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## Discussion of Recent Decisions

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## DISCUSSION OF RECENT DECISIONS

CHATTEL MORTGAGES — FILING, RECORDING, AND REGISTRATION — EFFECT OF FAILURE TO RECORD WITHIN PERIOD PRESCRIBED BY ILLINOIS STATUTE.—The Illinois Appellate Court was called upon, in the case of *Collateral Finance Company v. Braud*,<sup>1</sup> to construe the Illinois chattel mortgage recording act<sup>2</sup> as amended in 1931, which states, "No mortgage . . . shall be valid as against the creditors of the mortgagor, even though admitted to record, as hereinafter provided, unless it shall be deposited for filing or recording . . . within ten days of its execution, and any such mortgage . . . not deposited for filing or recording within ten days of the execution thereof shall be fraudulent and void as to such creditors." In this case, the Meier Motors Company, Inc., on November 28, 1936, executed a mortgage on certain chattels to the Universal Dealers Company. The mortgage was not recorded until January 12, 1937. Subsequently the chattels were taken possession of and sold at a chattel mortgage sale on January 29, 1937, to the defendant. The plaintiff had extended credit to the mortgagor evidenced by three notes, one of which was dated December 17, 1936, and the other two January 13, 1937. The plaintiff now brings this garnishment proceeding against the buyer at the chattel mortgage sale, claiming that the mortgagee sold without authority, not having filed the mort-

<sup>1</sup> 298 Ill. App. 130, 18 N.E. (2d) 392 (1938).

<sup>2</sup> Ill. Rev. Stat. 1937, Ch. 95, § 4.

gage within ten days of its execution, and that the defendant, as buyer of the chattel, is guilty of a technical conversion. The court held the defendant liable on the ground that, under the aforesaid act, the plaintiff had a right superior to that of the mortgagee and the defendant is in no better position than his vendor.

The first problem that confronted the court was whether the mortgagee had cured his defective mortgage, against everyone except lien creditors, by recording it, even though it was not done within the ten days after the execution of the mortgage as required by the statute. The court, with ample authority<sup>3</sup> and reason, held that failing to record the mortgage within ten days made it void as to simple contract creditors as well as judgment and lien creditors.

Until 1921, when an act<sup>4</sup> was passed identical with the provision in question and declared unconstitutional because of a formal defect, there was only one section<sup>5</sup> limiting the validity of a chattel mortgage for lack of diligence in recording it. That act provided that "no mortgage . . . shall be valid as against . . . any third person, unless possession thereof shall be delivered to and remain with the grantee or . . . the instrument is acknowledged and recorded. . . ." The mortgage was valid when recorded, even though recorded a great length of time after its execution, against everyone except those who had acquired a lien upon the property in the meantime.<sup>6</sup>

In the present act, the legislature evidently took cognizance of the frauds that were being perpetrated upon creditors by giving the mortgagor the indicia of unincumbered ownership of chattels. To prevent this, they have set a time limit within which the mortgage must be recorded, thereby apparently preventing the mortgagee, after the ten days are past, from ever being able to comply with the statute and rendering the mortgage forever void as to creditors "even though [later] admitted to record."

The second, and most embarrassing, question is what is meant by "creditors," in reference to the time credit was extended to the mortgagor. The creditors may conveniently be divided up into three groups; (1) those who extended credit before the execution of the mortgage, (2) those who extended credit between the time of executing the mortgage

<sup>3</sup> In construing a statute similar to the one in Illinois, (Consol. Laws of N.Y. 1930, Ch. 33, § 230), the New York court said, "A simple contract creditor is as much within the protection of the statute as a creditor whose debt has been merged in a judgment . . . It will be noted . . . [the statute says] the . . . mortgage . . . shall be invalid as against the creditors of the mortgagor, not merely as against judgment creditors having executions . . . The rule that a creditor must first recover a judgment is simply one of procedure and does not affect the right." In re Shay's Estate, 285 N.Y.S. 379 (1935). See also Ransom & Randolph Co. v. Moore, 272 Mich. 31, 261 N.W. 128 (1935); In re Bothe, 173 F. 597 (1909); Ruggles v. Cannedy, 127 Cal. 290, 53 P. 911 (1898); Spellman v. Beeman, 70 Fla. 575, 70 So. 589 (1916).

<sup>4</sup> Ill. Rev. Stat. 1921, Ch. 95, § 4a.

<sup>5</sup> Ill. Rev. Stat. 1937, Ch. 95, § 1.

<sup>6</sup> Blatchford v. Boyden, 122 Ill. 657, 13 N.E. 801 (1887); Springer v. Lipsis, 209 Ill. 261, 70 N.E. 641 (1904); Southern Surety v. People's State Bank of Astoria, 332 Ill. 362, 163 N.E. 659 (1928).

and the recording thereof, and, (3) those who extended credit after the recording of the mortgage.

Although it was unnecessary for the court to determine whether the act could be construed as making a late recorded mortgage invalid as to creditors who had extended credit to the mortgagor before the execution of the mortgage, the language, by inference, clearly includes that group. Such a decision would be well supported, for, as was said in *Pierson v. Hickey*,<sup>7</sup> the fraud that will be perpetrated on a creditor of this type is the "apparent unincumbered ownership of the property in the possession of his debtor, justifying the inference of perfect security, and inducing delay in the enforcement of his claim."

In the second group we included those creditors who had extended credit to the mortgagor between the execution of the mortgage and its late recording. It cannot reasonably be contended that it was not the intention of the act to protect this class of persons, for they are fraudulently induced to give credit in reliance upon the mortgagor's apparent unincumbered ownership of chattels which are actually incumbered by a secret lien.

The group attracting the most attention, for it will be noted that two of the notes were dated after the recording, is the group of those who extended credit after the tardy recording of the mortgage. The court decided that these creditors were also within the class as to whom the mortgage was void, stating that "the amendment of section 4<sup>8</sup> in 1931 was obviously enacted to protect general creditors from the indeterminate secret lien of an unrecorded chattel mortgage. . . ." There is a grave question whether making the mortgage void as to creditors extending credit after the recording of the mortgage can be included within this purpose. As the Court of Appeals for the Second Circuit, in construing the New York statute,<sup>9</sup> said, "plainly his [the mortgagee's] delay could have had no possible effect upon the action of those who became creditors after it had ended. We should have to hold that his failure in some way infected the mortgage forever, a gratuitous assumption, which would result in hardship to him [the mortgagee] without benefit to any one else."<sup>10</sup> There is no fraud upon this creditor, for he extends his credit with constructive notice of the presence of the mortgage on the property.

The court is apparently only supported in its decision by an early New

<sup>7</sup> 16 S.D. 46, 91 N.W. 339 (1902).

<sup>8</sup> Ill. Rev. Stat. 1937, Ch. 95, § 4.

<sup>9</sup> "Every mortgage . . . is absolutely void as against creditors of the mortgagor . . . unless the mortgage, or a true copy thereof, is filed as directed in this article. . . ." Consol. Laws of N.Y., Ch. 33, § 230. The New York courts have interpreted this as meaning that it must be recorded within a reasonable time, in contrast to the ten days in Illinois, thereby putting it on an equal basis with the Illinois statute.

<sup>10</sup> In re Myers, 24 F. (2d) 349 (1928). See also In re Ideal Steel Wheel Co., Inc., 25 F. (2d) 651 (1928); Fred C. Silverthorn & Sons v. Pacific Finance Corp., 133 Cal. App. 163, 23 P. (2d) 798 (1933); Wolpert v. Gripton, 213 Cal. 474, 2 P. (2d) 767 (1931); In re Wade, 185 F. 664 (1911); Pierson v. Hickey, 16 S.D. 46, 91 N.W. 339 (1902); Hanson v. Blum, 53 N.D. 526, 207 N.W. 144 (1926); Ransom & Randolph Co. v. Moore, 272 Mich. 31, 261 N.W. 128 (1935).

Jersey case,<sup>11</sup> decided under a statute<sup>12</sup> similar to the one in Illinois.<sup>13</sup> It is submitted that, since the creditor has sustained no loss except by his own lack of diligence, the only reason that can be given for holding the mortgage to be void as to this creditor is that the mortgagee will be coerced into recording his mortgage within ten days of its execution by the infliction of a further penalty upon him if he fails so to do.

W. L. THOMPSON

COURTS—INJUNCTION AGAINST PROCEEDINGS—EXTRATERRITORIAL EFFECT OF INJUNCTION AGAINST SUIT.—In *Taylor v. Atchison, Topeka & Santa Fe Railway Company*,<sup>1</sup> the plaintiff, a resident of Kansas, brought suit in Illinois under the Federal Employers' Liability Act<sup>2</sup> to recover damages for personal injuries suffered in Kansas while in the employ of the defendant, a Kansas corporation. Thereafter, upon the ground that such action harassed and oppressed the defendant and constituted a burden upon interstate commerce, the defendant obtained from a Kansas court an injunction temporarily restraining the plaintiff from further prosecuting the suit in Illinois. Upon motion of the plaintiff, the plea in abatement setting up the order granting the injunction was stricken by the trial court.

The Appellate Court for the First District sustained the action of the trial court and affirmed the judgment, holding that the Illinois court, having obtained jurisdiction first, would hold it to the exclusion of other courts having concurrent jurisdiction. The decision also rested upon the ground that the Federal Employers' Liability Act made it the duty of the Illinois court to try the case on its merits.

In reaching its conclusion, the Appellate Court found it necessary to distinguish the instant case from *Allen v. Chicago Great Western Railroad Company*.<sup>3</sup> In the latter case, an Iowa court enjoined Allen from prosecuting, until after final disposition of the Iowa injunction proceedings, a suit filed in Illinois upon the same cause of action as was involved in a prior pending suit in Iowa for personal injuries suffered in that state. The Appellate Court in that case held that the temporary injunction should have been enforced and that a continuance should have been granted by the trial court.

