

December 1955

## Survey of Illinois Law for the Year 1954-1955

Chicago-Kent Law Review

Follow this and additional works at: <https://scholarship.kentlaw.iit.edu/cklawreview>



Part of the [Law Commons](#)

---

### Recommended Citation

Chicago-Kent Law Review, *Survey of Illinois Law for the Year 1954-1955*, 34 Chi.-Kent L. Rev. 1 (1955).  
Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol34/iss1/1>

This Notes is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact [jwenger@kentlaw.iit.edu](mailto:jwenger@kentlaw.iit.edu), [ebarney@kentlaw.iit.edu](mailto:ebarney@kentlaw.iit.edu).

# CHICAGO-KENT LAW REVIEW

Copyright 1956, Chicago-Kent College of Law

---

---

VOLUME 34

DECEMBER, 1955

NUMBER 1

---

---

## SURVEY OF ILLINOIS LAW FOR THE YEAR 1954-1955\*

### I. BUSINESS ORGANIZATIONS

#### CORPORATIONS

THE BIG NEWS in the field of corporation law during the past year was provided by the case of *Wolfson v. Avery*,<sup>1</sup> a case which is noteworthy not only because of the law announced therein, but also because of its impact on many large domestic corporations. In the subject case, the Illinois Supreme Court held Section 35 of the Business Corporation Act<sup>2</sup> to be in conflict with the State Constitution.<sup>3</sup> This section authorized corporations having nine or more directors to divide their directors into classes and stagger the terms thereof in lieu of electing an entire board of directors annually. The court took the position that this infringed upon the cumulative voting provisions of the constitution in that it tended to deny *proportional* minority representation on the board of directors, though it did permit minority representation. It

\* The present survey is not intended in any sense to be a complete commentary upon, or annotation of, the cases decided by the Illinois courts during the past year, but is published rather for the purpose of calling attention to cases and developments believed significant and interesting. The period covered is that of the judicial year, embracing from 3 Ill. (2d) 116 to 6 Ill. (2d) 234; from 3 Ill. App. (2d) 118 to 6 Ill. App. (2d) 325. Statutory changes of general interest are also noted.

<sup>1</sup> 6 Ill. (2d) 78, 126 N. E. (2d) 701 (1955). Hershey, J. filed a dissenting opinion. This case, in both its trial and appellate stages, has been the subject of several law review comments. See 103 U. of Pa. L. Rev. 822, 50 Northwestern L. Rev. 112, 43 Ill. B. J. 807, and 9 Miami L. Q. 365.

<sup>2</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 32, § 157.35.

<sup>3</sup> Ill. Const. 1870, Art. XI, § 3.

was admitted that exact proportional representation could not be obtained, but the court seemed to feel that the constitution guaranteed it to the extent that it was possible. It should also be pointed out that Section 35 had the effect of delaying proportional representation, though this factor was not stressed.

In three cases, problems generated by, and peculiar to, small closely held corporations arose to plague the Appellate Courts. In two of these, the issue involved the authority of the President to make contracts binding upon the corporation. In both cases, the President lacked the express authority of the board of directors and the subject matter of the contract was not within the powers normally incident to that office. Nevertheless, a contract to pay an employee a fixed salary plus a percentage of the profits was held to bind the corporation in the case of *Jaffe v. Chicago Warehouse Lumber Co.*,<sup>4</sup> where the President of the corporation had, with the knowledge of the board of directors, arrogated its authority and was in complete domination of the corporation.<sup>5</sup> A contrary result was reached in *Smith v. Shoreline Printers & Publishers*,<sup>6</sup> wherein a contract made by the President of a corporation to subordinate the assignment of an account receivable taken for security purposes was held not to bind the corporation. The different result was predicated entirely upon the precise facts of the case, the court being of the opinion that the President did not dominate the corporation to the extent necessary to avoid the general rule. In the other case in this category, that of *Moss v. Waytz*,<sup>7</sup> the litigants, former partners, had incorporated their business and, at the same time, entered into a contract among themselves requiring, inter alia, unanimity of directors for corporate action. Said contract was never incorporated into the by-laws, and indeed a by-law of unknown origin required only a majority vote of the directors. The Appellate Court for the

<sup>4</sup> 4 Ill. App. (2d) 415, 124 N. E. (2d) 618 (1955). Leave to appeal has been denied.

<sup>5</sup> This exception to the general rule is not entirely new. For a similar case, see *Joy v. Ditto, Inc.*, 356 Ill. 348, 190 N. E. 671 (1934).

<sup>6</sup> 6 Ill. App. (2d) 290, 127 N. E. (2d) 677 (1955).

<sup>7</sup> 4 Ill. App. (2d) 296, 124 N. E. (2d) 91 (1955), noted in 43 Ill. B. J. 738.

First District, in an unsatisfactory opinion which ignored all of the normal concepts of corporate management, held that the contract was valid and took precedence over the by-laws.

Another case worthy of mention is *People ex rel. J. H. Anderson Monument Co. v. Rosehill Cemetery Co.*<sup>8</sup> Plaintiff therein brought a quo warranto proceeding charging the corporation with unlawfully selling monuments and cemetery markers. Such activity was held to be ultra vires for the reason that no such express power was given and the implied powers of quasi-public corporations are to be strictly construed.

The Illinois Securities Act<sup>9</sup> has, in the case of *Hammer v. Sanders-Fye Drilling Co.*,<sup>10</sup> received further judicial interpretation during the past year. This case involved a contract to share the drilling cost of an oil well and providing for the assignment of a working interest in the event such exploration was successful. It was there held that such a contract was not a security for purposes of the act since that portion of the contract pertaining to drilling costs is not a sale at all, and the transfer of a working interest is an assignment of oil in place, and therefore an interest in real estate.

Legislation during the past year produced only relatively minor changes in the field of corporation law. It is, however, worth noting that a new and comprehensive act has been passed for the incorporation and regulation of Savings and Loan Associations.<sup>11</sup> Also new is an act permitting the organization of corporations for the purpose of guaranteeing or insuring members of credit unions against loss.<sup>12</sup> A new act relating to bank

<sup>8</sup> 3 Ill. (2d) 592, 122 N. E. (2d) 233 (1954). Klingbiel, J. filed a dissenting opinion based on the question of corporate power. Hershey, J. filed a dissenting opinion based on the issue of the propriety of the remedy in which Fulton, J. concurred. For a discussion of the latter question, see Section III, Civil Practice and Procedure, note 60, first series. The case has been noted in 33 CHICAGO-KENT LAW REVIEW 186.

<sup>9</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 121½, § 97 et seq.

<sup>10</sup> 6 Ill. App. (2d) 346, 127 N. E. (2d) 492 (1955).

<sup>11</sup> Laws 1955, p. —, S. B. No. 565; Ill. Rev. Stat. 1955, Vol. 1, Ch. 32, § 701 et seq.

<sup>12</sup> Laws 1955, p. —, H. B. No. 1110; Ill. Rev. Stat. 1955, Vol. 1, Ch. 32, § 503a1 et seq.

holding companies<sup>13</sup> and an amendment<sup>14</sup> to Section 5(g) of the Business Corporation Act limit the power of corporations to hold and vote stocks in Illinois banking corporations, though such restriction does not apply to stocks held at the effective date of these acts. And lastly, in pursuance of what is rapidly becoming a tradition, the legislature again saw fit to revise the so-called "blue sky laws"<sup>15</sup> by a comprehensive amendment<sup>16</sup> thereto.

#### UNINCORPORATED BUSINESS ASSOCIATIONS

Only two cases appear to have had any impact on the subject field during the past year. The first, that of *Wallace v. Malooly*,<sup>17</sup> involved a Massachusetts or business trust, and the plaintiff therein, a certificate holder, had unsuccessfully demanded access to a list of other certificate holders for the purpose of persuading them to vote against a plan proposed by the trust managers. The Supreme Court, apparently faced with this precise question for the first time, held that a certificate holder in a business trust did have such a right so long as it was sought to be exercised for a proper purpose, and that the plaintiff's purpose was proper. This result appears to be consistent with other cases<sup>18</sup> holding that a certificate holder in a business trust has a right to inspect the books of account.

In the case of *Schnackenberg v. Towle*,<sup>19</sup> a joint adventure between two attorneys, operative at a time when one of them was a judge of the circuit court, was held to violate public policy. The agreement provided that, in return for a share of the attorney's fees, the judge should assume responsibility for the conduct of certain litigation, though it should be handled by, and in the

<sup>13</sup> Laws 1955, p. —, S. B. No. 600; Ill. Rev. Stat. 1955, Vol. 1, Ch. 16½, § 64 et seq.

<sup>14</sup> Laws 1955, p. —, S. B. No. 601; Ill. Rev. Stat. 1955, Vol. 1, Ch. 32, § 157.5(g).

<sup>15</sup> The latest complete edition is the Illinois Securities Act of 1953, Ill. Rev. Stat. 1953, Vol. 2, Ch. 121½, § 137.1 et seq.

<sup>16</sup> Laws 1955, p. —, S. B. No. 180; Ill. Rev. Stat. 1955, Vol. 2, Ch. 121½, § 137.2 et seq.

<sup>17</sup> 4 Ill. (2d) 86, 122 N. E. (2d) 275 (1954).

<sup>18</sup> See, for example, *Wylie v. Bushnell*, 277 Ill. 484, 115 N. E. 618 (1917).

<sup>19</sup> 4 Ill. (2d) 561, 123 N. E. (2d) 817 (1955). A petition for certiorari was denied: 349 U. S. 939, 75 S. Ct. 785, 99 L. Ed. (adv.) 651 (1955).

name of, the other. The Supreme Court, in overruling the decision of the Appellate Court for the First District,<sup>20</sup> took the position that a circuit judge, during his tenure of office, is not permitted to practice law and, accordingly, held the agreement unenforceable.

The 1955 session of the General Assembly effected some constructive changes in the procedural rules relating to partnerships. It is now permissible to sue a partnership in its firm name<sup>21</sup> and service of process may be obtained by leaving a copy thereof with any partner or agent of the partnership, or by publication as in the case of individuals.<sup>22</sup> A companion act provides that a judgment rendered against a partnership in its firm name shall support execution only against partnership property and become a lien only upon real property held in the firm name.<sup>23</sup> Resort to these provisions is principally a matter of convenience, since the individual liability of partners is not barred by a judgment thereunder until satisfaction is had.<sup>24</sup> With respect to that individual liability, it is pertinent to note that partners may now be sued separately and an unsatisfied judgment against one does not bar an action against the remainder.<sup>25</sup> In such suits, service may be obtained as in the case of individuals, and also by leaving a copy of the summons with any other partner and mailing a copy thereof to the partner sued.<sup>26</sup>

#### PRINCIPAL AND AGENT

Age-old problems involving the extent of the agent's authority are constantly recurring, albeit in a novel form, and the present year is no exception. In *Slape v. Fortner*,<sup>27</sup> an agent was authorized under a written agreement to contract for the drilling of

<sup>20</sup> 351 Ill. App. 497, 115 N. E. (2d) 813 (1953).

<sup>21</sup> Laws 1955, p. —, H. B. No. 439; Ill. Rev. Stat. 1955, Vol. 2, Ch. 110, § 27.1(1).

<sup>22</sup> Laws 1955, p. —, H. B. No. 439; Ill. Rev. Stat. 1955, Vol. 2, Ch. 110, § 13.4(1).

