

December 1939

Discussion of Recent Decisions

Chicago-Kent Law Review

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Recommended Citation

Chicago-Kent Law Review, *Discussion of Recent Decisions*, 18 Chi.-Kent L. Rev. 93 (1939).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol18/iss1/4>

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CHICAGO-KENT LAW REVIEW

PUBLISHED DECEMBER, MARCH, JUNE, AND SEPTEMBER BY THE STUDENTS OF
CHICAGO-KENT COLLEGE OF LAW, 10 N. FRANKLIN ST., CHICAGO, ILLINOIS

Subscription price \$2.00 per year Single copies, 75c. Foreign subscription, \$2.50

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VOLUME 18

DECEMBER, 1939

NUMBER 1

DISCUSSION OF RECENT DECISIONS

CORPORATIONS—DIVIDENDS—VALIDITY OF INFORMAL DIVIDEND AGAINST CREDITORS OF CORPORATION.—For the first time in Illinois, the question of the informal dividend has been passed upon. In the recent case of *Metropolitan Trust Company v. Becklenberg*,¹ the defendant, having a lot in Chicago worth over a half million dollars, organized the Diversey Building Corporation with an authorized capital stock of \$100,000, taking all of the shares of stock but two for himself. The other two shares were held for him by dummy holders. The balance of the value of the lot was set up on the books as paid-in surplus. To erect a building, Becklenberg made a loan in the sum of \$1,250,000, evidenced by bonds secured by trust deed dated May 22, 1924. The principal debt in 1932 had been reduced to \$987,500, and in 1934 it was evidenced by a new trust deed executed pursuant to a reorganization plan in proceedings under Section 77-B of the Federal Bankruptcy Act. Becklenberg treated the building as belonging to himself. He collected the rents and profits and commingled them with his own funds. He made necessary disbursements and retained the balance. No dividends were ever formally declared; no note was ever given to the corporation; no interest was ever paid; and naturally no demand for payment was ever made

¹ 300 Ill. App. 453, 21 N.E. (2d) 152 (1939).

upon Becklenberg. At the time of default in the payments on the bonds, the books of both the corporation and Becklenberg showed that he had withdrawn a total of \$387,542.06, representing a sum of over four times the amount of the profits earned by the building. The plaintiff brought this suit as trustee under the second trust deed and as assignee of the corporation for the benefit of the bondholders, and he contended that the excess of the withdrawals over the expenditures retained by Becklenberg constituted a loan or advance to him by the corporation and represented an indebtedness due from him to the corporation. The defendant insisted that these withdrawals, even though no formal dividends were declared, nevertheless constituted lawful dividends² and therefore were not recoverable by the plaintiff. The court affirmed a judgment for the defendant.

On a close consideration of the cases cited by the court it appears doubtful that they support the holding in the instant case, inasmuch as they are tax cases,³ probate court proceedings,⁴ contests between stockholders,⁵ contests between corporation and stockholders,⁶ and suits between bondholders and corporation, the corporation itself being the majority or lone stockholder of a subsidiary corporation.⁷

The usual and proper way of appropriating corporate profits to stockholders is by declaring a dividend, but there may be a division of profits among stockholders without such formality.⁸ An informal division of profits has been held to be the equivalent of a dividend;⁹ however, no case

² *E.M.T. Coal Co. v. Rogers*, 216 Ky. 440, 288 S.W. 342 (1926); *Chattanooga Sav. Bank v. Brewer*, 17 F. (2d) 79 (1927), cert. den. 274 U.S. 751, 47 S. Ct. 764, 71 L. Ed. 1332 (1927); *In re Wilson's Estate*, 85 Ore. 604, 167 P. 580 (1917); *Barnes v. Spencer & Barnes Co.*, 162 Mich. 509, 127 N.W. 752, 139 Am. St. Rep. 587 (1910); *Hadley v. Commissioner of Internal Revenue*, 36 F. (2d) 543 (1929). See also *Central of Georgia Railway Co. v. Central Trust Co.*, 135 Ga. 472, 69 S.E. 708 (1910); *Smith v. Moore* 199 Fed. 689 (1912); *M. Groh's Sons v. Groh*, 80 N.Y.S. 438 (1903); *Brown v. Luce Mfg. Co.*, 231 Mo. App. 259, 96 S.W. (2d) 1098 (1936); *Fidelity & Columbia Trust Co. v. Louisville Ry. Co.*, 265 Ky. 820, 97 S.W. (2d) 625 (1936); *Atherton v. Beaman*, 264 F. 878 (1920); *Freeman v. Rogers White Lime Co.*, 138 Ark. 312, 211 S.W. 146 (1919).

³ *Hadley v. Commissioner of Internal Revenue*, 36 F. (2d) 543 (1929); *Chattanooga Sav. Bank v. Brewer*, 17 F. (2d) 79 (1927).

⁴ *In re Wilson's Estate*, 85 Ore. 604, 167 P. 580 (1917).

⁵ *E.M.T. Coal Co. v. Rogers*, 216 Ky. 440, 288 S.W. 342 (1926); *Freeman v. Rogers White Lime Co.*, 138 Ark. 312, 211 S.W. 146 (1919).

⁶ *Barnes v. Spencer & Barnes Co.*, 162 Mich. 509, 127 N.W. 752 (1910); *M. Groh's Sons v. Groh*, 80 N.Y.S. 438 (1903).

⁷ *Fidelity & Columbia Trust Co. v. Louisville Ry. Co.*, 265 Ky. 820, 97 S.W. (2d) 625 (1936); *Central of Georgia Railway Co. v. Central Trust Co. of N.Y.*, 135 Ga. 472, 69 S.E. 708 (1910).

⁸ *Atherton v. Beaman*, 264 F. 878 (1920). See also *Cook, Corporations* (5th ed.), II, § 534; *Fletcher's Cyc. on Corporations*, XI, 875.

⁹ *Spencer v. Lowe*, 198 F. 961 (1912); *Ratcliffe v. Clendenin*, 232 F. 61 (1916); *Redhead v. Iowa Nat. Bank*, 127 Iowa 572, 103 N.W. 796 (1905); *Hartley v. Pioneer Iron Works*, 181 N.Y. 73, 73 N.E. 576 (1905); *Berryman v. Bankers' Life Ins. Co.*, 102 N.Y.S. 695 (1907); *Grants Pass Hardware Co. v. Calvert*, 71 Ore. 103, 142 P. 569 (1914); *Powers-Buchanan Co. v. Powers*, 269 Pa. 388, 112 A. 541 (1921); *Kearneysville Creamery Co. v. American Creamery Co.* 103 W.Va. 259, 137 S.E. 217 (1927).

has gone as far as the instant case in following this rule. The courts indicate that a distribution of an informal character is not a dividend unless at least two conditions are present. There must be a division of the profits, and of the profits only; and the rights of creditors and third parties must not be impaired.

Although there is no controlling Illinois case, the Illinois Supreme Court has several times indicated an inclination toward a strict interpretation of the general rule.¹⁰ It is well settled in this state that stockholders have no legal right to any share in the profits of a corporation until dividends have been declared.¹¹

In *Hamblock v. Clipper Lawn Mower Company*, which was a stockholder's suit to recover a declared dividend, the court said: "The records of the company fail to show that a dividend was ever declared and there is no evidence there were any profits from which dividends could be declared. . . . A dividend is not a debt until it is declared and set apart for this purpose. . . . It is a rule that dividends can be declared and paid only from profits except where no rights of creditors intervene and all the stockholders assent. The payment of dividends out of capital is reducing the capital to the detriment of the creditors, and it is illegal for a company to pay dividends to shareholders out of the capital before an income is earned. . . . Corporate officers make themselves liable to be called upon to repay to the company dividends paid out of the capital stock."¹²

The assets of a private corporation, whether consisting of real estate or personal property, are held to belong to the corporate body, and the stockholders are not considered, in any sense, as the owners thereof.¹³ The mere fact that one or several persons owns a large majority of the stock has been held to give no additional right or power to deal with the corporate property.¹⁴

Decisions in the Seventh Circuit Court of Appeals have also adopted the rule of the informal dividend, but they have been very careful to

¹⁰ See note, L.R.A. 1918B 1051 for a collection of cases on this subject.

¹¹ *Ford v. Ford Mfg. Co.*, 222 Ill. App. 76 (1921); *Hamblock v. Clipper Lawn Mower Co.*, 148 Ill. App. 618 (1909); *Robertson v. Bucklen & Co.*, 107 Ill. App. 369 (1903); *Davis v. Stevens-Davis Co.*, 192 Ill. App. 374 (1915); *Alsop v. De Koven*, 107 Ill. App. 190 (1903), *aff'd* 205 Ill. 309, 68 N.E. 930 (1903); *People v. Dennett*, 276 Ill. 43, 114 N.E. 493 (1916).

¹² 148 Ill. App. 618 at 620 (1909). See also *American Wire-Nail v. Gedge*, 96 Ky. 513, 29 S.W. 353 (1895); *Grant v. Ross*, 100 Ky. 44, 37 S.W. 263 (1896).

¹³ *Cummings v. People*, 211 Ill. 392, N.E. 1031 (1904). See also *Hopkins v. Roseclaire Lead Co.*, 72 Ill. 373 (1874); *Sterling-Midland Coal Co. v. Coal Co.*, 336 Ill. 586, 168 N.E. 655 (1929).

¹⁴ *Bloom v. Vehon Co.*, 341 Ill. 200, 173 N.E. 270 (1930); *Sellers v. Greer*, 172 Ill. 549, 50 N.E. 246 (1898), where the court quotes from *Cook, Stockholders* (3rd ed.), § 709: "Although one person owns a majority of the stock, or all of it, or all but two shares, he does not in consequence thereof acquire the right to act for the corporation, or as the corporation, independently of the directors. One person may own all the stock, and yet the existence, relations and business methods of the corporation continue. A single stockholder cannot make a contract for and in the name of the corporation which shall have any binding force or validity, except by subsequent ratification or adoption in the regular manner."

point out, as have the state decisions, that this allowance of informal dividends will only be applied where the division is made from the profits of the corporation and where no rights of creditors intervene.¹⁵

The facts show clearly that the withdrawals in the instant case came not merely from the profits of the corporation but from the sum designated as paid-in surplus and representing the value of corporate property. Under the corporation act in force in 1924¹⁶ and until 1933,¹⁷ paid-in surplus was part of the capital and not available for dividends.¹⁸ There can be no doubt that the loss of this sum was detrimental to the bondholders.

Thus it would seem that the factual situation of the instant case is not one to which the rule of informal dividends should be applied. Particularly is this true insofar as the money taken by the defendant represented capital or assets other than profits.

E. R. BERNSTEIN

DEEDS — VALIDITY OF CONDITIONS — WHETHER GRANTOR'S RESERVATION OF POSSIBLE EMINENT DOMAIN AWARDS IS VOID AS RESTRAINT ON ALIENATION.

—The Court of Appeals of New York in *Application of Mazzone*¹ considers a unique aspect of the ripe old doctrine that any restraint in a fee simple deed on the right of alienation of the property conveyed is void, holding that a clause in a deed reserving to the grantor the proceeds to be awarded in contemplated eminent domain proceedings does not constitute such a restraint on the grantee's right of alienation.

At the time of the making of the deed, the proper authorities of the City of New York had adopted and filed in public office a map of the section of the Bronx wherein lay the land, showing the street on which this property fronted to be fifty feet wide but indicating that the street was to be widened by the acquisition of a twenty-five foot strip from each side

¹⁵ In re Haas Co., 131 F. 232 at 234 (1904): "Dividends mean the division not of capital and assets as such, but of earnings; and a final division of capital and assets means that the corporation will invite no further credit. Under the name of dividends there can be no lawful division of assets and capital that would impair the rights of creditors; and so long as the corporation is a going concern, there can be no lawful division of capital and assets that would diminish the security upon which continuing or future credit will be presumably based. . . . Unless shareholders may invade, at will, the capital and assets of the corporation, appropriating them with impunity to the payment of their individual debts, the transaction complained of by the trustee cannot be sustained."

