client. The two powers are in conflict with each other. If this relationship is the result of the provision in the trust, specific performance cannot be the remedy.

Three fundamental reasons are given for denying this decree.[7] First, there is no mutuality of remedy. The attorney cannot have a remedy where the trustee will be denied the same. Second, an equity court will not grant specific performance of a contract of services because of the difficulty of continually supervising the conduct of the employee. Third, it is not a wise policy to force upon the employer in a personal relationship, a person whom he does not wish to have in his employment. Thus it is clear that even if the plaintiff has a right, his remedy will not be through specific performance.

If the defendant does not have a trust nor a right to specific performance of an obligation, has he any right at all? Did this provision in the will create an obligation which will give the attorney a right to damages for breach? If there is a right to damages, it must arise through the creation of the attorney-client

6 Ibid., p. 719.
7 Ibid., p. 717.

relationship and not by trust. But a study of the will and the effect upon it if this contention is sustainable, will show that this was not the intent of the testator, for the testator has not given to the attorney any specific thing, nor did he intend to; he merely attempted to create a continuing relationship between these parties. This the courts have decided is beyond his power. Thus to allow the alternative of damages would be to say that the testator has conferred a specific benefit upon the attorney, such benefit to be paid in money taken in derogation of the cestui que trust and yet the only beneficiary in this trust is the cestui, and this is the only intent of the testator concerning the giving of specific benefits.

It would seem, then, that this provision in the will has created an interest which is without a remedy.

R. L. HUFF

LATENT AMBIGUITY CAUSED BY MISDESCRIPTION OF A LEGATEE.— The ever perplexing problem of misdescription in a will arose in the recent case of *Norton* v. *Jordan*.[1] The plaintiffs in the lower court, Mr. and Mrs. James M. Norton filed a bill in equity to construe the will of their cousin, Mrs. Harriet L. Milligan and petitioned the court that certain general and residuary legacies given in the will to Mr. and Mrs. Richard Norton be interpreted as to have been given to the plaintiffs, Mr. and Mrs. James M. Norton. Thirty of the thirty-two legatees were made parties defendant. Subsequently, one Richard Henry Norton, nephew of the plaintiffs, and his wife, were made additional defendants. Richard Henry Norton and his wife are not elsewhere mentioned in the will. They disclaimed any interest in the legacies and bequests and by their bill admitted the allegations of the plaintiffs' bill as amended.

The case in interesting because one plaintiff's given name was different from that mentioned in the will and because of the fact that there existed a person such as was described in the will.

The court decided in favor of the plaintiffs and based its decision upon the theory of a latent ambiguity in the will. Latent ambiguities, according to the decision, consist of two kinds: first, a misnomer, where the description may apply to two things or to two persons; second, a misdescription, which exists where the extrinsic evidence discloses that there is no such person or thing in existence, or, if in existence, the person is not the one intended, or the thing does not belong to the testator. If extrinsic evidence discloses such a latent ambiguity, it may be removed by the same kind of evidence. If there exists a misdescription or misnomer, the false words may be stricken and if a sufficient description remains, when interpreted in the light of surround-

[1] 360 Ill. 419 (1935).

ing circumstances, to identify the object or subject of the testator's gift with certainty, the will may be construed with the false words eliminated. However, if after the words are stricken, a sufficient description does not remain, the court will not strike the false words and the legacy must fail for want of certainty.

It is interesting to note that the eight cases[2] which the court cites in support of its decision deal with the misdescription of land and not of devisees or legatees. But the problem is not new in Illinois. In a case decided in 1890,[3] the names of various charitable corporations were improperly designated in a will. The court in that case decided that a mistake in the name or description of a legatee or devisee, whether an individual or a corporation, will never render a bequest void if the name and description used in the will, as applied to the facts and circumstances proved, will identify such person or corporation. The court further held that it might inquire into every material fact relating to the person who claims under the will, or to the property, or circumstances of the testator and his family and affairs for the purposes of identifying the person intended by the testator.

That is the doctrine which the court followed in the principal case. The court mentioned and relied on an abundance of evidence extraneous to the will which firmly indicated that the plaintiffs were the persons mentioned in the will, despite the fact that there did exist a distant relative who bore the name designated in the will. As was pointed out in the late case of *Morgan* v. *National Trust Bank,*[4] extrinsic evidence is never admissible to alter, detract from or add to the terms of a will, yet parol evidence is admissible to identify the beneficiaries and place the court in the situation of the testator and disclose what he had in mind at the time of the making of the will. The same doctrine of striking repugnant description where there is sufficient description remaining to identify the property in the construction of a deed was followed in the recent case of *Brunotte* v. *DeWitt.*[5] The theory of striking the bad and retaining the good received the sanction of the United States Supreme Court in *Patch* v. *White*[6] as early as 1886.

[2] Patch v. White, 117 U. S. 210, 29 L. Ed. 860 (1886); Bimslager v. Bimslager, 323 Ill. 303, 154 N. E. 135 (1926); Gano v. Gano, 239 Ill. 539, 88 N. E. 146 (1909); Collins v. Capps, 235 Ill. 560, 85 N. E. 934 (1908); Felkel v. O'Brien, 231 Ill. 329, 83 N. E. 170 (1907); Huffman v. Young, 170 Ill. 290, 49 N. E. 570 (1897); Whitcomb v. Rodman, 156 Ill. 116, 40 N. E. 553 (1895); Decker v. Decker, 121 Ill. 341, 12 N. E. 750 (1887).

[3] Woman's Union Missionary Society of America v. Mead, 131 Ill. 338, 23 N. E. 603 (1890).

[4] 331 Ill. 182, 162 N. E. 888 (1928).

[5] 360 Ill. 518 (1935).

[6] 117 U. S. 210, 29 L. Ed. 860 (1886).

In the principal case of *Norton* v. *Jordan*,[7] the task of the Illinois Supreme Court was made much easier by the fact that Richard Henry Norton whose name was similar to that mentioned in the will, disclaimed any interest in the will, leaving the court to consider surrounding circumstances in assuring itself that the plaintiffs were the persons intended in the will.