<sup>23</sup> Laws 1955, p. —, H. B. No. 449; Ill. Rev. Stat. 1955, Vol. 1, Ch. 77, § 1a.

<sup>24</sup> Laws 1955, p. —, H. B. No. 439; Ill. Rev. Stat. 1955, Vol. 2, Ch. 110, § 27.1(2).

<sup>25</sup> Laws 1955, p. —, H. B. No. 439; Ill. Rev. Stat. 1955, Vol. 2, Ch. 110, § 27.

<sup>26</sup> Laws 1955, p. —, H. B. No. 439; Ill. Rev. Stat. 1955, Vol. 2, Ch. 110, § 13.4(2).

<sup>27</sup> 3 Ill. App. (2d) 339, 122 N. E. (2d) 57 (1954), noted in 43 Ill. B. J. 378.

an oil well, though the price to be paid therefor was left blank. The agent, without awaiting the insertion of the amount, went to a well driller, displayed his written authority, and contracted with him for the drilling of the well. The blank space in the agreement was never completed, thus dispelling any notions of ratification. A judgment of the trial court, adverse to the well driller, was affirmed by the Appellate Court for the Fourth District on the ground that when the agent showed the incomplete written authority to the well driller, he was thereby charged with notice that the agent's authority was limited. Hence, the principal could not be bound beyond the limits of the agent's actual authority.

It is a well established principle in brokerage cases that a real estate broker who was employed by an owner for the purpose of finding a buyer for the owner's land, must prove, in order to become entitled to the commission, that the prospective purchaser was ready, willing and able to buy the property at the established terms. In the case of *Epstein v. Howard*,<sup>28</sup> it was held that the concept, "financial ability," required a showing that the purchaser had sufficient funds on hand or under his control to meet the owner's terms. Where, however, the owner approves of the buyer named by the broker, or sells the land to such buyer, it is conclusively presumed that the particular buyer was acceptable to the owner as a purchaser ready, willing and able to buy, thus relieving the broker from said burden of proof as was held in *Greenwald v. Marcus*.<sup>29</sup> Therein, it was also determined that the owner is entitled to an opportunity to investigate the buyer's ability to live up to the designated terms, unless such opportunity was waived. In the latter instance, he will not be allowed to object to the buyer's financial ability, even though the negotiations may never be consummated.

<sup>28</sup> 5 Ill. App. (2d) 553, 126 N. E. (2d) 162 (1955).

<sup>29</sup> 3 Ill. App. (2d) 495, 123 N. E. (2d) 139 (1954).

The attorney-client relationship involves a special type of agency with special and peculiar incidents and features.<sup>30</sup> Yet, this does not mean that it does not partake of some of the basic principles and concepts evolved by the law of agency. An apt illustration is the case of *Petrando v. Barry*,<sup>31</sup> where it was pointed out that an attorney was not liable to a printer for the cost of printing the briefs and abstract which the attorney had ordered in a case involving his client. The court thought that an attorney, who is authorized to appeal a case, has implied authority to order the printing of briefs and thereby bind his client for the printing costs. The fact that the briefs and abstract showed the name of the client for whom the attorney had acted was held to be sufficient notice to the printer that the attorney was acting in a representative capacity.

An interesting case involving the master-servant relationship arose in *Nordland v. Poor Sisters of St. Francis Seraph of Perpetual Devotion*.<sup>32</sup> A hospital intern, while engaged in assisting surgeons in an operation conducted in the operating room of the hospital, was injured by the explosion of the anesthetic machine. The Appellate Court for the First District affirmed the trial court's dismissal of his suit for the reason that the intern was an employee of the hospital and, as such, could recover only workmen's compensation for the injuries received. As an intern, the plaintiff was not an independent contractor since his work and duties were regulated by the hospital, which not only took care of his maintenance, but also retained the right to discharge him. Nor could he be considered a "loaned employee" for the time during which the operation took place. Although the intern had to follow the surgeon's directions during the operation, the hospital had undertaken to supply surgeons operating in the hospital with the assistance of interns, and when an intern was so engaged, he was fulfilling the hospital's duty.

<sup>30</sup> See, for example, this Section, note 19, and Section III, Civil Practice and Procedure, note 45, second series.

<sup>31</sup> 4 Ill. App. (2d) 319, 124 N. E. (2d) 85 (1955).

<sup>32</sup> 4 Ill. App. (2d) 48, 123 N. E. (2d) 121 (1955).



## LABOR LAW

There has recently been an upsurge of cases in various jurisdictions in which individual employees, whose rights had been disregarded by their employer and collective bargaining representative alike, attempted to enforce those rights in court. Most of these attempts were unsuccessful, due primarily to the narrow and legalistic approach which the courts took in these situations, an approach which failed to take into consideration the realities of modern industrial life. Of such a nature is the case of *Anson v. Hiram Walker & Sons*,<sup>33</sup> in which a group of employees asserted that their rights, established in a proper collective bargaining agreement, had been violated by their employer. The Court of Appeals for the Seventh Circuit affirmed the dismissal of the complaint in the lower court. The plaintiffs, who had grounded their action on the collective bargaining agreement, should have clearly and unequivocally alleged that they had exhausted all the remedies provided by the agreement itself, such as grievance procedure, before they ought to be entitled to appeal to the courts for relief. Moreover, the court opined, if at the conclusion of negotiations between employer and union in a grievance proceeding, the employer had acted wrongfully, he may be charged with the commission of an unfair labor practice over which the National Labor Relations Board exercises exclusive jurisdiction. What unfair labor practice the employer would or could commit in such an event is not stated by the court and can hardly be visualized, not even by a person endowed with an uncommon degree of imagination.

In another case, that of *United Protective Workers v. Ford Motor Company*,<sup>34</sup> an employee was more successful in safeguarding his rights under a collective bargaining agreement. The employee had contended that he was discharged in violation of the collective bargaining agreement governing his working conditions. The court awarded him damages and emphasized that where the

<sup>33</sup> 222 F. (2d) 100 (1955).

<sup>34</sup> 223 F. (2d) 49 (1955). For a discussion of the question of damages, see Section III, Civil Practice and Procedure, note 67, second series.

employer had made it clear that he would not change his position, the employee need not first exhaust his remedies under the contract before seeking relief in the courts.

Two other cases appear to be worthy of brief mention. The case of *Retail Druggists' Association v. Local 676-D, A. F. of L.*<sup>35</sup> should serve as a reminder to the bar that even peaceful picketing may be unlawful where it is carried on in the prosecution of an unlawful purpose. Although discussed elsewhere,<sup>36</sup> it should be noted herein that that portion of the Industrial Home Work Act which prohibits the processing of metal springs by home workers<sup>37</sup> was, in the case of *Figura v. Cummins*,<sup>38</sup> held unconstitutional by the Supreme Court.

With respect to legislation, it is appropriate to note a change, bulwarked by appropriate penalties, requiring that corporations pay their employees at least semi-monthly, and that such wage payments be made not later than thirteen days after the end of the pay period.<sup>39</sup> Other legislation<sup>40</sup> amended the Wage Assignment Act<sup>41</sup> so as to render it inapplicable to transactions under the Small Loan Act,<sup>42</sup> the Credit Union Act,<sup>43</sup> and the Federal Credit Union Act.<sup>44</sup>

#### WORKMEN'S COMPENSATION

Problems raised by the decision in *Grasse v. Dealer's Transport Co.*<sup>45</sup> still continue to occupy the courts. Therein, the Supreme Court declared unconstitutional the first paragraph of former Section 29 of the Workmen's Compensation Act<sup>46</sup> which limited

<sup>35</sup> 3 Ill. App. (2d) 325, 122 N. E. (2d) 66 (1954).

<sup>36</sup> See Section VII, Public Law, note 26.

<sup>37</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 48, § 252(G).

<sup>38</sup> 4 Ill. (2d) 44, 122 N. E. (2d) 162 (1954).

<sup>39</sup> Laws 1955, p. —, H. B. No. 736; Ill. Rev. Stat. 1955, Vol. 1, Ch. 48, §§ 36, 37.

<sup>40</sup> Laws 1955, p. —, H. B. No. 586; Ill. Rev. Stat. 1955, Vol. 1, Ch. 48, § 39.9.

<sup>41</sup> Ill. Rev. Stat. 1955, Vol. 1, Ch. 48, § 39.1 et seq.

<sup>42</sup> Ill. Rev. Stat. 1955, Vol. 1, Ch. 74, § 19 et seq. See, in particular, *ibid.*, § 35.

<sup>43</sup> Ill. Rev. Stat. 1955, Vol. 1, Ch. 32, § 496.1 et seq.

<sup>44</sup> 48 Stat. 1216; 12 U. S. C. A. § 1751 et seq.

<sup>45</sup> 412 Ill. 179, 106 N. E. (2d) 124 (1952), noted in 30 CHICAGO-KENT LAW REVIEW 375.

<sup>46</sup> Ill. Rev. Stat. 1951, Vol. 1, Ch. 48, § 138.5(b).

an employee injured by a third party tort-feasor, operating under the Act,<sup>47</sup> to a recovery of compensation from his employer. In *Geneva Construction Company v. Martin Transfer & Storage Company*,<sup>48</sup> the Supreme Court concluded that a non-negligent employer, who had paid workmen's compensation to an employee injured by a third party tort-feasor, could recover the amount of such compensation from the tort-feasor under common law principles of subrogation in the absence of any express statutory provision to that effect. It should be noted that the plaintiff-employer had filed its complaint prior to the 1953 amendments of the Workmen's Compensation Act which provided a mode of statutory subrogation for such employers.<sup>49</sup>

Repercussions of the Grasse case were likewise involved in *Govedarica v. Yellow Cab Company*.<sup>50</sup> An injured employee, who was subject to the provisions of the Workmen's Compensation Act, commenced a common law action against the third party tort-feasor after the two-year statute of limitations had run. Yet, he alleged that he was nevertheless entitled to maintain the suit, since Section 25 of the Act provided that if any of its provisions should be declared invalid, the period between the injury and such declaration shall not be counted as a part of the period of limitations for the commencement of an action relating to such injury.<sup>51</sup> Based upon that provision, the employee reasoned that the statute of limitations was tolled until the Grasse case was decided. The court disagreed with that contention and stated simply and categorically, without giving any reasons, that the above statutory provision pertained only to actions which arose out of some of the provisions of the Act, but did not have any effect on common law actions.

Although not technically within the survey period, it may be appropriate to note that, in the cases of *Bethlehem Steel Co. v.*

<sup>47</sup> Ill. Rev. Stat. 1955, Vol. 1, Ch. 48, § 138.1 et seq.

<sup>48</sup> 4 Ill. (2d) 273, 122 N. E. (2d) 540 (1954). For other aspects of the case, see Section III, Civil Practice and Procedure, note 71, first series.

<sup>49</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 48, § 138.5(b).

<sup>50</sup> 216 F. (2d) 499 (1954).

<sup>51</sup> Ill. Rev. Stat. 1951, Vol. 1, Ch. 48, § 138.25.

