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Discussion of Recent Decisions

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DISCUSSION OF RECENT DECISIONS

DAMAGES—GROUNDS OF COMPENSATORY DAMAGES—RIGHT TO RECOVER FOR SHOCK CAUSED BY DEFENDANT'S NEGLIGENT CONDUCT TOWARD PERSONAL PROPERTY OF DECEASED.—In the recent Nebraska case of *Rasmussen* v. *Benson*,[1] the latter negligently sold a partial sack of poisoned bran which was not adequately labeled to one Rasmussen. This bran was fed to Rasmussen's dairy cows. The next morning, after the cows had been milked and the milk delivered to his customers, the cows became ill. On discovering the cause, Rasmussen immediately notified all his customers not to use the milk. Subsequently his live stock had to be destroyed. Later that day Rasmussen, who apparently had used none of the milk personally, fainted and had to be taken to the hospital where he remained for some time. He later returned to his farm but was unable to work. Several months later he returned to the hospital where he finally died of a decompensated heart, caused by the mental shock and emotional upset resulting from the loss of his cattle and his dairy business. His widow sued for the wrongful death of her husband allegedly caused by the sale of the poisoned bran. The court held that damages were recoverable though not caused by any contemporaneous physical injury.

The right of a plaintiff to recover damages for nervous shock caused by

[1] 280 N. W. 890 (Neb., 1938).

negligence has had an interesting history both in this country and in England. Considering first the decisions of the latter country, we find that in 1888, in the English case of *Victorian Railways Commissioners* v. *Coultas*,[2] where a gate keeper negligently invited plaintiff to drive over a level crossing when it was dangerous to do so and plaintiff became so frightened as to suffer personal injuries, the court denied recovery, holding that there was no proof of impact. This case was not followed in Scotland in the case of *Gilligan* v. *Robb*,[3] where plaintiff was permitted to recover for illness due to nervous shock caused by a cow bolting from the street into the room where the plaintiff was present. There was no physical impact. The holding of the Coultas case was later questioned in the case of *Coyle* v. *John Watson, Ltd.*,[4] and repudiated in the well-known case of *Dulieu* v. *White and Sons*.[5] In the latter case the defendant drove a span of horses into a public house. This so frightened the pregnant plaintiff that she became ill and gave premature birth to a child who became an idiot. The court held that damages for injury which results from a nervous shock occasioned only by an apprehension of physical harm were recoverable in an action of negligence if some consequent physical injury is caused thereby. It was in the case of *Hambrook* v. *Stokes Brothers*,[6] however, that we have the first instance in which the court permitted a recovery where a person out of the zone of impact or personal danger died from nervous shock. In that case a mother had just sent her children to school and shortly thereafter heard a lorry, which had been negligently parked, running unattended down the street. Fearing that her children might be injured, she ran into the street and found that one of them had been run down. The shock caused a subsequent miscarriage and hemorrhage which led to death. Liability was predicated upon the fact that the defendant had been antecedently negligent to the mother as one of a class of persons who might have been struck by the lorry. The fact that one child was run over was not considered a prerequisite to recovery for the death of the mother. The court felt that there should be no distinction between shock sustained by the mother as a result of fear for her own safety and that sustained by reason of peril to her child who was in the danger zone. The correctness of the Hambrook decision has been questioned[7] on the grounds that the conduct complained of was directed not toward the deceased but toward a third person; while, in the other cases quoted in that decision, the tortious conduct was directed toward the plaintiff. An unsettled question, that arises from such a decision, is whether recovery should be permitted to those who likewise might suffer shock but who stand in a degree less close than that of parent, as, for example, a close friend of the person to whom the negligent conduct was directed.

The English rule, therefore, seems to be that any person who can show some physical injury, whether induced by actual impact or produced by mental shock, can recover from the negligent person responsible therefor,

2 13 App. Cas. 222 (1888).
3 [1910] S. C. 856.
4 [1915] A. C. 1 at 13.
5 [1901] 2 K. B. 669.
6 [1925] 1 K. B. 141. Cf. Spearman v. McCrary, 4 Ala. App. 473, 58 So. 927 (1912).
7 F. H. Bohlen, "Fifty Years of Torts," 50 Harv. L. Rev. 725 at 735.

provided a direct casual connection can be established between the wrongful act and the resultant injury, whether such injured person was within the zone of physical danger or not.

In this country, however, a considerable conflict exists. In cases of malicious acts against persons or property, it is academic to say that the plaintiff is entitled to recover damages for the injury sustained whether induced physically or produced by mental shock. Where the actor's conduct is merely negligent, however, a series of problems arise. Thus, (a) where there has been some slight physical impact, accompanied by shock, there may be a recovery for damages to health caused by the shock, even though the shock was the result produced by the impact and the fright concurrently;[8] (b) where there has been no impact but the plaintiff has been placed in zone of danger, recovery has been allowed in some states if physical consequences have resulted,[9] while other states,[10] including Illinois,[11] have denied recovery regardless of the results caused; (c) where there has been no impact and plaintiff is out of the zone of danger, recovery, usually denied, has been allowed for physical injury for nervous shock induced by fear for safety of one endangered by negligent act of defendant, at least in one case,[12] and, (d) when the tort involves destruction of personal property, recovery is usually limited to the value of the property, and nothing is allowed for the mental distress of the owner,[13] unless the act complained of is malicious or fraudulent.[14]

[8] Hack v. Dady, 127 N. Y. S. 22 (1911); Tracy v. Hotel Wellington Corp., 176 N. Y. S. 923 (1919); Comstock v. Wilson, 257 N. Y. 231, 177 N. E. 431 (1931).

[9] Pankopf v. Hinkley, 141 Wis. 146, 123 N. W. 625 (1909); Purcell v. St. Paul City R. Co., 48 Minn. 134, 50 N. W. 1034 (1892); Sloane v. Southern California Ry. Co., 111 Cal. 668, 44 P. 320 (1896).

[10] Ewing et ux. v. Pittsburgh, C. C. & St. L. Ry. Co., 147 Pa. St. 40, 23 A. 340 (1892); Mitchell v. Rochester Ry. Co., 151 N. Y. 107, 45 N E. 354, 34 L. R. A. 781 (1896).

[11] The defendant entered the home of the plaintiff and greatly surprised and shocked her; then the defendant threatened the plaintiff with abusive and threatening language. The plaintiff's nervous shock resulted in St. Vitus dance. The court denied recovery, since the damages were not the natural and probable consequences of defendant's acts. Braun v. Craven, 175 Ill. 401, 51 N. E. 657 (1898). See also West Chicago St. R. R. Co. v. Liebig, 79 Ill. App. 567 (1899).

[12] Bowman v. Williams, 164 Md. 397, 165 A. 182 (1933). This ruling is in line with the English rule as illustrated by the Hambrook case. The predominant rule seems to be, however, the one set forth in the case of Waube v. Warrington, 216 Wis. 603, 258 N. W. 497 (1935), which held that a husband could not recover for the death of his wife due to physical injuries caused by fright or shock while witnessing the negligent killing of her child. That court said: "It is quite another thing to say that those who are out of the field of danger through impact shall have a legally protected right to be free from emotional distress occasioned by the peril of others, when that distress results in physical impairment."

[13] 17 C. J. 836; Birmingham Waterworks Co. v. Martini, 2 Ala. App. 652, 56 So. 830 (1911); Carter v. Oster, 134 Mo. App. 146, 112 S. W. 995 (1908). But where section men dumped rock on the plaintiff's house, mental suffering caused by such indignities were held recoverable. Ft. Worth & N. O. Ry. Co. v. Smith, 25 S. W. 1032 (Tex., 1894). Where a defendant wrongfully removed the furnace from a home, so that a sick child had to be removed, plaintiff parent was allowed to recover for mental anguish. Vogel v. McAuliffe, 18 R. I. 791, 31 A. 1 (1895).

[14] Henderson v. Weidman, 88 Neb. 813, 130 N. W. 579 (1911); Carter v. Oster,

In the instant case, the immediate injury was done to personal property without malice or fraud, there was no impact, the deceased was out of the zone of personal danger, and the shock and the resultant death was unforeseeable according to ordinary standards.[15] The Nebraska court, therefore, in permitting a recovery, seems to have taken a forward step and created still another class of cases in which liability for emotional shock may arise, which, while akin to the English view expressed in the Hambrook case, differs from it in a substantial particular, i.e., that the threatened harm need not be directed toward the injured person or any one related to him, nor even be foreseen as a likely possibility.

G. KLOEK

EVIDENCE—WEIGHT AND SUFFICIENCY—WHETHER IT IS NECESSARY IN CIVIL ACTION TO PROVE CRIMINAL OFFENSE BEYOND REASONABLE DOUBT.—In a recent Illinois Appellate Court case,[1] the plaintiff had insured his store against fire, each of the policies stating that it would be void "in case of any fraud or false swearing by the insured . . . whether before or after a loss." The store burned, and the plaintiff sued to recover on the policies. The insurance companies defended that, although the plaintiff had represented the cause of the fire to have been unknown, he had in fact set the blaze himself. The lower court refused to charge the jury that, if they believed from a preponderance of the evidence that the plaintiff had caused the burning, they should find for the defendants. On appeal this ruling was affirmed, the appellate tribunal saying, "Where a felony is charged in the pleadings in a civil case, the offense must be proved beyond a reasonable doubt."[2]

The requirement in a civil case that a crime must be proved beyond a reasonable doubt had its origin in England.[3] The reason generally given for its adoption is the fact that an adverse decision in the civil case could, without the intervention of a grand jury, place on trial the one against

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134 Mo. App. 146, 112 S. W. 995 (1908); Morse v. Duncan, 14 F. 396 (1882). Where the defendant broke into a dwelling house, created a disturbance, and threw furniture down a steep enbankment into the street, the plaintiff was allowed to recover for mental anguish. Murray v. Mace, 41 Neb. 60, 59 N. W. 387 (1894).