R. A. REMPERT

IS THE REMOVAL OF REFUSE AND GARBAGE A GOVERNMENTAL OR A PROPRIETARY FUNCTION OF A MUNICIPALITY AS FAR AS LIABILITY OF THE MUNICIPALITY FOR THE TORTS OF ITS SERVANTS IS CONCERNED?—Illinois courts have further extended the liability of municipal corporations for the torts of their agents in the case of *Wasilevitsky* v. *City of Chicago*.[1] Here another case is taken out of the possible category of governmental functions and classed squarely in the category of proprietary or corporate functions wherein the city is liable for the torts of its servants. In this case the plaintiff was struck and severely injured by a garbage truck and trailers of the City of Chicago while plaintiff was placing some goods in his parked automobile in front of his home. The truck and trailers were being operated by the city in the removal of garbage and refuse from the streets and alleys. The court held that the city was in this case acting in a proprietary capacity and not in its governmental capacity and was therefore liable for torts committed by its servants while so acting.

The distinction between proprietary functions and governmental functions and the liability of the city for torts of its servants in the former and not in the latter is generally recognized.[2] The reason given is that the governmental functions, such as police and fire regulation, are not performed in the interest of the city in its private corporate capacity but in the interests of the public generally; that these functions are really governmental duties delegated to the municipality by the legislature and in the exercise of them the municipality is an agent of the state. The proprietary or corporate functions, on the other hand, are voluntarily assumed with the permission of the legislature and are exercised for the benefit of the municipal locality and its inhabitants.[3]

[7] 360 Ill. 419 (1935).

[1] 280 Ill. App. 531 (1935).

[2] City of Chicago v. Seben, 165 Ill. 371, 46 N. E. 244 (1897); City of Chicago v. Williams, 182 Ill. 135, 55 N. E. 123 (1899); Normal School v. City of Charleston, 271 Ill. 602, 111 N. E. 573 (1916); Hanrahan v. City of Chicago, 289 Ill. 400, 124 N. E. 547 (1919); Johnston v. City of Chicago, 258 Ill. 494, 101 N. E. 960 (1913); Evans v. City of Kankakee, 231 Ill. 223, 83 N. E. 223 (1907).

[3] City of Chicago v. Seben, 165 Ill. 371, 46 N. E. 244 (1897); Evans v. City of Kankakee, 231 Ill. 223, 83 N. E. 223 (1907).

The difficulty arises in deciding which municipal functions fall into the class of governmental and which into that of corporate or proprietary. Illinois has held consistently that the exercise of the police power is a governmental function[4] and has in one case given the police power such a broad definition that there is little left of city functions that would not be covered by the definition. That case, *Evans* v. *City of Kankakee*,[5] defines police power or regulations as including "the making and enforcement of all such laws, ordinances and regulations as pertain to the comfort, safety, health, convenience, good order and welfare of the public." Fortunately, in the decided cases, the Illinois courts have not followed the definition to its full extent. In fact, they have restricted the functions falling into the class of governmental.

In the case of *Johnston* v. *City of Chicago*,[6] the city was held liable for the negligence of a driver of an automobile who was hired by the secretary of the public library board and who at the time of the accident was driving an automobile owned by the public library, conveying books from one library building to another along the streets of the city. The court held the ownership and operation of a municipal library to be a proprietary or corporate function, even though it was for the comfort, convenience, and welfare of the public. The case of *Gebhardt* v. *Village of La Grange Park*,[7] in holding that the maintenance of a swimming pool is a governmental function, is out of line with the general trend of the Illinois cases. This case can be reconciled only on the ground, hinted by the court there, that the use of the pool was not limited only to the inhabitants of the village but could be used by outsiders. The reasoning in the case cannot be reconciled; for by it the proprietary functions would be restricted to those in the nature of a corporate business or undertaking for profit. The Illinois cases do not support this reasoning.

In the case of *Bedtke* v. *City of Chicago*,[8] the city was held liable for the negligence of its servants in the use of a portable incinerator in an alley back of plaintiff's premises which caused the destruction by fire of certain personal property of the plaintiff; and in the case of *Roumbos, Admr.* v. *City of Chicago*[9] the city was held liable for the death of a child which was caused

[4] Blake v. City of Pontiac, 49 Ill. App. 543 (1893); City of Chicago v. Selz, Schwab & Co., 202 Ill. 545, 67 N. E. 386 (1903); City of Chicago v. Williams, 182 Ill. 135, 55 N. E. 123 (1899); Clarke v. City of Chicago, 159 Ill. App. 20 (1910); Culver v. City of Streator, 130 Ill. 238, 22 N. E. 810 (1889); Evans v. City of Kankakee, 231 Ill. 223, 83 N. E. 223 (1907).

[5] 231 Ill. 223, 83 N. E. 223 (1907).

[6] 258 Ill. 494, 101 N. E. 960 (1913).

[7] 354 Ill. 234, 188 N. E. 372 (1933).

[8] 240 Ill. App. 493 (1926).

[9] 332 Ill. 70, 163 N. E. 361 (1928).

by its clothing having been ignited by a fire set by a street cleaner to a pile of rubbish, the street cleaner having left the fire burning without watching it. The last two cases held that the cleaning of streets is a proprietary function of the city and that the city is liable for the torts of its servants acting in that capacity. It is not a long step from the decisions in these street cleaning cases to the case here considered. Street cleaning certainly pertains to the comfort, convenience, health and welfare of the public and the removal of refuse and garbage does also, possibly to a greater degree because of the danger to public health that might be caused thereby.

Several other jurisdictions in this country are in accord with Illinois on these holdings. The Federal courts[10] and Texas[11] hold that the removal of waste and garbage is a proprietary function. Mississippi[12] and New York[13] hold that street cleaning is a proprietary function. But the decisions in the majority of jurisdictions are contrary to those of Illinois, and maintain that the removal of refuse and garbage is a governmental function because it is for the benefit of the health of the entire public, within and without the municipality. The states in this group are Alabama,[14] California,[15] Georgia,[16] Kentucky,[17] Massachusetts,[18] Missouri,[19] New Hampshire,[20] New Jersey,[21] North Carolina,[22] North Dakota,[23] Pennsylvania,[24] Tennessee,[25] Virginia,[26] and Wisconsin.[27]

The Illinois courts are restricting the acts that will be classed as governmental functions and classifying more and more of them in the class of proprietary functions in order to restrict the cases where the city might escape liability for the torts of its servants. Illinois is extending the doctrine of respondeat superior

10 Denver v. Porter, 126 F. 288 (1903).

11 Ostrom v. San Antonio, 94 Tex. 523, 62 S. W. 909 (1901).

12 Pass Christian v. Fernandez, 100 Miss. 76, 56 So. 329 (1911).

13 Silverman v. New York, 114 N. Y. S. 59 (1909); Quill v. New York, 55 N. Y. S. 889 (1899).

14 City of Tuscaloosa v. Fitts, 209 Ala. 635, 96 So. 771 (1923).

15 Manning v. City of Pasadena, 58 Cal. App. 666, 209 P. 253 (1922).

16 Love v. Atlanta, 95 Ga. 129, 22 S. E. 29 (1894).

17 City of Louisville v. Hehemann, 161 Ky. 523, 171 S. W. 165 (1914); City of Harlan v. Peaveley et al., 224 Ky. 338, 6 S. W. (2d) 270 (1928).