The two cases were distinguished by the Appellate Court in the present case upon the grounds that the present proceeding was brought under the federal act, whereas the Allen case was a common law action, and

<sup>11</sup> *National Bank of the Metropolis v. Sprague*, 21 N.J. Eq. 530 (1870).

<sup>12</sup> Laws of N.J. 1867, p. 463, § 4.

<sup>13</sup> Even New Jersey, however, fails to afford any impressive line of decisions supporting the court in this case, for in 1885 the legislature passed another act (1 Comp. St. of N.J. 1885, p. 463, § 8), which was construed by the courts as modifying the scope of the act of 1867 and rendering the defective mortgage valid as to creditors becoming such after the recording of the mortgage. See *Roe v. Meding*, 53 N.J. Eq. 350, 33 A. 394 (1895); *Bollschweiler v. Packer House Hotel Co.*, 83 N.J. Eq. 459, 91 A. 1027 (1914); *Mans v. Brody*, 111 N. J. L. 194, 168 A. 263 (1933).

<sup>1</sup> 292 Ill. App. 457, 11 N.E. (2d) 610 (1937).

<sup>2</sup> 45 U. S. C. A. §§ 51-6.

<sup>3</sup> 239 Ill. App. 38 (1925).

that in the principal case, as distinguished from the Allen case, the Illinois court was the first to take jurisdiction.

The Allen case is one of the very few reported decisions which accord recognition to foreign injunctions against suit. *Fisher v. Pacific Mutual Life Insurance Company*<sup>4</sup> was a similar case, wherein, on grounds of comity, the Mississippi court gave effect to a decree of the Tennessee court restraining a Tennessee resident from prosecuting an action on a life insurance policy. In *Gilman v. Ketcham*,<sup>5</sup> the Wisconsin court recognized an injunction of a New York court, which restrained creditors from prosecuting actions against an insolvent corporation, to the extent that it accorded preference to the rights of a receiver over those of a nonresident debtor in a garnishment action.

The courts of Minnesota and Missouri have announced that injunctions against suit are not entitled to extraterritorial recognition and are not properly within the scope of the full faith and credit clause of the Federal Constitution.<sup>6</sup> This rule has been followed in the federal courts in Minnesota, although the court, in *Doyle v. Northern Pacific Railway Company*,<sup>7</sup> expressed itself as reluctant to disregard the injunctive order of a Washington state court. Minnesota has also expressed the opinion that to give effect to such injunctions would be an unconstitutional deprivation of the privileges and immunities of citizens of other states.<sup>8</sup> In an early New York case, it was held that a foreign injunction against suit had no extraterritorial effect, but the court's action in holding that the findings of the Connecticut court in that case were res judicata was tantamount to giving effect to the Connecticut injunction.<sup>9</sup> In a Kentucky case, the court refused to allow as a bar to an action by a payee of a note against a co-maker a foreign injunction restraining the collection of the note.<sup>10</sup>

It has been argued that the effect of refusal of recognition of such injunctions results in an importation of large numbers of cases, largely tort actions for personal injuries, into certain states and operates to harass and oppress defendants.<sup>11</sup> On the other hand, it is argued that to give effect to such injunctions is to place an undue restriction on the right of a plaintiff to select the forum for the trial of a transitory cause of action.

It would appear from the decisions that injunctions such as are here under discussion do not command recognition by the courts of sister states. If such injunctions are given effect and the doctrine of *forum non conveniens* applied, it is solely because of comity and entirely dependent upon the policy of the state.

<sup>4</sup> 112 Miss. 30, 72 So. 846 (1916).

<sup>5</sup> 84 Wis. 60, 54 N.W. 395 (1893).

<sup>6</sup> *Alford v. Wabash Ry. Co.*, 229 Mo. App. 102, 73 S.W. (2d) 277 (1934); *Kepner v. Cleveland C., C. & St. L. Ry. Co.*, 322 Mo. 299, 15 S.W. (2d) 825, 65 A.L.R. 599 (1929); *State ex rel. Bossung v. District Court of Hennepin County*, 140 Minn. 494, 168 N.W. 589, 1 A.L.R. 145 (1918).

<sup>7</sup> 55 F. (2d) 708 (1932).

<sup>8</sup> *Frye v. Chicago, R. I. & P. Ry. Co.*, 157 Minn. 52, 195 N.W. 629 (1923), cert. den. 263 U.S. 723, 44 S. Ct. 231, 68 L. Ed. 525 (1924).

<sup>9</sup> *Dobson v. Pearce*, 12 N.Y. 156 (1854).

<sup>10</sup> *Nichols & Shepard Co. v. Wheeler*, 150 Ky. 169, 150 S.W. 33 (1912).

<sup>11</sup> 31 Mich. L. Rev. 963; 39 Yale L. J. 719.

Although, as is pointed out in the principal case, the rule is settled that a court whose jurisdiction attaches first in point of time may hold jurisdiction to the exclusion of courts of concurrent jurisdiction, it does not appear that the court is under an absolute duty so to do. If taking jurisdiction is discretionary, no reason appears why the court may not relinquish it. Therefore, if the Allen case correctly states the policy of this state, the fact that its court was first to take jurisdiction of the cause would seem to be of little consequence.

The second interesting point in the principal case involves the question whether a state court is bound to take jurisdiction of Federal Employers' Liability Act cases. In the leading case on this point, *Douglas v. New York, New Haven, & Hartford Railroad Company*,<sup>12</sup> the trial court dismissed a suit under the federal act brought by a resident of Connecticut against the railroad in New York. The dismissal was ordered pursuant to a New York statute giving its courts discretion to dismiss suits by non-residents against foreign corporations. The United States Supreme Court approved the action of the New York court and held that the federal act did not compel state courts to take jurisdiction of cases arising thereunder when their ordinary jurisdiction was not adequate to the occasion and that the federal act was not to be construed as attempting to compel states to enlarge the jurisdiction of their courts.

The Illinois Supreme Court reached a similar result in a suit brought under the federal act to recover for the death of plaintiff's intestate, the death having occurred in Missouri.<sup>13</sup> Where, however, the jurisdiction of state courts is adequate to entertain such actions, cases arising under the act may be enforced as of right in accordance with the limitations on venue prescribed therein,<sup>14</sup> and such cases may not be refused merely because they arise under the federal act.<sup>15</sup>

It would appear that the jurisdiction of the Illinois courts, except in cases of wrongful death arising outside the state, is adequate for the entertainment of suits under the act in question, even though the injuries on which they are based occur outside the state.<sup>16</sup> Hence, unless the rule of the Allen case be extended to cases such as the present, therefore presumably complying with the doctrine of the Douglas case, it would seem that the Illinois courts are bound to try such actions on their merits.

B. P. MORISSETTE

**DESCENT AND DISTRIBUTION—RIGHTS AND LIABILITIES OF HEIRS AND DISTRIBUTEES—WHETHER THE SHARE OF AN HEIR IS SUBJECT TO DEBTS OWED THE ESTATE BY THE ANCESTOR THROUGH WHOM HE CLAIMS.**—A man died intestate and insolvent, owing his father a sum of money, and leaving two minor chil-

<sup>12</sup> 279 U.S. 377, 49 S. Ct. 355, 73 L. Ed. 747 (1929). See also *Murnan v. Wabash Ry. Co.*, 246 N.Y. 244, 158 N.E. 508, 54 A.L.R. 1522 (1927).

<sup>13</sup> *Walton v. Pryor*, 276 Ill. 563, 115 N.E. 2 (1916), cert. den. 245 U.S. 675, 38 S. Ct. 10, 62 L. Ed. 540 (1917).

<sup>14</sup> *Mondou v. New York, N. H. & H. R. Co.*, 223 U.S. 1, 32 S. Ct. 169, 56 L. Ed. 327, 38 L.R.A. (N.S.) 44 (1912).

<sup>15</sup> *McKnett v. St. Louis & S. F. Ry. Co.*, 292 U.S. 230, 54 S. Ct. 690, 78 L. Ed. 1227 (1933).

<sup>16</sup> *Taylor v. Southern Ry. Co.*, 350 Ill. 139, 182 N.E. 805 (1932).

dren surviving him. Several years later his father died intestate, leaving an estate consisting solely of personal property. The administrator took credit in his final report for the amount of the debt and charged that amount against the guardian of the two minor children. The guardian excepted to the item. The Supreme Court of Illinois, having these facts squarely presented, was called upon in the recent case of *Russell v. Bulliner*<sup>1</sup> to decide for the first time whether a debt due from a deceased father may be charged against his children's share of the personal<sup>2</sup> property belonging to the estate of the grandfather who died intestate after his son's death.

The court held that the debt could not be set off, reversing the decision of the Appellate Court,<sup>3</sup> which had held that under the Descent Act the child takes as the representative of the parent, that the word "share" controls as to what the descendants take, and that, since the father's share was subject to the debt, the children's share is similarly subject. In the final analysis, the question depends upon whether the children step into the shoes of the ancestor or take a share of the estate in their own right. If the latter is true, the children, not responsible for the debts of their parent, take the property free of the charge.

The statute<sup>4</sup> provides that intestate property shall descend "to his or her children and their descendants, in equal parts; the descendants of the deceased child or grandchild taking the share of their deceased parents in equal parts among them." An analysis of the American decisions in point reveals that under our statute the Supreme Court clearly obeyed the mandate of the legislature. Sir William Blackstone wrote,<sup>5</sup> "Lineal descendants, *in infinitum*, of any person deceased shall represent their ancestor, that is, shall stand in the same place as the person himself would have done, had he been living. . . . And these representatives shall take neither more nor less, but just so much as their principals would have done." The Appellate Court considered this language sufficient to dispose of the case. But is it?

It is generally true that in contemplation of law the ancestor is merely a pipe through which the heir receives, but that rule is susceptible to statutory change. The word "share" as employed in our statute is used merely to designate that portion of the estate which is to pass to the heirs. Is it not logical to suppose that if the legislature intended that the heir take the place of the ancestor it would have said so in so many words? Since the statute thus skips around the ancestor and designates the party who is to take, a check-valve in the pipe of descent would not operate to interfere with the flow of the property.