¹⁶ Ill. Rev. Statutes 1923, Ch. 32, § 23.

¹⁷ The act now in force provides that dividends may be distributed out of paid-in surplus, but only on shares having a preferential right to receive dividends. Ill. Rev. Stat. 1937, Ch. 32, § 157, sub-sec. 41 (b).

¹⁸ *Johnson v. Canfield-Swigart Co.*, 292 Ill. 101, 126 N.E. 608 (1920), the court saying, "Our statute prohibits the payment of any dividend when a corporation is involvent or when such payment would diminish the amount of its capital stock. . . . The question has not heretofore been passed on in this State. Questions between stockholders and corporations have usually been considered under the doctrine that the property of a corporation is property held in trust as to creditors. . . ."

¹ 22 N.E. (2d) 315 (N.Y., 1939).

of the street. This map being on file constituted notice of the proposed condemnation to all parties interested in the land.

The land was conveyed by Mazzone, one of the present claimants to the proceeds of the eminent domain award, under a fee simple deed reciting that the grantor expressly reserved to himself all rights to whatever award might be made in connection with the widening of the street. The property subsequently passed by several mesne conveyances, each deed including the clause setting out Mazzone's right to the condemnation proceeds, until it reached the Vitabel Realty Company. Then the property was conveyed to Amanda Hjorth, another claimant in this case, under a deed purporting to convey to her all right to any award which might be made pursuant to the condemnation.

The court disposes of Amanda Hjorth's claim on the sound basis of estoppel² and then turns to consider the more interesting problem of the restriction imposed in the earlier deed of Mazzone—whether or not it amounted to a restraint on the free right of alienation.

The Appellate Division had held that it was such a restraint, that it was void because unconstitutional under Article 1, Section 14, of the New York Constitution,³ which says, "All fines, quarter-sales, or other like restraints upon alienation, reserved in any grant of land hereafter to be made shall be void." The Appellate Division's decision sees the restriction as repugnant to the estate granted and as impeding free alienation of property.

The Court of Appeals, however, in reversing that opinion said that the restriction contained in this deed was not such a restraint as is voided by the constitution, inasmuch as the alienation contemplated in this deed was not a voluntary alienation such as the rule on restraint of alienation was intended to protect, but was instead involuntary,⁴ amounting to no more than a submission to the well-established power of the sovereign to take property within its jurisdiction upon payment of fair compensation.⁵ The court was treading on sure ground when it said that condemnation is a

² Amanda Hjorth had notice of the claim of the original grantor, Mazzone, because she had joined in one of the mesne conveyances of the land in which Mazzone's right to the proceeds had been set out.

³ The section of the New York Constitution quoted is but an embodiment of the common law rule voiding restraints on the alienation of property.

⁴ The court, in speaking of condemnation proceedings as effecting an involuntary alienation, does not intend to place eminent domain in the same category with creditor's process. It is generally accepted that the prohibition of restraints on alienation includes involuntary alienation in the latter sense; a fee simple deed cannot remove the property conveyed from being reached for the grantee's debts and obligations. See 80 A.L.R. 1007. For cases holding that the rule of restraint on alienation applies alike to voluntary and involuntary alienation (creditor's process), see *Jones v. Port Huron Engine & Thresher Co.*, 171 Ill. 502, 49 N.E. 700 (1898); *Davis v. Davis*, 78 N.Y.S. 899 (1902); *Ricks v. Pope*, 129 N.C. 52, 39 S.E. 638 (1901); *Breinig v. Smith*, 267 Pa. 207, 110 A. 285 (1920).

⁵ See *Litchfield & M. Ry. Co. v. Alton & S.R.R.*, 305 Ill. 388, 137 N.E. 248 (1922), wherein the court says that eminent domain is the power of a sovereign to take private property within its jurisdiction for public use without the owner's consent.

compulsory taking of a fee under an inherent right of sovereignty and is not a voluntary sale.⁶

But does that fact remove a reservation of the right to condemnation proceeds from the rule on restraint of alienation? There are no cases directly in point, but tracing the rule down to its origin indicates that the decision of the Court of Appeals is sound in theory.

Two somewhat divergent principles of law are offered as bases for the rule of restraint on alienation. One, springing from the words of Coke and Littleton and propounded by Chancellor Kent,⁷ sets out that ownership in fee simple should be complete and absolute, that one of the principal incidents to a fee is alienability, and that any restraint on that right of alienability is repugnant to the very nature of the fee and consequently void. The logical extension of this doctrine is that any provision in a deed, the legal effect of which is to deprive the owner of a right, power, privilege, or immunity which he would normally have as an incident to his fee, is in some degree repugnant to the fee and an impediment to alienation. Whereas it is the general rule in all jurisdictions that a clear restraint on the right of alienation is void, certain states have gone so far as to say that *any* restraint, however slight, is void on this basis of repugnancy.⁸

The other well-defined theory advanced in support of the rule of restraints on alienation, as set out in Gray's work on that subject,⁹ is that the rule rests on sound public policy rather than on some antedated doctrine of technical common law. The doctrine of repugnancy, says Gray, is insufficient justification for a rule that is as determinative of rights in modern law as is this rule. Instead it is the public interest in the necessity for freedom of commerce that gives strength to the rule. Says Gray, "The policy of the law is that property should not be taken out of commerce."¹⁰ Courts accepting this latter theory permit themselves a wider discretion in considering various restraints and restrictions,¹¹ whereas decisions

⁶ *People v. Adirondack Ry. Co.*, 160 N.Y. 225, 54 N.E. 689 (1899); *People ex rel. Burhans v. City of New York*, 198 N.Y. 439, 92 N.E. 18 (1910); *In re Board of Water Supply of City of New York*, 277 N.Y. 452, 14 N.E. (2d) 789 (1938); *Kahlen v. State*, 223 N.Y. 383, 119 N.E. 883 (1918); *Chicago, B. & Q. R. Co. v. Cavanagh*, 278 Ill. 609, 116 N.E. 128 (1917); *Limits Industrial R. Co. v. American Spiral Pipe Works*, 321 Ill. 101, 151 N.E. 567 (1926), holding that property is always held subject to the right of eminent domain.

⁷ J. Kent, *Commentaries on American Law*, IV, 131.

⁸ See Richard E. Manning, "The Development of Restraints on Alienation Since Gray," 48 *Harv. L. Rev.* 373 (1935), noting Michigan and California as being two states adhering closely to the repugnancy doctrine.

⁹ J. C. Gray, *Restraints on the Alienation of Property* (Boston Book Co., Boston, 1895, 2d ed.).

¹⁰ J. C. Gray, *The Rule Against Perpetuities* (Little, Brown & Co., Boston, 1915, 3rd ed.) §§ 275-77.

¹¹ Well-reasoned opinions voiding certain restraints as being subversive to public policy: *Davis v. Hutchinson*, 282 Ill. 523, 118 N.E. 721 (1918); and *Morse v. Blood*, 68 Minn. 442, 71 N.W. 682 (1897).

incorporating the repugnancy doctrine should, and do, scrutinize the deed more closely for restrictions.¹²

Of the many types of restraints dealt with in the cases and in texts¹³ the group most closely aligned with the instant case is that requiring that upon alienation of the land a specified portion of the purchase price be paid to some designated individual—historically termed quarter-sales, tenth-sales, etc. Such a provision is admittedly a serious deterrent to alienation, particularly if payment be required upon each and every transfer. Provisions of this nature have been held invalid whether applicable to every transfer¹⁴ or to only the first,¹⁵ but no case has arisen where the sale concerned was under condemnation proceedings rather than being voluntary.

The New York Court of Appeals in awarding the proceeds of the eminent domain decree to Mazzone, the grantor, relied not on the ivy-bound common law doctrine of repugnancy but on the more modern and supportable doctrine of public policy, looking beyond the technical words of the conveyance to the practical effect of the clause. The court seems to feel that "since the objection to a restraint upon alienation is grounded on the social and economic disadvantages resulting therefrom, the validity of such a restraint should depend upon its actual effect on transfer, and not upon mere matters of form having no relation to such effect."¹⁶ In the instant case, the restraint complained of actually imposed no ill effect on the freedom of alienation, as is best evidenced by the fact that the property was conveyed several times in a ten-year period with no apparent inconvenience.

Looking again at the practical effect of the restriction, the court intimates that inasmuch as all parties participating in the various conveyances knew of the proposed condemnation proceedings, the consideration for each transfer took into allowance the fair value of the twenty-five foot strip in question. Still looking to the practical side of the problem, the court points out that Mazzone never attempted to exercise any degree of

¹² Cases following the repugnancy theory in voiding restraints: *Department of Public Works and Buildings v. Porter*, 327 Ill. 23, 158 N.E. 366 (1927); *Grems v. Parsons*, 149 N.Y.S. 577 (1914); *Kessner v. Phillips*, 189 Mo. 515, 88 S.W. 66 (1905); *De Peyster v. Michael* 6 N.Y. 467, 57 Am. Dec. 470 (1852). California, Georgia, Montana, North Dakota and South Dakota have by statute prohibited restrictions repugnant to the estate granted.

¹³ A. M. Kales, *Estates, Future Interests and Illegal Conditions and Restraints in Illinois* (Callaghan and Co., 2d ed. 1905); H. T. Tiffany, *Landlord and Tenant* (Callaghan and Co., Chicago, 1912); C. G. Tiedeman, *Real Property* (Thomas Law Book Co., St. Louis, 1906, 3rd ed.); James Kent, *Commentaries on American Law* (Little, Brown, & Co., Boston, 1873, 12th ed.).

¹⁴ *De Peyster v. Michael*, 6 N.Y. 467, 57 Am. Dec. 470 (1852); *Overbagh v. Patrie*, 8 Barb. 28 (1850), aff'd 6 N.Y. 510 (1852); but for an earlier New York case, contra, holding it valid, see *Jackson v. Schutz*, 18 Johns. (N.Y.) 174 (1820).

¹⁵ *In re Elliott* [1896], 2 Ch. 353; *Weiting v. Billinger*, 3 N.Y.S. 361 (1888); *Dunlop v. Dunlop's Ex'rs.*, 144 Va. 297, 132 S.E. 351 (1926).

¹⁶ Merrill I. Schnebly, "Restraints Upon the Alienation of Legal Interests," 44 *Yale L. J.* 961 at 981, 1186, 1380.

control over the twenty-five foot strip nor, indeed, could he rightfully have done so at any time after his conveying the land.

The court properly concludes that this clause merely gave Mazzone a right to the proceeds if and when a forced sale came about and in no way impeded alienation of the property nor did it take the property out of commerce so as to constitute an unconstitutional restraint on alienation.¹⁷

J. C. BERGHOFF

DESCENT AND DISTRIBUTION—CONVEYANCES IN FRAUD OF HEIRS—RESERVATION OF CONTROL DURING LIFE BY HUSBAND AS ALLOWING WIDOW TO TAKE STATUTORY SHARE IN PROPERTY AT HIS DEATH.—Gustav Krause, a married man, established an account in a New York savings bank in his own name as trustee for his daughter.¹ Then he deeded certain real estate to his sons, reserving to himself for his lifetime "the use, rents and profits of said premises." This was all done in order that Mrs. Krause would be deprived of her statutory share in the property owned by her husband at his death. After Gustav's demise, the widow filed suit to set aside the above transactions on the ground that they constituted a fraud on her rights. The New York Supreme Court held that the circumstance of the husband's control over the property during his lifetime, especially where coupled with an intent to defeat the widow's rights, warranted the relief requested.²

Many jurisdictions have seen fit to substitute for common law dower a right in property which the deceased spouse owned at his death.³ Some jurisdictions have given an option to the surviving spouse to take either dower or such an interest as is described above.⁴ Since the statutory right is dependent upon ownership of property by the deceased at the time of his death, opportunity for abuse has been presented by the use of inter

¹⁷ In *Colonial Trust Co. v. Brown*, 105 Conn. 261, 135 Atl. 555 (1926), the court refers to Mr. Gray's language where he says that in order for the restraint to be valid the property must not be taken out of commerce.