15 In Palsgraf v. Long Island R. Co., 248 N. Y. 339, 162 N. E. 99 (1928), the late Justice Cardozo stated, "If no hazard was apparent to the eye of ordinary vigilance, an act innocent and harmless, at least to outward seeming, with reference to her, did not take to itself the quality of a tort because it happened to be a wrong, though apparently not one involving the risk of bodily insecurity, with reference to someone else."

1 Sundquist v. Hardware Mutual Fire Ins. Co. of Minn., 296 Ill. App. 510, 16 N. E. (2d) 771 (1938).

2 Preponderance of the evidence is enough to sustain a charge of arson in defense of a civil suit on fire insurance policy. Picoraro v. Insurance Co. of State of Pa., 175 La. 416, 143 So. 360 (1932); Weiner v. Aetna Ins. Co., 127 Neb. 572, 256 N. W. 71 (1934).

3 Thurtell v. Beaumont, 1 Bing. 339, 130 Eng. Rep. 136 (1823); Chalmers v. Shackell, 6 Car. & P. 475, 172 Eng. Rep. 1326 (1834); Willmett v. Harmer, 8 Car. & P. 695, 173 Eng. Rep. 678 (1839).

whom the crime was charged.[4] Today the law of England on the subject is in an unsettled state, with a trend toward the lesser requirement in civil cases.[5] Of course, the reason given above for the "reasonable doubt rule" never existed in the United States, and such a procedure would be unconstitutional in Illinois.[6]

Following the early English cases, quite a group of states at first adopted the reasonable doubt rule.[7] In other states, the reasonable doubt standard was never introduced into civil cases, a mere preponderance of the evidence being enough to prove even a crime.[8] Today, practically all of the states have repudiated the necessity for the higher degree of proof.[9] Illinois stands alone.[10]

The first Illinois authority for the reasonable doubt rule held that, in an action for slander, a defendant seeking to justify a charge of perjury "is to be held to the same strictness of proof as would be required in a prosecution for the same offence."[11] Although the court was there referring to the requisite number of witnesses to prove perjury and could very well

4 Cook v. Field, 3 Esp. 133, 170 Eng. Rep. 564 (1788).

5 Vaughton v. London & North Western Railway Co., L. R. 9 Exch. 93 (1874); Hurst v. Evans, [1917] 1 K .B. 352.

6 Ill. Const. 1870, Art. II, § 8. See also note, 16 CHICAGO-KENT REVIEW 62.

7 Merk v. Gelzhaeuser, 50 Cal. 631 (1875); Schultz v. Pacific Ins. Co., 14 Fla. 73 at 121 (1872); Forshee v. Abrams, 2 Iowa 571 (1856); Thayer v. Boyle, 30 Me. 475 (1849); Polston v. See, 54 Mo. 291 (1873); Lexington Insurance Co. v. Paver, 16 Ohio 324 (1874); Coulter v. Stuart, 2 Yerg. (Tenn.) 226 (1828).

8 Spruil v. Cooper, 16 Ala. 791 (1849); Downing v. Brown, 3 Colo. 571 (1877); Munson v. Atwood, 30 Conn. 102 (1861); Atlanta Journal Co. v. Mayson, 92 Ga. 640, 18 S. E. 1010 (1893); Continental Insurance Co. v. Jachnichen, 110 Ind. 59, 10 N. E. 636 (1887); Aetna Insurance Co. v. Johnson, 11 Bush (Ky.) 587 (1874); Wightman v. Western Marine & Fire Ins. Co., 8 Rob. (La.) 442 (1844); McBee v. Fulton, 47 Md. 403 (1877); Gordon v. Parmalee, 15 Gray (Mass.) 413 (1860); Elliott v. Van Buren, 33 Mich. 49 (1875); Thoreson v. Northwestern National Ins. Co., 29 Minn. 107, 12 N. W. 154 (1882); Kane v. Hibernia Insurance Co., 39 N. J. L. 697 (1877); Kincade v. Bradshaw, 3 Hawks (N. C.) 63 (1824); Somerset Insurance Co. v. Usaw, 112 Pa. St. 80, 4 A. 355 (1886); Salley v. Globe Indemnity Co., 133 S. C. 342, 131 S. E. 616 (1926); Heiligmann v. Rose, 81 Tex. 222, 16 S. W. 931 (1891); Bradish v. Bliss, 35 Vt. 326 (1862); Hart v. Niagara Fire Insurance Co., 9 Wash. 620, 38 P. 213 (1894); Simmons v. Insurance Co., 8 W. Va. 474 (1875); Washington Union Insurance Co. v. Wilson, 7 Wis. 169 (1858); Buckeye Cotton Oil Co. v. Sloan, 272 F. 615 (1921).

9 Hearne v. DeYoung, 119 Cal. 670, 52 P. 150, 52 P. 499 (1898); Abraham et ux. v. Baldwin, 52 Fla. 151, 42 So. 591 (1906); Welch v. Jugenheimer, 56 Iowa 11, 8 N. W. 673 (1881); Ellis v. Buzzell, 60 Me. 209 (1872); Edwards v. George Knapp & Co., 97 Mo. 432, 10 S. W. 54 (1888); Bell v. McGinness, 40 Ohio St. 204 (1883); Lay v. Linke, 122 Tenn. 433, 123 S. W. 746 (1909).

10 A few authorities stand on middle ground. "In such cases the rule in England is that even in civil cases something more than a mere preponderance of evidence is required, to establish guilt . . . and whatever the law may be elsewhere, that appears to be the law of this state. . . . [The proof] should at least have been sufficiently certain to overcome the presumption of innocence . . . ." Rent-A-Car Co. v. Globe & Rutgers Fire Ins. Co., 161 Md. 249, 156 A. 847 (1931). See also Weston v. Gravlin, 49 Vt. 507 (1877); Simonton v. Los Angeles Trust & Savings Bank, 205 Cal. 252, 270 P. 672 (1928).

11 Crandall v. Dawson, 1 Gilm. 556 (1844).

have meant that, once the requisites were satisfied, the jury should decide according to a preponderance, the case has since been taken as authority for the reasonable doubt rule.[12]

After repeating the doctrine in several judicial asides,[13] the Illinois Supreme Court in *Harbison* v. *Shook*[14] again ruled that, in an action for slander in charging perjury, the defendant, in order to justify by proof of truth of the words, must convince the jury "by the same measure of proof which it would have required to have convicted of perjury." Eight years later the legislature fixed the requirement of proof in slander and libel cases at a mere preponderance of the evidence.[15]

In *Germania Fire Insurance Company* v. *Klewer*,[16] the court, in considering an instruction given by the lower court, said that a criminal offense must be proved beyond a reasonable doubt in a civil case. However, the case was reversed because of errors in other instructions and because of other errors in the instruction under consideration.

Following this came *McInturff* v. *Insurance Company of North America*,[17] another fire insurance case, in which the defendant complained of a ruling that it would have to prove arson beyond a reasonable doubt. The lower court's ruling was affirmed on two grounds; first, because it stated the law in Illinois, and second, and probably the weightier reason, because the defendant had asked the trial court for the same ruling and was now estopped to raise the issue. A later case[18] cited the McInturff case as authority for the reasonable doubt rule but held that the lack of such proof as to a forgery was irrelevant in the present case, because the party claiming under the allegedly defective deed was estopped, by other reasons, to claim title.

Apparently displeased at the doctrine which had crept into the law more or less unnoticed, the Illinois courts in a series of cases did what they could to restrict the rule. Proof beyond a reasonable doubt, it was held, is necessary only where an offense is charged in the pleadings and not where criminality appears incidentally.[19] The pleadings must charge the commission of a crime by a party to the suit, since a third party's crime can be proven by a mere preponderance of the evidence.[20] The reasonable doubt rule is restricted to charges of felony, a preponderance being enough to prove a misdemeanor.[21] It has already been mentioned that the lesser degree of proof is by statute enough in slander and libel

12 Germania Fire Insurance Co. v. Klewer, 129 Ill. 599, 22 N. E. 489 (1889).

13 McConnel v. Delaware Mutual Safety Ins. Co., 18 Ill. 228 (1856); Darling v. Banks, 14 Ill. 46 (1852); Crotty v. Morrissey, 40 Ill. 477 (1866).

14 41 Ill. 141 (1866).

15 Ill. Rev. Stat. 1937, Ch. 126, § 3.

16 129 Ill. 599, 22 N. E. 489 (1889).

17 248 Ill. 92, 93 N. E. 369 (1910).

18 Oliver v. Ross, 289 Ill. 624, 124 N. E. 800 (1919).

19 Sprague v. Dodge, 48 Ill. 142 (1868); Wargo v. Buske, 273 Ill. App. 28 (1933); Grimes v. Hilliary, 150 Ill. 141, 36 N. E. 977 (1894).

20 Schultz v. Royal Neighbors of America, 291 Ill. App. 176, 9 N. E. (2d) 435 (1937); Foster v. Graf, 287 Ill. 559, 122 N. E. 845 (1919).