*Industrial Commission*<sup>52</sup> and *Laclede Steel Co. v. Industrial Commission*,<sup>53</sup> the Supreme Court has clarified the application of the Workmen's Compensation Act<sup>54</sup> to heart cases. In both instances, the employee involved had a weakened heart and while performing his regular, though strenuous, job duties, he suffered a heart attack and collapsed. The employer argued that such a heart attack suffered by the employee in performing his normal duties could not be classified as an accidental injury arising out of the employment, and that such classification should be reserved to those cases where the heart attack was caused by either a tearing of the blood vessels or heart tissue, or by some unusual strain not normally attendant to the job duties. The Supreme Court rejected these contentions and declined to make arbitrary refinements between various types of heart diseases. It declared that if death or disability was caused or precipitated by "the unforeseen and unpremeditated giving away of a part of the employee's body"<sup>55</sup> while performing his work, the resulting death or disability was compensable and it did not make any difference whether the employee would not have suffered the heart attack had he been in normal health, since the Act was not limited to healthy employees only.

The last session of the General Assembly produced a number of minor changes in both the Workmen's Compensation Act<sup>56</sup> and the Occupational Diseases Act,<sup>57</sup> as well as increasing the amount of compensation awardable under each. Without going into a complete analysis of the changes so made, it might be worth brief mention that, in cases where death has resulted from compensable injury, the minimum award shall hereafter be \$6,000 and the maximum award is restricted to \$9,250. This is the equivalent of a general increase of \$1,250 over prior levels.

<sup>52</sup> 6 Ill. (2d) 278, 128 N. E. (2d) 714 (1955).

<sup>53</sup> 6 Ill. (2d) 296, 128 N. E. (2d) 718 (1955).

<sup>54</sup> Ill. Rev. Stat. 1955, Vol. 1, Ch. 48, § 138.1 et seq.

<sup>55</sup> 6 Ill. (2d) 278 at 294, 128 N. E. (2d) 714 at 717.

<sup>56</sup> Laws 1955, p. —, S. B. No. 859; Ill. Rev. Stat. 1955, Vol. 1, Ch. 48, § 138.1 et seq.

<sup>57</sup> Laws 1955, p. —, S. B. No. 860; Ill. Rev. Stat. 1955, Vol. 1, Ch. 48, § 172.36 et seq.

## II. CONTRACTS

Outstanding among the cases establishing or clarifying general principles of contract law is the holding of the Illinois Supreme Court in the case of *Schnackenberg v. Towle*.<sup>1</sup> The plaintiff there, a circuit judge, sued in equity for an accounting to recover a portion of a legal fee paid to an attorney with whom the judge, while holding office, had labored jointly in the interest of the client pursuant to an agreement to divide the fee and share responsibility for the handling of the client's claims. The Appellate Court had permitted a recovery on the contract but the Supreme Court reversed, following a careful review of comparable cases<sup>2</sup> and legislative action which had stemmed therefrom, when it came to the conclusion that the plaintiff should have no help from the courts as the contract was one against public policy. Opposition to the contract was said to lie in the fact that it would be inclined to bring the administration of justice into suspicion and disrepute. The holding, without doubt, broadens the base for holding similar contracts to be unenforceable.

The effect to be given to lack of mutuality of obligation was brought sharply to attention by the holding in the case of *Paul v. Rosen*,<sup>3</sup> a case which again discloses the need for legislation to effectuate the "firm" offer or at least for the exercise of extreme care when drafting an agreement under which one of the two bargaining parties has the option of not performing his promise. In that case, the defendant promised to sell his business to the plaintiff at an agreed price, contingent on the buyer's ability to secure a lease on the business building. The buyer did not bind himself to try to secure the lease although it would be implied that he should honestly try to do so. The buyer evidenced

<sup>1</sup> 4 Ill. (2d) 561, 123 N. E. (2d) 817 (1955), noted in 43 Ill. B. J. 735, reversing 351 Ill. App. 497, 115 N. E. (2d) 813 (1953). Certiorari has been denied: 349 U. S. 939, 75 S. Ct. 785, 99 L. Ed. (adv.) 651 (1955).

<sup>2</sup> To the extent that the views expressed therein were in conflict with the current holding, the court overruled the cases of *Town of Bruce v. Dickey*, 116 Ill. 527, 6 N. E. 435 (1886), and *O'Hare v. Chicago, Madison & Northern R. R. Co.*, 139 Ill. 151, 28 N. E. 923 (1891).

<sup>3</sup> 3 Ill. App. (2d) 423, 122 N. E. (2d) 603 (1954), noted in 1955 Ill. L. Forum 149.

a willingness to perform but the seller refused to abide by bargain and, when sued, successfully pleaded the lack of mutuality in the arrangement.

Notice might well be taken here of the case of *Cwik v. Condre*<sup>4</sup> for the Appellate Court there held that the recently enacted statute abolishing the effect of a seal<sup>5</sup> had no bearing on contracts made prior to its enactment, for which reason a sealed release, in keeping with common law principles,<sup>6</sup> was not subject to attack on the ground of lack of consideration absent any claim of fraud in its procurement. Mention might also be made at this point of the Supreme Court holding in the case of *In re Schneider's Estate*,<sup>7</sup> a case discussed more fully hereafter,<sup>8</sup> in which the court accepted oral evidence to modify a written agreement creating a joint tenancy in a bank deposit because the evidence tended to show a lack of donative intention. One cannot be certain, hereafter, that every written contract will be able to withstand attack from an assault by parole evidence.

Doctrines having bearing on the law relating to specialized types of contracts,<sup>9</sup> or quasi-contractual obligations, are discussed separately hereafter under appropriate classifications.

#### BILLS AND NOTES

Although this area of the law is usually most noteworthy for its inactivity, factual situations will occasionally arise which necessarily produce some addition or change in legal concepts. An example of this is to be found in the case of *Federal Deposit Insurance Corporation v. Wainer*<sup>10</sup> wherein a bank, insured by the plaintiff, had advanced money to the defendant and had taken

<sup>4</sup> 4 Ill. App. (2d) 380, 124 N. E. (2d) 612 (1955).

<sup>5</sup> Ill. Rev. Stat. 1955, Vol. 1, Ch. 30, § 153b.

<sup>6</sup> *Woodbury v. U. S. Casualty Co.*, 284 Ill. 227, 120 N. E. 8 (1918).

<sup>7</sup> 6 Ill. (2d) 180, 127 N. E. (2d) 445 (1955), noted in 44 Ill. B. J. 54, affirming 2 Ill. App. (2d) 560, 120 N. E. (2d) 353 (1954), noted in 33 CHICAGO-KENT LAW REVIEW 189. Hershey, J., wrote a dissenting opinion concurred in by Klingbiel, J.

<sup>8</sup> See Division VI, Property, note 21.

<sup>9</sup> No cases of consequence relating to contracts for the sale of personal property were determined during the survey period.

<sup>10</sup> 4 Ill. App. (2d) 233, 124 N. E. (2d) 29 (1955).

his note in return, although it appeared that the true agreement was that the note should not be enforced against the defendant and that the payee bank would look to a second bank, in which the defendant had a deposit, for payment. The payee bank was closed by the State Auditor and, pursuant to its statutory duty,<sup>11</sup> the plaintiff paid off the deposits and purchased certain of the assets including the note in question, said note then being overdue. The Appellate Court held that this note could be enforced against the maker by FDIC although the rationale on which the decision rests is obscure. Inasmuch as the note was taken by plaintiff when past due, it would appear that there could be no recovery under ordinary principles of negotiable instrument or simple contract law. The decision would, therefore, seem to rest on some form of estoppel and this supposition is strengthened by the stress the court put on the fact that there was a secret agreement intended to deceive creditors and public authority. The estoppel theory is weakened by the fact the note was past due, hence a purchaser after maturity should not be entitled to rely thereon. But this deficiency might appear to have been remedied by the fact that the FDIC was under an obligation to purchase the subject note as hereinabove mentioned. It would seem that at least a conditional obligation, made absolute by subsequent events, arose at the time the note was issued by the maker. In that event, the operative facts of estoppel would be created prior to the time the note, and the promise contained therein, became stale. If this hypothesis be true, then a vital distinction has been created between voluntary purchasers and those under an obligation to purchase.

Another case made worthy of note by its particular facts is that of *Crawford Door Sales Company v. Kowalik*.<sup>12</sup> Therein, the plaintiff brought suit against the treasurer of a corporation on certain notes given to secure an extension of the time of payment on the corporation's indebtedness. Between the time the indebtedness had been incurred and the time the notes were issued, the

<sup>11</sup> 64 Stat. 873; 12 U. S. C. A. § 1811 et seq.

<sup>12</sup> 4 Ill. App. (2d) 32, 123 N. E. (2d) 111 (1954).

corporation had changed its name. Nevertheless, the notes were executed by the defendant in the old name, under express authority and direction of the board of directors. It was there held that the defendant was not personally liable, despite Section 20 of the Uniform Negotiable Instruments Act,<sup>13</sup> one which provides that a person signing in a representative capacity is not absolved from liability if he does not indicate his principal. This result was reached on the ground that the intention of the parties was controlling, both the plaintiff and the corporation intending the notes to apply to the indebtedness running between them. Thus it would seem that the statutory section in question has been expanded to absolve a person signing in a representative capacity from liability to the payee even though he does not properly disclose his principal provided the payee knows the identity of the principal and intends to accept the latter's obligation.

#### INSURANCE

Under a decision which was novel in Illinois, the Supreme Court, in *Simmon v. Iowa Mutual Casualty Company*,<sup>14</sup> held that timely notice of an accident covered by an automobile liability policy issued by the defendant could be given by the injured plaintiff's attorney so as to prevent rise of the defense of non-compliance with the terms of the policy. After the accident, the plaintiff's attorney there concerned wrote to the insurer requesting a settlement, and this was the insurer's first notice. Subsequently, a summons served upon the insured was forwarded to the insurer who refused to defend the suit for the reason that the insured had not given notice and a default judgment was pronounced against the insured. The company, in the meantime, had inadvertently accepted two premium payments on the policy. In a direct action against the insurer, the crucial issue was one as to whether or not notice by the attorney for the claimant was sufficient. The trial court held it was; the Appellate Court re-

<sup>13</sup> Ill. Rev. Stat. 1955, Vol. 2, Ch. 98, § 40.

<sup>14</sup> 3 Ill. (2d) 313, 121 N. E. (2d) 509 (1954), noted in 4 DePaul L. Rev. 331, reversing 350 Ill. App. 1, 111 N. E. (2d) 374 (1953). Hershey, J., dissented, stating that the opinion of the Appellate Court correctly applied the law.



versed; but the Supreme Court sustained the trial court, saying that notice "by or on behalf of the insured" could reasonably be interpreted to include notice at the hand of the injured plaintiff or his attorney.

In the only other case of consequence, that of *Leonard v. Independence Life & Accident Company*,<sup>15</sup> a beneficiary named in a comprehensive personal accident insurance policy brought suit to recover benefits allegedly due because of the death of the insured, he having been intentionally stabbed by a rival. Among other exclusions contained in the policy was one to the effect that the insurance did not cover injury, fatal or non-fatal, resulting from "the intentional acts of the insured or of any other person except assaults by burglars or robbers." The beneficiary relied on an earlier case involving comparable facts but based on a policy with a narrower exclusionary provision.<sup>16</sup> Recovery was denied, however, when the court found the provision in question to be clear and unambiguous and broad enough to prevent liability of the type asserted.

While on the subject of insurance, mention might here be made of the fact that the statute relating to evidence of financial responsibility in motor vehicle cases, if provided in the form of a liability insurance policy, has been revised so as to require coverage in the \$10,000/\$20,000 class rather than at the lower limits heretofore prevailing.<sup>17</sup> Further revision has occurred with respect to authorized investments for domestic insurance companies,<sup>18</sup> and the size of the group, for purpose of group life insurance, has been reduced from twenty-five to ten employees.<sup>19</sup> Smaller enterprises will now be able to secure employee coverage which heretofore had been limited to larger organizations.