The case of *Martin v. Martin*,<sup>6</sup> relied on by the administrator, is of little weight, as the Ohio statute therein involved provides that the property shall pass to the "legal representatives" of the ancestor. *Head v. Spier*<sup>7</sup>

<sup>1</sup> 370 Ill. 260 (1938).

<sup>2</sup> In *Ellis v. Dumond*, 259 Ill. 483, 102 N.E. 801 (1913), involving realty alone, the court held that the property passes to the heir free of the debt.

<sup>3</sup> In re *Bulliner's Estate*, 294 Ill. App. 189, 13 N.E. (2d) 634 (1938).

<sup>4</sup> Ill. Rev. Stat. 1937, Ch. 39, § 1.

<sup>5</sup> Blackstone, *Commentaries on the Laws of England*, II, 214.

<sup>6</sup> 56 Ohio St. 333, 46 N.E. 981 (1897).

<sup>7</sup> 66 Kan. 386, 71 Pac. 833 (1903).



is the same, as the Kansas statute provided that the estate shall be disposed of in the same manner as if "they, or either of them, had outlived the intestate." *Adams v. Yancy*<sup>8</sup> involved a statute similar to ours. The Mississippi court decided that the legislature should have placed the words "absolutely and unconditionally" after the word "share" if it intended the heirs to take free from debts. That seems strange in view of the fact that ordinarily, when a statute gives something without more, the usual construction is that it gives absolutely and unconditionally, unless words of limitation are present. Another case cited in argument by appellee, *Batton v. Allen*,<sup>9</sup> involved only the question whether the grandfather intended to hold the ancestor liable for the debt, and therefore is of little importance to our inquiry.

The cases cited by counsel for the guardian are more in point and seemingly supported by the better reasoning. In *Kendall v. Mondell*,<sup>10</sup> involving a statute almost the same as ours, the court said that, although the ancestor would have taken the "share" subject to his debts just as in the case of any other property owned by him, the children, having no debts owing to the estate, take the "share" free of any charges. *Powers v. Morrison*<sup>11</sup> is even stronger, declaring that the word "portion" refers only to the property passing and does not include debts owing to the estate. Other cases cited in the argument follow the same line of reasoning.<sup>12</sup> In *Succession of the Misses Morgan*,<sup>13</sup> the Louisiana court aptly states, "A dead man can neither get nor give, inherit nor transmit. The representative of the deceased person does not receive by transmission from that person; he receives by designation of law. . . . He is endowed by the law with the rights of the latter in a certain succession, but is not laden with the obligations of that latter to the rest of the world."

It is not the object of this summary to reconcile the conflicting decisions under various statutes throughout the country nor to condone the action of courts in other jurisdictions reaching an opposing conclusion. A review of all the pertinent statutes and decisions reveals that wherever reference is made to a fraction of an estate passing to an heir in lieu<sup>14</sup> of a deceased ancestor, the only logical conclusion to be reached is that the fraction passes without regard to collateral debts of the ancestor, no matter to whom the debts were owed.<sup>15</sup>

L. BRUNETTE

<sup>8</sup> 105 Miss. 233, 62 So. 229 (1913).

<sup>9</sup> 5 N.J. Eq. 99 (1845).

<sup>10</sup> 67 Md. 444, 10 A. 240 (1887).

<sup>11</sup> 88 Tex. 133, 30 S.W. 851 (1895).

<sup>12</sup> *Stokes v. Stokes*, 62 S.C. 346, 40 S.E. 662 (1902); *Barnum v. Barnum*, 119 Mo. 63, 24 S.W. 780 (1893).

<sup>13</sup> 23 La. Ann. 290 (1871).

<sup>14</sup> In effect the Illinois court "substitutes" the heir for the ancestor, insofar as the share is concerned, rather than establishes the heir as "representative." As to the same proposition in wills, see Thompson, Construction of Wills, 417, § 280.

<sup>15</sup> Since a majority of the statutes in point make special reference to advancements, there is a fair implication, applying the doctrine of "expressio unius est exclusio alterius" that debts stand on a different footing. Ill. Rev. Stat. 1937, Ch. 39, § 8 is an example: "If a child or other descendant so advanced, dies before the intestate, leaving issue, the advancement shall be taken into consideration in the division of or distribution of the estate of the intestate. . . ." For a discussion of this proposition see Hughes's Appeal, 57 Pa. St. 179 (1868). For a more detailed discussion of the doctrine of collateral representation see *In re Georget*, [1928] 1 D. L. R. 230.

INTERNAL REVENUE—FORFEITURES AND ENFORCEMENT THEREOF—CONSTRUCTION OF STATUTORY “LOT OR TRACT” IN DETERMINING EXTENT OF REAL PROPERTY FORFEITABLE FOR VIOLATION OF REVENUE LAWS.—In the recent case of *United States v. About 151.682 Acres of Land*,<sup>1</sup> the Circuit Court of Appeals for the Seventh Circuit was called upon to decide whether they would give a literal interpretation to a statute, perhaps penal in purpose, when its literal operation would work hardship in the particular case. That case involved an appeal from a judgment decreeing forfeiture of a 151 acre farm for illicit operation of a still in a barn located thereon. Forfeiture was sought under a statute which provided that “all the right, title, and interest of such person in the lot or tract of land on which such [illegally operated] distillery is situated . . . who knowingly has suffered or permitted the business of a distiller to be there carried on, or has connived at the same . . . shall be forfeited to the United States.”<sup>2</sup> The sole question on appeal was whether the words “lot or tract” used in the statute should be taken to apply to the entire farm or should be limited to those portions of the premises which might reasonably be said to be involved in the offense. The court adopted the latter view, calling attention to the fact that an action for forfeiture is a proceeding in rem, the land itself being regarded as the culprit, and stated that “to forfeit property, a connection must be shown with that which offends.”<sup>3</sup>

The rule laid down is apparently a desirable one, but with the policy of legislation the courts have no legitimate concern, and whether this is a justifiable construction of the statute or not is a matter provocative of some difference of opinion.<sup>4</sup> The matter is not greatly clarified by precedent, for on this very point—the quantum of real property confiscable for violation of the internal revenue statutes—very little has been written.<sup>5</sup>

In most situations prior to the instant case the property forfeited always had some connection with the unlawful enterprise on which the libel was based. For instance, in one case an adjacent building supplied gas for the still,<sup>6</sup> in another, all the premises concerned were equipped with an alarm system for very obvious purposes;<sup>7</sup> while in a third, the

<sup>1</sup> 99 F. (2d) 716 (1938).    <sup>2</sup> 26 U.S.C.A. § 1184.    <sup>3</sup> 99 F. (2d) 716 at 720 (1938).

<sup>4</sup> That this statute if applied literally would work inequitably in some situations—if a wrong-doer here may be said to have any equities—in that it would place a heavier penalty on persons holding large pieces of property, is conceded. Yet if the legislative intent were that the statute would operate in that fashion, the seeming severity in such instances would be no objection, in conformance with the maxim, *jus dicere, non jus dare*.

<sup>5</sup> In obvious contrast is the wealth of cases dealing with the condemnation of illicit liquor or vehicles used in its transportation, as to which there can but infrequently arise any question as to the extent of property to be forfeited.

<sup>6</sup> *Norbriga v. United States*, 55 F. (2d) 146 (1932). The court met claimant's contention that forfeiture should be limited to so much of the realty as had actually offended by saying, “But the language of Section 3281 [26 U.S.C.A. § 1184] is that ‘all the right, title, and interest of such person in the lot or tract of land on which such distillery is situated . . . shall be forfeited,’” then going on to state that all the property was on a single lot, thus bringing the forfeiture within the literal provisions of the act.

<sup>7</sup> *United States v. Premises at 1707-9 and 1715 Saint Marks Ave.*, 55 F. (2d) 271 (1932).

structures were grouped on a single lot, opened into one another, and were adjoining a common yard.<sup>8</sup>

One other case involves the problem indirectly. In *Southern Surety Company v. Motlow*,<sup>9</sup> a suit was brought on a bond of indemnity against forfeiture of property for violation of internal revenue laws. The precise question was the exact extent of the liability assumed by the indemnitor rather than the correctness of the decree for forfeiture entered against the entire property at the Government's instance.<sup>10</sup> In view of the relationship between the structures involved, the court held the indemnitor had undertaken to indemnify against confiscation of any or all structures, saying: "But whether so or not [i. e., whether the property was connected with the illegal use], there was a seizure of the entire lot as required by 26 U.S.C.A. §306."<sup>11</sup> Though any view expressed by the court on the problem was gratuitous, the spirit displayed was plainly contrary to the holding in the instant case.

In but one case does a parallel situation appear, and in that a similar result was reached. That is the case of *United States v. Certain Piece of Land*,<sup>12</sup> in which the forfeiture of 130 acres of farm land, including buildings, was sought under the "lot or tract" clause aforementioned. This case fairly sustained the ruling in the principal decision, in language at least, saying that the opposite construction would make the magnitude of the forfeiture depend, not on the extent or grievousness of the operations, but solely on the accident of ownership.<sup>13</sup> But even here, it is significant that the court strove to find some boundaries to satisfy the requirements of "lot or tract" by picking a road along one side and an internal fence on another.<sup>14</sup>

<sup>8</sup> *United States v. Stowell*, 133 U.S. 1, 10 S. Ct. 244, 33 L. Ed. 555 (1889). Does not discuss the question here involved.

<sup>9</sup> 61 F. (2d) 464 (1932).

<sup>10</sup> For the forfeiture proceeding see *Motlow v. United States*, 35 F. (2d) 90 (1929). The premises therein consisted of a distillery and a distilling warehouse leased as a unit, but no question was made as to the point here considered. As the court there states (at p. 91): "The sole assignment of error on the present appeal is as follows: 'There was no evidence . . . that the Jack Daniel Distilling Company carried on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled on it.'" It is fairly apparent, therefore, since they did not bother to raise the point, that even claimant's counsel agreed that if grounds for forfeiture were established, the entire premises could be seized.