21 Rost v. Noble & Co., 316 Ill. 357, 147 N. E. 258 (1925); Gannon v. Kiel, 252 Ill. App. 550 (1929); Kuhl v. Clark, 261 Ill. App. 491 (1931).

cases.[22] As a consequence, the reasonable doubt rule, which has heretofore been sustained by a rather weak line of cases, is but a shadow of what it might have been, although the instant case in the appellate court affirms in no uncertain terms that the remnants of the doctrine are law in Illinois today. Occasion arises to consider whether such an infirm and limited doctrine ought not now be rejected entirely in favor of a uniform rule that the burden of proof in all civil cases should be the same regardless of the facts.

R. W. BERGSTROM

HUSBAND AND WIFE—TENANCY BY ENTIRETY—WHETHER TENANCY BY ENTIRETY CAN BE CREATED IN ILLINOIS BY EXPRESS GRANT TO HUSBAND AND WIFE AS TENANTS BY ENTIRETY.—In a recent federal inheritance tax case, *Jacobs* v. *United States*,[1] there was said by way of dictum, "Illinois does not know estates by the entirety."[2] Although the statement is justified by Illinois decisions saying that tenancy by the entirety arising by operation of law has been abolished, there is a question in the minds of many lawyers as to whether or not the estate can still be created by means of an express grant to husband and wife as tenants by the entirety.[3] An examination of the Illinois decisions touching on the subject of tenancy by the entirety shows that tenancy by the entirety was recognized in Illinois prior to the passage of the Married Women's Acts.[4] Further, the examination discloses that the Married Women's Act of 1861[5] is the foundation for the holding that tenancy by the entirety has been abolished in Illinois. However, there is no statutory provision expressly abolishing tenancy by the entirety. Therefore, if tenancy by the entirety has been abolished in Illinois, it has been abolished by implication only.

A review of the Illinois decisions discloses that *Cooper* v. *Cooper*[6] is the cornerstone of our cases on the subject. This case was the first one to be decided after the Married Women's Act of 1861. The decision of the case hinges on the construction of two deeds. The first deed was to William Cooper, Sarah Cooper (his wife) and the heirs of her natural

22 Ill. Rev. Stat. 1937, Ch. 126, § 3.

1 97 F. (2d) 784 (1938).

2 "If an estate in fee be given to a man and his wife, they are neither properly joint tenants, nor tenants in common: for husband and wife being considered as one person in law, they cannot take the estate by moities, but both are seised of the entirety, *per tout et non per my:* the consequence of which is, that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain to the survivor." Blackstone's Commentaries, II, 182.

3 See Walter B. Smith, "Tenancy by the Entirety in Illinois," 14 CHICAGO-KENT REVIEW 1.

4 Mariner v. Saunders, 10 Ill. (5 Gil.) 113 (1848); Lux v. Hoff, 47 Ill. 425 (1868).

5 "That all property . . . belonging to any married woman, as her sole and separate property . . . shall, notwithstanding her marriage, be and remain . . . her sole and separate property, under her sole control, and be held, owned, possessed and enjoyed by her the same as though she was sole and unmarried; and shall not be subject to the disposal, control or interference of her husband. . . ." Pub. Laws of Ill., p. 483.

6 76 Ill. 57 (1875).

body. The second deed was more complicated. During the course of its opinion, the court discussed the Married Women's Act of 1861 and said that the maxim, *cessante ratione legis, cessat ipsa lex,* applied to the situation.

Two appellate court cases, *Insurance Company of North America* v. *Hofing,*[7] and *Keller* v. *Bading,*[8] cite the Cooper case as authority for holding that tenancy by the entirety has been abolished, but in both cases the statements of the court were dicta and not pertinent to the issues involved.

Mittel v. *Karl*[9] involved a conveyance to Maria Jobst and Michael Jobst, her husband, and the survivor of them in his or her own right. The court bluntly said that tenancy by the entirety has been abolished in Illinois, citing the Cooper case. Here again the statement of the court was actually dictum, because the court arrived at its decision by construing the words of the deed and giving effect to the intent of the parties, who had provided for title in the survivor.

Lawler v. *Byrne,*[10] a partition suit, reached the Supreme Court in 1911. It was admitted that a conveyance had been made to husband and wife as joint tenants. Before death, the wife conveyed her interest to her children. In the partition suit brought by the children, the husband claimed that the wife could not sever her interest because she had been made a tenant by the entirety by operation of law. The court referred to the Mittel case and said that tenancy by the entirety had been abolished in Illinois.

The Married Women's Act of 1861 was enacted in derogation of the common law and should be strictly construed (hence not abolishing by implication a common law estate), since the purpose of the act was to enlarge the property rights of a married woman and not to take away the property rights enjoyed by a married woman at the common law.[11] In all of the foregoing Illinois cases the court could have held that the Married Women's Act of 1861 did not abolish tenancy by the entirety, but merely made it possible for the wife to hold as a tenant in common or as a joint tenant with her husband if the grantor so intended, thus leaving it possible for the wife to hold as a tenant by the entirety if such were the intent of the grantor. Therefore, when a case involving the precise issue is presented, the Supreme Court should recognize the existence of tenancy by the entirety arising from an express grant to husband and wife as tenants by the entirety.

H. WEINSTEIN

INJUNCTION—CRIMINAL PROSECUTIONS—WHETHER CRIMINAL PROSECUTION WILL BE TEMPORARILY RESTRAINED WHERE STATE HAS FIRST SOUGHT INJUNCTIVE RELIEF.—The steady encroachment of equity on the field of criminal law led to an interesting result in a recent Florida case.[1] There the state, on relation of a private person, sought to enjoin defendant's

7 29 Ill. App. 180 (1888).
8 64 Ill. App. 198 (1896).
9 133 Ill. 65, 24 N. E. 553 (1890).
10 252 Ill. 194, 96 N. E. 892 (1911).
11 See note, 13 CHICAGO-KENT REVIEW 288; Walter B. Smith, "Tenancy by the Entirety in Illinois," 14 CHICAGO-KENT REVIEW 1.

1 Gulf Theatres, Inc. v. State ex rel. Ferguson, 182 So. 842 (Fla., 1938).

operation of a theatre "bank night." The injunction was granted, but the defendant appealed, and a supersedeas was granted pending appeal. The prosecuting attorney was apparently about to institute criminal proceedings against the defendant, when the defendant asked the upper court to issue an order restraining criminal prosecution until the determination of the matter in equity. The court granted the prayer,[2] on the ground that the state, by submitting itself as plaintiff in the equity court,[3] had given equity jurisdiction, at least for the time being, of the entire case.

Undoubtedly equity has been gradually sweeping further into the domain of criminal law. Said one cautious investigator, "An examination of New York and Massachusetts legislation . . . reveals an increasing resort to the injunction as a means of law enforcement."[4] A bolder statement affirmed, "Law enforcement by injunction without statutory authorization has been considerably extended during the past fifty years."[5] It has also been said that "the . . . cases indicate that courts of equity are tending more and more towards a complete recognition of their power to protect the health and morals of the public as well as its property. . . . It is apparent that the elasticity of the word 'nuisance' permits courts to stretch it to cover almost any situation which threatens injury to interests of the public."[6] The same author states that " . . . the cases . . . indicate . . . that courts of equity will protect the interest of the public against crime, whatever may be its nature."[7]

The state, then, has been gaining a new and powerful weapon.[8] Under

[2] The court called the order a constitutional writ, under the Constitution of Florida, Art. V, § 5, which reads: "The Court shall have the power to issue . . . all writs necessary or proper to the complete exercise of its jurisdiction."

This closely parallels U. S. C. A., Tit. 28, § 377, which reads: "The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

[3] "When authority is properly conferred upon a private citizen to bring a suit in equity, in the name of the state, for the purpose of suppressing by injunction a public nuisance, the suit is in effect one instituted in behalf of the public, and in which the public is the real complainant. . . ." Pompano Horse Club, Inc. v. State ex rel. Bryan, 93 Fla. 415, 111 So. 801 (1927).

[4] Note, 45 Harv. L. Rev. 1096.

[5] S. P. Simpson, "Fifty Years of American Equity," 50 Harv. L. Rev. 171 at 227.

[6] Harmon Caldwell, "Injunctions against Crime," 26 Ill. L. Rev. 259 at 266 and 268.

[7] Ibid., 269.

[8] A writer tells of a Michigan case in which a prohibition statute had a void penalty provision; so the state obtained an injunction restraining defendants from violation of liquor laws, carrying firearms, and driving motor vehicles at an unlawful speed. The case never reached the Supreme Court because the necessity for the order passed with the adoption of a valid penal section. But said the author, "Drastic as this may seem it is no more than a projection of the propositions developed by other cases and it shows clearly what may happen if a check is not put upon this branch of equity jurisdiction. If we can enjoin such things, there appears no reason why we may not extend the jurisdiction to all crimes. . . . Is it not time to look ahead?" Note, 28 Mich. L. Rev. 440.

a legal system where the prosecutor has two courts in which to proceed, the rights of defendants should not be overlooked. Perhaps, with the greater prevalence of criminal equity, we shall find increasing instances in the future where the over-efficient prosecutor may try to doubly harass a defendant. This case may provide the answer for such situations.

In the past the theory behind the instant case has often been voiced, but rarely applied. It requires that the defendant in the equity bill and in the indictment must be the same person, and the person preferring the bill and the criminal charge must also be the same.[9] In addition, the subject matter of the two suits must be identical.[10]

The doctrine was perhaps originated in *Mayor of York* v. *Pilkington*.[11] There the municipal corporation claimed the sole right of fishing in a river, while the defendant also voiced a claim. A bill and cross-bill were brought to determine their respective rights, and, while the suits were pending, the plaintiff had the defendant indicted for a breach of the peace in fishing in the river, the trial to take place in plaintiff's own court. The defendant, with natural alarm, sought an order restraining the prosecution of the criminal proceeding, and the court granted it,[12] not upon the unproven ground that the corporation was both judge and party, but upon the ground that plaintiff had submitted its right to the equity court and thereby conferred complete jurisdiction on it.