18 Haley v. City of Boston, 191 Mass. 291, 77 N. E. 888 (1906).

19 Behrmann v. City of St. Louis, 273 Mo. 578, 201 S. W. 547 (1918).

20 Connor v. City of Manchester, 73 N. H. 233, 60 A. 436 (1905).

21 Condict v. Jersey City, 46 N. J. L. 157 (1884).

22 James v. City of Charlotte, 183 N. C. 630, 112 S. E. 423 (1922).

23 Montain v. City of Fargo, 38 N. D. 432, 166 N. W. 416 (1917); Moulton v. City of Fargo, 39 N. D. 502, 167 N. W. 717 (1918).

24 Scibilia v. City of Philadelphia, 279 Pa. 549, 124 A. 273 (1924); Bandos et al. v. City of Philadelphia, 304 Pa. 191, 155 A. 279 (1931).

25 City of Nashville v. Mason, 137 Tenn. 169, 192 S. W. 915 (1917).

26 Ashbury v. City of Norfolk, 152 Va. 278, 147 S. E. 223 (1929).

27 Bruhnke v. City of La Crosse, 155 Wis. 485, 144 N. W. 1100 (1914).

in the case of municipalities and is adopting or at least beginning to favor the idea advocated in 34 Harvard Law Review on page 66, that the distinction between governmental and private or proprietary functions in determining the tort liability of the municipal corporations for negligence in affirmative conduct be abandoned: that the doctrine of respondeat superior be applied to the city as well as to another, and that injuries caused by municipal employees be considered proper items to be borne by the community in place of the innocent injured person. The idea has been given further impetus by the enactment in 1931 by the Illinois legislature of laws making the municipality liable for the torts of its firemen.[28] The extension of the liability of municipalities for the torts of their employees may point to a new trend in the branch of the law relating to municipal corporations.

J. BOUCEK.

LIABILITY OF SUCCESSIVE INSURERS OF EMPLOYER'S LIABILITY IN OCCUPATIONAL DISEASE CASES. — The highest court of Massachusetts was recently faced with an unusual situation in *Donahue's Case,*[1] in connection with liability under the state Workmen's Compensation Act. The claimant in the case had worked as a weaver for the employer for nearly seventeen years, making asbestos brake lining, after which time he was forced to stop work because of pneumonoconiosis, a disease of the lungs, brought about by the inhalation of the asbestos dust. During the period of his employment and while he was continuously exposed to the dust, the employer had been insured successively by three different insurance companies. The Industrial Accident Board ruled that the Hartford Accident and Indemnity Company was the only one of the three liable to pay the compensation, on the ground that the personal injury occurred at the time of its coverage, on the date the claimant left work. The insurance company appealed, contending that as each of the insurers covered the employer at a time while the bodily condition was affected, each should bear a proportionate share, rather than that the last one be held liable for the cumulative effects.

The court affirmed the decision of the commission, basing its ruling on a construction of several provisions of the Workmen's Compensation Act. The court's premises are correct, but it is suggested that the conclusion arrived at was erroneous. It is quite true that "in these cases, where the cause operates through a period of years, the liability of any particular insurer depends upon whether or not it is found that the 'personal injury' took place during the time specified as the period of coverage in the

28 Smith-Hurd's Ill. Rev. Stat. (1933), Ch. 70, par. 9.

1 195 N. E. 345 (1935).

contract between that insurer and the employer."[2] But to hold that the injury did not occur until the time the claimant was unable to continue work, seems illogical in view of the known nature of the disease.

The only other case directly in point appears to be that of *Plecity* v. *George McLachlan Hat Company,* in Connecticut.[3] In that case the court came to the diametrically opposite conclusion that each successive insurer during the time of the growth of the disease was liable for the whole amount of compensation to the employee. The court felt that it would be an undue burden on the injured person to compel him to prove the exact extent of contribution due from each insurer, and said that matter could be settled among themselves.

The Massachusetts court dismissed the Plecity case with a wave of the hand, saying, ". . . it is unnecessary to discuss *Plecity* v. *George McLachlan Hat Company* . . . relied upon by the appellant. That case was decided under a statute and practice which differ from ours."[4] As a matter of fact, the basis of the Connecticut decision was not simply a statute, but a reasoned logical conclusion from all the facts and circumstances.

No case has arisen in Illinois on this subject. The law in this state is still extremely unsettled as to occupational diseases and their place under the Workmen's Compensation Act. But one decision may have a far-reaching effect.

In *Belleville Enameling and Stamping Company* v. *United States Casualty Company,*[5] decided in 1932, the court in Illinois held that a workman's compensation and employer's liability policy does not cover liability of an employer to employees for the contraction of silicosis, an occupational disease, when the policy does not contain any reference to an injury caused otherwise than by accident, and one of the provisions of the policy is that it shall apply only to injuries "sustained by reason of accidents occurring during the policy period." That has a bearing on the question here involved, because in the Plecity case in Connecticut, the provision in the policy was exactly the same, yet the court held that the mercurial poisoning of the claimant came within those terms, and that each insurer was liable to the claimant for the entire amount of compensation awarded, there being no words of apportionment in the policy.

If the obligation of the insurer under a liability contract becomes fixed when liability attaches to the insured,[6] when does liability so attach in the case of the gradual growth and develop-

[2] Ibid.

[3] 116 Conn. 216, 164 A. 707 (1933).

[4] 195 N. E. 345 (1935).

[5] 266 Ill. App. 586 (1932).

[6] Zieman v. U. S. Fidelity and Guaranty Co., 238 N. W. 100 (Iowa, 1931).

ment of the abnormal bodily condition which eventually incapacitates the employee? Is it only at the moment when the employee is overcome and forced to leave his employment, or is it during the entire term? Since it is impossible to ascertain definitely just when the disease was contracted, it seems more logical to hold liable all employers whose employment contributed to the injurious condition. Then it would follow that each successive insurer would be liable for the entire amount of compensation awarded, although there could be only one satisfaction, and the question of contribution would be determined among them.