<sup>11</sup> 26 U.S.C.A. § 306 was identical in the provisions under examination with 26 U.S.C.A. § 1184, construed in the principal case.

<sup>12</sup> Fed. Cas. No. 14767 (1870).

<sup>13</sup> "The language of the statute is 'lot or tract' of land. The latter word may have been used as synonymous with the former and to indicate a village or town lot which, being of definite boundaries and usually of limited size, might not unreasonably be deemed to be used and occupied for the purposes of the illicit business. An adjoining lot, though owned by the offender, would not under this provision be forfeited. It would be strange if the circumstance that the distillery was situated on an extensive farm in the country, should involve in the forfeiture, pasture, grain and wood lots, orchards, vineyards, dwelling-houses, and even it might be village lots, remote from the scene of operations of the distillery and having no connection with it."

<sup>14</sup> "In the plat of the survey of the farm sought to be forfeited in this case, there is laid down a tract of land a few acres in extent, adjacent to the distillery,

Unless the instant case should be reversed it would appear therefore that the forfeiture provision in question must now be treated as though it read, "that portion of the lot or tract of land on which such illegally operated distillery is situated and which has been used in connection therewith shall be forfeited."

R. G. MAYER

**JOINT TENANCY—CREATION AND EXISTENCE—WHETHER THERE CAN BE JOINT TENANCY IN A POSSIBILITY OF REVERTER.**—Where a fee upon special limitation<sup>1</sup> has been conveyed by joint tenants of an estate in fee simple, is the resulting possibility of reverter subject to the incident of survivorship? This query was answered in the affirmative in the recent case of *Cookman v. Silliman*,<sup>2</sup> in which the plaintiffs, heirs of the last surviving joint tenant, brought a bill for the specific performance of a contract for the sale of the realty in question. The contract was made after the determination of the qualified fee. It was held, over the defendant's contentions, that the possibility of reverter was subject to the incident of survivorship and that the reverter clause in the deed conveyed nothing but merely retained an interest in the grantors and therefore was unaffected by a statute providing that "no estate in joint tenancy . . . shall be held . . . unless the premises . . . shall be expressly . . . conveyed to such persons, to be held as joint tenants and not as tenants in common. . . ."<sup>3</sup>

It is universally admitted that a possibility of reverter is not an estate,<sup>4</sup> but it has been held to be a reversionary interest in land, "very like, though . . . not strictly identical with, a reversion."<sup>5</sup> That a joint tenancy

and including that building, the wine-shed, tank, etc. It is separated by a road from a vineyard of table grapes, which lies on the west; on the north, by a road running near or along a brook, from a barley field; on the east, by a fence, from a pasture lot; and on the south it is bounded by the exterior boundaries of the farm. It seems to me that to this tract the forfeiture should be limited. A judgment to this effect will be entered."

<sup>1</sup> At one time, there seems to have been considerable doubt as to the possibility of the creation of determinable fees after the Statute *Quia Emptores*. For an excellent discussion, see J. C. Gray and H. W. Challis, "Determinable Fees," 3 L.Q. Rev. 399 at 403. This article is commented on in 18 Mich. L. Rev. 144, where it was said that "on the whole Professor Gray seems to have the better of the argument and the worst of the decisions. . . ." *Danville Seminary v. Mott*, 136 Ill. 289, 28 N.E. 54 (1891), decides that such an interest can be created in Illinois.

<sup>2</sup> 2 A. (2d) 166 (Del., 1938).

<sup>3</sup> Del. Rev. Code 1935, § 3734. The court also reasoned that a possibility of reverter was not an "estate" within the meaning of the statute, but this contention seems illogical, inasmuch as the holding of the court results in a treatment of the interest as an estate for the purpose of survivorship. Illinois has a similar statute: "no estate in joint tenancy in any lands . . . shall be held . . . unless the premises therein mentioned shall expressly be thereby declared to pass not in tenancy in common but in joint tenancy. . . ." Ill. Rev. Stat. 1937, Ch. 76, § 1.

<sup>4</sup> *North v. Graham*, 235 Ill. 178, 85 N.E. 267, 126 Am. St. Rep. 189, 18 L.R.A. (N.S.) 624 (1908); *Copenhaver v. Pendleton*, 155 Va. 463, 155 S.E. 802, 77 A.L.R. 324 (1930).

<sup>5</sup> *North v. Graham*, 235 Ill. 178, 85 N.E. 267, 126 Am. St. Rep. 189, 18 L.R.A. (N.S.) 624 (1908). See also, A. M. Kales, *Estates, Future Interests and Illegal Conditions and Restraints in Illinois*, § 283; *Restatement of Property*, § 154 (1), comment (e).

in a reversion may exist seems indisputable.<sup>6</sup> The distinction should be noted between the interest involved in the instant case and the right of entry for condition broken, which has been described as nothing more than a chose in action.<sup>7</sup>

It has been generally held that a possibility of reverter descends as realty.<sup>8</sup> Whether this was true at common law or whether the heirs took by representation is a controverted point.<sup>9</sup> However, an overwhelming majority of decisions under modern statutes of descent have held that this interest descends to the heirs<sup>10</sup> of the owner upon his death. The leading case in Illinois is *North v. Graham*,<sup>11</sup> which holds that a possibility of reverter is an estate within the meaning of the Illinois Statute of Descent.<sup>12</sup>

A fair inference may be drawn from the Restatement of Property that the American Law Institute contemplated joint tenancy in the attenuated reversionary interest under discussion. Section 196, comment (a), states that "a future interest is concurrently owned . . . when owned in a tenancy in common, [or] in a joint tenancy. . . ." Section 153 (1), comment (a), announces that "the definition [of a future interest given in the section] is sufficiently broad to include all interests more particularly described as reversions [and] possibilities of reverter. . . ." It might be argued

<sup>6</sup> *Henstead's Case*, 5 Co. Rep. 10a, 77 Eng. Rep. 63 (1634); *Pullen v. Palmer*, 3 Salk. 207, 91 Eng. Rep. 780, where the court said, "One jointenant . . . cannot avow solely . . . the right of this rent is in all of them."

<sup>7</sup> "The estate was out of him, and all that remained was a right of entry for condition broken if the estate be treated as one on condition, or the possibility of reverter, if a limited fee." *Hanby v. Bailey*, 51 Pa. Super. Ct. 244 (1912). "The right of entry is not an estate, not even a possibility of reverter; it is simply a chose in action." *Tiedeman, Real Property* (3rd ed.), § 207, as quoted in *Wagner v. Wallowa County*, 76 Or. 453, 148 P. 1140, L.R.A. 1916F 303 (1915). See also, *Hart v. Lake*, 273 Ill. 60, 112 N.E. 286 (1916); *Fowler v. Coates*, 201 N.Y. 257, 94 N.E. 997 (1911); *Restatement of Property*, §§ 154, 155.

<sup>8</sup> *Presbyterian Church v. Venable*, 159 Ill. 215, 42 N.E. 836, 50 Am. St. Rep. 159 (1896); *Dees v. Chevronts*, 240 Ill. 486, 88 N.E. 1011 (1909); *Yarbrough v. Yarbrough*, 151 Tenn. 221, 269 S.W. 36 (1925). The minority view holds that the heirs take by representation. *Uppington v. Corrigan*, 151 N.Y. 143, 45 N.E. 359, 37 L.R.A. 794 (1896); *Puffer v. Clark*, 202 Mich. 169, 168 N.W. 471 (1918).

<sup>9</sup> See note in 18 L.R.A. (N.S.) 624, citing *Uppington v. Corrigan*, 151 N.Y. 143, 45 N.E. 359, 37 L.R.A. 794 (1896); *Adams v. Graham*, 235 Ill. 178, 85 N.E. 267, 126 *Methodist Protestant Church v. Young*, 130 N.C. 8, 40 S.E. 691 (1902); *Conner v. Waring*, 52 Md. 724 (1880).

<sup>10</sup> There is a split in the authorities as to whether the heirs are determined as at the date of the occurrence of the contingency, ending the qualified fee, or as at the date of the death of the holder of the possibility of reverter. Supporting the latter view: *Sagers v. Sagers*, 158 Iowa 729, 138 N.W. 911, 43 L.R.A. (N.S.) 562 (1912); *Green's Adm'r v. Irvine*, 23 Ky. L. Rep. 1762, 66 S.W. 278 (1902); *Clapp v. Wilder*, 176 Mass. 332, 57 N.E. 692, 50 L.R.A. 120 (1900); *Yarbrough v. Yarbrough*, 151 Tenn. 221, 269 S.W. 36 (1925); *North v. Graham*, 235 Ill. 178, 85 N.E. 267, 126 Am. St. Rep. 189, 18 L.R.A. (N.S.) 624 (1908); *Copenhaver v. Pendleton*, 155 Va. 463, 155 S.E. 802, 77 A.L.R. 324 (1930); *Pond v. Douglass*, 106 Me. 85, 75 A. 320 (1909). Supporting the former view: *Exum v. Davie*, 5 N.C. 475 (1810); *Methodist Protestant Church v. Young*, 130 N.C. 8, 40 S.E. 691 (1902); *Conner v. Waring*, 52 Md. 724 (1880).

<sup>11</sup> 235 Ill. 178, 85 N.E. 267, 126 Am. St. Rep. 189, 18 L.R.A. (N.S.) 624 (1908).