Though it was later scorned by Sir George Jessel as "Lord Hardwicke's doubtful decision,"[13] many Federal courts have indicated, in judicial asides, that they considered the case as good law,[14] so emphatically indeed that some authorities have taken the proposition as firmly established.[15] A Federal circuit judge applied the doctrine in *Wadley* v. *Blount*,[16] but his decision was reversed on appeal because the case did not contain the facts which are requisite in order that the rule may apply.[17] The instant case,

9 Spink v. Francis, 19 F. 670 (1884).

10 Fox Film Corp. v. Trumbull, 7 F. (2d) 715 (1925).

11 2 Atk. 302, 26 Eng. Rep. 584 (1742).

12 A stickler for accuracy, Lord Hardwicke declared, "Though I cannot grant an injunction, yet I may certainly make an order upon the prosecutors to prevent the proceeding on the indictment."

13 Kerr v. Corporation of Preston, [1876] 6 Ch. Div. 463.

14 Ex parte Sawyer, 124 U. S. 200, 8 S. Ct. 482, 31 L. Ed. 402 (1888); Davis & Farnum Mfg. Co. v. Los Angeles, 189 U. S. 207, 23 S. Ct. 498, 47 L. Ed. 778 (1903); Dobbins v. Los Angeles, 195 U. S. 223, 25 S. Ct. 18, 49 L. Ed. 169 (1904); Cave v. Rudolph, 287 F. 989 (1923); Logan and Bryan v. Postal Telegraph & Cable Co., 157 F. 570 (1908).

15 "Where criminal proceedings have been instituted by a party to a suit already pending before a court of equity and to try the same right that is in issue, there equity will interpose to protect its own jurisdiction. . . ." Note, 2 L. R. A. (N. S.) 631. See also note, L. R. A. 1916C 263; 32 C. J. 284.

16 65 F. 667 (1895). This was a bill in equity for appointment of a receiver. Creditors later sought a personal decree against the company's president. To coerce him they caused an indictment to be found against him in a state court. The president then filed his bill against the creditors and against the state prosecuting officer to enjoin further prosecution of the indictment. Injunction granted.

17 "The fallacy in the argument of the appellee in the present case is in the

therefore, is one of the few direct authorities for the doctrine, and perhaps the first one in the United States.

The rule in the instant case[18] presents a further question, relating to the utility of the temporary restraining order, which merely stays criminal prosecution for the moment. The *final* decree in equity, however, should not operate as res judicata in the criminal suit when that action is finally brought, since the causes of action are not the same.[19] As to whether the judgment will operate as an estoppel as to the issues actually decided, the rule may depend upon which side is successful in the equity proceeding. No estoppel should result where the decision in equity is for the state, inasmuch as the state may win in the civil suit by a mere preponderance of evidence, which would be insufficient in a criminal proceedings.[20] Thus it has been held that a decree enjoining a liquor nuisance was not admissible in evidence in a criminal prosecution against the same defendant for selling intoxicating liquor in violation of the law.[21]

However, this objection should not apply where the equity decision is in favor of the defendant, and it is possible that he could get the decree admitted as evidence, subject, of course, to the qualification that it would not be admissible where a crime could have been committed even if the civil judgment for the defendant were admitted to be proper.[22] Whether or not the decree favoring the defendant bars the criminal suit as a legal matter, it would certainly do so as a practical matter, since it would be the pronouncement of an appellate court of its conclusion that the facts involved did not constitute an offense, which the lower courts would be bound to follow. Prosecution of the criminal action, would probably, therefore, be abandoned.

R. W. BERGSTROM

INSURANCE—RISKS AND CAUSES OF LOSS—WHAT CONSTITUTES COLLISION IN EXCEPTING AND PROTECTING CLAUSES OF AUTOMOBILE INSURANCE POLICIES. —In the case of *Teitelbaum* v. *St. Louis Fire and Marine Insurance Company*,[1] the plaintiff's automobile was parked in a vacant lot next to a building. A person jumped or fell from the third story of this building and landed on the automobile, damaging it. The plaintiff based his suit on an insurance policy covering damage to the car but particularly excluding damage by collision. It was agreed that, under the terms of the policy, the plaintiff was not entitled to recover if the "loss was caused by

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assumption that the *same right* was involved in the criminal case . . . and in the equity. . . ." Harkrader v. Wadley, 172 U. S. 148, 19 S. Ct. 119, 43 L. Ed. 399 (1898).

18 Gulf Theatres, Inc. v. State ex rel. Ferguson, 182 So. 842 (Fla., 1938).

19 Hopkins v. Lee, 6 Wheat. (U. S.) 109, 5 L. Ed. 218 (1821); Coit v. Tracy, 8 Conn. 268, 20 Am. Dec. 110 (1830).

20 State v. Bradneck, 69 Conn. 212, 37 A. 492 (1897); Glenn v. State ex rel. Clore, 46 Ind. 368 (1874); Britton v. State, 77 Ala. 202 (1884); Freeman, Judgments, II, 1388.

21 State v. Weil, 83 S. C. 478, 65 S. E. 634 (1909).

22 People v. Kenyon, 93 Mich. 19, 52 N. W. 1033 (1892).

1 296 Ill. App. 327, 15 N. E. (2d) 1013 (1938).

collision with any other object." The Illinois Appellate Court found that the fall of the body upon the car constituted a collision.

The definition of collision in this case has two interesting aspects. First, it extends the scope of the legal meaning of the term to include a factual situation more remote from the ordinary meaning of collision than that in any previous Illinois case; and second, this definition of collision in an exception clause of a policy has established a precedent for the meaning of collision which will be applied to the protection clauses of policies in future litigation.

One cannot say that the court was wrong in finding that there was a collision in the Teitelbaum case. For authority, four cases were cited. In each of these cases, where the plaintiff policyholder was suing for damage occasioned by collision, the term "collision" appeared in the protection clause in his policy. In the two Illinois cases,[2] the car struck objects (sand in the one case and bricks in the other) at the side of the road. In the other two cases,[3] the plaintiff's car was injured by the fall of an elevator in which it was being carried. In all four cases the court found that the incident constituted a collision, so that the owner of the car could recover on the policy.

It must be remembered that in all four of these cases the court was under an obligation, in case of doubt, to resolve the meaning of the term "collision" in favor of the policyholder.[4] It could be argued that the facts in all the cases cited were too dissimilar to permit analogies with the Teitelbaum case, that the Teitelbaum case thus presented a new situation not clearly within the definition of collision, that the word "collision" was thus, under the circumstances, ambiguous, and that any ambiguous term in an insurance policy will be interpreted in favor of the policyholder, especially where the term appears in an excepting clause in the policy.

If Mr. Teitelbaum were to have another day in court, he could carry this argument even farther. He could say that, since it is necessary to go outside of Illinois to find any cases with facts at all comparable to his own, the court should look to two cases, one in Texas and one in Michigan, both of which are factually in point. In each of these cases the plaintiff had an insurance policy protecting him against damage to his vehicle. In the Texas case,[5] the court found that, when the second floor of a garage fell upon a car, it was not a collision, and the policyholder could not recover; and the Michigan court found that, when the scoop of a steam

2 Schussler v. Fort Dearborn Casualty Underwriters, 230 Ill. App. 581 (1923); Orr v. Farmers Automobile Ins. Ass'n, 242 Ill. App. 135 (1926).

3 Freiberger v. Globe Indemnity Company, 199 N. Y. S. 310 (1923); National Fire Ins. Co. v. Elliott, 7 F. (2d) 522, 42 A. L. R. 1121 (1925).

4 "Where the words of a policy of insurance are ambiguous or where, without doing them violence, they are capable of two interpretations, that one should be adopted which will sustain the claim of the assured." Garford Motor Truck Co. v. Miller's Nat. Ins. Co., 230 Ill. App. 622 (1923). See also Forest City Insurance Company v. James Hardesty, Adm'r, 182 Ill. 39, 55 N. E. 139 (1899); Terwilliger v. National Masonic Accident Ass'n, 197 Ill. 9, 63 N. E. 1034 (1902).

5 O'Leary v. St. Paul Fire and Marine Ins. Co., 196 S. W. 575 (Tex., 1917).

shovel fell upon a truck, such an incident was a collision and the policyholder could recover.[6]

This conflict among the courts, Mr. Teitelbaum would contend, is conclusive evidence of the ambiguity of the term "collision." He could then cite two comments[7] which discuss at great length the uncertainty of the meaning of this term in various situations. He would conclude that, since the term is ambiguous, it must be construed in his favor, especially when a contrary construction brings about a loss of coverage and particularly when the term appears in the excepting clause, which is always, in case of doubt, construed strongly against the insurance company. Therefore, he would say, the court should find that there was no collision in this case and he should be permitted to recover.

Be that as it may, the Teitelbaum case is now a decided fact, and its probable effects on future litigation over the meaning of term "collision" are interesting. It is submitted that the Teitelbaum case has extended the meaning of collision in either the protecting or excepting clause of an insurance policy in Illinois to include the following factual situations: (1) An elevator carrying a car falls and damages the car. (2) The second floor of a building falls on a car. (3) The scoop of a hoist falls on a car or a truck. (4) And, by analogy, objects, such as bricks or stones, fall on a car.