¹ The result of this transaction was to establish a trust for the daughter which was revocable until the settlor's death by means of withdrawals from the account but which became irrevocable at the settlor's death. See *In re Totten*, 179 N.Y. 112, 71 N.E. 748, 70 L.R.A. 711 (1904).

² *Krause v. Krause*, 13 N.Y.S. (2d) 812 (1939).

³ See *Stewart v. Stewart*, 5 Conn. 317 (1824); *Farrell v. Puthoff*, 13 Okla. 159, 74 P. 96 (1903).

⁴ See Ill. Rev. Stat. 1939, Ch. 3, § 162, which reads: "The intestate real and personal estate of a resident decedent and the intestate real estate in this state of a nonresident decedent after all just claims against his state are fully paid, descends and shall be distributed as follows: First when there is a surviving spouse and also a descendant of the decedent: (a) to the surviving spouse one-third of the personal estate and one-third of each parcel of real estate of which the decedent died seized and in which the surviving spouse does not perfect his right to dower in the manner provided in Section 19 hereof. . . ." (italics supplied) § 171 states that "the surviving spouse of a decedent who dies after the effective date of this Act is barred of dower unless he perfects his right thereto by filing during his lifetime at the time and place provided for herein a written instrument describing the real estate, signed by the surviving spouse, and declaring his intention to take dower therein."

vivos transfers to defeat the rights of the survivor. Whenever a case involving such a transfer and affecting the rights of the wife is presented, the courts have been influenced by two desires: (1) to protect the widow;⁵ and (2) to promote unhampered alienation of property.⁶ Between these two shoals, the judicial helmsmen have steered three distinct courses.

One group of cases holds that intent to deprive the widow of her statutory share will render an inter vivos conveyance void.⁷ The doctrine has been criticized on the grounds that proof of a mental state is always difficult and that, therefore, the widow is not adequately protected.⁸ This cannot be denied, but it is interesting to note that this difficulty of proof has been met by some courts by the indulgence of a presumption of wrongful intent from the very fact of the gift.⁹ The burden of convincing that there was no fraud is thereby placed upon those seeking to maintain the validity of the transfer, and thus the policy of protection of the widow is preserved.

Some courts take a view more unfavorable to the widow and support the transfer as long as title really passes and as long as the conveyance is not a mere mask for the purpose of enabling the husband to remain owner during his lifetime, while vesting an ostensible ownership in the donee which is to ripen into actual ownership upon the husband's death.¹⁰

⁵ A historical approach would indicate that the same considerations do not prevail in regard to the husband's interest in his wife's property. Modern authority on the point is lacking. For a discussion of the interests of the husband or wife in the property of the deceased spouse see Holdsworth, *History of English Law*, III, 185-197. See also Pollock and Maitland, *History of English Law*, II, 399-436.

⁶ See *Stewart v. Stewart*, 5 Conn. 317 (1824).

⁷ *Nichols v. Nichols*, 61 Vt. 426, 18 A. 153 (1889); *Martin v. Martin*, 48 Tenn. 644 (1870); *Payne v. Tatem*, 236 Ky. 306, 33 S.W. (2d) 2 (1930); *Thayer v. Thayer*, 14 Vt. 107, 39 Am. Dec. 211 (1842); *Manikee v. Beard*, 85 Ky. 20, 2 S.W. 545 (1887); *Smith v. Smith*, 22 Colo. 480, 46 P. 123, 34 L.R.A. 49 (1896); *Bodner v. Feit*, 286 N.Y.S. 814 (1936). The intent test was also adopted in a situation where the only effect of the conveyance was to defeat the right of the wife to elect to take her statutory interest in lieu of dower, in the case of *Newton v. Newton*, 162 Mo. 173, 61 S.W. 881 (1901). The court stated: "So that it will be seen that the ability or inability of a husband to defeat dower by conveying away his lands is not the basis, in either instance, for equitable interference. The only basis for that consists in the animus which prompts the conveyance." This latter rule was rejected in *Blankenship v. Hall*, 233 Ill. 116, 122 Am. St. Rep. 149, 84 N.E. 192 (1908).

⁸ 23 Cornell L. Q. 457 at 462.

⁹ *Martin v. Martin*, 48 Tenn. 644 (1870); *Payne v. Tatem*, 236 Ky. 306, 33 S.W. (2d) 2 (1930); *Nichols v. Nichols*, 61 Vt. 426, 18 A. 153 at 154 (1889): "The intent to defeat the marital rights of the oratrix by both grantor and grantees in the deed in question is necessarily presumed from their knowledge that such rights would be defeated by the conveyance. Both are presumed to have intended the natural results of their acts."

¹⁰ *Stewart v. Stewart*, 5 Conn. 317 (1824): "Was the deed fraudulent, as relative to Mr. Stewart? This depends entirely on the right, which she had to the estate conveyed, anterior to the death of her husband. If she had no right, which the law recognizes, then the delivery of the deed could be no fraud on her right, that is, no fraud on a nonentity. By the *English* law, the right to dower originates on the marriage; but by our law, it takes its origin at the husband's death." See also *Farrell v. Puthoff*, 13 Okla. 159, 74 P. 96 (1903); *Jones v. Somerville*, 78 Miss.

The test employed by these courts is the intent of the donor to divest himself of ownership,¹¹ regardless of any intent to defeat the widow. This doctrine obviously places emphasis on freedom of alienation of property, tempered by the policy of the statute of wills.

The third view, represented by a few decisions¹² and recommended by some legal theorists,¹³ seems to stand on middle ground. If the donor conveys his entire interest, intent to deprive the widow is not material, and the transfer is valid. To this extent, then, is the alienation of property facilitated. If the donor retains the use or control of the property during his life, the bona fide transfer of ownership or title is immaterial, and the transfer is invalid. Thus the policy of the protection of the widow is furthered. Just how large an interest must be retained by the grantor to defeat the conveyance has not been authoritatively determined.

The recent case of *Newman v. Dore*,¹⁴ decided in the New York Court of Appeals, by invalidating a trust because of control retained by the settlor-husband during his lifetime and by refusing to overrule prior New York decisions¹⁵ upholding identical trusts under other circumstances, seemed to point the way toward the third doctrine discussed. The instant case seems to have accepted the course indicated by the Court of Appeals, but it is noteworthy that the opinion was bolstered by a reference to the decedent's intent to deprive his widow, inasmuch as this factor was expressly declared to be immaterial in the *Newman* decision.¹⁶

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269, 84 Am. St. Rep. 627, 28 S. 940 (1900); *Phillips v. Phillips*, 30 Colo. 516, 71 P. 363 (1903); *Small v. Small*, 56 Kan. 1, 42 P. 323 (1895), 54 Am. St. Rep. 581, 30 L.R.A. 243 (1895); *Lines v. Lines*, 142 Pa. 149, 21 A. 809, 24 Am. St. Rep. 487 (1891); *Beirne v. Continental-Equitable Trust Co.*, 307 Pa. 570, 161 A. 721 (1932).

¹¹ *McGee v. McGee*, 26 N.C. 105 (1843); *Smith and wife v. Wm. Hines, adm'r*, 10 Fla. 258 (1863); *Walker v. Walker*, 66 N.H. 390, 31 A. 14 (1891); *Blodgett v. Blodgett*, 266 Ill. App. 517 (1932).

¹² *Brownell v. Briggs*, 173 Mass. 529, 54 N.E. 251 (1889). Justice Holmes, in *Leonard v. Leonard*, 181 Mass. 458, 63 N.E. 1068 (1902), states: "In *Brownell v. Briggs*, the conveyance was a voluntary conveyance unrecorded and left in the grantor's possession, which reserved to the grantor not only the right to use and occupy the land as he saw fit, but also the 'power and authority to sell or convey the said premises in fee simple or in mortgage, and to dispose of the proceeds as I shall see fit.' From the technical point of view such a conveyance does not quite take back all that it gives, but practically it does. . . . And the court decided that it was not enough to displace the right of the wife." See also *Newman v. Dore*, 275 N.Y. 371, 9 N.E. (2d) 966, 112 A.L.R. 643 (1937); *Poole v. Poole*, 96 Kan. 84, 150 P. 592 (1915); *Hayes v. Lindquist*, 22 Ohio App. 58, 153 N.E. 269 (1926).

¹³ 20 Cornell L. Q. 381; 23 Cornell L. Q. 457.

¹⁴ 275 N.Y. 371, 9 N.E. (2d) 966, 112 A.L.R. 643 (1937).

¹⁵ *Van Cott v. Prentice*, 104 N.Y. 45, 10 N.E. 257 (1887); *Hammerstein v. Equitable Trust Co. of New York*, 209 N.Y. 429, 103 N.E. 706 (1913).

¹⁶ "Motive or intent is an unsatisfactory test of the validity of a transfer of property." *Newman v. Dore*, 275 N.Y. 371, 9 N.E. (2d) 966 at 968, 112 A.L.R. 643 (1937). It is interesting to note that the court speaks in terms of the doctrine which permits defeat of the wife's interest as long as technical title or ownership is intended to pass, but reaches a contrary conclusion by admitting that an identical trust in another situation would probably be upheld.

JURY — RIGHT TO TRIAL BY JURY — WHETHER PRESENCE OF WOMEN ON JURIES IMPAIRS THE CONSTITUTIONAL RIGHT TO TRIAL BY JURY.—For the first time since 1818 when Illinois was admitted to statehood, women in this state are eligible for jury service.¹ The Illinois Supreme Court in a recent decision² granted a writ of mandamus compelling the jury commissioners of Cook County to add the names of women to their lists, in accordance with an act³ of the General Assembly making women eligible for jury service.

Washington, in 1911, was the first state to extend the duty of jury service to women. Kansas followed in 1912. Then with the passage of the nineteenth amendment to the United States Constitution, a group of states decided that making women electors automatically made them eligible for jury service.⁴ The Illinois court,⁵ as well as those of numerous other jurisdictions,⁶ reached a contrary conclusion as to the effect of the suffrage amendment, holding that there is no relation between the right to vote and the duty to serve on a jury when called, and in dictum indicated that a statute would be necessary to make women eligible. In 1929, the Illinois legislature passed an amendment with a referendum clause attached. A great majority of the voters approved the change, and in some counties women served on juries for a few months, but the Supreme Court held the act invalid because of the referendum clause.⁷ In May, 1939, Illinois following twenty-four of the other states amended the jury law by inserting the words "of each sex,"⁸ and the Illinois Supreme Court in the instant case decided that the amendment did not abridge the constitutional guarantee to a right to a trial by jury as heretofore enjoyed.⁹

The defendants contended that the act was unconstitutional on the grounds that it violated Section 5 of Article 2 of the Illinois Constitution, which provides that "the right of trial by jury as heretofore enjoyed, shall

1 Jury service has been defined by our courts as a duty imposed by the law making power. It is an incident of citizenship. In *Bragg v. The People*, 78 Ill. 328 (1875), the court said, "All citizens owe the duty of serving on juries, when properly selected under laws made for that purpose, for precisely the same reason they owe the duty of bearing arms in defense of the government, when its existence is menaced by violence. It is necessary to its existence, and to their protection in the enjoyment of the rights secured by government. . . . [Therefore,] the legislature shall be at liberty to perfect it from time to time, as experience shall justify, to the end that honesty and efficiency shall be brought into the jury box."