HELEN W. MUNSERT

CERTIFIED CHECK NOT PREFERRED CLAIM AGAINST CLOSED BANK IN HANDS OF RECEIVER.—In *People ex rel. Nelson* v. *Lincoln Trust and Savings Bank, Patrick DeMichele, Intervening Petitioner,*[1] the court held that the certification of a check by a bank before it closed did not amount to the creation of a trust fund to the amount of the check. The intervening petitioner in that case was the holder of two checks drawn on the Lincoln Trust and Savings Bank, one in the amount of $10,000 and the other in the amount of $1,870, both of which checks were certified by the bank before it closed its doors on April 15, 1931. It was also found by the master that the bank had made out a debit slip, which was marked paid, and which was delivered to the depositor before the bank closed. The plaintiff contended that these facts were sufficient to establish the creation of a trust fund in his favor to the amount of $11,870, and sought to have this amount allowed against the bank as a preferred claim.

The court disallowed the claim, saying that it was "already committed to the opinion that the holder of a certified check under similar circumstances as above is not entitled to a preferred claim." In support of this statement the court cited two Illinois cases, both of them appellate court decisions, *People ex rel. Nelson* v. *Builders and Merchants Bank,*[2] and *Clark* v. *Chicago Title and Trust Company.*[3] Both of these cases involved a cashier's check instead of a certified check, but the Supreme Court said in the Clark case, in affirming the decision of the Appellate Court: "The drawing of the cashier's check, even if it changed the form of indebtedness, did not change the fact. The Globe Savings Bank was still indebted to the appellant for the $3,000 represented by its cashier's check. There was no change in the nature of the debt. The only change was in the evidence of it." The court then added that, in legal effect, a cashier's check is the same as a

1 279 Ill. App. 18 (1935).
2 264 Ill. App. 388 (1932).
3 85 Ill. App. 293 (1899).

certified check. The Builders and Merchants Bank case was taken to the Supreme Court on petition for certiorari and the petition was denied;[4] therefore the Appellate Court felt that the Supreme Court had affirmed its decision.[5]

A noteworthy remark, though purely dictum, made by the court in the principal case, was as follows: "It should be noted that these claims arose before the Act of 1931 went into effect on July 8, 1931, wherein it is provided that under the circumstances above narrated the holder of a certified check is entitled to a preferred claim."[6] This act seems definitely to settle the question in this state as far as future cases are concerned and establishes a rule of law which has been the subject of conflict in judicial decisions.[7] Apparently no cases have as yet arisen in which the statute has been applied, but the wording of the act seems so clear and definite that no doubt can exist as to the stand which the courts must take.

G. E. HALL

ULTRA VIRES—MODERN TENDENCY TO RESTRICT THE DEFENSE.—That ultra vires as a defense is rapidly losing its potency is becoming increasingly evident from recent judicial expressions.

[4] 186 Ill. 440 (1900).

[5] On this question of the effect of quashing or dismissing a petition for a writ of certiorari by the Supreme Court there seems to be a conflict of opinion. In the early case of McConnel v. Swailes, 2 Scam. 571 (1840), the court said as to this point: "This court does not entertain a doubt, but that the dismissal of an appeal, or certiorari, is equivalent to a regular, technical affirmance of the judgment. . . ." This case was cited on the same point in Sutherland v. Phelps, 22 Ill. 92 (1859). In a recent Federal case, however, the court refused to consider the denial of certiorari by the Illinois Supreme Court as an expression of that court on the particular point there involved. The Federal case was White-Phillips Co., Inc. v. Graham, 74 F. (2d) 417 (1934).

The United States courts have held, however, that a denial of certiorari by the state supreme court is an affirmance of the decision of the appellate court for purposes of review by the Federal Courts under the statute which requires the party to proceed as far as possible in the state courts before appealing to the Federal courts. In Dodd and Edmunds, Illinois Appellate Procedure, this statement is made in regard to the writ: "The only matter to be determined on review by certiorari is whether or not the inferior tribunal had jurisdiction, or whether it exceeded its jurisdiction, or otherwise proceeded in violation of law. These issues cannot be tried on allegations contained in the petition for the writ or on any facts except on the record of the proceedings as returned." The case cited in support of this statement is Hine v. Roberts, 309 Ill. 439 (1923). It should also be noted that the granting or denying of the writ is discretionary with the Supreme Court and the fact that it is denied may merely be because the decision of the Appellate Court was not an abuse of its powers, even though the Supreme Court might have decided the issues differently. Hence, it seems that while the denial of certiorari is an affirmance of the Appellate Court's decision for some purposes, it is not the same as a Supreme Court decision on the point, and does not have quite as much weight as a Supreme Court decision so far as the doctrine of stare decisis is concerned.

[6] Cahill's Ill. Rev. Stat. (1931), Ch. 16a, par. 37.

[7] In re Jayne and Mason, 251 N. Y. S. 768 (1931).

The recent Illinois Appellate Court case of *Warner et al.* v. *Munson et al.*[1] is a good example of the trend of modern decisions. In that case a bill was filed to foreclose a trust deed on real estate given to secure a "bearer" promissory note executed by the defendants as mortgagors. The defense interposed was ultra vires. The evidence disclosed that the plaintiffs' assignor was a construction company which had purchased the note and trust deed with surplus funds as a temporary investment. The court in sustaining the plaintiffs' right to foreclose made the following statement:

"The *Svithiod*[2] and *Royal Drug Company*[3] cases . . . and the decisions cited and referred to therein, as well as text writers and authorities in other states, are tending to uphold and enforce partly executed contracts, fairly made, where 'the public policy of justice overbalances the public policy of keeping the corporation within the limits of its charter,'[4] unless expressly prohibited by statute."

The latter exception was recognized in the recent case of *Pattison* v. *The Illinois Bankers Life Association et al.*,[5] which was a suit to recover a payment due under the provisions of an insurance contract. Although the contract had been fully performed by the plaintiff and the defendant corporation had received the full benefit of that performance the court denied a recovery, stating that the type of insurance contract which was the basis of the suit was prohibited by the statute under which the defendant corporation was organized, and hence the power to make such contract was "entirely wanting" and it "could not be given vitality by the acts of the parties under it."