For the most part, this extension of the definition of a collision will benefit policyholders suing for indemnity against collision as found in the protecting clauses of policies. The Teitelbaum case appears to be the only case in which a controversy has arisen over the meaning of "collision" in an excepting clause of a policy. Therefore, it appears that a victory for the defendant insurance company in the Teitelbaum case will probably be the source of liability in the future for insurance companies that have assumed liability for damage by collision. L. N. CONKLIN

MORTGAGES—AMOUNT REQUIRED TO REDEEM—RIGHT OF MORTGAGOR, AFTER HAVING HIS RELEASE OF EQUITY OF REDEMPTION TO ASSIGNEE OF FORECLOSURE DECREE SET ASIDE, TO REDEEM BY PAYING AMOUNT ASSIGNEE PAID FOR DECREE.—In 1934, a mortgagee bank initiated foreclosure proceedings on land near Clay City, Illinois, against one Hush. A decree

[6] Universal Service Company v. American Insurance Company, 213 Mich. 523, 181 N. W. 1007, 14 A. L. R. 183 (1920).

[7] Note, 13 Ore. L. Rev. 61; Ralph Straub, "What Constitutes 'Collision' within Automobile Insurance," 33 Law Notes 44. The bank of a ditch at the side of a road is an object with which a car can collide. Walter E. Heller & Co., Inc. v. International Indemnity Co., 238 Ill. App. 361 (1925). When a car skids on gravel, overturns, and strikes an embankment at the side of the road, it is not a collision. Fox v. Interstate Exchange, 182 Wis. 28, 195 N. W. 842 (1923). It is a collision when an auto strikes a rut in the highway, so that the car skids into a ditch and overturns. Wood v. Southern Casualty Co., 270 S. W. 1055 (Tex., 1925). It is not a collision when a car strikes a hole in the road twelve inches deep. Garford Motor Truck Co. v. Miller's Nat. Ins. Co., 230 Ill. App. 622 (1923). See also Olympic Securities Co. v. Penn. Fire Ins. Co., 135 Wash. 307, 237 P. 707 (1925).

was entered finding that nearly one thousand dollars was unpaid, and a sale was authorized; however, the sale was never made. Moreover, the bank had secured a judgment against Hush for $1,400 on another obligation, a judgment which, subject to the mortgage, stood as a lien against the premises. About this time, Hush moved to Columbus, Ohio.

During 1935, oil was found near Clay City. In August of that year one Reaugh, a disbarred attorney, who had on occasion represented Hush when the latter resided in Clay City, made a hurried trip to Columbus, Ohio, and offered Hush $50 for a quitclaim deed to the land. No conveyance was made at this time, and Reaugh returned to Clay City, where he secured from the receiver of the mortgagee bank an assignment of the foreclosure decree to himself and a release of the unrelated money judgment on the mortgaged premises—all for a consideration of $100.

Some time thereafter, Reaugh executed a lease of the premises to the Pure Oil Company, and in March, 1937, three days after it had been reported that a valuable oil well had been brought in on a farm near the Hush land, Reaugh took his second trip to Columbus to see Hush. Either at this time or at the prior meeting in 1935 (the evidence on this point is conflicting) Hush greeted Reaugh by saying, "How is everything around Clay City?" Reaugh replied, "It is the same old town, you know how it is, no change." Then Reaugh, purporting to act for a third person, persuaded Hush and his wife, who were totally ignorant of the oil activity, to execute a quitclaim deed for $100 to one De Long, an agent for Reaugh. Hush, upon ascertaining the true state of affairs, promptly brought a bill against Reaugh to rescind and redeem. The Federal District Court, in *Hush* v. *Reaugh*,[1] entered a decree in accordance with the bill.

As a decree of foreclosure is assignable,[2] Reaugh naturally became subject to the same rights and liabilities as the original mortgagee,[3] since an assignee is regarded as standing in the same shoes as his assignor. The Illinois courts have often held that, while there is no fiduciary relationship as between the mortgagor and mortgagee,[4] yet an agreement between them extinguishing the equity of redemption will be closely scrutinized, and if it can be said that the consideration therefor is grossly inadequate,[5] or if the mortgagee in any way avails himself of his position to obtain an advantage over the mortgagor,[6] or if the agreement indicates in any manner

1 23 F. Supp. 646 (1938).

2 Williams v. Chicago Exhibition Co., 188 Ill. 19, 58 N. E. 611 (1900); Franzke v. Chicago Stock Yards and Transit Co., 205 Ill. App. 313 (1917); Cunningham v. Doran, 18 Ill. 386 (1857); Mayer v. Moore, 61 N. Y. S. 940 (1899); Walker v. Lillibridge, 112 Mich. 384, 70 N. W. 1031 (1897).

3 Kilgour v. Gockley, 83 Ill. 109 (1876); Hazle v. Bondy, 173 Ill. 302, 50 N. E. 671 (1898); Lauf v. Cahill, 231 Ill. 220, 83 N. E. 155 (1907); Copelin v. Calkins, 131 Ill. App. 149 (1907); Poulson v. Simmons, 126 Ind. 227, 26 N. E. 152 (1890); Moore v. Smith, 103 Mich. 387, 61 N. W. 538 (1894).

4 Conant v. Riseborough, 139 Ill. 383, 28 N. E. 789 (1891); West v. Reed, 55 Ill. 242 (1870).

5 Brown v. Gaffney, 28 Ill. 149 (1862).

6 Semour v. Mackey, 126 Ill. 341, 18 N. E. 552 (1888); Scanlan v. Scanlan, 134 Ill. 630, 25 N. E. 652 (1890).

that it is not free from oppression, fraud, or undue influence,[7] it will be set aside upon the petition of the aggrieved party. The District Court, in rescinding the conveyance releasing the equity of redemption, properly held that, in view of this mortgagor-mortgagee relationship, the representation made by Reaugh, to the effect that the community around Clay City had not changed, was a representation of fact upon which Hush rightfully relied.

The court decreed that "Hush is entitled to redeem from the mortgagee [*sic*] decree held by Reaugh upon payment of $100 received by Hush and of $100 paid by Reaugh for the assignment of the decree plus taxes and interest, less such sums as may be shown upon an accounting Reaugh has realized from the farm and the oil lease."[8] This language is capable of two constructions: First, that Hush, after paying $200 to Reaugh, would then be entitled to redeem for the amount of the decree; second, that payment of $200 to Reaugh would be all that was necessary for a redemption. If the former construction is the correct one, Hush is put in the position of being obliged to pay a premium of $100 for having unwittingly permitted himself to be defrauded. On this basis, Hush, after repaying the $100 he received for the quitclaim deed, would then have to pay $1,100 in order to satisfy a mortgage foreclosure decree that called for $1,000. While there are decisions[9] holding that, when the mortgagor's application for a setting aside of the conveyance of the equity of redemption is granted, the mortgagee is remitted to his unimpaired rights under the mortgage, no case has been found wherein the party guilty of fraud was either benefitted by his fraudulent conduct or deprived of rights that existed prior to the fraud.

However, if Hush were given a complete redemption conditioned only on his payment of $200, the decree is even more subject to attack since its effect would be virtually to deprive Reaugh of a mortgage foreclosure decree calling for $1,000 inasmuch as Hush upon payment of $100 would extinguish that claim. Since the purpose of a rescission suit based on fraud is to put the parties in the positions they occupied prior to the fraud, it is obvious that if relief consistent with either of the aforementioned constructions were given, that result has not been achieved.

Seemingly, the only basis upon which the decision could be supported is that the parties were regarded as occupying the positions of principal and agent, in that Reaugh, when he went to Columbus and made inquiries concerning the land, became in effect the agent of Hush for the purpose of securing a purchaser for the equity of redemption. Consequently, the court may have silently applied the familiar rule[10] that an agent authorized

[7] Cassem v. Heustis, 201 Ill. 208, 66 N. E. 283 (1903); Shultz v. McCarty, 193 Ill. App. 318 (1915); Bowen v. Kraemer, 260 Ill. App. 454 (1931).

[8] Hush v. Reaugh, 23 F. Supp. 646 at 651 (1938).

[9] First Nat. Bank of Lebanon v. Essex, 84 Ind. 144 (1882); Chaffe & Bro. v. Morgan, 30 La. Ann. 1307 (1878).

[10] Tyler v. Sanborn, 128 Ill. 136, 21 N. E. 193 (1889); Fox v. Simons, 251 Ill. 316, 96 N. E. 233 (1911); Johnson v. Bernard, 323 Ill. 527, 154 N. E. 444 (1926); Daytona Gables Development Co. v. Glen Flora Inv. Co., 345 Ill. 371, 178 N. E.

to sell is incapable of selling to himself. If this were the position taken by the court and if the facts justify it, the conclusion that Hush would be entitled to a complete redemption upon payment of $200 is unquestionably correct, since to hold otherwise would be to permit a fiduciary who breached his trust to profit thereby.