2 *People ex rel. Denny v. Traeger*, 372 Ill. 11, 22 N.E. (2d) 679 (1939).

3 Ill. Rev. Stat. 1939, Ch. 78, § 25.

4 *Commonwealth v. Maxwell*, 271 Pa. 378, 114 A. 825, 16 A.L.R. 1134 (1921); *State v. Walker*, 192 Ia. 823, 185 N.W. 619 (1921); *People v. Barltz*, 212 Mich. 580, 180 N.W. 423, 426, 12 A.L.R. 520 (1920); *State v. Bray*, 153 La. 103, 95 So. 417 (1923).

5 *People ex rel. Murray v. Holmes*, 341 Ill. 23 at 28, 173 N.E. 145, 71 A.L.R. 1327 (1930); *People ex rel. Fyfe v. Barnett*, 319 Ill. 403 at 407, 150 N.E. 290 (1925).

6 *In re Grilli*, 179 N.Y.S. 795 (1920); *State v. Kelley*, 39 Ida. 668, 229 P. 659 (1924).

7 *People ex rel. Thompson v. Barnett*, 344 Ill. 62, 176 N.E. 108 (1931).

8 Ill. Rev. Stat. 1939, Ch. 78, § 25.

9 *People ex rel. Denny v. Traeger*, 372 Ill. 11, 22 N.E. (2d) 679 (1939).

remain inviolate;¹⁰ but the trial of civil cases before justices of the peace by a jury of less than twelve men may be authorized by law."¹¹ Under the prevailing view, the phraseology, "as heretofore enjoyed," is held to relate only to the kinds of cases triable by jury under the English common law and under our constitutions of 1818 and 1848.¹² What is meant by a jury trial is not defined by our constitution, but the Illinois Supreme Court in *People v. Kelly*¹³ reaffirmed the essential elements to be (1) twelve, (2) impartial, (3) qualified jurors, (4) who should unanimously decide the facts in controversy, (5) under the direction and superintendence of a judge. The only question raised in the instant case was whether or not a woman could be qualified.

At common law, women were only permitted to serve on juries in one instance, upon the writ *de ventre inspiciendo*, which issued for the purpose of determining pregnancy.¹⁴ Hence it might be argued that the right to a trial by jury "as heretofore enjoyed" is a right to be tried by a jury of men. However, qualifications have never been held to constitute one of the fundamental requisites of jury trial which are not subject to change by the legislature.¹⁵ Thus personal knowledge of the facts of the case,¹⁶ land ownership,¹⁷ and citizenship¹⁸ have been removed as qualifications. On the other hand, property ownership has been validly imposed as a qualification.¹⁹ In this connection, it is interesting to note that a party has no right to a trial by a jury composed in any proportion of his own race,²⁰ although a deliberate exclusion of that race would be objectionable.²¹

¹⁰ Inviolable is defined by approved lexicographers to mean unhurt, uninjured, unpolluted, unbroken. Inviolable, says Webster, is derived from the latin word "inviolatus" which is defined by Ainsworth to mean not corrupted, immaculate, unhurt, "untouched." See *Flint River Steamboat Co. v. Roberts*, 2 Fla. 102, 48 Am. Dec. 178 at 184 (1848). Certainly there is nothing in the addition of women to juries to render the jury "inviolable."

¹¹ Ill. Const. 1870, Art. 2, § 5.

¹² *People v. Bruner*, 343 Ill. 146, 175 N.E. 400 (1931); *Echlin v. Superior Court*, 90 P. (2d) 63 at 67 (California 1939); *Gutierrez v. Gober*, 43 N. Mex. 146, 87 P. (2d) 437 (1939); *Research Hospital v. Continental Illinois Bank & Trust Co.*, 352 Ill. 510 at 521, 186 N.E. 170 (1933), holding that there is no constitutional guarantee that a question of fact concerning marriage be submitted to a jury. See also *Commonwealth v. Maxwell*, 271 Pa. 378, 114 A. 825, 16 A.L.R. 1134 (1921).

¹³ 347 Ill. 221 at 232 179 N.E. 898 (1931). See also *Lommen v. Minneapolis Gas-light Co.*, 65 Minn. 196, 68 N.W. 53 (1896).

¹⁴ *Cooley's Blackstone* (3rd ed.), IX, 395. In our own colonies, the jury system existed substantially as in England and the jury of women to decide the pregnancy question was known as the matron's jury.

¹⁵ *Brown v. State*, 62 N.J.L. 666 at 676, 42 A. 811 (1899), *Ex Parte Mana*, 178 Cal. 213, 172 P. 986, L.R.A. 191E 771 (1918); *People v. Merhige*, 219 Mich. 95, 188 N.W. 454 (1922).

¹⁶ *Holdsworth, History of English Law*, I, 317 et seq. The change from jurors with personal knowledge of the facts to modern jurors was a gradual development of the common law, involving no constitutional question.

¹⁷ *Kerwin v. People*, 96 Ill. 206 (1880). Here no constitutional issue is raised.

¹⁸ *People v. Collins*, 166 Mich. 4, 131 N.W. 78 (1911).

¹⁹ *People v. Cosmo*, 205 N.Y. 91, 98 N.E. 408. (1912).

²⁰ *Virginia v. Rives*, 100 U.S. 313 25 L. Ed. 667 (1880).

²¹ *Norris v. Ala.*, 294 U.S. 587 55 S. Ct. 579, 79 L. Ed. 1074 (1935).

Under the Illinois statute, persons are qualified who are (1) inhabitants of the town or precinct, not exempt from serving on juries, (2) of the age of twenty-one years or upwards, and under sixty-five years, (3) in the possession of their natural faculties and not infirm or decrepit, (4) free from all legal exceptions, of fair character, of approved integrity, of sound judgment, well informed, and who understand the English language.²² Therefore there is nothing in the qualifications act which excludes women.

It has been generally held in all jurisdictions that restrictions or amplifications of the elements of a jury trial may be made so long as they do not substantially impair the right itself.²³ The courts have jealously guarded the right,²⁴ but they have been liberal in permitting changes in procedure, in modes of trial, qualifications, and other details.²⁵

A further contention was made and rejected in the instant case that when the framers of the Constitution, in that portion of the provision which reads, "but the trial of civil cases before justices of the peace, by a jury of less than twelve men, may be authorized by law," used the word "men" they evinced an intention that all juries be composed of men only. The court, however, followed the holdings²⁶ construing similar provisions in other jurisdictions that "men" was used in its generic sense meaning mankind and thus including women.

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²² Ill. Rev. Stat. Ch. 78 § 2.

²³ *People v. Kelly*, 347 Ill. 221 at 232, 179 N.E. 898 (1931); *Boader v. State*, 201 Ala. 76, 77 So. 370 (1917).

²⁴ *Flint River Steamboat Co. v. Roberts*, 2 Fla. 102, 48 Am. Dec. 178 (1848).

²⁵ In *People v. Pierce*, 369 Ill. 172, 15 N.E. (2d) 845 (1938), the defendant was permitted to waive his right to be tried by a jury of twelve men, and where he does he can not question the procedure in review of his conviction if the waiver became effective through the consent of the government counsel, the sanction of the court, and the express and intelligent consent of the defendant. See also *Patton v. U.S.A.*, 281 U.S., 276, 50 S. Ct. 253, 74 L. Ed. 854, 70 A.L.R. 263 (1930). A defendant was held not to have been deprived of his constitutional right to a jury trial where the plaintiff filed a written demand for a trial by a jury of six and paid a six dollar fee. The defendant made a demand for a twelve man jury but failed to pay the additional fee as required by court rule, and as a result the case was tried by a jury of six. *Huber v. Van Schaack Mutual, Inc.*, 368 Ill. 142, 13 N.E. (2d) 179 (1938). A statute providing that the court in charging the jury shall only instruct as to the law of the case was held not to be a violation of the right of trial by jury. *People v. Kelly*, 347 Ill. 221 at 229, 179 N.E. 898 (1931). The constitutions of Oklahoma and Texas provide that three-fourths of the jury may render a verdict in criminal cases below the grade of a felony; and the constitution of Montana provides that in similar cases two-thirds of the jury may render a verdict. These provisions are held not to violate the right to trial by jury as guaranteed by the United States Constitution. *Dodd, State Government* (2d ed.), 285-286. In *People v. Gibbs*, 349 Ill. 83 at 92, 181 N.E. 628 (1932), a statute permitting the defendant to waive a trial by jury and elect to be tried by the judge alone was held not to impair the defendant's right to a trial by a jury.

²⁶ *Rackliffe v. Seal*, 36 Mo. 317 at 319 (1865); *People v. Baritz*, 212 Mich. 500, 180 N.W. 423, 12 A.L.R. 520 at 524 (1920); *State v. Seiler*, 106 Wis. 346, 82 N.W. 167 (1900); *Eichorn v. Missouri, K. & T. Ry. Co.*, 130 Mo. 575 at 589, 32 S.W. 993 (1895): "As to the criticism of the court's instruction because it defined negligence to mean the lack of such care and caution as reasonable and prudent 'men' would exercise under like circumstances, instead of 'women,' 'men' in this instruction, was generic, and embraced 'women'."

LANDLORD AND TENANT—INCUMBRANCES, TAXES, AND ASSESSMENTS—RIGHT OF LESSEE TO PAY RENT BY PAYING TAXES.—William Bromstedt, the owner of a tract of land, leased it to one Schoenfeld for a term of twenty-five years. Schoenfeld was to pay all the taxes on the property accruing during the term. Several years later, Bromstedt leased the property to the plaintiff. This second lease was to take effect at the termination of the first one and contained an implied covenant of quiet enjoyment. Thereafter, Schoenfeld defaulted in payment of the taxes, and when the plaintiff took possession there was a substantial delinquency. The county treasurer of Cook County then sought to have a tax receiver appointed to take over the property. Shortly thereafter, the reversioner attempted, under a forfeiture clause in the lease, to forfeit the plaintiff's interest for nonpayment of rent. The plaintiff filed a bill in equity to enjoin the appointment of the tax receiver and the forfeiture of the lease. "The complaint also sought sanction for the payment of delinquent taxes by the plaintiff and deduction of the amounts so paid from rents due and to become due under the leases." The plaintiff claimed that during its tenancy "on or about the first of each . . . month it made legal tender of the rent and kept its tender good" until the present litigation commenced, since which time it "has deposited the accruing rents with the clerks of the circuit and superior courts of Cook County under the provisions of orders entered in those courts. . . ." It was held by the trial court and affirmed by the Appellate Court of Illinois that the plaintiff was entitled to the relief requested.¹

The right of a lessee, in the absence of a provision in the lease, to pay his rent by paying taxes on the leased property is the chief point of interest in the case.² As a general rule, the retention of a debt is not justified by the creditor's breach of an obligation to the debtor, and the debtor may not consider his debt paid to the extent of the damages accruing to him as a result of the creditor's breach.³ And in such case, the debtor's remedy would be a suit against the creditor or a set-off, recoupment, or counterclaim to an action instituted by the creditor.⁴ Thus a breach of a covenant by a landlord would not, in and of itself, justify the tenant's retention, as a *pro tanto* payment of rent, of an amount equal to the damages sustained.⁵ However, in certain instances the right to pay rent by a satisfaction

¹ Sixty-third & Halsted Realty Co. v. Chicago City B. & T. Co., 299 Ill. App. 297, 20 N.E. (2d) 162 (1939).