<sup>15</sup> 4 Ill. App. (2d) 244, 124 N. E. (2d) 10 (1955).

<sup>16</sup> *Ziolkowsky v. Continental Casualty Co.*, 365 Ill. 594, 7 N. E. (2d) 451 (1937).

<sup>17</sup> Laws 1955, p. —, S. B. No. 168; Ill. Rev. Stat. 1955, Vol. 2, Ch. 95½, § 58e.

<sup>18</sup> Laws 1955, p. —, S. B. No. 288; Ill. Rev. Stat. 1955, Vol. 1, Ch. 73, § 737

<sup>19</sup> Laws 1955, p. —, H. B. No. 905, Ill. Rev. Stat. 1955, Vol. 1, Ch. 73, § 842.

## QUASI-CONTRACTS

There is little opportunity in law for one who has been a party to an express contract to substitute, as basis for recovery, any promise implied in law arising from the benefits which he may have conferred. What little opportunity that does exist in this direction is very properly denied to one who could be said to be *in pari delicto* under some form of illegal arrangement.<sup>20</sup> It should, therefore, prove to be no surprise to note that, in *Kilian v. Frazier*,<sup>21</sup> a plaintiff who had been duped into paying money to another to be used to influence public officials in connection with the granting of contracts concerning supplies to public institutions<sup>22</sup> was denied any right to recover the money so paid, and this whether his complaint proceeded in quasi-contract or in tort for fraud and deceit.

In the only other case of consequence dealing with quasi-contractual concepts, that of *Hammer v. Sanders*,<sup>23</sup> the attempt of several persons to recover money paid for securities allegedly issued in violation of the Illinois Securities Act<sup>24</sup> fell afoul of another firm concept, to-wit: one who wishes to repudiate an express agreement and substitute a promise implied in law in place thereof must restore, or at least tender a return of, the benefits he has received.<sup>25</sup> The case also serves as an illustration for the fact that a pleading allegation to the effect that tender has been made would be meaningless if, actually, no tender had been made, thereby leaving the express contract still in existence.

<sup>20</sup> Mention has previously been made in this section of the case of *Schnackenberg v. Towle*, 4 Ill. (2d) 561, 123 N. E. (2d) 817 (1955), which affords sidelights on this point.

<sup>21</sup> 4 Ill. App. (2d) 108, 123 N. E. (2d) 592 (1954).

<sup>22</sup> It is criminal, under Ill. Rev. Stat. 1955, Vol. 1, Ch. 38, § 139, to conspire to interfere with competition in bidding or to "chill" the bids on public contracts.

<sup>23</sup> 6 Ill. App. (2d) 346, 127 N. E. (2d) 492 (1955).

<sup>24</sup> The action was based on Ill. Rev. Stat. 1951, Vol. 2, Ch. 121½, § 97 et seq. This statute was repealed and replaced with another in 1953, but civil rights under the former statute were preserved: Ill. Rev. Stat. 1955, Vol. 2, Ch. 121½, § 137.16.

<sup>25</sup> The case indicates that a formal disclaimer of interest may be required in the event the thing transferred later turns out to be worthless.

## SURETYSHIP

Those cases during the year which dealt with novel points in the law of suretyship grew out of public bonds or recognizances rather than private contracts. The nature of the obligation undertaken was the principal matter of concern in the case of *People ex rel. Schull v. Massachusetts Bonding & Insurance Company*.<sup>26</sup> The compensated surety had there signed a permit bond on an application to drill an oil well<sup>27</sup> and suit was predicated on this bond because of the failure on the part of the principal to cause the surface of the land to be restored, as near as possible, to its former condition. After suit had been commenced, the surety, at its own expense, caused the well site to be restored to the satisfaction of the Department of Mines and Minerals and then relied on this fact in support of the defense that, as no damage had been suffered by the breach, the surety should be absolved of liability. It was held, however, that the statutorily required instrument was in the nature of a penalty bond and not merely some form of indemnity agreement, hence a judgment for the penal sum was affirmed. In the case of *Board of Education v. Swam*,<sup>28</sup> by contrast, the compensated corporate surety on a performance and payment bond on a public job<sup>29</sup> was held to have subjected itself to a liability greater than that required by law because it had undertaken to "promptly make payment" to those who supplied labor or materials, hence became subject to suit on the bond as soon as the principal made default.

While enforcement of most bonds may be had either by suit in debt or by *scire facias* proceedings, the case of *People v. Rocco*<sup>30</sup> demonstrates that, as to bail bonds given in connection with criminal proceedings, the remedy by *scire facias* described

<sup>26</sup> 4 Ill. (2d) 23, 122 N. E. (2d) 185 (1954).

<sup>27</sup> Bond for this purpose is required by Ill. Rev. Stat. 1955, Vol. 2, Ch. 104, § 67.

<sup>28</sup> 5 Ill. App. (2d) 124, 124 N. E. (2d) 554 (1955).

<sup>29</sup> Bonds of this character are required by Ill. Rev. Stat. 1955, Vol. 1, Ch. 29, § 15. A suit on the bond by a materialman or other beneficiary would ordinarily be delayed until after final settlement on the prime contract: *Ibid.*, § 16.

<sup>30</sup> 4 Ill. App. (2d) 238, 124 N. E. (2d) 25 (1955). Leave to appeal has been denied.

in the Criminal Code<sup>31</sup> is now the sole and exclusive remedy. Some earlier decisions to the contrary,<sup>32</sup> achieved prior to the adoption of the statute in question, were there said to be inapplicable because the more recent legislative expression on the point, from the very fact of its completeness on the subject, was held to be controlling. When *scire facias* proceedings are used, as in the case of *People v. Young*,<sup>33</sup> it will apparently do the compensated corporate surety no good to urge that its liability has been discharged because continuances have been granted to the accused person without the consent of the surety. The rule that modification of the prime contract without the surety's consent operates as a discharge would appear to be one to be confined in its operation to private contracts and be inapplicable to bail bonds.<sup>34</sup>

In the event the bond, or the statute on which the bond is based, requires the giving of notice or the performance of conditions precedent to liability, it would be expected that the surety would be entitled to rely on a non-performance of such requirements as a defense. It became a close question, therefore, in the case of *McWane Cast Iron Pipe Company v. Aetna Casualty & Surety Company*,<sup>35</sup> to determine whether the particular public contract bond, which was silent on the point, had been issued pursuant to, and incorporated by implication, the terms of the pertinent statute or formed an unqualified common law obligation on the part of the surety. On finding that the bond had been given in conformity with statutory mandate,<sup>36</sup> hence could be said to

<sup>31</sup> Ill. Rev. Stat. 1955, Vol. 1, Ch. 38, § 625 et seq.

<sup>32</sup> *People v. Witt*, 19 Ill. 169 (1867); *People v. Pate*, 15 Ill. 221 (1853).

<sup>33</sup> 6 Ill. App. (2d) 123, 126 N. E. (2d) 746 (1955).

<sup>34</sup> The holding in *Ogden v. People*, 62 Ill. 63 (1871), may be explained on the ground that, in the event the prosecution seeks a continuance, a new recognizance should be taken for the surety has fully discharged his obligation by seeing to it that the principal appeared on the date originally fixed.

<sup>35</sup> 3 Ill. App. (2d) 399, 122 N. E. (2d) 435 (1954).

<sup>36</sup> The bond in suit, like the one involved in the case of *Board of Education v. Swam*, 5 Ill. App. (2d) 124, 124 N. E. (2d) 554 (1955), mentioned above at note 28, was not drafted in statutory terms but contained an undertaking, not required by Ill. Rev. Stat. 1955, Vol. 1, Ch. 29, § 15, that the principal should "promptly make payment" to suppliers of labor or materials.

include the statutory condition for notice,<sup>37</sup> the court achieved the result that the surety possessed an absolute defense since the claimant had failed to charge that statutory notice had been given.<sup>38</sup>

### III. CIVIL PRACTICE AND PROCEDURE

Without question, the one outstanding achievement in the past year has been the culmination of approximately five years of effort on the part of the Joint Committee on Illinois Civil Procedure<sup>1</sup> in the form of the passage, by the legislature, of the Revised Civil Practice Act,<sup>2</sup> effective January 1, 1956, together with the adoption, by the Supreme Court, of a revised system of court rules.<sup>3</sup> Any attempt to provide a complete commentary on these changes would cause this survey to reach to an inordinate length. The principal changes or developments made thereby are, however, noted in this section at appropriate points and minor changes in verbiage have been left to the considered attention of the bar.<sup>4</sup>

<sup>37</sup> Ill. Rev. Stat. 1955, Vol. 1, Ch. 29, § 16, directs that no supplier shall have a right of action "unless he shall have filed a verified notice . . . within 180 days after the date of the last item of work or the furnishing of the last item of materials." The court likened this notice to the one required by Ill. Rev. Stat. 1955, Vol. 1, Ch. 24, § 1—11, to support a civil action against a municipality.

<sup>38</sup> The case of *Laclede Steel Co. v. Hecker-Moon Co.*, 279 Ill. App. 295 (1935), was distinguished on the basis the bond there concerned was of the common-law variety.

<sup>1</sup> The Illinois State Bar Association and the Chicago Bar Association, at the suggestion of the Supreme Court, organized this committee and charged it with responsibility to examine into matters of procedural reform achieved elsewhere since the adoption of the Illinois Civil Practice Act of 1933 and to recommend changes therein. The committee recommendations, with supporting explanations and suggested revisions were placed in print and made available to the bar about a year ago. See Tentative Final Draft of Proposed Amendments to Illinois Civil Practice Act (Burdette Smith Co., Chicago, 1954).

<sup>2</sup> Laws 1955, p. —, H. B. No. 439; Ill. Rev. Stat. 1955, Vol. 2, Ch. 110, § 1 et seq. The publishers of the bound volumes of the Illinois statutes, to avoid a degree of confusion which heretofore existed in the numbering system because of the one-time existence of earlier practice acts, have utilized the same section numbering as that found in the legislative bill.

<sup>3</sup> These rules, also effective on January 1, 1956, may be found in Ill. Rev. Stat. 1955, Vol. 2, Ch. 110, beginning at Section 101.1. The number following the decimal point is the same as that adopted by the court in its numbering of the new rules.

<sup>4</sup> In addition to the pamphlet supplement to Ill. Rev. Stat. 1955 published by Burdette Smith Co., Chicago, 1955, which contains the comments of the Joint Committee, see also Tone, "The New Amendments to the Civil Practice Act," 43 Ill. B. J. 900-5.