Further indicative of the modern trend is the statement found in the case of *Royal Drug Company* v. *Levin*[6] where the court, in disallowing the defense of ultra vires to an action by a corporation on a promissory note, said: "As indicating the modern trend with reference to this question, it should be noted that at the last session of the General Assembly of this State an act was passed, effective July 1, 1933, which in effect wipes out the defense of ultra vires in such a case as is now before us."[7]

How the newly-enacted Business Corporation Act will affect the principles laid down in the cases of *Warner et al.* v. *Munson et al.* and *Pattison* v. *The Illinois Bankers Life Association et al.*,

1 280 Ill. App. 484 (1935).

2 Independent Order of Svithiod v. Ring Lodge No. 8, 261 Ill. App. 289 (1931).

3 Royal Drug Company v. Levin, 273 Ill. App. 231 (1934).

4 Benson Lumber Company v. Thornton, 185 Minn. 230, 240 N. W. 651 (1932).

5 360 Ill. 616, 196 N. E. 882 (1935).

6 273 Ill. App. 231 (1934).

7 Cahill's Ill. Rev. Stat. (1933), Ch. 32, par. 8.

which were decided under the law as it existed prior to the adoption of the new act, is still uncertain. However, the former case does not in anywise conflict with the Act and the result reached works justice to both parties; but the latter case seems to sacrifice the "public policy of justice" upon the public policy of keeping the corporation within its powers. It is cases of the latter type which are more apt to be affected by the new act.

L. G. RICHMAN

JURISDICTION OF CIRCUIT COURT TO REVIVE MUNICIPAL JUDGMENT, TRANSCRIPT OF WHICH HAS BEEN FILED.—The recent Illinois Appellate Court case of *Van Horne* v. *Harford*[1] holds that a judgment obtained in a city court may be revived only in that court, and not in the circuit court, even though a transcript has been filed in the circuit court. Although this is the general weight of authority,[2] the case is practically one of first impression in this state. The point was raised indirectly by the Illinois Supreme Court in 1875 in *Challenor* v. *Niles*,[3] in which the court held that in *scire facias* to revive a judgment, or upon a matter of record, the circuit court has jurisdiction to send its process to any county where the defendant may be found. In support of its decision the court said that it was "aware of no practice that would authorize a writ of *scire facias* to issue to revive a judgment from a county other than that in which the judgment was rendered, and if the writ could not be sent for service to another county, in many cases the object of the writ would be defeated."

It is interesting to note that the Appellate Court, in the principal case, cites Corpus Juris in support of its decision, although the decision would actually fall into an apparent exception and qualification given in Corpus Juris. The language there in point follows: "A proceeding to revive a judgment must be brought in the court and county wherein it was rendered. The rule applies even where, under statutory authority, a transcript of the judgment is filed in a court of another county, or where a transcript of a judgment of a federal court is filed in a state court, unless the statute providing for the transfer authorizes a revivor in the court to which the transfer is made; but in the case of judgments of justices or other inferior courts removed by transcript to a superior court, jurisdiction to revive the judgment resides in the latter court."[4]

1 280 Ill. App. 576 (1935).

2 Thompson v. Parker, 83 Ind. 96 (1882); McRoberts v. Lyon, 79 Mich. 25, 44 N. W. 160 (1889); Bank v. Moore, 98 Neb. 843, 154 N. W. 731 (1915); Case Threshing Machine Co. v. Edmisten, 85 Neb. 272, 122 N. W. 891 (1909).

3 78 Ill. 78 (1875).

4 34 C. J. 664, sec. 1021.

Inasmuch as the court in question, the City Court of Alton, is an inferior court, as determined elsewhere by judicial decision,[5] the present case, as stated, would seem to fall within the exception. However, upon investigation it will be found that the cases cited in support of the apparent exception limit its application to those cases where by statute the judgment of the inferior court, upon its being filed in the superior court, shall have the same force and effect as a judgment of the latter court.[6] This restriction in effect destroys the exception, inasmuch as the power conferred by such a provision necessarily includes the power of revival.

The Illinois statute relating to judgments and decrees of a city court provides that "such judgments and decrees shall be liens upon the real estate in such city from the time of their rendition, and in the county wherein such city court is situate, after a certified transcript of the same shall have been filed in the office of the clerk of the circuit court of the said county."[7] Clearly, the effect of this statute is merely to render the judgment a lien upon realty, or upon additional realty, and not to give the judgment standing in the superior court itself.

Inasmuch as this is the general rule, sanctioned alike by commentators and authorities, the law of the principal case will doubtless be followed by the Supreme Court if the question is raised there.

G. S. STANSELL

NECESSITY OF ASSIGNING CROSS-ERRORS.—The Illinois Appellate Court in its recent decision in the case of *McNulty* v. *Hotel Sherman Company*[1] has determined that the necessity for assigning cross-errors is the same under the Civil Practice Act[2] as it was under the Practice Act of 1907. The plaintiff recovered a verdict of $4,000 for personal injuries. The defendant moved for a new trial, which motion the court allowed after the plaintiff had declined to remit $2,000 from the amount of the verdict. The plaintiff appealed from the order granting a new trial and the defendant failed to indicate its intention of cross-appeal. The question presented was whether the defendant's failure to prosecute a cross-appeal precluded it from urging every ground and excep-

[5] The People v. Municipal Court, 359 Ill. 102, 194 N. E. 242 (1935). For a discussion of this case, see 13 CHICAGO-KENT REVIEW 273. Also, Reid v. Morton, 119 Ill. 118, 6 N. E. 414 (1886); Wolf v. Hope, 210 Ill. 50, 70 N. E. 1082 (1904).

[6] Case Threshing Machine Co. v. Edmisten, 85 Neb. 272, 122 N. W. 891 (1909); Guffy v. Nelson, 131 Pa. St. 273, 18 A. 1073 (1890); Smith v. Wehrly. 157 Pa. St. 407, 27 A. 700 (1893).

[7] Cahill's Ill. Rev. Stat. (1915), Ch. 37, par. 379.

[1] 280 Ill. App. 325 (1935).

[2] 355 Ill. 34, 35, Rule 35 (1) and (2) (1934).

tion in the record entitling it to a new trial: that is, whether the appellee was limited to questioning only the excessiveness of the damages as required by the remittitur.