<sup>12</sup> Ill. Rev. Stat. 1937, Ch. 39, § 1: "Estates, both real and personal . . . shall descend . . . in manner following. . . ."

that the comment to Section 196, quoted above, is restricted to cases where the owner of a future interest has the right to bring an action of waste, since it is located in the chapter on waste, and that it is very unlikely that the owner of a possibility of reverter could bring an action for waste.<sup>13</sup> The argument may be refuted by the fact that other sections in other chapters of the Restatement refer to Section 196 for a definition of the term, "concurrently owned."<sup>14</sup> Furthermore, the inference drawn is supported by other sections.<sup>15</sup>

Thus it may be seen that the decision of the Delaware court in the instant case, although unsupported by any precedent directly in point, is a logical and reasonable one and should be followed in other jurisdictions should such a controversy arise in the future.

W. L. SCHLEGEL

**JUDGMENTS—ACTIONS ON JUDGMENTS—WHETHER INTEREST ON A JUDGMENT IS PART OF IT WITH REGARD TO THE STATUTE OF LIMITATIONS.**—Where a judgment bears interest by virtue of a statute, is that interest part of the judgment, action for which will be barred only by the statute of limitations on judgments or which will be barred by the limitation on simple contract debts? The Illinois Supreme Court was faced with this problem in the recent case of *Blakeslee's Storage Warehouses v. City of Chicago*.<sup>1</sup> The plaintiff had been awarded \$54,554 for land taken in an eminent domain proceeding, and the principal had been paid by the defendant eight months after rendition of this judgment. In December, 1934, nearly nine years from the date of the award, the plaintiff filed suit for interest from the date of the award to the time of payment and for interest on such unpaid interest<sup>2</sup> to the date of suit. Interest was undeniably due under Section 3 of the Interest Act,<sup>3</sup> but the defendant claimed that Section 16 of the Statute of Limitations,<sup>4</sup> which outlaws after five years

<sup>13</sup> See 27 R.C.L. 1038.

<sup>14</sup> See comment on § 219, Restatement of Property.

<sup>15</sup> Sec. 175(1) states that "when a future interest in land is owned in joint tenancy or in a tenancy in common, then a concurrent owner in such future interest has power to compel partition thereof. . . ." Subsection (2) (d) limits the right to partition to concurrent owners of a fee simple absolute. The caveat on this section notes that "the requirement stated in Subsection (2) (d) excludes many possible types of future interests in land. . . ." It therefore becomes apparent that the reporter contemplated, in Subsection (1), joint tenancy in the other types of future interests. The definition of "future interest" in § 153(1), comment (a) includes a possibility of reverter.

Sec. 154(3) states that "a possibility of reverter is any reversionary interest which is subject to a condition precedent." Sec. 217 declares that "the owner of a future interest which was subject to a condition precedent . . . can recover damages. . . [under certain conditions]." Sec. 219, referring to § 217, states that "when a future interest is concurrently owned by two or more persons, each concurrent owner therein has . . . each right stated in . . . this Chapter to exist in favor of a single owner. . . ." The comment on § 219 refers to § 196, comment (a) for a definition of "concurrently owned," which includes joint tenancy.

<sup>1</sup> 369 Ill. 480, 17 N.E. (2d) 1 (1938).

<sup>2</sup> It was held that the plaintiff "could in no event recover interest on interest."

<sup>3</sup> "Judgments recovered before any court or magistrate shall draw interest at the rate of five (5) per centum per annum . . . until satisfied." Ill. Rev. Stat. 1937, Ch. 74, § 3.

<sup>4</sup> Ill. Rev. Stat. 1937, Ch. 83, § 16.

"all civil actions not otherwise provided for," barred this claim. The plaintiff contended that Section 26 of the Statute of Limitations,<sup>5</sup> which bars actions on judgments after twenty years, was applicable to this suit, but the court held that "the right to interest . . . such as interest on a judgment, does not emanate from the controversy, or from the judgment, or from anything of a judicial nature. . . ." The court further stated that "the conclusion is inescapable that interest on a judgment is not a part of it." The action was held to be barred by the five year statute; two judges dissented.

The matter has not been frequently raised in litigation and probably never has it been argued under the precise situation of the instant case. However, a standard text on judgments<sup>6</sup> contains the following statement: "Except where a valid release is given, or there is a lawful agreement otherwise providing, a judgment may be satisfied or discharged only by payment in full with accrued interest and costs." Corpus Juris states that "where no time for the payment of interest is fixed, it is deemed payable with the principal, and the statute does not run against the interest until the debt is barred. . . ."<sup>7</sup>

Under analogous situations, the courts seem to have been unanimous in the opinion that interest and the judgment<sup>8</sup> are one obligation. A New York court,<sup>9</sup> and an English court,<sup>10</sup> have allowed execution<sup>11</sup> upon interest after the judgment had been paid. A Nebraska case<sup>12</sup> has said that "the statute does not run against the interest until the debt [a judgment] is barred." The case of *Dickson v. Epling*<sup>13</sup> seems to be the only

<sup>5</sup> "Judgments in any court of record in this State may be revived by scire facias . . . [or an action of debt] may be brought thereon within twenty years next after the date of such judgment and not after. . . ." Ill. Rev. Stat. 1937, Ch. 83, § 26.

<sup>6</sup> Freeman, Judgments (5th ed.), II, 2329, § 1118, citing *Persons v. Gardner*, 108 N.Y.S. 616 (1907).

<sup>7</sup> 33 C.J. 257, § 186, citing *Greenwood v. Fenton*, 54 Neb. 573, 74 N.W. 843 (1898).

<sup>8</sup> In cases involving notes and bonds, it has been held that "the . . . interest . . . is not . . . separated from the principal demand; and consequently the statute of limitations does not run upon it, until the principal is barred. . . ." *Grafton Bank v. Doe*, 19 Vt. 463 (1847). See also *Lovett v. Lessler*, 99 N.J. Eq. 251, 132 A. 77 (1926).

<sup>9</sup> *Johnson v. Tuttle*, 17 Abb. Pr. 315 (1863). This case clearly indicates a feeling on the part of the court that judgment and interest thereon are one obligation.

<sup>10</sup> *Foakes v. Beer*, [1884] 9 A. C. 605. In this case the principal of a judgment was paid under an accord; the interest alone remained unpaid. The following statement speaks for itself as to the court's opinion on the subject of separability of judgment and interest: "In relation to a judgment debt payable immediately, and on which the creditor is entitled to have execution, is the payment by the debtor of a part a sufficient consideration to support a parole agreement by the judgment creditor not to take any proceedings whatever on the judgment for the residue? In my opinion it is not. . . ."

<sup>11</sup> "Execution, in civil actions, is the mode of obtaining the debt or damages or other thing recovered by the judgment. . . ." *Bouvier's Law Dictionary* (8th ed.), I, 1112.

<sup>12</sup> *Greenwood v. Fenton*, 54 Neb. 573, 74 N.W. 843 (1898). It should be noted that the court reversed and remanded with the statement that even under the defendant's contention, some interest was due.

<sup>13</sup> 170 Ill. 329, 48 N.E. 1001 (1897).

Illinois case in point. Here the appellants were allowed recovery on judgments rendered eight years before, although the appellees contended that Section 16 of the Limitations Act<sup>14</sup> barred the claim after five years, because it was an action for damages<sup>15</sup> to real property within the purview of that section. The following language, when read in the light of the decision, indicates the court's attitude as to the status of interest: "The court, in its decree, allowed appellants a recovery for the face of the several judgments, but refused to allow interest on the judgments. . . . Section 3 of Chapter 74 . . . provides that judgments shall draw interest at the rate of 6 per cent per annum from the date until satisfied. . . ." Interest for the entire eight years was allowed, and this could have only been done on the theory that Section 26 of the Limitations Act,<sup>16</sup> pertaining to judgments, applied to the interest as well. The Supreme Court of the United States<sup>17</sup> has reached a similar conclusion with this statement: "The interest lawfully accruing upon each of the claims was as much a part of it as the original debt. The creditor had the same right to the payment of the one as of the other. If there had been a judgment, and the full amount due upon it had not been paid, an action of debt might have been brought upon it to recover the balance. . . . If . . . the judgment debtor had chosen to pay only the principal of the judgment, leaving the interest unsatisfied, and the suit had been for the balance, consisting of interest only, the same result would have followed." The statute of limitations was not involved, but the inference is unavoidable that the Supreme Court regards interest as part of the judgment.

It would be useless to regret the holding of the *Blakeslee* case. The decision is so unambiguous that it will probably remain the law, unless a statute is passed to overrule the doctrine that "an action to recover interest on a judgment [in Illinois] falls within the term 'all civil actions not otherwise provided for.'" <sup>18</sup> However, in the light of the foregoing discussion, might it not well be hoped that the rule will be limited to cases where the principal has been paid and only the interest remains due? A ray of hope may be found in the words of the opinion of the instant case: "The action in this case is not upon the judgment. It has been paid. The claim is for interest which is solely of statutory origin."<sup>19</sup>

W. L. SCHLEGEL

<sup>14</sup> "Actions . . . to recover damages for an injury done to property, real or personal . . . and all civil actions not otherwise provided for, shall be commenced within five years next after the cause of action accrued." Ill. Rev. Stat. 1937, Ch. 83, § 16. It is interesting to note that this is the same section under which interest was barred after five years in the *Blakeslee* case. In that case it was raised as to "all civil actions not otherwise provided for . . ." In the *Dickson* case, this section was raised in regard to actions to recover damages for injuries to property.

<sup>15</sup> The court held that this was not an action to recover damages for an injury done to property, but an action on a judgment.

<sup>16</sup> "A civil action may be brought thereon within twenty years next after the date of such judgment. . . ." Ill. Rev. Stat. 1937, Ch. 83, § 26.

<sup>17</sup> *Nat. Bank, etc. of N.Y. v. Mech. Nat. Bank*, 94 U.S. (4 Otto) 437, 24 L. Ed. 176 (1876).

<sup>18</sup> *Blakeslee's Storage Warehouses v. City of Chicago*, 369 Ill. 480, 17 N.E. (2d) 1 (1938).