## AVAILABILITY OF REMEDIES

The structure of the judicial department of the state, in general, remains the same as heretofore<sup>5</sup> but emphasis has been added, by the holding in *Starck v. Chicago & North Western Railway Company*,<sup>6</sup> to the irrational results which can follow from ill-considered legislative tinkering, under the power given to create courts,<sup>7</sup> with the shape of the judicial department. By virtue of the holding therein, it is now possible for courts organized under the general Municipal Court Act<sup>8</sup> to entertain jurisdiction over transitory tort causes of action without limit, no matter where the events occurred, provided it is possible for these courts to gain jurisdiction over the parties to the suit. The state is now presented with the ridiculous spectacle of having still another set of tribunals, originally intended to exercise restricted jurisdiction, working in competition with the major courts of the state. Circuit courts, on the other hand, have been denied the right to consider election contests growing out of the organization of mosquito abatement districts<sup>9</sup> by reason of the holding in the case of *Bell v. South Cook County Mosquito Abatement District*,<sup>10</sup> a case which affirms the view that matters of this nature, despite a provision in the Election Code tending to indicate otherwise,<sup>11</sup> belong within the exclusive jurisdiction of the county courts.<sup>12</sup>

<sup>5</sup> A proposed amendment to the judicial article of the state constitution which would have produced a drastic but entirely desirable revision both in the court structure and the method of operation of the judicial department met with rough treatment at the hands of the Executive Committee of the House in the 69th General Assembly and failed in passage. See 36 Chicago Bar Record 475 (1955), at p. 476.

<sup>6</sup> 4 Ill. (2d) 616, 123 N. E. (2d) 826 (1955), noted in 33 CHICAGO-KENT LAW REVIEW 263.

<sup>7</sup> Ill. Const. 1870, Art. VI, § 1.

<sup>8</sup> Ill. Rev. Stat. 1955, Vol. 1, Ch. 37, § 442 et seq.

<sup>9</sup> Such districts may be formed in the manner directed by Ill. Rev. Stat. 1955, Vol. 2, Ch. 111½, § 74 et seq.

<sup>10</sup> 3 Ill. (2d) 353, 121 N. E. (2d) 473 (1954).

<sup>11</sup> Ill. Rev. Stat. 1955, Vol. 1, Ch. 46, § 23—24.

<sup>12</sup> See *Heaney v. Northeast Park District*, 360 Ill. 254, 195 N. E. 649 (1935). Views expressed therein were followed on the ground the statute there construed had been afterwards re-enacted into the present Election Code without change, a fact which was said to evidence legislative concurrence with the court's exposition of the legislative intent.

While treating with courts, it might be considered appropriate to discuss the conduct of judges serving in the courts.<sup>13</sup> According to the facts in the case of *Smallwood v. Soutter*,<sup>14</sup> the trial judge there concerned, faced with a question as to the right of an attorney to represent one of the litigants, apparently appointed another attorney to inquire into the situation and, on the latter's report with recommendations, proceeded to enter an order from which an appeal was taken. Pointing out that the lawyer who had acted as judge-designate was neither a master in chancery<sup>15</sup> nor a special commissioner,<sup>16</sup> and finding a total absence of authority for the appointment of any other person to serve as assistant to the judge, the reviewing tribunal reversed the order on the ground the judge had no power to delegate any of his functions to an appointee and, when he had attempted to do so, had deprived the litigant of the right to a full and complete hearing before the court.

Venue requirements, as well as jurisdictional limitations, should be observed if a given court is to have authority to proceed with the case so it should furnish no surprise to note that, in *Green v. Walsh*,<sup>17</sup> a judgment taken by confession was ordered set aside as wholly void when it was made to appear that the note in suit had been executed out of the state, the defendants were non-residents, and had no property in the county in which the proceeding had been instituted,<sup>18</sup> inasmuch as at least one of these elements would have been needed to establish venue and to support

<sup>13</sup> See ante. Division II, Contracts. note 1, for discussion of the case of *Schnackenberg v. Towle*, 4 Ill. (2d) 561, 123 N. E. (2d) 817 (1955).

<sup>14</sup> 5 Ill. App. (2d) 303, 125 N. E. (2d) 679 (1955). Leave to appeal has been denied.

<sup>15</sup> Appointment of masters in chancery is regulated by Ill. Rev. Stat. 1955, Vol. 2, Ch. 90, § 1. By two additions to that statute, provision has now been made for the completion of proceedings before masters whose terms of office have expired or who cease to act for any reason: Laws 1955, p. —, H. B. No. 450; Ill. Rev. Stat. 1955, Vol. 2, Ch. 90, §§ 5a-5b.

<sup>16</sup> Authority for the appointment of this official is conferred by *ibid.*, § 5. See also *Simpson v. Harrison*, 328 Ill. App. 425, 66 N. E. (2d) 494 (1946).

<sup>17</sup> 5 Ill. App. (2d) 535, 126 N. E. (2d) 398 (1955).

<sup>18</sup> The jurisdictional requirements of Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 50(5), relating to judgments by confession, have been reiterated in Section 50(4) of the Revised Civil Practice Act.

the judgment.<sup>19</sup> Errors in venue may, however, be waived if not promptly asserted<sup>20</sup> so the defendant in *O'Laughlin v. O'Laughlin*,<sup>21</sup> who had joined issue and had litigated the case before raising any question as to the accuracy of venue allegations, was held to be in no position to complain even if an error in venue had occurred. While there has been some reshuffling of the statutory provisions as to venue, the controlling principles are generally the same except that a new section relates to suits against partnerships,<sup>22</sup> machinery has been provided for the hearing and disposition of motions for transfer to a proper venue<sup>23</sup> and, in cases where defendants reside in different counties, a defendant who has once raised the point of an erroneous joinder to support a claim of wrong venue and who has lost thereon must renew his motion at the close of the evidence if he desires to rely on the ruling as ground for reversal on appeal.<sup>24</sup>

Jurisdiction over the subject matter and of the parties is also a matter of vital concern to the successful prosecution of a suit. Although no change has occurred with respect to jurisdiction over the plaintiff, who submits himself to the control of the court by the mere act of filing suit, and very little has been done to change the statute law concerning the summons or service thereof,<sup>25</sup> new methods for service on private corporations<sup>26</sup> and on partners

<sup>19</sup> Mention might be made of the fact that the defendants were careful to use a special and limited appearance to prevent the court from obtaining jurisdiction over them. By contrast, see the effect to be given to a failure to preserve the jurisdictional question in the holding in *Liberty National Bank of Chicago v. Vance*, 3 Ill. App. (2d) 1, 120 N. E. (2d) 349 (1954).

<sup>20</sup> A degree of vagueness on the point to be found in Ill. Rev. Stat. 1953, Vol. 1, Ch. 110, § 135, has been removed by Section 8(2) of the Revised Civil Practice Act which now expressly declares that all "objections of improper venue are waived" unless the defendant takes action in the time and manner there specified.

<sup>21</sup> 4 Ill. App. (2d) 323, 124 N. E. (2d) 88 (1955).

<sup>22</sup> Ill. Rev. Stat. 1955, Vol. 2, Ch. 110, § 6(2).

<sup>23</sup> *Ibid.*, Ch. 110, § 6(3), § 10, and § 11.

<sup>24</sup> *Ibid.*, Ch. 110, § 9.

<sup>25</sup> Rule 5 of the Illinois Supreme Court now states that a copy of the complaint, to be furnished by the plaintiff, is to be attached to the copy of the summons used in making service. Failure to furnish a copy of the complaint does not invalidate service but does subject the offending party to an obligation to reimburse for expense incurred in obtaining a copy.

<sup>26</sup> Ill. Rev. Stat. 1955, Vol. 2, Ch. 110, § 13.3.



and partnerships<sup>27</sup> have been devised. In suits against non-residents who have, by reason of the doing of acts specified in Section 17 of the Revised Civil Practice Act,<sup>28</sup> become amenable to the exercise of an *in personam* jurisdiction to be wielded by the courts of the state,<sup>29</sup> the summons is to be personally served outside the state before jurisdiction can be said to attach.<sup>30</sup> The jurisdiction so acquired is one of limited nature.<sup>31</sup>

In the realm of case law on this aspect of procedure, the case of *Hale v. Hale*,<sup>32</sup> points out the obvious proposition that no court has power to enter an order which could, in any way, bind a person not a party to the proceeding and, that being the case, such court would be equally without power to punish such person for contemptuous disregard of such an order.<sup>33</sup> By contrast, in *O'Rourke v. O'Rourke*,<sup>34</sup> reinforcement was given to the proposi-

<sup>27</sup> *Ibid.*, Ch. 110, § 13.4.

<sup>28</sup> The legislature followed the recommendations of the Joint Committee in specifying that (a) the transaction of any business, (b) the commission of a tortious act, or (c) the ownership, use, or possession of any real estate, within the state, should be sufficient to make the person concerned amenable to jurisdiction. Substantial revision was made, however, in the fourth recommendation which said that the "insuring of any person, property or risk located within the State, whether the policy is delivered by mail or otherwise," should be sufficient for this purpose. On that point, see note in 33 CHICAGO-KENT LAW REVIEW 148. As revised, the fourth ground is practically valueless since it is available only if the defendant has been "contracting to insure" property within the state at the time of contracting. The door has now been opened for haggling over the question as to the place where the contract was made, a point usually resolved by reference to language in the insurance contract itself.

<sup>29</sup> The basic principle involved is analogous to the one which supports control over the non-resident motorist who has used the state highways: Ill. Rev. Stat. 1955, Vol. 2, Ch. 95½, § 23.

<sup>30</sup> Ill. Rev. Stat. 1955, Vol. 2, Ch. 110, § 16(1).

<sup>31</sup> *Ibid.*, Ch. 110, § 16(3).

<sup>32</sup> 5 Ill. App. (2d) 90, 124 N. E. (2d) 596 (1955).

<sup>33</sup> The order in question grew out of a custody fight incident to a divorce proceeding. It purported to command a sister of the defendant, not herself a party to the suit nor enjoying custody by virtue of any court order, to deliver custody of the children of the marriage to the plaintiff. The physical presence of the sister in the courtroom at the time the order was entered was said not to be enough to give the court authority over her. Compare this holding with the one attained in the case of *Horn v. Horn*, 5 Ill. App. (2d) 346, 125 N. E. (2d) 539 (1955), also arising in the Third District, wherein it was held that a custodian of a child and a stranger to the suit, acting pursuant to court order temporarily vesting custody in him, was not an indispensable party to proceedings to modify the custody order as he possessed neither natural nor property rights in the child.

<sup>34</sup> 3 Ill. App. (2d) 464, 122 N. E. (2d) 829 (1954). Following a decree for divorce in DuPage County under which questions relating to custody of the child

tion that, once one court has acquired jurisdiction over the parties and the subject matter, no other court of the state should attempt to assert control in the same area for, if this was permitted, orderly procedure would tend to be disrupted. Without question, as in *Lichter v. Scher*,<sup>35</sup> an *in personam* default judgment could not be permitted to stand in the face of a showing that the defendant had never been served with process<sup>36</sup> but jurisdiction would exist, in an *in rem* proceeding, to sequester property within the state, provided the same can be brought under the control of the court, even though the defendant be a non-resident, hence immune from personal service. The explanation for the seemingly contradictory results attained in the sequestration cases of *Failing v. Failing*<sup>37</sup> and *Ragen v. Ragen*<sup>38</sup> lies in the fact that, in the first, no effort was made to seize or even to specifically describe the property over which jurisdiction was sought whereas, in the latter case, the complaint was full and specific on the point.<sup>39</sup>

Preliminary to suit, the attorney who has given attention to the foregoing jurisdictional problems should also, in an appropriate case, give thought to the matter of trial by jury since, if an appropriate demand is not made in timely fashion, the right to trial by jury may be waived.<sup>40</sup> Nothing has been done in the course of the year to materially affect the law insofar as it re-

---

were reserved, one of the litigants instituted proceedings in Cook County to resolve the custody question. It was held that the court in Cook County lacked jurisdiction to enter any order on the point.

<sup>35</sup> 4 Ill. App. (2d) 37, 123 N. E. (2d) 161 (1954).