J. P. McGUIRE

MORTGAGES — STRICT FORECLOSURE — RIGHT OF PURCHASER AT JUDICIAL SALE AFTER HE HAS CONVEYED PROPERTY TO THIRD PARTY TO BRING STRICT FORECLOSURE AGAINST JUNIOR INCUMBRANCER.—In the recent New Jersey case of *Sears, Roebuck and Company* v. *Camp*,[1] the complainant held a first mortgage on certain property. Before foreclosing, the complainant had an abstractor make a title search. The abstractor, through inadvertence, failed to discover an assignment of a junior mortgage to Camp. The original mortgagee of this incumbrance, however, was made a party, and her equity of redemption was foreclosed by the decree. At the judicial sale, the property was struck off and sold to complainant, who, four months later, conveyed the property to one Reinert, who entered into possession at once. The assignment to Camp was later discovered, and the original first mortgagee as complainant brought a bill for strict foreclosure against him. Camp answered, denying complainant's right to sue, on the ground that the complainant had lost all interest in the property by conveying to Reinert. The bill was then amended to include Reinert as a party defendant, and the latter tendered a reconveyance of the title to the complainant and joined in the prayer of the bill. The lower court ruled that the right to bring strict foreclosure proceedings is limited to the purchaser of the mortgaged premises at the judicial sale who is in possession thereof under a sheriff's deed; and, since the complainant was not in that class, the court dismissed the bill. The Court of Errors and Appeals, however, reversed the decree of the lower court and remanded the cause with directions that complainant's bill be allowed. To justify this decision, the court stated that it could assume that complainant had made an independent equitable assignment of the rights under the foreclosed mortgage as an incident to the conveyance to Reinert and that therefore Reinert stood in the same position as did the complainant prior to the conveyance, i. e., with the right of strict foreclosure against Camp. The court then stated that, since complainant was still bound on his warranty to Reinert and since the latter joined in the prayer of the bill and tendered back a reconveyance, there was such a unity of interest as would serve to justify relief by way of strict foreclosure.

Although judicial foreclosure is generally had in this country and strict foreclosure is forbidden by statute in many states yet it is permitted where it will subserve equity and justice. In Illinois, it is allowed where the property is of less value than the amount of debt, if the mortgagor is

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107 (1931); Hall v. Paine, 224 Mass. 62, 112 N. E. 153 (1916); Norby v. Security State Bank, 177 Minn. 127, 224 N. W. 843 (1929).

[1] 1 A. (2d) 425 (N. J. Eq., 1938).

insolvent,[2] and the mortgagee is willing to take the property in full satisfaction and there is no other incumbrance.[3] It has been held that the bill must specificially allege that the value of the estate does not exceed the amount of the debt and costs.[4] Strict foreclosure may be invoked where the mortgage has been given for entire purchase price if no part of the price has been paid and if the value of the land does not exceed the amount of the mortgage.[5] But strict foreclosure has been held proper though there are other creditors.[6] Thus, where mortgaged property worth less than the amount of the mortgage had been abandoned by the mortgagor, who had become insolvent, and the mortgagee was willing to take the property in full satisfaction of the debt, a strict foreclosure was held to be proper on the grounds that a judgment creditor who had only a junior lien could not have benefitted by an ordinary foreclosure.[7] It has also been held in Illinois that where the trustee in the trust deed is the owner of the indebtedness he may have a decree of strict forclosure vesting the title in him in his individual capacity.[8] No parallel Illinois case has been found involving the problem in the New Jersey case, and in such cases the remedy would usually be had by a conventional reforeclosure in equity with the attendant statutory period of redemption.[9]

In the instant case, the court cited the New York case of *Benedict* v. *Gilman and Couch*.[10] Here the mortgagee-purchaser at a foreclosure sale made a conveyance of "all his interest, both in the mortgages and in the mortgaged premises" to a third party. The grantee subsequently filed a bill for strict foreclosure against intervening judgment creditors who had not been made parties to the foreclosure suit. The court held that the bill was proper. The Benedict case can be justified because the petitioner was grantee of the interest in the original mortgage as well as the property, and in bringing the action of strict foreclosure he was merely doing what the original mortgagee could have done. This feature was missing from the instant case, where the mortgagee-purchaser by a later deed apparently divested itself of all interest in the property.

In the recent case of *Mesiavech* v. *Newman*[11] where the solicitor through mistake and in good faith failed to make tenants in possession of mortgaged premises parties to a foreclosure suit, the New Jersey court held that grantee of purchaser at foreclosure sale could later obtain relief in strict foreclosure.

2 Strict foreclosure is not allowed where the mortgagor is solvent. Rabbit v. First Nat. Bank of Rock Falls, 237 Ill. App. 289 (1925).

3 Carpenter v. Plagge, 192 Ill. 82, 61 N. E. 530 (1901); Illinois Starch Co. v. Ottawa Hydraulic Co., 125 Ill. 237, 17 N. E. 486 (1888).

4 Brahm v. Dietsch, 15 Ill. App. 331 (1884).

5 Wilson v. Geisler, 19 Ill. 49 (1857).

6 Moffett v. Farwell, 123 Ill. App. 528 (1905), aff'd 222 Ill. 543, 78 N. E. 925 (1906).

7 Rexroat v. Ford, 201 Ill. App. 342 (1916).

8 Rabbit v. First Nat. Bank of Rock Falls, 237 Ill. App. 289 (1925).

9 Wehrheim v. Smith, 226 Ill. 346, 80 N. E. 908 (1907).

10 4 Paige (N. Y.) 58 (1833).

11 120 N. J. Eq. 192, 184 A. 538 (1936). See also Lockard v. Hendrickson, 25 A. 512 (N. J. Eq., 1892).

An Oregon court[12] has held that the proper course of procedure to bar the rights of a judgment lien creditor, who was not made a party to the foreclosure of a prior mortgage was a suit in strict foreclosure, requiring the creditor to redeem within a reasonable time or be barred and foreclosed. Defendant had claimed that the remedy should have been foreclosure of the original mortgage and distribution of the proceeds according to priorities of the parties. Here, however, it was the purchaser at the judicial sale who brought suit.

With the exception of the above distinguishable cases, the instant case seems to stand quite alone. That equity and justice was accomplished cannot be denied. Should the case be followed it would appear that the tendency to restrict the use of strict foreclosure has ceased and that a trend has started in the other direction.

G. KLOEK

RELEASE—RIGHT TO CONTEST VALIDITY—RESTORATION OF CONSIDERATION AS PREREQUISITE TO AVOIDANCE OF RELEASE PROCURED BY FRAUD IN THE INDUCEMENT.—In a recent New York case,[1] the plaintiff sued to recover damages for a fractured skull. A release was pleaded in answer. Plaintiff replied that the release was procured by fraud, since defendant's agent had assured plaintiff that his injuries were minor when in fact they were serious. Plaintiff admitted receiving seventy-five dollars for the release, and the court said that unless that sum was returned the complaint would be dismissed before trying the issue of fraud. Plaintiff refused to return the money, so the complaint was dismissed, and on appeal the dismissal was affirmed. This appears to be in line with other decisions in New York.[2] We are concerned with how Illinois courts would treat a similar question.

In general a release is invalid and may be avoided if procured by fraud and deceit. This is true in nearly all jurisdictions, including Illinois.[3]

12 Koerner v. Willamette Iron Works, 36 Ore. 90, 58 P. 863 (1899).

1 Gilbert v. Rothschild, 5 N. Y. S. (2d) 52 (1938).

2 Joslyn v. Empire State Degree of Honor, 204 N. Y. 621, 97 N. E. 1107 (1912), reversing 129 N. Y. S. 563 (1911).

3 53 C. J. 1217, § 34; Woodbury v. U. S. Casualty Company, 284 Ill. 227, 120 N. E. 8 (1918); Babcock v. Farwell, 245 Ill. 14, 91 N. E. 683 (1910). Where the release is obtained by fraud in the execution, the modern authorities are unanimous in allowing the plaintiff to proceed immediately at law without obtaining a rescission or cancellation of the instrument. 53 C. J. 1230, § 48; Woodbury v. U. S. Casualty Co., 284 Ill. 227, 120 N. E. 8 (1918); Hemmick v. Baltimore & O. S. W. R. Co., 263 Ill. 241, 104 N. E. 1027 (1914); Turner v. Manufacturers' and Consumers' Coal Co., 254 Ill. 187, 98 N. E. 234 (1912). To the defense of release, the plaintiff replies that the facts show fraud in the execution. For example he may show that he was tricked into signing an instrument he did not intend to sign, that the release was represented to be a receipt for wages or for expenses, that the instrument was misread to the signer, or that one paper was surreptitiously substituted for another. In such a case the plaintiff will be successful in the law courts. He is not required to obtain a cancellation in equity nor to return the consideration received for the release, because proof of fraud in the execution will show the instrument to be void and hence of no avail to the defendant. Ziegler v. Pennsylvania Co., 63 Ill. App. 410 (1896); Monahan v. St. Paul Coal Co., 193 Ill. App. 308 (1915); Spring Valley Coal Co. v. Buzis, 213 Ill. 341, 72 N. E. 1060 (1905).

In the case of fraud in the inducement—fraud as to such matters as the consideration, the extent of the injuries of the plaintiff, or other matters collateral to the instrument itself—plaintiff must usually obtain rescission or cancellation of the release before proceeding with his suit. At common law, equity alone could give this relief.[4] Today, however, some jurisdictions have adopted systems of procedure under which equitable matters may be considered in actions at law, and in these jurisdictions it is not necessary to resort to equity for cancellation.

Prior to the Civil Practice Act of 1933, a plaintiff in Illinois seeking to avoid a release for fraud in the inducement would have been required to go to the equity court first to have the release set aside before proceeding at law.[5] Under the Civil Practice Act, the cancellation of a release in Illinois is probably still an equitable issue and probably the complaint should state that relief is sought in chancery.[6] By the weight of authority, as a prerequisite to setting aside a release, plaintiff should do equity by tendering or returning the consideration given him for the release.[7]

We now come to the principal problem. Must the plaintiff, under Illinois law, return or tender the consideration to get a release set aside when it has been procured by fraud in the inducement? If the suit is

[4] Chicago City Ry. Co. v. Uhter, 212 Ill. 174, 72 N. E. 195 (1904); Babcock v. Farwell, 245 Ill. 14, 91 N. E. 683 (1910).