<sup>19</sup> *Ibid.*



LICENSES—OCCUPATIONAL SALES TAX—WHAT CONSTITUTES A “SALE AT RETAIL” UNDER ILLINOIS STATUTE.—The recently decided case of *Revzan v. Nudelman*<sup>1</sup> places a new interpretation on the Illinois Retailers' Occupation Tax Act<sup>2</sup> in holding that sales of sole leather and rubber heels by a wholesale leather dealer to a shoe repairman are not sales at retail as contemplated by the act, and that therefore the appellees, wholesale leather dealers, are not liable for the tax.

It should be noted that the question of the liability of the shoe repairman was not presented to the court,<sup>3</sup> since both parties conceded that he is “engaged in the business of rendering service.”<sup>4</sup> The appellant, the

<sup>1</sup> 370 Ill. 180, 18 N.E. (2d) 219 (1938).

<sup>2</sup> Ill. Rev. Stat. 1937, Ch. 120, § 440 et seq. Sec. 441 reads, “A tax is imposed upon persons engaged in the business of selling tangible personal property at retail in this State at the rate of . . . three per cent (3%) of the gross receipts from such sales in this State. . . .” Sec. 440 reads, “Sale at retail” means any transfer of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property. . . .” Original Act held unconstitutional, *Winter v. Barrett*, 352 Ill. 441, 186 N.E. 113 (1933). Present Act held constitutional, *Reif v. Barrett*, 355 Ill. 104, 188 N. E. 889 (1933).

Under the present Act the following businesses have been held liable for the tax: mining company, selling coal at the mine price direct to a manufacturer, *Franklin County Coal Co. v. Ames*, 359 Ill. 178, 194 N. E. 268 (1934); restaurant, *O'Neil v. Dept. of Finance*, 360 Ill. 484, 196 N.E. 463 (1935); hotel dining room, *Brevooort Hotel Co. v. Ames*, 360 Ill. 485, 196 N.E. 461 (1935); gasoline retailer, *People v. Werner*, 364 Ill. 594, 5 N. E. (2d) 238 (1936); nurseryman, contracting for improving and landscaping realty and furnishing trees, shrubs, etc., *Swain Nelson & Sons Co. v. Dept. of Finance*, 365 Ill. 401, 6 N. E. (2d) 632 (1937); retail liquor dealer, *Bardon v. Nudelman*, 369 Ill. 214, 15 N. E. (2d) 836 (1938).

The following businesses have been held not liable for the tax: public utilities, *People Gas, Light & Coke Co. v. Ames*, 359 Ill. 152, 194 N. E. 260 (1934); vendors of plumbing and heating supplies, *Bradley Supply Co. v. Ames*, 359 Ill. 162, 194 N. E. 272 (1934); blue-printers, photostaters, and commercial photographers, *J. A. Burgess Co. v. Ames*, 359 Ill. 427, 194 N. E. 565 (1935); commercial printers, furnishing special printed matter, *H. G. Adair Printing Co. v. Ames*, 364 Ill. 342, 4 N. E. (2d) 481 (1936); electrotypes, stereotypers, and matrix makers, *A. B. C. Electrotype Co. v. Ames*, 364 Ill. 360, 4 N. E. (2d) 476 (1936); building contractors, as to “materials” furnished, *Herliby Mid-Continent Co. v. Nudelman*, 367 Ill. 600, 12 N. E. (2d) 638 (1937); optometrists, *Babcock v. Nudelman*, 367 Ill. 626, 12 N. E. (2d) 635 (1937); wholesale leather dealers, selling to shoe repairmen, *Revzan v. Nudelman*, 370 Ill. 180, 18 N. E. (2d) 219 (1938).

<sup>3</sup> Plaintiffs (appellees) were wholesale leather dealers engaged in selling sole leather, etc., to shoe repairmen. The facts were stipulated in the trial court as follows: The cost to repairman of materials used in repair work is 30 per cent of the price charged the customer for the repairs; persons having repairs made contract with repairman for a lump sum price, including labor and materials; the customer does not select the particular materials to be used; and the repairman does not buy materials for use on particular shoes but for his general stock.

<sup>4</sup> Rules and Regulations relating to the Retailers' Occupation Tax Act, revised March 15, 1938 (pub. by Dept. of Finance, State of Illinois). Rule 13, which was attacked in the instant case, reads in part as follows: “Persons engaged in the business of repairing shoes are deemed primarily to render service. They are purchasers for use or consumption of tangible personal property incidentally used by them in the rendering of such service. Consequently, the sales of sole

Department of Finance, contended that the repairman is engaged in the business of rendering service, in the performance of which he "uses or consumes" the sole leather and rubber heels, that sales by the appellees to the repairman must be sales of tangible personal property for use or consumption and not for resale, and that therefore the sales are taxable.

In holding the appellees not liable for the tax, the court defines certain words used in the act and cites some of the earlier cases<sup>5</sup> in support of its decision. After consulting the standard authorities (including Webster's Dictionary) and stating various shades of meaning of the words *use or consumption*,<sup>6</sup> the court sets forth its definition of the word *use* as "a long continued possession and employment of a thing to the purpose for which it is adapted. . . ." and of the word *consumption* as "destruction by use." It is stated that the statute gives its own clear and unambiguous definition of the words *sale at retail* as meaning any transfer of tangible personal property "for use or consumption and not for resale in any form as tangible personal property . . ." and that therefore the court needs only to examine each group of sales to determine whether the vendor falls within these terms of the act.

In holding that wholesale leather dealers do not fall within the terms of the act, the court states that the use made of the sole leather and rubber heels by the repairman, while it is a use in the colloquial sense, is not the use contemplated in the act. It is but a fleeting and temporary possession and employment and not the long continued possession and employment required by the act. The user or consumer contemplated by the act 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." In this sense, a shoe repairman might be said to use his awl, hammer, and other tools and machinery, but not the leather which he possesses only temporarily and then attaches to his customers' shoes.

In answer to the appellant's argument that, since the repairman does not sell the materials at retail in rendering his services, sales to him by the appellees must be sales at retail, the court points out that this is not the test to be applied in determining liability, stating, ". . . if it be conceded that they [repairmen] do not come within the statute, it does not follow that such a determination necessarily shows a liability of plaintiffs [wholesale leather dealers]. In order to impose a tax on anybody under the act, the facts must bring such party within its terms, without regard to the non-liability of anybody else."<sup>7</sup>

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leather, rubber heels . . . to shoe repairman for their use in connection with . . . such service are sales at retail within the meaning of the . . . Act."

<sup>5</sup> The court relies mainly on *Bradley Supply Co. v. Ames*, 359 Ill. 162, 194 N. E. 272 (1934), which held that vendors of plumbing and heating supplies to building contractors (who install them under contracts with building owners) are not liable for the tax.

<sup>6</sup> Webster's Dictionary is quoted as defining the word *consume* as "to use up, expend, waste, or exhaust," the word *consumption* as "use of goods resulting in diminution or destruction of their utility" and also as "active use of goods so as to accomplish their direct and immediate destruction," and the word *use* as "an act of employing, to convert to one's service," etc.

<sup>7</sup> *Revzan v. Nudelman*, 370 Ill. 180 at 186, 18 N. E. (2d) 219 (1938).

It is this interpretation of the statute which raises so many interesting questions as to its future application to other businesses involving similar or comparable transactions. The instant case may have an adverse effect on collections of taxes from building contractors and the materialmen who sell to them.<sup>8</sup> The questions in these cases are important because these businesses have been before the court more often than any other<sup>9</sup> and because the amount of taxes involved in these suits is generally large.<sup>10</sup> The court had difficulty in evolving satisfactory rules to apply in the building contractor cases, but since the decision in *Herlihy Mid-Continent Company v. Nudelman*,<sup>11</sup> the state has been collecting taxes from the contractors for installation of "fixtures" and from the materialmen for sales of "materials" to the contractors.<sup>12</sup>

Under the interpretation of the act as laid down in the Revzan case, no reason is apparent why the materialmen might not be exempted from the tax as it applies to materials (such as sand, gravel, cement, and steel) sold to contractors. The cost to the contractor bears about the same relation to his contract price charged the building owner as the

<sup>8</sup> Rule 6 of the Department of Finance (revised March 15, 1938) reads in part "Persons who sell *materials* to contractors . . . for use by them in construction . . . or repair of buildings, roads or other improvements are liable for tax . . . Contractors are the 'persons using' materials . . . Materials are defined as tangible personal property which, when combined with other tangible personal property, loses its identity to become an integral and inseparable part of a completed structure. [A list of 30 materials follows.] On the other hand, contractors who furnish and install *fixtures* are making sales at retail and must pay tax. . . . Fixtures are defined as things which are accessory to a building or other real estate and which do not lose their identity as accessories when placed or installed." A list of 65 fixtures follows.

<sup>9</sup> The chronology of the contractor cases is interesting. In *Bradley Supply Co. v. Ames*, 359 Ill. 162, 194 N. E. 272 (1934), materialmen selling plumbing and heating supplies to contractors were held not liable for the tax. In *R. S. Blome Co. v. Ames*, 365 Ill. 456, 6 N. E. (2d) 841 (1937), contractors were held liable for the tax as to both materials and fixtures, on the ground that the contractor did transfer title to tangible personal property to the owner of realty. The court stated that, regardless of the fact that the transfer might not be a sale at all and that title might pass by accession, it was a transfer under the act. In *People ex rel. Herlihy Mid-Continent Co. v. Nudelman*, 370 Ill. 237, 18 N. E. (2d) 225 (1938), the whole doctrine was re-examined, the Blome case was expressly overruled, and the Bradley case was distinguished. Thus the law now seems to be as set forth in Rule 6 (see note 8 above).

<sup>10</sup> The importance of these cases is shown by the fact that the tax collected under this act is the largest single source of revenue to the state today. There were seven contractors involved in the first Herlihy case, each contesting various amounts of taxes. In the subsequent case of *People ex rel. Herlihy Mid-Continent Co. v. Nudelman*, 370 Ill. 237, 18 N. E. (2d) 225 (1938), the Supreme Court issued a writ of mandamus ordering the State to refund approximately \$25,000 in taxes to the petitioner alone. The sequel to the two Herlihy cases came on February 20, 1939, when the case of *R. S. Blome Co. v. Nudelman* (not reported before going to press) was decided, the court again issuing a writ of mandamus ordering the State to refund to the various petitioners taxes paid.