<sup>36</sup> It appeared there that the sheriff returned service on a corporate defendant in a dram shop case by delivering process to a bartender employee rather than to an officer or agent of the corporation. In that respect, see Ill. Rev. Stat. 1955, Vol. 2, Ch. 110, § 13.3.

<sup>37</sup> 4 Ill. (2d) 11, 122 N. E. (2d) 167 (1954), noted in 43 Ill. B. J. 508.

<sup>38</sup> 4 Ill. App. (2d) 445, 124 N. E. (2d) 628 (1954).

<sup>39</sup> While prior seizure, as by injunction, writ of sequestration, or attachment would clearly serve to confer jurisdiction, the Supreme Court, in *Failing v. Failing*, 4 Ill. (2d) 11, 122 N. E. (2d) 167 (1954), indicated that, in view of its tacit approval given to the procedure followed in *Wilson v. Smart*, 324 Ill. 276, 155 N. E. 288 (1927), it would probably hold a complaint describing the property in detail and indicating that relief was sought against the same to be sufficient to support *in rem* jurisdiction, particularly so if the notice by publication to the non-resident defendant also spoke on the point in detail.

<sup>40</sup> Ill. Rev. Stat. 1955, Vol. 2, Ch. 110, § 64.

lates to the plaintiff and the outset of the case<sup>41</sup> but the decision in *Schwartz v. Lake View Tool & Manufacturing Company*<sup>42</sup> reveals a situation which could lead to difficulty in the event the defendant, upon filing a counterclaim, first demands trial by jury and then later elects to waive such right. It was there held that if the plaintiff, upon filing a reply to the counterclaim, does not join in the jury demand he may not later assert the right to trial by jury upon learning of the defendant's waiver.<sup>43</sup> The cautious attorney concerned with a civil suit should, therefore, preserve his client's rights in this respect at every stage of the case.

In much the same way, attention should be given to applicable statutes of limitation and the effect they may have on the litigation.<sup>44</sup> Brief mention might be made of the fact that, in *Orlicki v. McCarthy*,<sup>45</sup> the Supreme Court held the recently enacted addition to the Dram Shop Act, one imposing a time limitation on suits thereunder,<sup>46</sup> was retroactive in its operation, hence could be utilized to bar a suit on a claim arising prior to the enactment thereof but on which no action had been instituted until after the specified period had expired. On the statutory front, new sections have been added to the Limitations Act to create bars to proceed-

<sup>41</sup> Section 64 of the Revised Civil Practice Act, to avoid the possibility of incurring unnecessary expense in the event the case may be dismissed on motion, permits the defendant to delay jury demand on his part "not later than the filing of his answer."

<sup>42</sup> 4 Ill. App. (2d) 565, 124 N. E. (2d) 570 (1955), noted in 33 CHICAGO-KENT LAW REVIEW 381.

<sup>43</sup> The case actually turned on the construction to be given to a rule of the Municipal Court of Chicago. Since this rule was similar in content to the former Civil Practice Act provision set forth in Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 188, the case might be said to be a precedent for a similar holding in a state court. It might be noted that Section 64 of the Revised Civil Practice Act, while recognizing the right of a defendant to demand trial by jury after the plaintiff has waived his earlier request, provided the defendant does so "promptly after being advised of the waiver," is silent on the specific point at hand.

<sup>44</sup> See post, this division, note 71, for a discussion of the case of Geneva Construction Co. v. Martin Transfer & Storage Co., 4 Ill. (2d) 273, 122 N. E. (2d) 540 (1954), one dealing with the right to add new parties plaintiff, after the limitation period has run, to a suit brought within the permitted time.

<sup>45</sup> 4 Ill. (2d) 342, 122 N. E. (2d) 513 (1954), affirming 2 Ill. App. (2d) 182, 119 N. E. (2d) 1 (1954), noted in 32 CHICAGO-KENT LAW REVIEW 346.

<sup>46</sup> Laws 1949, p. 816; Ill. Rev. Stat. 1953, Vol. 1, Ch. 43, § 135. The limitation period for suits of this character was, in 1955, reduced from two years to one year. See Laws 1955, p. —, H. B. No. 834; Ill. Rev. Stat. 1955, Vol. 1, Ch. 43, § 135.

ings not heretofore subject to specific limitation<sup>47</sup> but the principal point, as to which confusion will exist for the time being, grows out of some revisions made in the Injuries Act with particular bearing on suits for wrongful death. In that area, the legislature enacted, and the Governor signed, two separate bills the earlier of which, while making a change in the matter of the effect to be given to contributory negligence on the part of a statutory beneficiary, preserved the one-year limitation period heretofore existing.<sup>48</sup> The later measure, in addition to making changes not here pertinent, prescribed a two-year limitation period.<sup>49</sup> Until the conflict between these bills is resolved, perhaps by the passage of amendatory legislation, attorneys would be wise to obviate any question by seeing to it that all wrongful death cases are instituted well within the shorter of the two periods.

The proper or improper selection of parties, both plaintiff and defendant, could have profound consequences on the outcome of planned litigation. While the statute law on the subject remains generally the same as heretofore, the Civil Practice Act has been revised to the extent that (1) judgments in suits brought by subrogees shall not hereafter operate to the prejudice of subrogors who may be entitled to rely on other causes growing out of the transaction in question,<sup>50</sup> (2) specific provision has now been made for the use of third-party practice without changing the law in relation to contribution, indemnity or the like,<sup>51</sup> (3) the subject of intervention has been codified in a manner analogous to the federal rule relating thereto,<sup>52</sup> (4) as is also true with respect

<sup>47</sup> Laws 1955, p. —, S. B. No. 127; Ill. Rev. Stat. 1955, Vol. 2, Ch. 83, §§ 24d-24e. A seven-year limitation has now been imposed on suits based upon Ill. Rev. Stat. 1955, Vol. 1, Ch. 59, § 10 et seq., relating to fraudulent devises, and a two-year limitation has been established against suits to enforce contracts to make wills. These periods may be shortened in the event appropriate steps are taken, in the manner directed by the Administration Act, Ill. Rev. Stat. 1955, Vol. 1, Ch. 3, § 344 et seq., to fix a time for the filing of claims against estates.

<sup>48</sup> Laws 1955, p. —, H. B. No. 565; Ill. Rev. Stat. 1955, Vol. 1, Ch. 70, § 2.

<sup>49</sup> Laws 1955, p. —, H. B. No. 777; *ibid.*, Ch. 70, § 2.

<sup>50</sup> Ill. Rev. Stat. 1955, Vol. 2, Ch. 110, § 22(4).

<sup>51</sup> *Ibid.*, Ch. 110, § 25(2).

<sup>52</sup> *Ibid.*, Ch. 110, § 26.1. Compare with Fed. Rules Civ. Pro., Rule 24.

to matters of interpleader,<sup>53</sup> and (5) suits against a partnership may now be directed against the entity by its firm name.<sup>54</sup>

Content has been added to this area of the subject as the result of a few judicial decisions. The holding in *Shelton v. Sulek*<sup>55</sup> is difficult to understand for the plaintiff in that action, a real estate broker, had taken judgment by confession as payee of a negotiable note, used to serve as a temporary binder in lieu of a cash deposit under a real estate sale contract, but was there declared not to be the proper party to sue on the note for lack of a suable interest. Since the Illinois Civil Practice Act lacks a "real party in interest" provision<sup>56</sup> and directs that, as to all matters not regulated, the practice at common law or in equity should prevail,<sup>57</sup> the decision would seem to be erroneous on its face for the opinion does not disclose that the plaintiff's name, as payee in the note, was qualified in any respect and nothing would seem to be more certain than that a promisee is a proper party to sue on a contract.

The right of a private individual to serve as relator in a quo warranto proceeding is conditioned upon the terms of the specific statute<sup>58</sup> and such a person is generally deemed to be unqualified as possessing no right separate and distinct from that of the general public is whose name the action is maintained. Where a

<sup>53</sup> *Ibid.*, Ch. 110, § 26.2. Heretofore, interpleader could only take place in Illinois in relation to equity proceedings. The revision now gives the state a modern form of practice, one which also eliminates the old distinctions between bills of interpleader and bills in the nature of bills of interpleader. The new practice provision specifically recognizes the right of a defendant to use a counterclaim for this purpose. On that point, see *Curran v. Harris Trust & Savings Bank*, 348 Ill. App. 210, 108 N. E. (2d) 729 (1952).

<sup>54</sup> *Ibid.*, Ch. 110, § 27.1. It should be noted that the section so added is limited to suits *against* the partnership so it is to be presumed that the old law continues with respect to partners suing as plaintiffs. The contractual obligations of the partners are declared, by *ibid.*, Ch. 110, § 27, to be both joint and several in character and, by the same section, it would now appear to be possible to combine more than one but less than all joint obligors in the same suit.

<sup>55</sup> 5 Ill. App. (2d) 186, 125 N. E. (2d) 313 (1955).

<sup>56</sup> The sale contract did, however, contain a provision to the effect that the earnest money, on default, could be appropriated first to the seller's expenses, if any, and then to the "payment of said commission," so it could be said that the broker possessed an interest of a sort.

<sup>57</sup> Ill. Rev. Stat. 1955, Vol. 2, Ch. 110, § 1.

<sup>58</sup> *Ibid.*, Ch. 112, § 10.

distinct interest can be demonstrated to exist, however, the private individual may utilize this method of procuring relief so it became necessary, in two cases, to resolve a question as to the right of the relator to conduct the proceedings. In *People ex rel. McCarthy v. Firek*,<sup>59</sup> the Supreme Court, following a lengthy discussion of the point, held that a taxpayer in a sanitary district had both a personal and substantial distinct interest entitling him to act. The problem in *People ex rel. J. H. Anderson Monument Company v. Rosehill Cemetery Company*<sup>60</sup> was not quite so simple for the relator there was a monument dealer who sought to question the right of a cemetery to engage in the business of selling monuments and markers for installation in the cemetery and whose principal basis for complaint lay in the degree of competition which it faced by reason of its location across the street from the cemetery.<sup>61</sup> A majority of the Supreme Court judges, on the strength of the substantial decrease in business shown to have been produced by the competition so generated, held the relator had a peculiar interest in the situation hence had a right to conduct the suit.

One interesting point concerning the right to maintain representative proceedings was made in the case of *Smyth v. Kaspar American State Bank*.<sup>62</sup> Following the closing of the bank there concerned, certificates of beneficial interest were issued to the depositors, payable out of future recoveries and net profits before dividends in the reorganized institution. From realizations on frozen assets, a final liquidating dividend was tendered to the certificate holders, some of whom accepted and surrendered their certificates, made a condition to the distribution, but others of whom rejected the tender and retained their certificates. Mem-

<sup>59</sup> 5 Ill. (2d) 317, 125 N. E. (2d) 637 (1955).

<sup>60</sup> 3 Ill. (2d) 592, 122 N. E. (2d) 283 (1954), noted in 33 CHICAGO-KENT LAW REVIEW 344 and 43 Ill. B. J. 383. Hershey, J., wrote a dissenting opinion in which Fulton, J., concurred. Klingbiel, J., also wrote a dissenting opinion.

<sup>61</sup> A competitor, as such, is not ordinarily permitted to assert that a competing corporation is engaging in *ultra vires* conduct: *Golconda Northern Ry. v. Gulf Line R. Co.*, 265 Ill. 194, 106 N. E. 818 (1914).