² The propriety of equitable relief under the circumstances seems to have been settled by the case of Illinois Merchants Trust Co. v. Harvey, 335 Ill. 284, 167 N.E. 69 (1929), in which it was held that equity would relieve against a threatened forfeiture of a lease, since the demand of the lessor upon which his alleged right to forfeit was based was invalid. The element of the threatened appointment of a tax receiver in the instant case strengthens the plaintiff's request for equitable relief.

³ Williston, Contracts (Rev. ed.), III, 2503, § 887E.

⁴ *Idem.* For the difference between set-off, recoupment, and counterclaim, see Stegal v. Union Bank & Federal Trust Co., 163 Va. 417, 176 S.E. 438, 95 A.L.R. 582 (1934).

⁵ McNamara v. Dorey, 219 Mass. 151, 106 N.E. 592 (1914). See also Faylor v. Brice, 7 Ind. App. 551, 34 N.E. 833 (1893); Williston, Contracts (Rev. ed.), III, 2507, § 887F.

of the lessor's obligation to a third person or by the removal of an encumbrance against the leased property has been recognized by the courts.

Thus a tenant who actually paid⁶ the mortgagee of the property in order to prevent an eviction by the mortgagee who had threatened to "put the law in force" was deemed to have paid his rent.⁷ And a lessee who discharged an annuity which was an encumbrance upon the property in order to prevent a distress had a right to deduct from his rent the sum so paid.⁸ Likewise the payment by a sublessee of the sublessor's rent to the original lessor, even in the absence of an express demand by the latter,⁹ has been held to constitute payment to the sublessor.¹⁰ The instant case presents an application of the principle of the above cases to the situation in which a tenant pays taxes on the land.

There would seem to be no doubt but that the duty of paying the taxes in most situations is the duty of the owner of the land and not that of the lessee.¹¹ The tenant may assume the duty by express agreement,¹² and

⁶ *Hickman v. Machin*, 4 H. & N. 716, 157 Eng. Rep. 1023 (1859). This case indicates the necessity for actual payment by the following statement: "If notice is given and acted upon, it may be considered an answer to the claim for rent, in the same way as the payment of any other charge would be. But the defendant has not paid. . . ."

⁷ *Underhay v. Read*, 20 Q.B.Div. 209 (1887); *Johnson v. Jones*, 9 Ad. & E. 809, 112 Eng. Rep. 1421 (1839); "This is a plea . . . of payment; and the defect of the lessor's title is shown only as a medium of proof that the payment was for the benefit, and by reason of the default, of the lessor himself." But see *Alchorne v. Gomme*, 2 Bing. 54, 130 Eng. Rep. 225 (1824), seemingly contra. However the apparent holding of the *Alchorne* case that payment to the mortgagee was not payment of rent to the mortgagor is explained in a later case, *Pope v. Biggs*, 9 B. & C. 245, 109 Eng. Rep. 91 (1829), where the court said: "The case of *Alchorne v. Gomme* . . . is an authority the other way; but the pleadings in that case do not perhaps sufficiently raise the question . . . and . . . the attention of the Court seems to have been principally directed to the consideration of the effect of the alleged attornment by the tenant to the mortgagee. . . ."

⁸ *Taylor v. Zamira*, 6 Taunt. 524, 128 Eng. Rep. 1138 (1816): "The Plaintiff having so paid the annuity, has a right to deduct from his rent the sum so paid. . . ."

⁹ *Peck v. Ingersoll*, 7 N.Y. 528 (1852): "It is not necessary, that the headlandlord should distrain, or even demand the money, or commence or threaten a suit. The right to enforce his claim in this way will make the payment by the under-tenant compulsory, within the principles of the decisions." This language was approved in *Raubitscheck v. Semken*, 4 Abb. N.C. (N.Y.) 205n (1878).

¹⁰ *James v. Taylor*, 93 Ga. 282, 20 S.E. 309 (1893); *Carter v. Carter*, 5 Bing. 406, 130 Eng. Rep. 1118 (1829): "And the payment of ground-rent and land-tax may operate as payment of rack-rent growing due, as well as of rack-rent actually due." See also *Sapsford v. Fletcher*, 4 T.R. 511, 100 Eng. Rep. 1147 (1792).

¹¹ *Sevier v. Bonta*, 217 Ky. 835, 290 S.W. 683 (1927); *Hammon v. Sexton*, 69 Ind. 37 (1879); *Barry v. Frankini*, 287 Mass. 196, 191 N.E. 651 (1934).

¹² *Hart v. Hart*, 117 Wis. 639, 94 N.W. 890 (1903). See also *Finch v. Gilray*, 16 Ont. App. 484 (1889); *Los Angeles Land & Water Co. v. Consumers' Rock & G. Co.*, 3 Cal. (2d) 77, 43 P. (2d) 281 (1935); *Carlyle v. Bartels*, 245 Ill. App. 153 (1924), affirmed in 315 Ill. 271, 146 N.E. 192 (1925). Provisions which impose the duty upon the lessee are strictly construed, and where the lease specifically designates the taxes which the lessee is to pay, the doctrine of *expressio unius est exclusio alterius* applies. *Brainard v. New York Cent. R. Co.*, 242 N.Y. 125, 151 N.E. 152,

even in the absence of such agreement he must pay taxes assessed on improvements which he has made.¹³ "When . . . there is a lease of land owned by the state or a municipality, the reversion being exempt from taxation, the usufructuary interest alone is subject to tax in proportion to its value; and in the absence of agreement to the contrary, the tax necessarily falls upon the lessee."¹⁴ The same rule would apply where the tax was expressly laid upon the leasehold interest.¹⁵ But in most cases the primary duty is upon the landlord, owner of the land, and this fact is not changed by statutes which for the purpose of facilitation of collection place a duty upon the occupant of the land in addition to the duty of the owner.¹⁶

Where the owner's obligation to pay taxes has been discharged by his lessee so that the lien upon the property is removed, there would seem to be no dispute as to the existence of a cause of action against the owner.¹⁷ There can be no contention that the tenant was a mere volunteer in making the payment, since he was justified in protecting his interest from the tax lien.¹⁸ As a matter of fact, there is a presumption that the payment was made to prevent the sale of the land for the tax and to secure the benefit of the lease, even in the absence of actual or threatened proceedings to foreclose the lien.¹⁹

The right to pay rent in this unusual manner has been limited to cases where the tenant has removed an incumbrance on the land or has satisfied an obligation of the landlord to a third person.²⁰ Furthermore, the tenant must have acted under compulsion in order to protect his leasehold interest.²¹ And the lessee's act must have given him a cause of action

45 A.L.R. 751 (1926); *Young v. Illinois Athletic Club*, 310 Ill. 75, 141 N.E. 369, 30 A.L.R. 985 (1923); *Carlyle v. Bartels*, 245 Ill. App. 153 (1924), affirmed in 315 Ill. 271, 146 N.E. 192 (1925).

¹³ *Smith v. Sugar Creek Coal Co.*, 110 W.Va. 553, 158 S.E. 903 (1931); *Amoskeag Savings Bank v. Shell Eastern P. Products*, 192 A. 149 (N.H., 1937); *Bournique v. Williams*, 225 Ill. App. 12 (1922).

¹⁴ *Hammond Lumber Co. v. City of Los Angeles*, 12 Cal. App. (2d) 277, 55 P. (2d) 891 (1936). See also *Phila., Wilm. and Balt. R. R. Co. v. Appeal Tax Court of Balt. City*, 50 Md. 397 (1878).

¹⁵ See *Hammond Lumber Co. v. City of Los Angeles*, 12 Cal. App. (2d) 277, 55 P. (2d) 891 (1936).

¹⁶ *Hammon v. Sexton*, 69 Ind. 37 (1879); *Barry v. Frankini*, 287 Mass. 196, 191 N.E. 651 (1934); *Dawson v. Linton*, 5 Barn. & Ald. 521, 106 Eng. Rep. 1281 (1822). The constitutionality of such statutes was decided in *Vermont & Canada R. Co. v. Vermont Central R. Co.*, 63 Vt. 1, 21 A. 262, 10 L.R.A. 562 (1890), writ of error dismissed in 159 U.S. 630, 16 S. Ct. 113, 40 L. Ed. 284 (1895).

¹⁷ *Graham v. Allsopp*, 3 Ex. 186, 154 Eng. Rep. 809 (1848); *Rogers v. McKenzie*, 73 N.C. 487 (1875); *Sevier v. Bonta*, 217 Ky. 835, 290 S.W. 683 (1927); *Carlyle v. Bartels*, 245 Ill. App. 153 (1924), affirmed in 315 Ill. 271, 146 N.E. 192 (1925).

¹⁸ *Carlyle v. Bartels*, 245 Ill. App. 153 (1924), affirmed in 315 Ill. 271, 146 N.E. 192 (1925).

¹⁹ *Rogers v. McKenzie*, 73 N.C. 487 (1875).

²⁰ *Boodle v. Campbell*, 7 Man. & G. 386, 135 Eng. Rep. 161 (1844).

²¹ However, the very presence of an encumbrance which is paramount to the interest of the lessee constitutes a compulsion. This fact is generally enunciated by

against the landlord.²² These qualifications seem to place the right upon a quasi-contractual basis—the interesting point being the fact that under these circumstances, the rent is treated as actually having been paid.²³

W. L. SCHLEGEL

LICENSES—OCCUPATIONAL SALES TAX—WHETHER SALE OF CONTAINERS IS A RETAIL SALE.—In the New York case of *American Molasses Company v. McGoldrick*,¹ it was held that the sale of containers to a sugar refiner for use in the distribution of his products was a sale for resale and not a retail sale. The statute governing the point defined a retail sale as a sale to a customer or to any person for any purposes other than for resale in the form of tangible personal property.² The basis for decision was that the article retained its identity and was transmitted as tangible personal property together with its contents, and therefore was not consumed. Does the person who fills a container use or consume the container or does he sell it to the purchaser of the contents, who takes title to the container when he purchases the contents therein contained? The instant case adopts the latter alternative.

A majority of retail sales tax laws define retail sale as a "sale for use or consumption and not for resale." Some statutes define retail sale as a "sale for purposes other than for resale." The term "use or consumption" is a limitation on the power of the courts to construe the phrase "retail sale." It may compel the courts to assess the tax even though what would be commonly considered a wholesale sale is involved. The status of the seller as a wholesale or retail seller would seem to be immaterial under such a definition, the real test being use or consumption, irrespec-

the courts in the language of presumptions. See *Peck v. Ingersoll*, 7 N.Y. 528 (1852); *Raubitschek v. Semken*, 4 Abb. N.C. (N.Y.) 205n (1878); *Rogers v. McKenzie*, 73 N.C. 487 (1875).

²² "A tenant who has been compelled by a superior landlord or other incumbrancer having a title paramount to that of his immediate landlord, to pay sums due . . . may treat such payment as having been made in satisfaction . . . of rent due to his immediate landlord. . . . The existence of . . . a right of action [against the landlord] is the foundation on which the doctrine . . . rests. And where the payment . . . gives no right of action against the party suing for the rent, there the principle . . . does not apply." *Graham v. Allsopp*, 3 Ex. 186, 154 Eng. Rep. 809 (1848).

²³ *Sapsford v. Fletcher*, 4 T.R. 511, 100 Eng. Rep. 1147 (1792); *Johnson v. Jones*, 9 Ad. & E. 809, 112 Eng. Rep. 1421 (1839); *Finch v. Gilray*, 16 Ont. App. 484 (1889); *Carter v. Carter*, 5 Bing. 406, 130 Eng. Rep. 1118 (1829); *Stubbs v. Parsons*, 3 B. & Ald. 516, 106 Eng. Rep. 750 (1820); *Graham v. Allsopp*, 3 Ex. 186, 154 Eng. Rep. 809 (1848). See notes 7 and 22 supra.