[5] Woodbury v. U. S. Casualty Co., 284 Ill. 227, 120 N. E. 8 (1918); Hemmick v. Baltimore & O. S. W. R. Co., 263 Ill. 241, 104 N. E. 1027 (1914); Babcock v. Farwell, 245 Ill. 14, 91 N. E. 683 (1910); Chicago City Ry. Co. v. Uhter, 212 Ill. 174, 72 N. E. 195 (1904). If the question was whether plaintiff had sufficient mental capacity to execute the instrument, proof would be heard in the action at law in Illinois. Turner v. Manufacturers' and Consumers' Coal Company, 254 Ill. 187, 98 N. E. 234 (1912); Pawnee Coal Company v. Royce, 184 Ill. 402, 56 N. E. 621 (1900). However, in this latter case the court said that plaintiff, after regaining his reason, should not retain the fruits of his contract where the other party was unaware of his incapacity, for such retention would be taken to be an affirmation of the instrument. Chicago, Rock Island and Pacific Railway Company v. Lewis, 109 Ill. 120 (1884).

[6] Ill. Rev. Stat. 1937, Ch. 110, §§ 259.9, 259.10, 259.11. However, the court can transfer the cause of action or counterclaim from the law docket to the equity docket as it sees fit. § 168.

[7] 53 C. J. 1232, § 50, citing cases in U. S., Ala., Alaska, Cal., D. C., Ga., Ind., Ky., Me., Mass., Mich., Minn., Mo., N. Y., N. D., Ohio, Pa., R. I., Tenn., W. Va., and Wis. This, of course, is not true where the reply to the release states facts which show fraud in the execution. There are numerous cases involving this point in Illinois in which it is said that, when fraud in the execution is present, the release is void and the consideration need not be returned before proceeding. Ziegler v. Penn. Company, 63 Ill. App. 410 (1896); Chicago, Rock Island, and Pacific Railway Company v. Lewis, 109 Ill. 120 (1884); Monahan v. St. Paul Coal Company, 193 Ill. App. 308 (1915); Spring Valley Coal Company v. Buzis, 213 Ill. 341, 72 N. E. 1060 (1905). There are also cases which state that only an actual, intended fraud will relieve the plaintiff of the necessity of returning the consideration. However, in these cases the plaintiff claimed a fraud because of his own incapacity to contract and failed to prove an intention to defraud on the part of the defendant. Pawnee Coal Company v. Royce, 184 Ill. 402, 56 N. E. 621 (1900); Chicago Union Traction Company v. Mommsen, 107 Ill. App. 353 (1903); Rumszas v. Chicago Rock Island and Pacific Railway Company, 196 Ill. App. 41 (1915).

for a liquidated sum, it would appear that the consideration need not be returned, according to the Illinois Appellate Court case of *Waterstrow* v. *National Americans*.[8] In that case Mrs. Waterstrow came to the law court and asked for cancellation of a release for fraud in the inducement. The case was promptly transferred to equity. Mrs. Waterstrow admitted signing the release with knowledge of its contents and nature, but said that an agent of the defendant insurance company had told her that her insurance policy was worthless and that she had better take fifty dollars for a release while she could get it. The question of whether she should be required to return the fifty dollars which she had received for the release was scarcely considered. Without requiring such a return, the court tried the issue of fraud, set the release of the policy aside, and gave judgment for the plaintiff, crediting the defendant with the fifty dollars on the judgment rendered.

This procedure was also followed in *Caine* v. *Farmers' and Mechanics' Life Association*.[9] The plaintiff there was in a grief-stricken condition over the death of her husband. Defendant's agent came and represented that the plaintiff had no rights under a life insurance policy for $2,000 issued by the defendant. Plaintiff was offered $200 as an act of kindness to induce her to surrender the policy. She accepted the $200 and gave a release. During the trial the plaintiff said she was unable to return the consideration but offered to credit the $200 on the judgment which might be rendered against the defendant. The court said, "Boiled down, then, the question before us is, was appellant obliged to pay back or tender back to appellee the $200 before bringing suit?" The court acknowledged that usually such tender or return was necessary, but found for plaintiff, allowing a recovery for the balance, upon the ground that the acceptance of a less sum of money than the amount actually due can not be held to a satisfaction. Thus it seems evident that where the plaintiff is suing for a liquidated sum he is not required to return the consideration.

Where, however, the plaintiff is suing for personal injuries or on some other unliquidated demand, the court would not be able to say that the acceptance of a lesser sum was not a satisfaction, inasmuch as the amount due the plaintiff could not be certain until the close of the trial. In such a case a different rule might be invoked, as indicated by the 1883 decision of an Illinois law court in *Carroll* v. *The People*.[10] In that case there was an action of debt by appellee for the use of Jane Lavis on the bond of Carroll. This bond was given in accordance with the dram shop act. Carroll sold beer to Jane's husband, causing him to become intoxicated so that he fell under a train and lost a leg. Carroll's defense was a release for which he had paid Jane fifty dollars. Jane's answer claimed that the release was void because of fraud and undue influence by a friend of defendant. The court said that it was Jane's duty to rescind and return the money as soon as she discovered the fraud and that a return of the

[8] 183 Ill. App. 82 (1913). [9] 115 Ill. App. 307 (1904).

[10] 13 Ill. App. 206 (1883). See also Munnis v. The Northern Hotel Co., 237 Ill. App. 50 (1925).

consideration was necessary. This, of course, was an action of debt at law and does not govern what a court of equity would or should do when asked to cancel a release for fraud in the inducement. In such a case some slight distinguishing feature of the particular case might cause the court to decide either for or against requiring the return of the consideration.

It would, then, seem to be the most advisable practice under the present system, in cases where the claim is for an unliquidated sum and where the defense is a release, to make the reply of fraud as complete as a bill for rescission under the older practice and to include in the reply an allegation of tender of the sum received for the release. If, for some reason, this is undesirable, the reply should at least contain an offer to credit the consideration received on any judgment which might be rendered against the defendant.

L. N. CONKLIN

SALES—REMEDIES OF SELLER—WHETHER VENDOR'S LIEN SHOULD REVIVE UPON BUYER'S UNAUTHORIZED RETURN OF GOODS.—The recent case of *Jones* v. *Lemay-Lieb Corporation*[1] in Massachusetts should be of interest to Illinois lawyers because it turns upon the interpretation of a sales statute[2] very similar to one in Illinois.[3] In that case, the vendor of an automobile delivered the machine to the vendee, who took it away. The vendee then returned the car in an attempt to rescind, stopped payment on his check for the purchase price, and demanded to be placed in status quo. The vendor refused to rescind the sale, waited what was held to be a reasonable time, and sold the car to a third party. The Massachusetts court held that this was not a conversion of vendee's property and that the vendor's lien, which was lost upon the original delivery of the car, was revived by reason of the possession thrust upon the vendor by the vendee's ineffective attempt to rescind.

The court freely admitted that the vendor lost his lien when the buyer lost possession and said, "The question is whether the defendant [vendor] acquired a new vendor's lien by reason of the kind of possession which it found thrust upon it as a result of the plaintiff's abortive attempt to rescind." It decided that the lien revived, believing that the authorities elsewhere are to that effect and that such a rule probably serves commercial convenience.

The Jones case is of further interest when considered in connection with the Illinois case of *Excelsior Stove and Manufacturing Company* v. *Venturelli*[4] and the discussion of that decision in the CHICAGO-KENT REVIEW.[5] In that case the defendant returned stoves purchased from the plaintiff, requesting by letter that the plaintiff apply the purchase price of the stoves against the defendant's indebtedness. The plaintiff, after paying the freight, uncrating the stoves, and placing them in stock, held them five months and then credited defendant with less than the purchase price.

1 16 N. E. (2d) 634 (Mass., 1938). 2 Gen. Laws of Mass. 1932, Ch. 106, §§ 41-49.
3 Ill. Rev. Stat. 1937, Ch. 121½, § § 52-60.
4 290 Ill. App. 502, 8 N. E. (2d) 702 (1937). 5 Note, 15 CHICAGO-KENT REVIEW 342.

The court decided that the vendor had acted correctly, saying, "It is true that as a general rule an unpaid seller of goods loses his lien when he parts with possession of the goods to the vendee; however, in this case, appellant [vendee] after receiving the stoves and keeping them for years wrongfully returned them to appellee. His letter indicated he did not want them and appellant so testified. Under these circumstances we do not believe that appellee was obliged to accept these goods in full satisfaction of appellant's note or else decline to receive them, but it, appellee, had the right to receive the goods and thus prevent further loss or damage to the merchandise."

As was suggested in the CHICAGO-KENT REVIEW discussion of this case, the above language in effect implies that the vendor's lien revives upon the unauthorized and unwarranted return of the goods by the vendee. If this is true, then both the Massachusetts and Illinois cases proceed upon the same basic theory, which might be stated as follows:

Although a vendor loses his lien when the vendee lawfully obtains possession of the goods, the former lien may revive or a new lien may arise when the vendee foists possession of the goods back upon the vendor in an unsuccessful attempt to rescind, if the vendee's return of the goods is unwarranted and unauthorized. The vendor must, of course, exercise his revived lien in accordance with the statutory provisions applying to vendor's liens.

The above is, in effect, a crystallization of what the court said in the Massachusetts case. Such a conclusion can be taken from the Illinois decision only by implication. However, since both decisions arise under statutes practically identical in their text, they would be persuasive decisions to place before an Illinois court considering a new case involving a similar question.