<sup>62</sup> 6 Ill. App. (2d) 64, 127 N. E. (2d) 149 (1955). Leave to appeal has been granted.

bers of each group, purporting to represent the two classes, joined in a proceeding to compel the bank to pay the unsatisfied balances from subsequent earnings. The Appellate Court for the First District initially held that a representative suit was proper on behalf of those who had retained their certificates, since the purpose of the action was one to establish a common fund from which their claims could be satisfied, but said that, as to the others, representation was not possible for their claims to reinstate their certificates rested on fraud or duress, hence were personal in character. On rehearing, however, the court concluded that the basis for the demands of the holders who had surrendered their certificates rested primarily on mistake, rather than fraud or duress, for which reason, no conflict of interest appearing, the combination of the two sets of claims in the one suit and the conduct thereof by bona fide representatives of each group of claimants was not improper.

Attempts to bring new parties into pending litigation<sup>63</sup> led to three interesting holdings, two of which have made drastic change in the prior law on the subject. The decision in *Hurley v. Finney*,<sup>64</sup> while correct on the basis of the law as it stood at the time of the decision, reflects a situation which, it is to be hoped, has now been cured by Section 26.1 of the Revised Civil Practice Act.<sup>65</sup> An insurer was there denied the right to intervene in a pending law action affecting the insured-defendant for the purpose of securing a declaratory judgment as to its rights and obligations under the policy, particularly since the intervention, if permitted, would lead to the formulation of new and different

<sup>63</sup> Some revision has been made in this connection in former Section 25 of the Civil Practice Act, particularly with respect to the proposition as to when the action can be said to be commenced, for purpose of limitation, against a new party added as a defendant. See note in 24 CHICAGO-KENT LAW REVIEW 170 (1946), discussing the effect of the case of *Piper v. Epstein*, 326 Ill. App. 400, 62 N. E. (2d) 139 (1945), but note the change made by Ill. Rev. Stat. 1955, Vol. 2, Ch. 110, § 25(3).

<sup>64</sup> 6 Ill. App. (2d) 23, 126 N. E. (2d) 513 (1955).

<sup>65</sup> The Joint Committee comment to Ill. Rev. Stat. 1955, Vol. 2, Ch. 110, § 26.1, indicates a purpose to permit intervention to "avoid relitigation in another suit of issues which are being litigated in a pending suit." It must be noted, however, that the situation in the case at hand does not fall squarely within the categories described in Section 26.1, paragraphs 1 to 4 inclusive.

issues<sup>66</sup> and also cause the court, in a suit where service and jurisdiction depended on a non-resident's use of a state highway,<sup>67</sup> to rule on causes of action not directly connected with the use made of the highway.<sup>68</sup>

Far more important is the holding of the Supreme Court in the case of *Johnson v. Moon*<sup>69</sup> for the court there, by stretching statutory language for the addition of new parties as needed for a "complete determination" of the controversy,<sup>70</sup> achieved a result under which the choice of parties no longer rests in the hands of the plaintiff but is open to revision at the election of a defendant who files a counterclaim, provided the claim so asserted grows out of the transaction which forms the basis of the suit. It was there said that if the plaintiff, in a tort case, chooses to bring in only certain of the tort-feasors, any defendant already before the court may force the addition of those not originally made parties to the suit.

Equally remarkable is the result finally attained in the case of *Geneva Construction Company v. Martin Transfer & Storage Company*.<sup>71</sup> While the decision, to some degree, reflects the court's concern with respect to the impact made on the rights of injured employees because of a prior holding interpreting a provision of the Workmen's Compensation Act,<sup>72</sup> the determination therein opens a vista to a possible means to circumvent applicable stat-

<sup>66</sup> By Section 26.1 of the Revised Civil Practice Act, the trial judge, in the order allowing intervention, is permitted to exercise a degree of discretion as to the terms to be imposed.

<sup>67</sup> Ill. Rev. Stat. 1955, Vol. 2, Ch. 95½, § 23.

<sup>68</sup> See, in that connection, the case of *Dart Transit Co., Inc. v. Wiggins*, 1 Ill. App. (2d) 126, 117 N. E. (2d) 314 (1954).

<sup>69</sup> 3 Ill. (2d) 561, 121 N. E. (2d) 774 (1954), reversing 1 Ill. App. (2d) 6, 116 N. E. (2d) 95 (1953). See also Zacharias, "Illinois Concepts Concerning Joinder of Parties and Causes," 33 CHICAGO-KENT LAW REVIEW 118-47 (1955).

<sup>70</sup> The holding interpreted Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 149. The only revision made in this section, so far as here applicable, was of purely textual character: Ill. Rev. Stat. 1955, Vol. 2, Ch. 110, § 25.

<sup>71</sup> 4 Ill. (2d) 273, 122 N. E. (2d) 540 (1954), affirming 351 Ill. App. 289, 114 N. E. (2d) 906 (1953).

<sup>72</sup> See *Grasse v. Dealer's Transport Co.*, 412 Ill. 179, 106 N. E. (2d) 124 (1952), noted in 30 CHICAGO-KENT LAW REVIEW 375, which deals with the right of an injured covered employee to sue a third person who caused the injury in a common law action for damages.



utes of limitation by the simple process of adding extra plaintiffs to a pending suit. The action there had been instituted in prompt time by an employer who was seeking to recover from a third person for money paid out for workmen's compensation benefits to an injured employee. More than two years after institution of the suit and over four years after the date of the injury,<sup>73</sup> the employee, on learning of his right to maintain his own suit,<sup>74</sup> secured leave to intervene and filed an amended complaint in which his personal claims were added to those of his employer. A judgment for plaintiffs on the complaint as amended was affirmed, despite defense insistence on the bar by limitation, when the court held that the amendment provision of the Civil Practice Act was broad enough to permit the introduction of additional parties plaintiff. It was also held that the complaint, when so amended, related back to the date of the original filing of the suit inasmuch as the amended claim grew out of the same transaction or occurrence as that set forth in the original pleading.<sup>75</sup> One is left to speculate whether the same result would follow if one person, harmed in an accident injuring multiple parties, were to begin suit promptly and the other injured persons, each pursuing his own independent claim growing out of the occurrence, should long afterward seek to participate in the case. To say, as the court there did, that it is the basic policy, by requiring prompt suit, to see to it that the defendant is afforded a "fair opportunity to investigate the circumstances upon which liability against him is predicated,"<sup>76</sup> which policy is served if one party has sued on the facts, leads to the disregard of another policy against clogging the courts with stale claims.

<sup>73</sup> A two-year limitation would prevent the bringing of an independent suit: Ill. Rev. Stat. 1955, Vol. 2, Ch. 83, § 15. See also *Govedarica v. Yellow Cab Co.*, 216 F. (2d) 499 (1954), where, on comparable facts, the injured employee was denied the right to sue because his claim had become barred and there was, apparently, no pending action in which he could intervene.

<sup>74</sup> The case of *Grasse v. Dealer's Transport Co.*, cited in note 72 ante, was decided in the interim between the employee's injury and his application for permission to intervene.

<sup>75</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 170, as now amended by Section 46 of the Revised Civil Practice Act, particularly paragraph 2.

<sup>76</sup> 4 Ill. (2d) 273 at 289-90, 122 N. E. (2d) 540 at 549.

Nothing has been done to change the law relating to the nature of legal remedies<sup>77</sup> but issues with regard to the scope of equitable and statutory remedies do still arise. Equity jurisdiction, of course, depends upon the inadequacy of a remedy at law. The problem came up, therefore, in the case of *Lackey v. Pulaski Drainage District*,<sup>78</sup> as to whether equity should assume jurisdiction to enjoin against the collection of drainage assessments where the basis for suit was not the absence of authority to make the levy but rather one as to alleged irregularities in the exercise of such authority. It was held that, as the remedy by way of quo warranto was proper and adequate, the granting of equitable relief would be improper. In *Pierce v. Pierce*,<sup>79</sup> however, the court found an independent equitable jurisdiction to exist in matters of partition and, on the basis thereof, upheld a decree directing partition of a long-term leasehold interest.

Purely political rights will not be enforced or protected in equity so, in *People ex rel. Carter v. Hurley*,<sup>80</sup> it was held improper to grant even temporary relief by way of injunction in a proceeding where mandamus was the proper form of remedy and the relator also sought relief of that nature. While older ideas in that area die slowly, despite a provision in the statute on mandamus assimilating the practice therein to that followed in other civil cases,<sup>81</sup> it is cheering to note that, in the case of *American Civil Liberties Union v. City of Chicago*,<sup>82</sup> wherein a violation of a civil as distinct from a political right was involved, the court found no objection

<sup>77</sup> See post, Division II, Contracts, notes 30 to 32, for the case of *People v. Rocco*, 4 Ill. App. (2d) 238, 124 N. E. (2d) 25 (1955), which holds that a suit in debt may not be maintained on a criminal recognizance, the statutory remedy under Ill. Rev. Stat. 1955, Vol. 1, Ch. 38, § 625 et seq., being there declared to be the exclusive remedy.

<sup>78</sup> 4 Ill. (2d) 72, 122 N. E. (2d) 257 (1954).

<sup>79</sup> 4 Ill. (2d) 497, 123 N. E. (2d) 511 (1955), affirming 351 Ill. App. 336, 115 N. E. (2d) 107 (1953), noted in 32 CHICAGO-KENT LAW REVIEW 265.

<sup>80</sup> 4 Ill. App. (2d) 24, 123 N. E. (2d) 341 (1954). See also *Malkin v. City of Chicago*, 6 Ill. App. (2d) 151, 127 N. E. (2d) 145 (1955), wherein an attempt to combine claims in mandamus with prayers for declaratory relief was criticized.

<sup>81</sup> Ill. Rev. Stat. 1955, Vol. 2, Ch. 87, § 11. There is authority, in Section 44 of the Civil Practice Act, for the joinder of legal and equitable claims in one suit.

<sup>82</sup> 3 Ill. (2d) 334, 121 N. E. (2d) 585 (1954). Further appeal has been dismissed: 348 U. S. 979, 75 S. Ct. 572, 99 L. Ed. (adv.) 470 (1955).

to a combination of equitable prayers for relief along with a request for a declaratory judgment.<sup>83</sup>

Mention could also be made at this point of two other cases dealing with declaratory judgment proceedings. It was pointed out, in *Fairbanks Morse & Company v. City of Freeport*,<sup>84</sup> that if relief is to be sought by way of declaratory judgment prompt action to that end is desirable as the opportunity may pass in the event another court, under some form of conventional action, has succeeded in gaining jurisdiction over the problem before the declaratory judgment proceeding is instituted. Perhaps more significant is the holding of the Appellate Court for the Fourth District in the case of *Burgard v. Mascoutah Lumber Company*.<sup>85</sup> It was there held that, after a declaration of rights has been made, either party may petition the court for such further relief as may be appropriate and, for this purpose, other and separate pleadings or counterclaims will not be needed. A personal judgment in favor of the defendant against the petitioner for declaratory relief was there affirmed, absent any counterclaim, although the court was careful to note that, while the proceeding may be docketed as either at law or in equity, close attention must be given to the right to trial by jury to avoid possible constitutional questions. It was also there said that, in the event jury trial is had, the verdict of the jury is not merely advisory in character but possesses the same effect as a verdict in an action at law.