<sup>11</sup> 367 Ill. 600, 12 N. E. (2d) 638 (1937). For a full discussion of this case and its relation to the Bradley case and the Blome case, see 16 CHICAGO-KENT REVIEW 294.

<sup>12</sup> See Rule 6 (in note 8 above).

cost of leather to the shoe repairman bears to the price charged his customer.<sup>13</sup> The contractor "possesses and employs" the materials for only a short time, he "uses" them only in a colloquial sense in performing service for others, he does not retain them "as long as they last or until he desires to do away with them," and he makes them into an article of far greater value by adding his skill and labor to them. The court will no doubt be called upon to re-examine the doctrine of the contractor and materialmen cases and, under the doctrine of the Revzan case, may arrive at a different result.

There are many other lines of business which may seek to take advantage of the doctrine of the Revzan case and, if the doctrine is followed consistently, it would seem that several of them would be exempted from liability for the tax.<sup>14</sup> Reference to the Rules of the Department of Finance will show that the whole scheme of collecting the tax has been based on the theory that someone is liable for the tax in every line of sales and that if one person is held to be exempt from the tax, this fact per se places liability on someone further back in the chain of commerce. The Revzan case completely discards this theory and holds that certain commercial transactions are so wrapped in the cloak of service that the final transfer by the tradesman to the ultimate user is not a sale at all and not a transfer within the meaning of the act, but at the same time holds that the non-liability of the tradesman does not place liability on his supplier.<sup>15</sup>

W. S. McCLANAHAN

**MORTGAGES—FORECLOSURE BY ACTION—WHETHER DIVISION OF ATTORNEY'S FEES BETWEEN NOTEHOLDERS SHOULD BE MADE ON A BASIS COMMENSURATE WITH INTEREST OF HOLDER.**—In *Dreger v. Boyer*<sup>1</sup> a noteholder under a split mortgage, who did not have the right to declare the entire issue due, instituted foreclosure proceedings and made the other noteholders parties defendant. Certain of the noteholders, so named as defendants, filed a counterclaim to enforce their rights against the plaintiff's claim to priority.<sup>2</sup> A decree of foreclosure was entered in favor of the plaintiff and the counterclaimants in the order of their respective priorities and allow-

<sup>13</sup> In the stipulated facts of the Revzan case, it is stated that the cost of materials to the repairman is 30 per cent of the price charged the customer. In the Herlihy case, the trial court found that cost of materials represented 25 per cent of the contract price charged for sewer construction and 33½ per cent of contract price for sewage treatment works.

<sup>14</sup> See Rules of Department of Finance, Rules 10, 22, 27, 31, 43, 48, 53, 54, 69, for typical "service" businesses, in which title to property is transferred to the customer as an incident to the main purpose of rendering service.

<sup>15</sup> See also *American Optical Co. v. Nudelman*, 370 Ill. 627, 19 N. E. (2d) 582 (1939), holding optical supply houses liable to pay the tax and *Acme Printing Ink Co. v. Nudelman* (not yet reported), holding not liable a printing ink company, selling printing ink for use in the production of special printed matter.

<sup>1</sup> 297 Ill. App. 581, 18 N. E. (2d) 87 (1938).

<sup>2</sup> Plaintiff's note had originally been drawn to mature before those of the counterclaimants, but, by virtue of an extension agreement, had been extended so as to mature on a later date than the other notes, hence not entitled to any priority. See *Kuppenheimer v. Chicago Title and Trust Co.*, 163 Ill. App. 127 (1911); *Sargent v. Howe*, 21 Ill. 148 (1859); *Gardner v. Diederichs*, 41 Ill. 158 (1866).

ing plaintiff a lump sum for attorney's fees incurred in the foreclosure. The decree also gave the plaintiff a priority to the extent of the attorney's fees incurred by him and the counterclaimants appealed, contending that an allowance of fees should have been made them for their attorney's services. The court held that, since the plaintiff was not bringing a representative suit, he could only recover a proportion of the attorney's fees allowed commensurate with his interest under the mortgage and that a similar allowance should have been made to the counterclaimants. The court also held that the aggregate fees allowed must not exceed the fees which would have been allowed in the event that the plaintiff had sued to foreclose the entire issue.

It is generally recognized that where a representative suit is brought, any allowance of attorney's fees should be made to the vigilant plaintiff alone and that the persons represented through him have no claim thereto.<sup>3</sup> Where, however, a cross-complaint becomes necessary to settle disputed rights as between the plaintiff and the represented parties, a division of the allowance for attorney's fees among the parties appears appropriate.<sup>4</sup>

There then arises the question of the basis for making such division. In *Howard v. Burns*,<sup>5</sup> an allowance of \$500 was made to the plaintiff who held a note for \$3,000, and another allowance of \$600 was made to the cross-complainants who owned \$27,000 worth of notes secured by the same trust deed. The basis for making the division was not stated, and apparently, as to this point, the parties were satisfied.<sup>6</sup> It would appear, however, that the court considered the amount of service rendered as controlling the division, rather than the value of the interests represented.<sup>7</sup>

The instant case proposes a new method in such cases, making the amount of allowance apportioned each party depend not on the amount of service rendered but rather on the value of the interest represented. Such a rule would undoubtedly strike at litigation fostered by persons who buy up small amounts of past due notes or bonds with a view to foreclosure for the primary purpose of collecting extensive attorney's fees. The doctrine possesses the disadvantage, however, that the bona

<sup>3</sup> *Trustees v. Greenough*, 105 U.S. 527, 26 L. Ed. 1157 (1882); *Central R. R. and Banking Co. v. Pettus*, 113 U.S. 116, 5 S. Ct. 387, 28 L. Ed. 915 (1885).

<sup>4</sup> *Robbins v. Slavin*, 292 Ill. App. 479, 11 N. E. (2d) 651 (1937). The entire fee was allowed to the intervenor on the ground that the original suit was collusive. See also *Carson v. Rebhan*, 294 Ill. App. 180, 13 N. E. (2d) 630 (1938). In this case, the mortgagor was held to have no right to complain where the court apportioned fee between plaintiff and counterclaimants, on ground division did not harm mortgagor.

<sup>5</sup> 279 Ill. 256, 116 N. E. 703 (1917).

<sup>6</sup> The objection thereto was made by the mortgagor, but overruled with the brief statement: "The plaintiff in error is not concerned with the manner in which Howard and Shaw may apportion the solicitors' fees between themselves." 279 Ill. 256 at 262, 116 N. E. 703 (1917).

<sup>7</sup> In *Carson v. Rebhan*, 294 Ill. App. 180, 13 N. E. (2d) 630 (1938), similar ambiguity exists. The opinion states, "The court made its allowance, the amount of which is not questioned, and apportioned it between the counsel. . . ." The basis for such division is not given.

fide small holder would virtually be deprived of his remedy if the remaining noteholders were able to enter his proceeding and claim the lion's share of an allowance made for services performed by his attorney for the benefit of both.

D. C. PHILLIPS

**MORTGAGES—FORECLOSURE BY ACTION—WHETHER MORTGAGE MAY BE FORECLOSED TO RECOVER ATTORNEY'S FEES AFTER SATISFACTION OF THE SECURED NOTE.**—In the Illinois Appellate Court case of *Washingtonian Home of Chicago v. Van Meter*,<sup>1</sup> the defendant executed and delivered a note and a trust deed in the nature of a mortgage to the plaintiff in which latter document, among other things, it was covenanted, “. . . and the like fees, expenses and disbursements incurred or paid by the mortgagee or its successors in any suit or proceeding . . . shall also be paid by the mortgagor. All such fees . . . shall be an additional lien hereunder. . . .” The note itself contained no provision for attorneys' fees in the event suit was brought thereon.<sup>2</sup> When the mortgagor defaulted, the mortgagee obtained a judgment at law on the note, and after obtaining satisfaction thereof, he sued to foreclose the trust deed to recover the amount of attorneys' fees incurred in the prior suit at law. The defendant contended that since the debt was the primary obligation and the mortgage merely incidental thereto, the discharge of the debt operated to discharge the mortgage. Foreclosure of the trust deed solely to recover such attorneys' fees, the court held, was proper, since recovery thereof in the action on the note was not feasible,<sup>3</sup> and the lien of the mortgage was not discharged simply by paying the principal.

The Illinois courts have generally held that the payment of the debt operates as a discharge of the mortgage, but this doctrine is limited in its scope to cases where the mortgage contains no covenants other than

<sup>1</sup> 297 Ill. App. 591, 18 N. E. (2d) 81 (1938).

<sup>2</sup> See complaint in the files of the Superior Court of Cook County, number 36 S-2017.