In *Pelouze* v. *Slaughter*,[3] decided under the Practice Act of 1907, the court reviewed the question of cross-appeals very thoroughly. There it was said, "In general, the cases holding a party can only protect his right by assigning cross-errors have been where the decree or judgment did not give the party all the relief that he claimed or gave to his adversary more than he was considered entitled to, and where the appellee or defendant in error might have taken an appeal or prosecuted a writ of error."[4]

If a party has not obtained all that he deems himself entitled to, he may appeal; but not where he gets all that he claims.[5] The statutory assignment of cross-errors is only required where a party seeks a reversal of a decree or judgment and might have appealed or sued out a writ of error.[6]

In the McNulty case it was sufficient that the defendant controverted the plaintiff's assignment of errors, and having prevailed over them, the case was rightly remanded for an entire new trial. As the plaintiff had not accepted the order of remittitur, the remanding for a new trial was all that the defendant could claim. It follows that the defendant, not being in any way aggrieved by the court's order or any part thereof, could not have appealed or sued out a writ of error and therefore would not have been required to assign cross-errors under the Act of 1907. Since Rule 35 of the Supreme Court Rules takes the place of section 107 of the Practice Act of 1907, the defendant is not required to prosecute a cross-appeal from a motion granting a new trial.

The reason stated in the order for granting a new trial is not controlling, and when the whole record is brought up on appeal, the defendant should be allowed to urge any ground upon which he relied in the lower court to sustain the order or judgment. He need not file a cross-appeal in order to have considered all grounds upon which he relied in the trial court to obtain a new trial.

J. D. GANNON

RATIFICATION OF DELIVERY OF CHECK TO UNAUTHORIZED AGENT AS INCLUDING RATIFICATION OF FORGED SIGNATURE OF PRINCIPAL.—In the case of *Ubowich* v. *Northern Trust Company*,[1] the plaintiff, as unknown heir of Charles Ubowich, was entitled to

[3] 241 Ill. 215 (1909).
[4] Ibid., p. 225, and cases there cited.
[5] Gray v. Jones, 178 Ill. 169 (1899).
[6] 241 Ill. 226 (1909).

[1] 281 Ill. App. 109 (1935).

$1,000. This sum had been deposited by order of the probate court with the county treasurer. Subsequently, an unknown person petitioned the county treasurer for the payment of the sum. Whether the party acted as the plaintiff, Alex M. Ubowich, or as his agent, is unknown. Pursuant to the petition, the county treasurer issued a check to Alex M. Ubowich, and delivered it to the unknown person. The check was then taken by this person and indorsed to the defendant bank with the indorsement of Alex M. Ubowich and F. F. Roberts. The money was paid to this person as F. F. Roberts, and he subsequently disappeared. Plaintiff, Alex Ubowich, now brings his suit against the bank for the conversion of this check.

The defense of the bank was that the plaintiff had no title to the check as there had been no delivery; that plaintiff could not ratify this delivery without ratifying the forgery; that he was therefore barred from bringing an action for conversion. To meet this, the plaintiff claimed that by bringing his suit, he ratified the delivery of the check by the county treasurer to the unknown person as his agent and nothing more. The court held that the plaintiff might ratify the delivery of the check without ratifying the forgery. To sustain this, two questions seem to be involved: Was this a delivery capable of ratification? Was this delivery connected with the subsequent forgery?

Delivery means transfer of possession from one person to another. There must exist an intention to deliver and an act of delivering, either actual or constructive.[2] When the county treasurer drew this check, he drew it solely for Alex M. Ubowich. F. F. Roberts received the check as the check of Alex Ubowich. Here, then, is an act and an intention to deliver. That would be sufficient if Roberts could be connected with the plaintiff as an agent. There was no evidence as to what Roberts said or did, but it was known that the check was issued as the property of the plaintiff, and that the defendant bank, when taking the check, took it as the check of the plaintiff. Thus, there is an unauthorized person acting either as the plaintiff or for him, and holding in his hands at all times the check made out to the plaintiff. At any time up to the indorsement of the check, the plaintiff could have ratified this act and received the check.[3] It was at this point, then, that the real ratification took place; and it cannot be said that it was in any manner connected with the subsequent forgery. The plaintiff by ratifying the act of Roberts merely approved the delivery of the check to him. Roberts stood as an agent holding a check of his principal when he took the check to

[2] 8 C. J. 203.

[3] Crowell v. Osborne, 43 N. J. L. 335 (1881); Meeker v. Shanks, 112 Ind. 207, 13 N. E. 712 (1887); Pickle v. People's National Bank, 88 Tenn. 380, 12 S. W. 919 (1890).

the bank. The defendant bank received the check as belonging to the plaintiff, principal, and not to Roberts, and it took it only through a forgery.

The court approved an opinion in a Tennessee case wherein Judge Lurton said: "The effect of this ratification is simply to make the check the property of the complainant. It does not ratify the collection of the check by one whose act in receiving it is subsequently ratified, and agency to receive a check payable to order implies no authority to indorse it in the name of the payee, or to collect without such indorsement."[4]

It is clear that the bank could not take the check of the plaintiff without his indorsement. Its acts in receiving it, paying the proceeds to Roberts, and refusing to return the check to plaintiff, constituted a conversion of the plaintiff's property. The plaintiff recovers, not upon the theory of a delivery to the bank, but on the theory that the check was delivered to him through his agent and subsequently to the bank, which now holds it only through a forgery and is therefore bound to return it or its value.

R. L. HUFF

LIABILITY OF TRUSTEE UNDER LAND TRUST FOR INJURIES DUE TO CONDITION OF TRUST PROPERTY.—As a result of a recent Illinois Appellate Court decision, the use of the land trust as a practical device to avoid the complications arising from co-ownership of land, has been encouraged. In the case of *Brazowski* v. *Chicago Title and Trust Company*,[1] the court discussed such trusts and held that a trustee thereunder, who merely holds the legal title and who is not in fact in occupancy or control, is not liable for torts occurring by reason of the defective condition of the trust property. In order to hold a trustee liable for such torts he must not only have such legal title, but he must have possession of the premises, either actually or constructively, and must have control. Possession as here used means more than occupancy; it means the management of the premises.

In the case under discussion, property in Chicago was owned by four men as tenants in common, and they executed a declaration of trust designating the Chicago Title and Trust Company as trustee to hold the title for the benefit of the settlors. By the instrument of trust the beneficiaries had the power of direction to deal with title to the property, the right to rentals or proceeds from sale, the entire management and control of the property, and the renting, selling and handling thereof. But it specifically provided that as far as the public was concerned the trustee had full power to deal with the property. For a time the

[4] Pickle v. People's National Bank, 88 Tenn. 380, 12 S. W. 919 (1890).