While the courts have treated the rent as being paid under these circumstances, it is worthy of note that, under forcible entry and detainer actions, such matter is not a good defense, usually because of express terms in the statute. See 26 C.J. 841, § 90; *Moroney v. Hellings*, 110 Cal. 219, 42 P. 560 (1895); *Arnold v. Krigbaum*, 169 Cal. 143, 146 P. 423, Ann Cas. 1916D 370 (1915); *Truman v. Rodesch*, 168 Ill. App. 304 (1912); *Schumann Piano Co. v. Mark*, 208 Ill. 282, 70 N.E. 226 (1904).

¹ 22 N.E. (2d), 369 (N.Y., 1939). Two justices dissented.

² *Ibid.*

tive of whether the property is used or consumed in the place of business or in the home of the purchaser.³

In Michigan, the court, in the application of such a statute, felt compelled to hold sales to manufacturers to be retail despite a resolution of the legislature expressing its intention not to tax sales to manufacturers.⁴ The term "use or consumption" requires that property sold for resale must retain its identity as physical property in the process.⁵

The New York court, although it is not construing a "use or consumption" statute, lays down a rule that is entirely consistent with one. The construction of the New York statute does not dismiss the requirement that property be resold as tangible personal property to escape being a retail sale.⁶ Nor does a "use or consumption" statute require that all use be taxed.⁷

In Arkansas, the sale of wrapping paper, bags, and twine to a retailer is held to be a retail sale for use or consumption.⁸ The sale of boxes to a manufacturer as a container for his product resulting in a considerable increase in the price of the product is held to be a sale for resale.⁹ Other courts have held the two views inconsistent.¹⁰ The views are not necessarily inconsistent and find authority by implication in the dissenting opinion of *American Molasses Company v. McGoldrick*.¹¹

Arkansas prefers to distinguish and to rationalize the two situations as follows: Where the containers serve no practical utility to the manufacturer of the contents and increase substantially the price of the contents, the container is considered part of the product sold. The consumer buys "completed wrapped packages" of the product,¹² whereas, in the case of sales by a retailer, costs of the contents is "predetermined either by weight or count, without reference to the attributes of delivery."¹³

In Alabama, the sale of containers, whether to manufacturers, dis-

³ Warren v. Fink, 146 Kan. 716, 72 P. (2d) 968 (1937).

⁴ Boyer-Campbell Co. v. Fry, 271 Mich. 282, 260 N.W. 165, 98 A.L.R. 827 (1935).

⁵ Smith Oil & Refining Co. v. Department of Finance, 371 Ill. 405, 21 N.E. (2d) 292 (1939), involving the sale of core oil destroyed in the manufacturing process; Franklin County Coal Co. v. Ames, 359 Ill. 178, 194 N.E. 268 (1934), concerning the sale of coal to manufacturers; Boyer-Campbell Co. v. Fry, 271 Mich. 282, 260 N.W. 165, 98 A.L.R. 827 (1935).

⁶ Mendoza Fur Dyeing Works, Inc. v. Taylor, 272 N.Y. 275, 5 N.E. (2d) 818 (1936).

⁷ Revzan v. Nudelman, 370 Ill. 180, 18 N.E. (2d) 219 (1938).

⁸ Wiseman v. Arkansas Wholesale Grocers' Ass'n, 192 Ark. 313, 90 S.W. (2d) 987 (1936).

⁹ McCarroll v. Scott Paper Box Co., 195 Ark. 1105, 115 S.W. (2d) 839 (1938).

¹⁰ Birmingham Paper Co. v. Curry, 190 So. 86 at 88 (Ala., 1939); Durr Drug Co. v. Long, 188 So. 873 (Ala., 1939).

¹¹ 22 N.E. (2d) 369 (N.Y., 1939). The dissenting opinion noted the McCarroll case, but could not reach the same decision because of the factual differences; and it expressly noted that the appeal in the case before the court did not involve "smaller cotton bags of two-, five-, ten-, fifteen- and twenty-five-pound capacity with which the sacks or 'envelopes' [the larger sacks for distributive purposes] are filled."

¹² McCarroll v. Scott Paper Box Co., 195 Ark. 1105, 115 S.W. (2d) 839 (1938).

¹³ *Ibid.*

tributors, or retailers, is held to be a retail sale and subject to tax.¹⁴ In this view, the cost of containers is sustained by the packer as a service or overhead expense, regardless of its relation to the cost of the contents.

It is clear that no distinction can be made where there is a "use or consumption" statute simply on the basis that one is a "wholesale seller" and another is a "retail seller."¹⁵ Both wholesaler and retailer use containers for retention and distribution. Whether their use is sufficient to bring the sales of containers to them within the definition of retail sale is quite another matter. That they use the containers for retention and distribution of the contents is undeniable. But on the other hand the purchasers of the contents use the containers for retention, distribution, and storage of the contents, and it is generally the consumer of the contents who destroys the subsequent utility of the container. The situation in *McCarroll v. Scott Paper Box Company*,¹⁶ illustrates a use of small containers by a manufacturer which have no utility whatsoever to the manufacturer for retention and distribution.

The courts give two reasons why a sale of containers to manufacturers, distributors, or retailers should be considered a retail sale; (1) it is they who use the product for the purpose to which it is adapted,¹⁷ and (2) the transmission of the containers with the contents to the purchaser thereof is a service or "overhead expense," coming out of his profits.¹⁸ But it seems that this view is a needless digression from the path of legislative intention. First, since the container is manufactured for retention, distribution, and storage, both the filler of the container and the purchaser of the contents "use" the container. "The user or consumer contemplated by the statute is the ultimate user or consumer who will use the articles as long as they last, or until he desires to do away with them."¹⁹ Second, the treatment of the expense of containers as overhead is an attempt to vitiate the idea that there is a sale. One element of sale is assuredly present—passage of title to the container to the purchaser of the contents. That cost of the contents is increased by the "overhead" is apparent in the light of modern cost-accounting. But since the cost is often infinitesimal in relation to total cost of contents, there is no visual increase in price, which explains, perhaps, why cost is "predetermined without reference to the attributes of delivery" in the case of retail sales.²⁰ Hence

¹⁴ *City Paper Co. v. Long*, 235 Ala. 652, 180 So. 324 (1938); *Birmingham Paper Co. v. Curry*, 190 So. 86 (Ala., 1939); *Durr Drug Co. v. Long*, 188 So. 873 (Ala., 1939).

¹⁵ *Warren v. Fink*, 146 Kan. 716, 72 P. (2d) 968 (1937).

¹⁶ 195 Ark. 1105, 115 S.W. (2d) 839 (1938).

¹⁷ *McCarroll v. Scott Paper Box Co.*, 195 Ark. 1105, 115 S.W. (2d) 839 (1938), dissenting opinion.

¹⁸ *Warren v. Fink*, 146 Kan. 716, 72 P. (2d) 968 at 970 (1937); *City Paper Co. v. Long*, 235 Ala. 652, 180 So. 324 at 327 (1938); *Wiseman v. Arkansas Wholesale Grocers' Ass'n*, 192 Ark. 313, 90 S.W. (2d) 987 at 990 (1936).

¹⁹ *Revzan v. Nudelman*, 370 Ill. 180, 185, 18 N.E. (2d) 219 (1938); *Peoples Gas Light Co. v. Ames*, 359 Ill. 152, 194 N.E. 260 (1934).

²⁰ *McCarroll v. Scott Paper Box Co.* 195 Ark. 1105, 115 S.W. (2d) 839 (1938).

the decision in the American Molasses Company case would seem to be the better rule.

The Illinois Department of Finance applies the same rule.²¹ In view of *Revzan v. Nudelman*,²² defining the intention of the legislature, Illinois is not likely to reverse the present attitude of the Department of Finance.

R. RICHMAN

MORTGAGES—PERSONS ENTITLED TO REDEEM—WHETHER A CREDITOR OF ONE HAVING ONLY INCHOATE DOWER MAY REDEEM FROM FORECLOSURE SALE.—In the case of *Klein v. Mangan*¹ the Illinois Appellate Court has had occasion to pass upon the vexing problem of who may redeem from a judicial sale as a judgment creditor under Section 20 of the Illinois Judgment Act.² The facts of the case present the question: Where a husband has joined his wife in executing a promissory note and a trust deed conveying the wife's separate property as security for the note, may a judgment creditor of the husband redeem from a sale held pursuant to a foreclosure of the mortgage? The Appellate Court held that such a redemption should be restrained at the request of the purchaser at the foreclosure sale, stating

²¹ Rules relating to particular trades, etc. Revised 1938. Rule No. 1. "When used in this rule, the term 'containers' includes all containers, wrapping and packing materials, bags, twines, wrapping papers, gummed tapes, cellophane, boxes, bottles, drums, cartons, sacks or other packing, packaging, containing and wrapping materials in which tangible personal property may be contained.

"Where persons engaged in the business of selling containers sell the same to other persons for use by the purchasers in connection with shipping or delivering their own tangible personal property, or in connection with rendering services, or for personal or other uses, sales of such containers shall be deemed to be sales at retail, and the sellers thereof liable for payment of Retailers' Occupational Tax.

"If the purchasers of containers are engaged in the business of selling personal property contained in such containers to other persons, and title to such containers passes to such other persons together with title to the tangible personal property contained therein, then such containers shall be deemed to be sold for purpose of resale. [For example, a sale of fruit boxes to a packer who fills the boxes with fruit and resells the fruit in such boxes, is a sale of boxes for resale.] All containers shall be considered as being sold for resale if title thereto passes from the purchaser of such container to other persons along with tangible personal property sold and contained therein. . . .

"Paper napkins and towels, toilet tissues, drinking straws and paper cups or plates, are deemed to be sold at retail when sold to a purchaser for use in connection with the conduct of his business and not purchased for resale as such."

²² 370 Ill. 180, 18 N.E. (2d) 219 (1938). The court defines use as "a long continued possession and employment of a thing to the purpose for which it is adapted as distinguished from a possession and employment that is merely temporary or occasional. The user or consumer contemplated by the statute is the ultimate user or consumer who will use the articles as long as they last or until he desires to do away with them."

¹ 301 Ill. App. 203, 22 N.E. (2d) 269 (1939).

² Ill. Rev. Stat. 1939, Ch. 77, § 20. The section reads in part as follows: "If such redemption is not made, any decree or judgment creditor, his heirs, executors, administrators or assigns, may, after the expiration of twelve months and within fifteen months after the sale . . . redeem the premises. . . ."

that a judgment creditor may not redeem unless his judgment debtor has some interest in the land which is subject to execution and calling attention to the fact that the husband's dower interest was inchoate.

The court based its decision on a construction of Section 20 of the Judgment Act, previously mentioned, and on previous Illinois cases³ which, though not strictly in point, present analogous problems. In conclusion the court stated that these and other cases cited are "based upon the principle that a judgment creditor, to be entitled to redeem from a foreclosure sale, must have an execution which may be levied on some tangible interest in the land susceptible of sale under an execution." It is in this interpretation of the statute that the case seems to be somewhat open to criticism.