<sup>3</sup> In an action on a note which contained the following provision, “We further agree, if the . . . note is not paid without suit, to pay ten dollars in addition to the above for attorney's fees,” it was held that the ten dollars were not due until after suit and a recovery could not be had in that action for the amount specified as attorney's fees. *Nickerson v. Babcock*, 29 Ill. 497 (1863). See also *Easter v. Boyd*, 79 Ill. 325 (1875); *Dearlove v. Edwards*, 166 Ill. 619, 46 N. E. 1081 (1897); *Anderson v. Terhune*, 206 Ill. App. 348 (1917); *Pitzer v. McCune*, 152 Ill. App. 144 (1909); *Byers v. The First National Bank of Vincennes*, 85 Ill. 423 (1877); *Bacon v. Schepflin*, 185 Ill. 122 at 126, 56 N. E. 1123 (1900). In the foregoing cases the notes, which were not judgment notes, each contained a provision for the payment of attorney's fees “in addition to the amount of the note,” or a provision for attorney's fees “if it should be collected by an attorney.” The terms of the notes differed from the usual provision in ordinary judgment notes. The respective courts held, in substance, that the attorneys' fees were not due until the suit was instituted and attorneys' fees incurred. Consequently the fees could not be recovered in the one suit on the note. The court in the instant case treats the provisions in the mortgage as having the same effect. But see Ill. Rev. Stat. 1937, Ch. 110, § 163, by which the plaintiff might have filed supplemental pleadings to include these attorneys' fees. His failure to do so, however, does not act as a waiver of his right to recover such fees.

those referring to the payment of the note.<sup>4</sup> Of necessity a different problem will arise where the mortgage or trust deed contains additional covenants such as those commonly used whereby the mortgagor agrees to reimburse the mortgagee for amounts expended by him in the payment of taxes, insurance premiums, mechanics' lien claims and the like, as well as the one found in the instant case to repay the mortgagee for expenses involved in any suit in which the mortgagee is a party by reason of his relationship to the mortgagor.<sup>5</sup>

Much will depend on the language of the particular covenant and the terms of the note. No attempt is made to cover the innumerable factual situations which might arise by reason of differences in the terms of notes and mortgages and the different remedies pursued by the mortgagee where the terms of the notes or mortgages are similar. However, the more common ones are herewith discussed. Thus, where both the note and the mortgage provide for the recovery of attorney's fees, the mortgagee may, nay in fact must, recover the same in whichever action he pursues.<sup>6</sup> Where, however, the note is silent on the subject, and the mortgage authorizes recovery of attorney's fees only where the mortgagee is made a party defendant in some collateral proceeding, then obviously no claim for attorney's fees due the mortgagee could be asserted in either the action at law on his note or the foreclosure of the mortgage since none has been promised except on the contingency named. If that

<sup>4</sup> See Jones, *Mortgages* (8th ed), II, 626, § 1156; Harold L. Reeve, *Law of Mortgages and Foreclosures in Illinois* (Chicago, Callaghan and Co., 1932), I, 395, § 332. See also *Schifferstein v. Allison*, 123 Ill. 662, 15 N. E. 275 (1888); *Ventres v. Cobb*, 105 Ill. 33 at 41 (1882); *Redmond v. Packenham*, 66 Ill. 434 (1872); *Boone v. Clark*, 129 Ill. 466 at 482, 21 N. E. 850 at 853 (1889). In *Carroll v. Haigh*, 97 Ill. App. 576 (1901), rev'd on other grounds in *Haigh v. Carroll*, 197 Ill. 193, 64 N. E. 375 (1902), the court said, "The mortgage and all the provisions thereof are to be regarded as for but one purpose, viz., the securing of the payment of the mortgage debt; and when that debt has been paid in full, the mortgage, together with all its terms and provisions, has expended its force, and the premises conveyed are no longer subject to its provisions, but are discharged therefrom." See also 19 R.C.L. 439, § 224, where it is said that "the general principle is . . . that the payment of the debt *ipso facto et eo instanti* extinguishes the mortgage. . . ." The following cases are cited: *Barrett v. Hinckley*, 124 Ill. 32, 14 N. E. 863, 7 Am. St. Rep. 331 (1888); *Harris v. Mills*, 28 Ill. 44, 81 Am. Dec. 259 (1862); *Ryan v. Dunlap*, 17 Ill. 40, 63 Am. Dec. 334 (1855).

<sup>5</sup> *Huber v. Brown*, 243 Ill. 274, 90 N. E. 748 (1910), wherein the court stated, "A mortgagor . . . may . . . insert a clause in the instrument binding himself to indemnify the grantee or any owner of the indebtedness, not only for an attorney's fee incurred in connection with the foreclosure of the deed, but also any and all attorney's fees and necessary expenses paid out or incurred in any collateral litigation in which the grantee or owner of the indebtedness may be a party by reason of his relation to the debt or the deed securing the same." See also *Keifer v. Reis*, 331 Ill. 38 at 48, 162 N. E. 157 (1928); *Henke v. Gunzenhauser*, 195 Ill. 130, 62 N. E. 896 (1902).

<sup>6</sup> The familiar doctrine against splitting a cause of action would prevent the use of a law action to recover the debt and an equity foreclosure to recover the attendant expense in the collection thereof or vice versa. At this point it cannot be too strongly emphasized that the provisions of the note and mortgage must be in such terms as to make the fees collectible in one action on the note or on the foreclosure of the mortgage.

contingency has occurred, then recovery for such expenses could only be maintained through the foreclosure of the mortgage.<sup>7</sup>

Where the note is silent on the subject, but the mortgage provides for the reimbursement of the mortgagee for the costs of foreclosure, including attorney's fees, in the event foreclosure is necessary, such recovery is limited to cases in which the mortgagee has in fact instituted foreclosure proceedings and the allowance can only be made therein.<sup>8</sup> If in such case, the mortgagee should elect to sue on the note, obviously no additional allowance could be made in that action. After a judgment on the note had been satisfied, the mortgage itself would then become *functus officio*.<sup>9</sup> Foreclosure merely to obtain attorney's fees for foreclosing would be ridiculous.

There then remains the situation where the note is silent on the subject, but the covenants in the mortgage are such that expenditures made by the mortgagee for the purposes enumerated may be recovered in any action in which the mortgagee may become involved, as was true in the principal case. No one could equitably contend that the mortgagee's recovery should be limited to principal and interest if he had discharged the mortgagor's obligation to pay taxes,<sup>10</sup> and since recovery for such expenditures would be impossible in an action on the note, the only other possibility would be to allow such recovery in an additional action of foreclosure.<sup>11</sup> To hold otherwise would be to deny the mortgagee recourse

<sup>7</sup> In *Macaulay v. Dorian*, 317 Ill. 126, 147 N. E. 793 (1925), it was held that the complainant in a foreclosure suit should recover attorney's fees incurred by reason of the mortgagee's having been made, as the holder of the trust deed, a party defendant in a divorce proceeding against the mortgagor, where there was a supplemental bill disputing the mortgagor's title. The trust deed contained a provision that it should secure, in addition to the loan, attorney's fees in case the mortgagee should be made a defendant in any suit in regard to the property.

<sup>8</sup> In a bill to foreclose a mortgage containing a clause that, if default should be made in the performance of the covenants in the deed, the mortgagor would pay all costs and expenses including an attorney's fee, which might be incurred in collecting the same, it was held that upon default the attorney's fee is due and collectible in foreclosure proceedings. *Dunn v. Rodgers*, 43 Ill. 260 (1867). See also *Clawson v. Munson*, 55 Ill. 394 (1870); *Cheltenham Improvement Co. v. Whitehead*, 128 Ill. 279, 21 N. E. 569 (1889); *Heffron v. Gage*, 149 Ill. 182, 36 N. E. 569 (1894); *Fuller v. Brown*, 167 Ill. 293, 47 N. E. 202 (1897); *Abbott v. Stone*, 172 Ill. 634, 50 N. E. 328 (1898); *Healy v. Protection Mutual Fire Insurance Co.*, 213 Ill. 99, 72 N. E. 678 (1904); *In re Estate of William Rieken*, 241 Ill. App. 235 (1926); *Bennett v. Benton State Bank*, 249 Ill. App. 539 (1928).

<sup>9</sup> Clearly, the very terms of the provision in the mortgage warrant this determination.

<sup>10</sup> Where the mortgagee pays the taxes on property, he is entitled to add the amount to the principal of the mortgage debt. *Boone v. Clark*, 129 Ill. 466, 21 N. E. 850, 5 L.R.A. 276 (1889). For further cases in point, see *Sharp v. Thompson*, 100 Ill. 447 (1881); *Brown v. Miner*, 128 Ill. 148, 21 N. E. 223 (1889); *Loewenstein v. Rapp*, 67 Ill. App. 678 (1896); *Abbott v. Stone*, 172 Ill. 634, 50 N. E. 328 (1898); *Gray v. Robertson*, 174 Ill. 242, 51 N. E. 248 (1898); *Lidster v. Poole*, 122 Ill. App. 227 (1905); *Brockway v. McClun*, 243 Ill. 196, 90 N. E. 374 (1909).

<sup>11</sup> "The general rule may be stated to be that, as the amount paid for taxes, together with the amount due upon the mortgage, constitutes but a single and indivisible demand, existing only by virtue of the mortgage, and being collateral and subordinate thereto, it cannot be separated and collected in several action;



to the alternative remedies presently available and to force him to pursue a single course of action.

In Illinois, where the holder's remedy is both legal and equitable, and the courts cannot grant such relief simultaneously, then, should the holder elect to sue at law on the notes, there should still remain his equitable remedy on the mortgage if necessary.<sup>12</sup> E. FRANCE

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therefore, a mortgagee who has paid taxes upon the encumbered property, either before or after the foreclosure of his mortgage . . . cannot, after foreclosure of the mortgage, maintain an independent action against the mortgagor to recover the amount so paid. . . ." 10 L.R.A. (N.S.) 679. But apparently the situation wherein taxes are paid, suit on the note is maintained, and an independent suit for the taxes is brought has not come up before the courts.

<sup>12</sup> In *Rohrer v. Hefner*, 336 Ill. 450 at 455, 168 N. E. 266 (1929), the court in speaking of the mortgagee's election of remedies said, "He [the mortgagee] may sue the mortgagor in assumpsit for a judgment upon the personal obligation; he may sue in equity for the foreclosure of the mortgage; or he may recover the possession of the mortgaged property by an action of ejectment. These remedies are concurrent or successive, as the mortgagee may deem proper, and he may pursue any two or all three of the remedies simultaneously." See also *Bradley v. Lightcap*, 202 Ill. 154, 67 N. E. 45 (1903); *Fish v. Glover*, 154 Ill. 86, 39 N. E. 1081 (1894); *Harper v. Ely*, 70 Ill. 581 (1873); *Jones, Mortgages* (8th ed.), III, 1, § 1565.