[1] 280 Ill. App. 293 (1935).

trust company made leases and collected the rents, but after a few years it turned the balance over to the beneficiaries who continued in full control. The plaintiff, an infant, was injured by the collapse of a fence on the trust property, and he sued the trust company, claiming that the trustee was in possession through its agents, the beneficiaries, and therefore liable for the tort. He also claimed that the provisions of the trust deed were inconsistent and repugnant, in that as to the public the trustee had full control, but the beneficiaries were also given full control.

The court held that the beneficiaries had vested the trustee with the legal title, and at the same time reserved to themselves the management and control, and therefore the powers of the beneficiaries were not derived from the trustee but created by themselves as principals. For that reason the beneficiaries were not the agents of the trustee in collecting the rents and maintaining the premises, but were exercising those powers in their own rights. It was only as to the public, and to protect persons acquiring rights in the property by dealing with the trustee that the trustee was to be considered sole owner.

This type of instrument is not uncommon. In *Gallagher and Speck* v. *Chicago Title and Trust Company*,[2] a similar trust deed was considered and the court held that there was no relation of principal and agent created between the grantee as trustee and the beneficiary named in the instrument. In *Whittaker* v. *Central Trust Company*,[3] the trustee was held not liable for personal injuries on the ground that it did not have the possession and control over the property where the trust deed provided management and direction were to be vested in the beneficiaries.

The Illinois law is in accord with that in other jurisdictions. To render the trustee liable for torts, he must have more than the mere legal title, and it is immaterial whether the trust is created by deed or by will. In *Eisenbrey* v. *Pennsylvania Company for Insurance*,[4] property was devised to trustees, but a certain part of it, on which an injury occurred, was directed to be occupied and kept in repair by a sister of the deceased. The court held that the company, being a mere trustee, not in the occupancy of the premises even by a tenant, and exercising no control whatever over it, could not be held responsible because there was no room for the doctrine of respondeat superior. A New York case decided just a few years later held that executors to whom the legal title of the testator's realty was devised, were not liable for injuries caused by the defective condition of the premises, the use whereof was given to another, and of which the executors were not given the duty to repair, because the duty

[2] 238 Ill. App. 39 (1925).
[3] 270 Ill. App. 614 (1933).
[4] 141 Pa. St. 566, 21 A. 639 (1891).

of keeping premises in safe condition in general pertains to occupancy and not ownership.[5] The theme running through all these tort liability cases is that unless the holder of the legal title is in possession or control of the premises, there is no duty imposed on such holder to keep the premises in repair, and he is therefore not liable for injuries occurring on them.

The primary feature of the land trust as used to prevent the disabilities of ownership by tenants in common, is that legal title is placed in a trustee for the benefit of the cotenants, who are the cestuis as well as the settlors. By this method, the questions of descent of property and dower interests arising by the death of the cotenant are avoided. The powers of the trustee are broad in that third persons have a right to deal with him as the true owner in the fullest sense. But as between the trustee and the beneficiaries, the latter have the entire management and control of the property by virtue of their own declaration in the trust deed, and can in no sense be agents of the trustee. Since the beneficiaries were in possession of the premises as principals, the trustee cannot be held for failure to repair, and the trust companies are relieved from responsibilities which might hitherto have been a deterrent to the formation of such trusts.

HELEN W. MUNSERT

SPECIFIC PERFORMANCE OF PAROL PROMISE TO CONVEY INTEREST IN LAND.—*Fierke* v. *Elgin City Banking Company*,[1] recently decided on demurrer by the Supreme Court of Illinois, furnishes a test for the establishment of the law with respect to the specific performance of parol promises to convey land. John Fierke, the uncle of the complainant, seventy-two years of age and in failing health, living alone in the old family dwelling house after the death of his wife, promised his nephew, the complainant, that if he and his wife would give up their home, become members of his family, and assume the management of the establishment during the remainder of his life, he would, in consideration therefor, at his death, leave him the residence property and its contents in fee simple, 1,300 shares of stock in three corporations, and $10,000 in money. The complainant alleged that in reliance upon the promise he and his wife gave up their home, moved with his uncle, and fully performed their part of the agreement; and that they had performed many arduous duties, as a result of which they suffered impaired health. The uncle did provide for the complainant in his will, but not to the extent of his promise. In this action for specific performance, the court said, "The allegations taken as true, which under demurrer must be taken

[5] Butler v. Townsend, 84 Hun 100, 31 N. Y. S. 1094 (1895).

[1] 359 Ill. 394, 194 N. E. 528 (1935).

as true . . . sufficiently show that by reason of the contract the complainant made a change by which he suffered substantial detriment, financially and physically. . . . The allegations taken as true, show that an abrogation of the contract would amount to a fraud on the complainant and sufficient to take the case out of the Statute of Frauds."

A great deal of confusion seems to have arisen from the improper use of the expression that part performance takes the case out of the Statute of Frauds. As a matter of fact, the Statute, in dealing with part performance, has reference only to the sale of chattels. It is indeed unfortunate that this phrase has become ingrained in opinions concerning parol promises involving interests in land. Not only is it misleading, but it is not strictly true that part performance will take the case out of the Statute. By the weight of authority, where the purchaser has paid part, or even all of the purchase price, he is not entitled to specific performance. There must be something more than the performance of his promise. Where the purchase price is paid in money, the injured party can be made whole again by the return of the purchase money with interest. It is not, then, performance that takes the contract out of the Statute—it is the fact that the promisee has suffered a substantial detriment in his change of position in reliance on the contract, so that the promisor's failure to perform would amount to a fraud on the complainant.

In the Illinois case of *Snyder* v. *French*,[2] where the deceased had promised that if the complainant's parents would allow him and his wife to take the complainant, then an infant, and raise her as their own, they would on their death leave her all their property, and the complainant, who had been so raised, upon the death of the promisor intestate brought an action against the heirs for specific performance, the court denied relief upon the ground that the complainant had not shown that her condition was worse than it would have been had she continued to live with her natural parents. The court placed its decision on the theory of a change of position, which seems to be the true basis for decreeing specific performance in such cases.