L. N. CONKLIN

WILLS—REVOCATION—DIVORCE AS EFFECTING REVOCATION BY IMPLICATION.—In the recent case of *Gartin* v. *Gartin*[1] the Illinois Appellate Court decided that a decree of divorce obtained by a wife which provides for a lump sum in full settlement of all claims for alimony and support constituted a sufficient change of circumstances to effect an implied revocation of the will of the husband made prior to the decree. The testator and his wife were married in 1915. In 1929, he made his will, naming his wife as sole beneficiary. The wife obtained a divorce in 1935, the decree providing that the testator pay the wife $1,500 in full settlement of alimony and support claims. The testator died in 1936, and thereafter the Probate Court of Cook County issued letters testamentary to the wife. A bill seeking to have the will declared revoked by implication was later filed in the Circuit Court of Cook County, and a decree was so entered. This decree was affirmed by the decision under consideration.

Revocation of wills by change of circumstances was recognized by the ecclesiastical courts.[2] The original theory underlying the doctrine was

[1] 296 Ill. App. 330, 16 N. E. (2d) 184 (1938).

[2] Page, Wills (2d ed.), § 474.

that, in view of such change of circumstances, the average testator would be presumed to have desired a different disposition of his property from that indicated in his will.[3] The ecclesiastical courts based the doctrine upon the rebuttable intention of the testator.[4] This theory was adopted in some of the early common law cases, but later cases treated the presumption as conclusive in situations where the doctrine was applied.[5]

The question arises as to what changes of circumstances will be deemed sufficient to revoke a will by implication. Section seventeen of the Illinois Wills Act sets forth the methods for expressly revoking a will.[6] The Illinois Descent Act provides that a prior will is revoked by subsequent marriage.[7] It also provides that if a child is born after the will is made and such child is not mentioned and the will does not expressly show an intention to disinherit such child, the other legacies and devises shall abate equally so as to give the said child a portion equal to that which he would have received if the testator had died intestate.[8] Such are the provisions of the Illinois statutes regarding revocation.

At common law, the change of circumstances which would revoke the will of a man was marriage and subsequent birth of issue; marriage alone was not sufficient. The reason seemed to be that the husband was obligated to provide for his children. A revocation by marriage alone would not benefit the wife as she was not an heir of the husband.[9] The will of a woman, however, was revoked by marriage alone. One explanation for this rule is that the same degree of capacity was required to revoke as to make a will, and, unless the marriage revoked the will, it would be irrevocable during coverture.[10] In Illinois it has been held that inconsistent provisions of a later will shall revoke by implication the similar provisions contained in a prior will.[11] It has also been held in Illinois that where property which is specifically devised has been conveyed by the testator and later reacquired by him, such provisions in the will shall be revoked by implication,[12] but the rule is otherwise where the devise is general.[13] The death of the chief beneficiary under the will does not revoke it.[14] A great increase in the wealth of the testator will

3 Page, Wills (2d ed.), § 474.

4 Fox v. Marston, 1 Curt. Eccl. 494 (1837).

5 Page, Wills (2d ed.), § 474.

6 "No will, testament or codicil shall be revoked, otherwise than by burning, canceling, tearing or obliterating the same, by the testator himself, or in his presence, by his direction and consent, or by some other will, testament or codicil in writing declaring the same, signed by the testator or testatrix, in the presence of two or more witnesses, and by them attested in his or her presence; and no words spoken shall revoke or annul any will, testament or codicil in writing, executed as aforesaid, in due form or law." Ill. Rev. Stat. 1937, Ch. 148, § 19.

7 Ill. Rev. Stat. 1937, Ch. 39, § 10.

8 Ibid.

9 Page, Wills (2d ed.), § 475.

10 Page, Wills (2d ed.), § 481.

11 Lasier v. Wright, 304 Ill. 130, 136 N. E. 545 (1922).

12 Phillippe v. Clevenger, 239 Ill. 117, 87 N. E. 858 (1909).

13 Strang v. Day, 362 Ill. 110, 199 N. E. 263 (1935).

14 Redwood v. Howison, 129 Md. 577, 99 A. 863 (1917).

not revoke a prior will,[15] nor will a great increase in property combined with insanity on the part of the testator for a number of years.[16] A will which disinherits a child to whom the testator is later reconciled will not be revoked by such change of circumstances.[17]

Whether or not divorce alone resulted in such a change of circumstances as to revoke a prior will is a question which does not seem to have been presented to any of the early English courts inasmuch as absolute divorce is of comparatively recent origin.[18] This question has never before been decided by the Illinois courts of review. The Illinois Supreme Court has held that the statutes on revocation are not exclusive and that the doctrine of revocation by implication exists in Illinois.[19] How much does this doctrine depend upon the actual intention of the testator? In considering the question of revocation by subsequent marriage, the Illinois Supreme Court has said that the subsequent marriage alone would revoke the will, as provided by the Illinois statutes, regardless of the actual intention of the testator,[20] except where the will was made in contemplation of marriage to a particular person.[21] The general rule in the states where no statute exists on this question seems to be that the presumption created by the changed conditions is conclusive and cannot be rebutted by evidence.[22]

It is generally held that neither divorce alone[23] nor divorce and alimony will revoke a prior will.[24] It is generally held in states where this matter has been passed upon, that divorce and settlement of property rights will revoke the prior will.[25] However, a recent case in California has decided that such change of circumstances will not have this effect.[26] In Nebraska, it has been held that the circumstances existing at the time of the decree

[15] Hill v. Hill, 106 Neb. 17, 182 N. W. 578 (1921); Verdier v. Verdier, 8 Rich. Law (S. C.) 135 (1855).

[16] Warner & Wife v. Beach, 70 Mass. (4 Gray) 162 (1855).

[17] Aten v. Tobias, 114 Kan. 646, 220 P. 196 (1923). [18] 9 R. C. L. 494.

[19] Phillippe v. Clevenger, 239 Ill. 117, 87 N. E. 858 (1909). Property specifically devised was conveyed and later reacquired by the testator, who held it at his death. Revocation by change of circumstances was held to have resulted. Contra, where devise was general, Strang v. Day, 362 Ill. 110, 199 N. E. 263 (1935).

[20] Hudnall v. Ham, 183 Ill. 486, 56 N. E. 172 (1899); Lawman v. Murphy, 321 Ill. 421, 152 N. E. 220 (1926); Gillmann v. Dressler, 300 Ill. 175, 133 N. E. 186 (1921).

[21] Ford v. Greenawalt, 292 Ill. 121, 126 N. E. 555 (1920).

[22] In re Battis, 143 Wis. 234, 126 N. W. 9 (1910); Lansing v. Haynes, 95 Mich. 16, 54 N. W. 699 (1893); Wirth v. Wirth, 149 Mich. 687, 113 N. W. 306 (1907); In re McGraw's Estate, 228 Mich. 1, 199 N. W. 686 (1924); In re Hall's Estate, 106 Minn. 502, 119 N. W. 219 (1909); Hoitt v. Hoitt, 63 N. H. 475 (1885).

[23] Card v. Alexander, 48 Conn. 492 (1881); In re Brown's Estate, 139 Iowa 219, 117 N. W. 260 (1908); Baacke v. Baacke, 50 Neb. 18, 69 N. W. 303 (1896); In re Jones' Estate, 211 Pa. 364, 60 A. 915 (1905); Charlton v. Miller, 27 Ohio St. 298 (1875); Murphy v. Markis, 98 N. J. Eq. 153, 130 A. 840 (1925).

[24] In re Brown's Estate, 139 Iowa 219, 117 N. W. 260 (1908).

[25] Lansing v. Haynes, 95 Mich. 16, 54 N. W. 699 (1893); Wirth v. Wirth, 149 Mich. 687, 113 N. W. 306 (1907); In re McGraw's Estate, 228 Mich. 1, 199 N. W. 686 (1924); In re Battis, 143 Wis. 234, 126 N. W. 9 (1910); In re Hall's Estate, 106 Minn. 502, 119 N. W. 219 (1909). In the latter case the decree itself fixed the property rights.

[26] In re Patterson's Estate, 64 Cal. App. 643, 222 P. 374 (1923).

would determine whether or not the presumption to revoke was conclusive but that evidence of the testator's affection for his wife was not competent to show this fact.[27] Michigan seems to have gone further than any other state with regard to this question of divorce revoking the prior will. In the case of *In re McGraw's Estate,* the court held the will to be revoked on the mere fact of divorce alone and said that the failure of the wife to seek alimony was equivalent to a property settlement.[28] The question of whether or not the whole will should be revoked where the wife is not the sole beneficiary has been answered in the negative in Minnesota.[29]

To summarize the foregoing discussion of the cases, it seems to be fairly well settled that divorce alone does not revoke a prior will, and Iowa, at least, has held that divorce and alimony does not.[30] Divorce and property settlement will revoke the prior will. In the case at hand $1,500 was given the wife in full settlement of all claims for alimony and support. Can this be said to be equivalent to a property settlement by decree? If so, the case would seem to be in accord with the general weight of authority; otherwise, the case will stand apart as announcing a new doctrine in Illinois.

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27 In re Martin's Estate, 109 Neb. 289, 190 N. W. 872 (1922).

28 228 Mich. 1, 199 N. W. 686 (1924).

29 In re Hall's Estate, 106 Minn. 502, 119 N. W. 219 (1909). The wife was to share one third of testator's estate. Held that the will was revoked by divorce and property settlement only as to the part given to wife.

30 See note 24.