There was no right to redeem at common law and the right to redeem is, therefore, purely statutory.⁴ Redemption statutes, which are in derogation of the common law, although strictly construed to determine the classes that come within their provisions, are liberally construed to make them effective as to those within their provisions.⁵ While they are not to be extended beyond what the legislature has authorized or intended,

³ *Schroeder v. Bozarth*, 224 Ill. 310, 79 N.E. 583 (1906), gives some support to the plaintiff's theory. The husband and wife owned separate tracts of land which they included in a joint mortgage, which was subsequently foreclosed. The lands were sold as a unit and a judgment creditor of the husband redeemed all of the lands. It was held that the sheriff's deed conveyed only the husband's separate property and his life estate in his wife's property (the wife having died before the foreclosure) to the redemptioner. It should be noted, however, that this was a bill in chancery for partition, brought by the heirs of the wife against the remote grantee of the redemptioner. The right to redeem was not directly involved, and in fact the right to redeem had been vindicated more than 17 years before in an action of ejectment brought by the same parties prior to the death of the husband. *Bozarth v. Largent*, 128 Ill. 95, 21 N.E. 218 (1889).

In *Fisher v. Eslaman*, 68 Ill. 78 (1873), title to a tract of land was held by two tenants in common, who joined in a mortgage which was later foreclosed. Redemption was made by a judgment creditor of one of the tenants in common and it was held that only the interest of the tenant who was the judgment debtor was redeemed. Here again it should be noted that the controversy arose in an action of ejectment, brought by the redemptioner against the tenant in common who was not a judgment debtor.

The cases involving attempted redemptions by joint owners or their creditors are not strictly in point in the Klein case. Section 26 of the Judgment Act (Ill. Rev. Stat. 1939, Ch. 77, § 26) provides for partial redemptions by these parties and this has influenced the court in cases where joint owners or their creditors attempted to redeem the whole title. See *Donason v. Barbero*, 230 Ill. 138, 82 N.E. 620 (1907); *Sledge v. Dobbs*, 254 Ill. 130, 98 N.E. 243 (1912); *Schuck v. Gerlach*, 101 Ill. 338 (1882); *Carabelli v. Carabelli*, 266 Ill. App. 453 (1932).

⁴ 42 C. J. Mortgages § 2080, § 2105, 35 C. J. Mortgages § 104, and cases cited; *Hall v. American Bankers Insurance Co.*, 315 Ill. 252, 146 N.E. 137 (1925); *Peoria & Springfield Railroad Co., v. Thompson*, 103 Ill. 187 (1882); *Durley v. Davis*, 69 Ill. 133 (1873); *Littler v. People ex rel. Hargadine*, 43 Ill. 188, (1867).

⁵ 35 C.J. Mortgages § 106, 42 C.J. Mortgages § 2081, and cases cited; *Crowder v. Scott State Bank of Bethany*, 365 Ill. 88, 5 N.E. (2d) 387 (1936); *Schuck v. Gerlach*, 101 Ill. 338 (1882); *Whitehead v. Hall*, 148 Ill. 253, 35 N.E. 871 (1893); *Strauss v. Tuckhorn*, 200 Ill. 75, 65 N.E. 683 (1902); *Garden City Sand Co. v. Christley*, 289 Ill. 617, 124 N.E. 729 (1919); *Level v. Goosman*, 285 Ill. 347, 120 N.E. 758 (1918).

in apparent contrast it has been said that in case of doubt or ambiguity the construction should be in favor of the right to redeem, to the end that the debtor's property may pay as many of his debts as possible.⁶ In order for a creditor to redeem it is not necessary that his judgment be a lien upon the land involved.⁷

Returning to the Illinois statutes, Section 20⁸ of the Judgment Act states, "If such redemption is not made, any decree or judgment creditor . . ." may redeem. Two questions present themselves here. First, what is meant by "such redemption?" Section 18⁹ shows us that "such redemption" means a redemption by "any defendant . . . or any person interested in the premises, through or under the defendant." Looking again at Section 20, we note that "any decree or judgment creditor" may redeem and this raises the question as to whose judgment creditor is intended. Apparently the statute means a judgment creditor of one of the persons who are given the right to redeem by Section 18.

The Supreme Court of Illinois seems to have applied such an interpretation to the various sections of the Judgment Act in deciding most of the cases which have arisen in this field,¹⁰ but there are cases which tend to limit the effect of the statute.¹¹

Only a few cases need be mentioned in order to show who may redeem under Section 18 within the twelve month period. Of course the mortgagor who was still the owner of the fee at the date of foreclosure may redeem, as may the grantee of the mortgagor.¹² The holder of a junior mortgage may redeem from a sale held pursuant to a foreclosure of a senior mortgage,¹³ and a judgment creditor who was made a party defendant in the foreclosure suit may redeem under Section 18 as a "per-

⁶ 42 C.J. Mortgages § 2081 and cases cited; *Kerr v. Miller*, 259 Ill. 516, 102 N.E. 1050 (1913); *Meier v. Hilton*, 257 Ill. 174, 100 N.E. 520 (1912); *Level v. Goosman*, 285 Ill. 347, 120 N.E. 758 (1918); *Crowder v. Scott State Bank of Bethany*, 365 Ill. 88, 5 N.E. (2d) 387 (1936); *Smith v. Wehrheim*, 126 Ill. App. 328 (1906) *Aff'd*, *Wehrheim v. Smith*, 226 Ill. 346, 80 N.E. 908 (1907); *Carabelli v. Carabelli*, 266 Ill. App. 453 (1932); *Porter v. Citizens National Bank*, 202 Ill. App. 621 (1916).

⁷ 23 C.J. Executions § 729 and cases cited; *Williams v. Williston*, 315 Ill. 178, 146 N.E. 143 (1924); *Level v. Goosman*, 285 Ill. 347, 120 N.E. 758 (1918); *Heinroth v. Frost*, 250 Ill. 102, 95 N.E. 65 (1911); *Commerce Vault Co. v. Barrett*, 222 Ill. 169, 73 N.E. 47 (1906); *Pease v. Ritchie*, 132 Ill. 638, 24 N.E. 433 (1890); *Sweezy v. Chandler*, 11 Ill. 445 (1849).

⁸ Ill. Rev. Stat. 1939, Ch. 77, § 20. See note 2, *supra*.

⁹ Ill. Rev. Stat. 1939, Ch. 77, § 18. The section reads in part as follows: "Any defendant, his heirs, executors, administrators, assigns, or any person interested in the premises, through or under the defendant, may . . . within twelve months from said sale, redeem the real estate so sold. . . ."

¹⁰ *Fitch v. Wetherbee*, 110 Ill. 475 at P. 489, "Whoever else may redeem in such cases it hardly admits of a doubt the judgment creditor of the mortgagor is one of the persons that may redeem. . . ."

¹¹ *Schroeder v. Bozarth*, 224 Ill. 310, 79 N.E. 583 (1906); *Fisher v. Eslaman*, 68 Ill. 78, (1873).

¹² *Hack v. Snow*, 338 Ill. 28, 169 N.E. 819 (1929); *Davenport v. Karnes*, 70 Ill. 465 (1873); *Dunn v. Rodgers*, 43 Ill. 260 (1867).

¹³ *Heinroth v. Frost*, 250 Ill. 102, 95 N.E. 65 (1911); *Illinois National Bank v. School Trustees*, 211 Ill. 500, 71 N.E. 1070 (1904).

son interested."¹⁴ The inchoate right of dower is sufficient interest to entitle a wife to redeem from a sale held pursuant to foreclosure of a mortgage in which she joined,¹⁵ and, according to some authorities, the rule applies even though she did not join in the mortgage.¹⁶ It has also been held that the equitable owner of real estate may redeem from a foreclosure sale,¹⁷ and this rule has been applied to a purchaser who had only an executory contract of sale coupled with possession at the time of the foreclosure sale, but who later acquired a deed from the mortgagor.¹⁸

Under Section 20, the issues are more complicated and the law is not so well settled. The simplest redemption under this section is one by a judgment creditor holding a valid judgment on which execution may issue against the mortgagor who still retains title to the property being foreclosed. Redemption may be made by a judgment creditor of a mortgagor who has disposed of his equity of redemption or has lost it by sale on execution before the foreclosure sale,¹⁹ or after the sale and before the mortgagor's period of redemption has expired,²⁰ and even where he disposed of his equity before the redeeming creditor's judgment was entered.²¹ The same is true of a creditor whose judgment was recovered after the debtor's period of redemption had expired,²² and even where the indebtedness on which the judgment was based was incurred after the twelve-month period had ended.²³ Redemptions have also been held valid when made by a creditor holding a judgment against the grantee of the mortgagor, where the grantee took title before the twelve month period had expired,²⁴ and also where a creditor held a judgment against an heir of a deceased mortgagor.²⁵ The right of a judgment creditor to redeem under Section 20 is not affected by the fact that he was a party defendant in the foreclosure suit and also could have redeemed under Section 18 as a "person interested."²⁶ It has also been held that the holder of a defi-

¹⁴ *Beadle v. Cole*, 173 Ill. 136, 50 N.E. 809 (1898); *Whitehead v. Hall*, 148 Ill. 253, 35 N.E. 871 (1893).

¹⁵ *Bigonness v. Hibbard*, 267 Ill. 301, 108 N.E. 294 (1915). In the *Klein* case the Appellate Court quotes from this case and states that it held that a widow could redeem on the basis of her consummate dower right. In fact the *Bigonness* case held that the wife could have redeemed from the foreclosure sale during her husband's lifetime on the basis of her inchoate right of dower. Recovery was denied the widow because she had waited until 14 years after the foreclosure sale and thus was guilty of laches.

¹⁶ 42 C.J. Mortgages § 2104, and cases cited.

¹⁷ *Crowley v. Methodist Book Concern*, 323 Ill. 215, 153 N.E. 652 (1926).

¹⁸ *Noyes v. Hall*, 97 U.S. 34, 24 L. Ed. 909 (1878).

¹⁹ *Fitch v. Wetherbee*, 110 Ill. 475 (1884).

²⁰ *Phillips v. Demoss*, 14 Ill. 409 (1853).

²¹ *McLagan v. Brown*, 11 Ill. 519 (1850).

²² *Strauss v. Tuckhorn*, 200 Ill. 75, 65 N.E. 683 (1902); *Kufke v. Blume*, 304 Ill. 288, 136 N.E. 678 (1922).

²³ *Kerr v. Miller*, 259 Ill. 516, 102 N.E. 1050 (1913); *Williams v. Williston*, 315 Ill. 178, 146 N.E. 143 (1924).

²⁴ *Aetna Life Insurance Co. v. Beckman*, 210 Ill. 394, 71 N.E. 452 (1904).

²⁵ *Schuck v. Gerlach*, 101 Ill. 338 (1882).

²⁶ *Boynton v. Pierce*, 151 Ill. 197, 37 N.E. 1024 (1894); *Heinroth v. Frost*, 250 Ill. 102, 95 N.E. 65 (1911).

ciency decree rendered in a foreclosure suit can redeem from his own sale as a "decree creditor," under Section 20, provided the person primarily liable for the debt was the holder of the title when the deficiency decree was entered.²⁷ The courts will not look to the motives of the debtor and creditor in securing a judgment on which to redeem; and redemptions have been held valid where the judgment was confessed to by the owner of the equity of redemption for the sole purpose of enabling the creditor to redeem, so long as the indebtedness was bona fide and there was no fraud in the consideration.²⁸

In *Fitch v. Wetherbee*,²⁹ the equity of redemption of the mortgagor had been seized and sold on execution before the bill to foreclosure the trust deed was filed. Subsequently a sale was held pursuant to the foreclosure of the trust deed and the property sold. The redeeming creditor recovered judgment against the mortgagor ten months after the foreclosure sale and redeemed after the twelve month period had expired, and the redemption was held valid. Having conveyed the legal title by the trust deed and having lost its equity of redemption in the previous execution sale, the debtor (mortgagor) certainly had no "interest in the land" when the judgment was recovered. In answering the question of what judgment creditors may redeem, the Supreme Court stated, "Primarily, it must be any decree or judgment creditor of the mortgagor or judgment debtor whose property is the subject of contention among his creditors."