In *Adkins* v. *Adkins*,[3] it was held that in order to take an oral promise that has been partly performed out of the Statute of Frauds, the part performance must be such that it would constitute a fraud not to compel the agreement to be fully performed. Although the courts are fairly agreed that the acts must amount to an equitable estoppel, there is a great divergence of opinion as to what constitutes such an estoppel. In *Adkins* v. *Adkins*, the plaintiff spent several years caring for his father

[2] 272 Ill. 43, 111 N. E. 489 (1916).
[3] 332 Ill. 422, 163 N. E. 823 (1928).

and mother and tending the farm, put improvements on the land, and paid taxes, doctor bills, and funeral expenses for his parents. In that case, it was held that denial of specific performance would not amount to a fraud on the plaintiff. In the same jurisdiction, it was held in the principal case that the plaintiff, by spending three years in the elaborate home of his uncle with a retinue of servants, had been put in such a position that not to grant specific performance would be to permit the promisor to perpetrate a fraud upon him. It seems only just, however, where one party, in reliance on the oral promise of another, has put himself in such a position that he cannot be returned to status quo, that the other party should not be permitted to set up the Statute of Frauds as a defense.

Some courts have held that as a condition precedent to securing specific performance, the plaintiff must have had such possession of the property as would point to the existence of a contract to convey.[4]

In Illinois, the possession seems to be a question of evidence which goes to prove the existence of the contract rather than an element that must be present before specific performance will be decreed. In *Aldrich* v. *Aldrich*,[5] it was held by the Supreme Court of Illinois that to establish an oral contract to convey, it was not essential to show that the son took exclusive possession and made permanent improvements, where the father lived on the land with his son, who was not to have exclusive possession until the father's death. In the principal case, the contract being admitted, it was not necessary for the court to touch on the character of the possession in arriving at their decision.

W. R. MacMillan

Right to Proceeds of Insurance Policy upon Mortgaged Property After Repairs Have Been Made.—In the recent case of *Koscher* v. *Chicago City Bank and Trust Company*,[1] the Illinois Appellate Court for the First District held, where a fire loss had occurred to mortgaged premises in default, and where the trust deed contained the usual clause requiring the mortgagor to secure the proper fire insurance, and the insurance check had been made payable jointly to the mortgagor, the mortgagee, and the contractor who made the repairs, that the mortgagee was entitled to the money to apply against his deficiency decree obtained subsequent to the damage and repairs.

The equity owner filed the original bill, asking for the proceeds of the check to be turned over to the contractor; the mortgagee

[4] Dexter v. Winslow et al., 254 Mass. 407, 150 N. E. 158 (1926); Burns v. McCormick, 233 N. Y. 230, 135 N. E. 273 (1922).

[5] 287 Ill. 213, 122 N. E. 472 (1919).

[1] 280 Ill. App. 500 (1935).

filed a cross-bill to foreclose and asked for application of the insurance proceeds on the deficiency; and the contractor lien claimant intervened. The master found for the foreclosing mortgagee; the chancellor held for the equity holder; and the Appellate Court reversed, and sustained the finding of the master. In so doing, the court first decided that under the trust deed, even if the trustee had not been named as one of the beneficiaries under the policy, the mortgagee would have an equitable lien upon the proceeds.[2] Although the court cited foreign cases,[3] there are many Illinois decisions which hold this to be the law.[4] In all these cases, however, the properties had not been repaired. The problem of determining who is entitled to the insurance money when repairs have been made remains. Is the mortgagee to have the security of the property in the condition which he bargained for and in addition the cash proceeds of the insurance?

First of all, the law is clear that the intervening contractor could under no circumstances be entitled to the fund directly, for it has been decided in this state that a stranger to the insurance contract, in the absence of any other contract to secure the insurance for his benefit, can have no claim upon it.[5]

It has been held in other states that when repairs are made the mortgagee ceases to have a lien on the proceeds of insurance.[6] The court, however, stressed the defaults under the terms of the trust deed, thus leaving some doubt as to the result if there had been no defaults. It seems clear enough that if in the absence of default repairs were made, there would be nothing due the mortgagee. In *Palmer Savings Bank* v. *Insurance Company of North America*,[7] cited in support of the decision, the court avoided the apparent inequities with the reasoning that the price paid at the foreclosure sale was higher than it would have been if the repairs had not been made, and accordingly the owner was not harmed; that the legal situation was the same as if the sum had been paid to the owner.

[2] Thomas v. Vonkapff, 6 Gill & J. (Md.) 372 (1834); note to 3 Kent Com. 376; Angell, Fire and Life Insurance, sec. 62; 2 Am. Leading Cas. 834, 5th ed.; Nichols v. Baxter, 5 R. I. 491 (1858); Wheeler v. Factors' & Traders' Ins. Co., 101 U. S. 439, 25 L. Ed. 1055 (1880).

[3] Juneau County State Bank v. Steckling, 181 Wis. 430, 195 N. W. 396 (1923); Farmers' Loan & Trust Co. v. Penn Plate Glass Co., 186 U. S. 434, 46 L. Ed. 1234 (1902); Butson v. Misz, 81 Ore. 607, 160 P. 530 (1916).

[4] Grange Mill Co. v. Western Assurance Co., 118 Ill. 396, 9 N. E. 274 (1886); Norwich Fire Ins. Co. v. Boomer, 52 Ill. 442 (1869); Wilson v. Hakes, 36 Ill. App. 539 (1890).

[5] Lindley v. Orr, 83 Ill. App. 70 (1898).

[6] Huey v. Ewell, 22 Tex. Civ. App. 638, 55 S. W. 606 (1900); Matter of Moore, 6 Daly (N. Y.) 541 (1876); Connors v. Mango, 207 Wis. 115, 240 N. W. 821 (1932).

[7] 166 Mass. 189, 44 N. E. 211 (1896), cited in Silver v. United States Trust Co., 280 Mass. 295, 182 N. E. 372 (1932).

Ultimately the only one harmed is the contractor, and since he could not under any recognized principle of law recover directly any part of the proceeds of the insurance,[8] there is no injustice or inequity. He has his action against the owner who is richer by reason of not having to pay a larger deficiency.

The decision seems sound inasmuch as it is supported by adjudicated Illinois decisions and is the weight of authority in American jurisdictions.[9] On the one doubtful point—the distribution of proceeds of insurance after repairs have been made and after defaults have occurred—it is a case of first impression in this jurisdiction, and, while seemingly inequitable, there is no theory apparent on which the court could have decided otherwise.

J. E. BRUNSWICK

ERRATUM—In the June issue of the CHICAGO-KENT REVIEW, Vol. XIII, p. 266, the quotation contained in lines 7-9, should be corrected to read: "Under the practice which obtained prior to January 1, 1934, this judgment being a unit as to both the creamery company and the cartage company, it cannot be affirmed as to one and reversed as to the other."

8 Lindley v. Orr, supra.
9 26 C. J. 942, and see footnote 3.