Applying these rules to the Klein case, the redemption should be held valid. The inchoate right of dower has been held to be sufficient interest to enable the husbands themselves to redeem.³⁰ Since they were in the class of persons who could have redeemed within twelve months under Section 18, their judgment creditor was within the class of persons who could redeem after twelve months and within fifteen months under Section 20. Or, applying the other rule of the *Fitch* case, since Mangan was "a judgment creditor of the mortgagors," he could redeem under Section 20.³¹

The result of the decisions construing Section 20 has been to create a conflict as to whether the redemptioner acquires, not the property which was sold at the foreclosure sale, but only the interest of the par-

²⁷ *Strause v. Dutch*, 250 Ill. 326, 95 N.E. 286 (1911).

²⁸ *Kufke v. Blume*, 304 Ill. 288, 136 N.E. 678 (1922); *Karnes v. Lloyd*, 52 Ill. 113 (1869); *Williams v. Williston*, 315 Ill. 178, 146 N.E. 143 (1924).

²⁹ 110 Ill. 475 (1884).

³⁰ *Bigonness v. Hibbard*, 267 Ill. 301, 108 N.E. 294 (1915).

³¹ It appears that no injury would follow from holding the redemption valid and allowing the sale to be held by the sheriff. When no redemption was made within the twelve month period, Klein, the foreclosing creditor, as a holder of a deficiency decree, under the rule of *Strause v. Dutch*, 250 Ill. 326, 95 N.E. 286 (1911), could have redeemed from his own sale. Under Ill. Rev. Stat. 1939, Ch. 77, § 24, if he did this within two days of the expiration of the twelve month period he would have barred the right of the husband's creditor to redeem, since Klein's was the senior decree. Not having protected himself by one of these methods, Klein could still bid at the sale to be held pursuant to Mangan's redemption and, if he was the highest bidder and no further redemption was made, he would receive a deed within sixty days of such sale. Ill. Rev. Stat. 1939, Ch. 77, § 23.

ticular debtor against whom the judgment was entered.³² Two questions must be answered to clarify the law in this field. The first question is substantive: What does a redemptioner acquire by his redemption from a valid foreclosure or judicial sale? Does he take as an assignee of the first purchaser (holder of a certificate of sale) or does he acquire only the interest of his judgment debtor? It is a well settled rule that a purchaser at a judicial sale acquires no interest whatever in the property sold, but only a right to receive the redemption money, or, if no redemption is made, to receive a deed.³³ With this rule in mind, we may state the second, or procedural, question: Should the holder of a certificate of sale be allowed to question the validity of a redemption, or should this issue be left to be litigated (in partition or ejectment suits) between the redemptioner and the former owners or those claiming under them?

It appears that logically the holder of a certificate of sale should be denied the right to contest the validity of a redemption. Since the certificate holder bargained for and received only an alternative right to receive the redemption money or a deed, he would not be prejudiced by such a holding.³⁴ This would result in the dismissal of the complaint for want of equity in the Klein case, which was the ruling of the trial court. The first, or substantive, question would then arise, if at all, in a controversy between the redemptioner and the former owners or those claiming under them, and it seems that these are the proper parties to litigate this question. When this controversy arises, the courts should then apply the rule of liberal construction of the statutes and hold the redemption by Mangan valid. To hold otherwise is to read Section 20 as giving the right to redeem to "any decree or judgment creditor who has a valid judgment against one who has some tangible interest in the land susceptible of sale on execution." Such a restriction is not found in the language of the statute and should not be supplied by the courts. The better rule would seem to be that the redemptioner acquires the property which was sold at the first sale and, if the entire title of the owners would have been cut off by a deed to the first purchaser, the same effect should follow from issuance of a deed to the redemptioner.³⁵

W. S. McCLANAHAN

WORKMEN'S COMPENSATION—RIGHT OF EMPLOYER TO REMEDY OF EMPLOYEE OR EMPLOYEE'S REPRESENTATIVE—EMPLOYER'S SUBROGATION AGAINST FARMER.—An employee amenable to the Illinois Workman's Compensation Act was

³² That he gets only the debtor's interest: *Fisher v. Eslaman*, 68 Ill. 78 (1873); *Schroeder v. Bozarth*, 224 Ill. 310, 79 N.E. 583 (1906). That he may redeem the entire property even though the judgment debtor had lost his interest before the judgment was entered: *McLagan v. Brown*, 11 Ill. 519 (1850); *Fitch v. Wetherbee*, 110 Ill. 475 (1884).

³³ *Sutherland v. Long*, 273 Ill. 309, 112 N.E. 660 (1916); *Phillips v. Demoss*, 14 Ill. 409 (1853); *Strauss v. Tuckhorn*, 200 Ill. 75, 65 N.E. 683 (1902); *Reed v. Behm*, 364 Ill. 399, 4 N.E. (2d) 844 (1936); *Klein v. Mangan*, 369 Ill. 645, 17 N.E. (2d) 958 (1938).

³⁴ See *Fitch v. Wetherbee*, 110 Ill. 475 at 490-1 (1884).

³⁵ See *Sutherland v. Long*, 273 Ill. 309, 112 N.E. 660 (1916); *Smith v. Mace*, 137 Ill. 68 at 73, 26 N.E. 1092 (1891); *Blair v. Chamblin*, 39 Ill. 521 (1866); *Massey v. Westcott*, 40 Ill. 160 (1866).

killed through the negligence of a farmer, a member of a class expressly excluded from the act.¹ Compensation was voluntarily paid to the sole dependent by the employer who then filed suit in his own name against the farmer claiming subrogation under Section 29.² The trial court dismissed the suit on motion of the defendant, and the Appellate Court for the third district sustained the dismissal.³ The opinion stated that the statute which gives the employer the right to maintain his suit against "such third party" limits the "third party" defendants to those mentioned in Section 29: (1) parties under the act; (2) parties who might have been under the act, but have elected not to be bound by it. Therefore, since the defendant herein is a farmer expressly exempted from the operation of the statute, the suit was held not to lie.

The Appellate Court's definition of "such third party" narrows the objective of statutory subrogation to a compass smaller than that sanctioned historically,⁴ and smaller than that heretofore described by the Supreme Court.⁵ The practical result is to furnish a defense to one producing an injury. The farmer is not to be responsible for his own negligence to one who under the law has paid for the result of the farmer's misfeasance. The legislature surely did not intend such a result.

Certainty of compensation to those injured in industrial activity is primarily the object of the law, thereby affording financial protection to the workmen and his dependents.⁶ Secondly, it is the object of the law to afford indemnity to an employer who has paid compensation for an injury in those cases where the injury to the employee was caused by the negligence of some other employer or the negligence of a third person not within the act.⁷ A denial of indemnity to the employer against any third person is clearly in derogation of the second objective.

The Illinois Supreme Court has repeatedly held that the statute should be given a practical construction in order to give effect to the purpose and object of its adoption and "should not be made to depend on fine spun theories based upon scientific technicalities. . . ."⁸ To create a favored class of third persons immune to subrogation action of the employer is hardly giving effect to the legislature's intent, but is looking to form and words rather than to spirit and effect. It is interesting to note that the personal representative of the deceased might have maintained an action under the Injuries Act⁹ but it is submitted that the opinion in the instant case does not turn about this alternative.

¹ Ill. Rev. Stat. 1939, Ch. 48, § 139.

² Ill. Rev. Stat. 1939, Ch. 48, § 166.

³ *Agar Packing & Provision Co. v. Becker*, 301 Ill. App. 237, 22 N.E. 447 (1939).

⁴ *Thomas C. Angerstein, The Employer & The Workman's Compensation Act of Illinois* (Hawkins & Loomis Co., 1930), I, XXVI.

⁵ *Newman v. Ind. Com.*, 353 Ill. 190, 187 N.E. 137 (1933).

⁶ *Faber v. Ind. Com.*, 352 Ill. 115 at 118 185 N.E. 255 (1933).

⁷ *Baker & Conrad v. Chicago Heights Const. Co.*, 364 Ill. 386 at 393, 4 N.E. (2d) 953 (1936).

⁸ *Juergens Bros. Co. v. Ind. Com.*, 290 Ill. 420, 125 N.E. 337 (1919); *Faber v. Ind. Com.*, 352 Ill. 115 at 119, 185 N.E. 255 (1933).

⁹ Ill. Rev. Stat. 1939, Ch. 70, §§ 1, 2.

In *O'Brien v. Chicago City Ry. Co.*¹⁰ the Supreme Court said, "Where the negligent party was subject to the provisions of the act Section 29 provided that the measure of his liability should be the damages sustained, not, however, exceeding the compensation payable under the act, and the employer of the injured employee should be subrogated to his employee's right against the party causing the injury; but where the person was not subject to the provisions of the act [e.g. a farmer] his liability as it existed before the act was not affected, but the injured employee's employer should be subrogated . . . to the extent of the compensation paid or to be paid under the act."¹¹

A farmer is not bound by the act. He is a stranger to it, or shall we say expressly excluded from its application in so far as he might be considered to be engaged in a hazardous enterprise, or able to take advantage of the act in limiting his liability to his employees, or forced to receive compensation from his employer, or forced to pay compensation to his employees. If he neither gives nor receives compensation, why is he immune to legal liability under Section 29? He has no such immunity when recompense is demanded in person by the immediately injured party or his personal representative.

Section 29 concerns legal liability, not liability for damages nor does it distinguish between liability under common law and liability created by statutes such as the Wrongful Death Act.¹² The vocational status of a farmer cannot exempt him from legal liability nor particularly the liability arising under the Injuries Act.¹³ This liability should be enforceable by virtue of Section 29 by an employer to whom the statute has transferred the right invaded. This is found impossible by the instant decision but no difficulty was found in Maryland,¹⁴ nor in New York.¹⁵

If we wish to breathe into the language of the statute the spirit and

¹⁰ 305 Ill. 244 at 253, 137 N.E. 214 (1922).

¹¹ Summarizing the holdings, it was stated in *O'Brien v. Chicago City Ry. Co.*, 305 Ill. 244 at 255, 137 N.E. 214 (1922): "From these cases it appears that we have held . . . that the common law right of action of an employee against any other person than his employer for negligently injuring him in the course of his employment where such other person is bound by the provisions of the Workmen's Compensation Act is abolished; . . . [and] that the common law right of action of an employee against any other person than his employer for negligently injuring him in the course of his employment where such other person is not bound by the provisions of the Workmen's Compensation Act is not affected by the act but is preserved in its full extent to the employee. . . ."

¹² Ill. Rev. Stat. 1939, Ch. 70, §§ 1, 2.

¹³ *Idem*.

¹⁴ In *Storrs v. Mech*, 166 Md. 124, 170 A. 743 (1934), an employer who had paid compensation to a deceased employee's dependent sister and then sought to be reimbursed by maintaining an action against the tortfeasor was faced with the argument that the Death Statute provided that recovery should be for the benefit of the wife, husband, parent, and child of the deceased and did not include a sister. The court held the Compensation Act did not create a new liability, but did enlarge the class of persons who might take advantage of the liability created by the Death Statute and in construing both acts together held the employee's sister could be included and that since the sister could have sued the third person the employer could maintain the suit for indemnity.

¹⁵ *Coleman v. Cating Rope Works*, 286 N.Y.S. 315 (1936).

intention that the Supreme Court has so often stated should govern the interpretation and application of the act, it would seem that not only a farmer but any person who is subject to liability should be compelled to indemnify the employer.¹⁶

E. Young

¹⁶ For a searching analysis of the meaning and effect of Section 29 as to third persons but not involving death see *Botthof v. Fenske*, 280 Ill. App. 362 (1935).