Other forms of equitable remedies also received attention. The case of *Metropolitan Life Insurance Company v. Henriksen*,<sup>86</sup> one of first impression in this state, reveals that relief against a mistake can be secured by way of reformation, despite the presence of a so-called incontestability clause in an insurance policy, where through clerical error the policy fails to express the true

<sup>83</sup> A proceeding for declaratory judgment, while statutory in character, is essentially equitable in nature. No significant change has been made in the statute providing for declaratory relief but the same has been renumbered and now appears as Section 57.1 of the Revised Civil Practice Act.

<sup>84</sup> 5 Ill. (2d) 85, 125 N. E. (2d) 57 (1955).

<sup>85</sup> 6 Ill. App. (2d) 210, 127 N. E. (2d) 464 (1955).

<sup>86</sup> 6 Ill. App. (2d) 127, 126 N. E. (2d) 736 (1955).

understanding between the parties. Negative restrictive covenants, if reasonable, may be enforced by injunction according to the case of *Bauer v. Sawyer*<sup>87</sup> even though the covenant contains a provision for a penalty in the event of a breach. Attention could also be drawn to the case of *Schien v. City of Virden*<sup>88</sup> for the emphasis it puts on the matter of the summary assessment of damages incurred by reason of the wrongful issuance of a temporary injunction.<sup>89</sup> According to that case, it is a condition precedent to the assessment of damages that the temporary injunction be demonstrated to have been wrongfully issued. If, therefore, a motion to dissolve has been denied and no appeal has been taken from that order,<sup>90</sup> the order for temporary injunction becomes final and precludes the possibility of an assessment of damages regardless of the final outcome of the case.<sup>91</sup>

#### PREPARATION OF PLEADINGS

Very little has been said or done in relation to the content, form, or the manner of setting forth the claim upon which the civil action is based although it should be noted that there is now a specific prohibition against the use of the several common counts in actions heretofore sounding in general assumpsit.<sup>92</sup> It would seem from the case of *Steward v. Bartley*,<sup>93</sup> however, that the bar has not yet become fully conversant with the fact that, in actions resting on wilful and wanton conduct, the plaintiff

<sup>87</sup> 6 Ill. App. (2d) 178, 126 N. E. (2d) 844 (1955). Leave to appeal has been granted.

<sup>88</sup> 5 Ill. (2d) 494, 126 N. E. (2d) 201 (1955).

<sup>89</sup> Ill. Rev. Stat. 1955, Vol. 1, Ch. 69, § 12, authorizes the court, in the instances there mentioned, to act upon a suggestion of damages but specifies that the failure to do so does not operate to bar an action on the injunction bond.

<sup>90</sup> An appeal from an interlocutory order of this character is permitted by Ill. Rev. Stat. 1955, Vol. 2, Ch. 110, § 78.

<sup>91</sup> Supplementing earlier opinions in the same case wherein attempts to recover damages for the wrongful issuance of an injunction growing out of a labor dispute had proved to be ineffective, the current holding in *United Mail Order, etc., Union v. Montgomery Ward & Co.*, 6 Ill. App. (2d) 477, 128 N. E. (2d) 645 (1955), now establishes the fact that, in a suit on an injunction bond, the judgment cannot exceed the penal sum named therein for this is the extent of the contractual liability assumed thereunder.

<sup>92</sup> Ill. Rev. Stat. 1955, Vol. 2, Ch. 110, § 33(1).

<sup>93</sup> 5 Ill. App. (2d) 208, 124 N. E. (2d) 899 (1955).

must now<sup>94</sup> allege freedom from wilful and wanton conduct on his part if the complaint is to be considered sufficient to withstand a motion to strike. Fortunately for the plaintiff there concerned, no question was raised over the omission of this essential allegation, until after trial and verdict so it was possible, through the use of the principle of *aider by verdict*, for the court to conclude that allegations as to freedom from contributory negligence plus allegations that the plaintiff had warned the defendant about his reckless conduct were enough to support the judgment.<sup>95</sup> Reminder is also given, by the case of *Fowley v. Braden*,<sup>96</sup> that exhibits attached to pleadings are a part thereof for all purposes<sup>97</sup> so reference may be made thereto to determine whether inconsistency lies between the allegations of the complaint, or the theory thereof, and the verbiage or nature of the exhibit.<sup>98</sup> Verification of a complaint should, according to *Petru v. Petru*,<sup>99</sup> be no idle gesture to be lightly undertaken for the court there indicated that a complete abandonment of charges contained in a sworn complaint could well go a long way to impair confidence in the veracity of the plaintiff as a witness.

Mention has been made of some problems arising from the joinder of parties in a suit.<sup>1</sup> Of related character is the matter of joining a series of distinct claims. In that connection, specific statutory authority now exists for the inclusion in one case of a series of related claims even though certain of them may not be cognizable until others of the series have been prosecuted to con-

<sup>94</sup> The allegation was first considered to be essential in the case of *Prater v. Buell*, 336 Ill. App. 533, 84 N. E. (2d) 676 (1949).

<sup>95</sup> The court specifically stated that it expressed no opinion on the point as to whether the complaint would have survived a motion under Ill. Rev. Stat. 1955, Vol. 2, Ch. 110, § 45, if such a motion had been presented in timely fashion.

<sup>96</sup> 4 Ill. (2d) 355, 122 N. E. (2d) 559 (1954).

<sup>97</sup> Ill. Rev. Stat. 1955, Vol. 2, Ch. 110, § 36.

<sup>98</sup> The complaint in question proceeded on the theory that a joint venture existed between the parties. The exhibits tended to indicate the arrangement was no more than a contract for the rendition of services.

<sup>99</sup> 4 Ill. App. (2d) 1, 123 N. E. (2d) 352 (1954).

<sup>1</sup> See above, this section, notes 50 to 76 inclusive.

clusion.<sup>2</sup> The case of *LaPlaca v. LaPlaca*<sup>3</sup> would indicate that the Supreme Court is also willing to permit an action to be expanded beyond normal scope so as to be made to cover unrelated claims, at least so long as the parties made no protest,<sup>4</sup> but the Appellate Courts have tended to place narrow limits around the degree of joinder which will be permitted, particularly when protest is made and the joined claims are of unusual nature.<sup>5</sup> Care should be exercised, therefore, before too great a reliance is placed on the language of the Civil Practice Act relating to this point.<sup>6</sup>

Nothing of consequence has been done to change the rules relating to defensive pleadings<sup>7</sup> but attention might be given to three cases which throw light on the subject of affirmative defenses. There is indication, in the case of *McClellan v. Chicago Great Western Railway Company*,<sup>8</sup> that a person relying on an act of God to defeat tort liability should plead the same affirmatively, probably because it would be one of those defenses "likely to take

<sup>2</sup> Section 44 of the Revised Civil Practice Act now so declares, using an illustration of a case wherein the plaintiff joins a cause of action for damages with one to set aside an alleged fraudulent conveyance in the manner permitted by Fed. Rules Civ. Pro., Rule 18(b). Heretofore, two separate suits would have been needed to accomplish complete relief.

<sup>3</sup> 5 Ill. (2d) 468, 126 N. E. (2d) 239 (1955).

<sup>4</sup> The case began as a suit for separate maintenance but ended up as a partition proceeding on a counterclaim filed for that purpose. No objection appears to have been made that the issues in a statutory proceeding for separate maintenance should be kept within proper limits: *Petta v. Petta*, 321 Ill. App. 512, 53 N. E. (2d) 324 (1944), noted in 22 CHICAGO-KENT LAW REVIEW 231.

<sup>5</sup> See *Johnson v. Johnson*, 5 Ill. App. (2d) 453, 125 N. E. (2d) 843 (1955), in which old rules as to multifariousness were invoked to prevent the combination in one suit of three distinct claims for partition where the titles to the three parcels did not arise from a common source and there was a degree of lack of identity as to the co-tenants, the Second District there holding that, under Ill. Rev. Stat. 1955, Vol. 2, Ch. 106, § 44 et seq., joinder would be permitted only if the several titles were derived from a common source or all co-tenants were interested in all of the parcels. See also *People ex rel. Carter v. Hurley*, 4 Ill. App. (2d) 24, 123 N. E. (2d) 341 (1954), where the First District held it improper to join equitable claims with demands for mandamus on the authority of some older cases decided long before the adoption of the Civil Practice Act.

<sup>6</sup> Ill. Rev. Stat. 1955, Vol. 2, Ch. 110, §§ 43(1) and 44(1).

<sup>7</sup> Section 41 of the Civil Practice Act has been amended so as to provide that, in the event allegations and denials have been made without reasonable cause and not in good faith, the pleader thereof shall pay, in addition to all reasonable expenses, reasonable attorney's fees to be taxed by the court: Ill. Rev. Stat. 1955, Vol. 2, Ch. 110, § 41.

<sup>8</sup> 3 Ill. App. (2d) 235, 121 N. E. (2d) 337 (1954).

the other party by surprise.”<sup>9</sup> The defense of illegality, however, is specifically declared to be an affirmative defense so, in *Bauer v. Sawyer*,<sup>10</sup> the defendant was denied the right to rely on an alleged illegal restraint in the contract sued upon because first, he had not set forth this defense in his answer, and second, he had not sustained the burden of proof which rested on him in this respect. The defendant in *Whitsel v. County of Cook*<sup>11</sup> specifically pleaded the defense of *res judicata*, electing to stand thereon when the answer was stricken on motion, but lost on appeal because the higher court came to the conclusion that a second suit between the same parties, or their privies, in the former action actually involved different, although somewhat related, issues.<sup>12</sup>

Motion practice, both with respect to the manner of raising objections to pleadings and as to termination of the suit because of the presence of certain defects or defenses, has been subjected to a degree of statutory revision. In addition to changes in verbiage, a new subsection has been added to Section 45 of the Civil Practice Act to make it clear that, among other forms of motion, one seeking judgment on the pleadings would be of proper character.<sup>13</sup> More substantial revision has been made in Section 48 for, in addition to expanding the scope of the motion thereunder to apply to third-party proceedings,<sup>14</sup> the permissible grounds for relief now extend to cases wherein either plaintiff or defendant

<sup>9</sup> Ill. Rev. Stat. 1955, Vol. 2, Ch. 110, § 43(4). The discussion of the point is by way of dicta, however, for the plaintiff did not object, because of any lack of affirmative pleading, to the introduction of defense testimony to support this contention.

<sup>10</sup> 6 Ill. App. (2d) 178, 126 N. E. (2d) 844 (1955). Leave to appeal has been granted.

<sup>11</sup> 4 Ill. (2d) 269, 122 N. E. (2d) 564 (1954), noted in 1955 Ill. L. Forum 173.

<sup>12</sup> The earlier case, that of *Galt v. County of Cook*, 405 Ill. 396, 91 N. E. (2d) 395 (1950), had dealt with the validity of a 130 foot set-back line imposed by a county zoning ordinance. The current action, involving the same and some additional property was directed against an 80 foot set-back line provision found in the same section of the same ordinance. This, the court said, constituted an independent cause of action.

<sup>13</sup> Ill. Rev. Stat. 1955, Vol. 2, Ch. 110, § 45(5). Statutory recognition is thereby given to what has, heretofore, been held to be an appropriate form of attack: *Milanko v. Jensen*, 404 Ill. 261, 88 N. E. (2d) 857 (1949).

<sup>14</sup> Prior to this the Section 48 motion ran only against the complaint or the counterclaim: Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 172.

lacks legal capacity,<sup>15</sup> the claim has been extinguished by discharge in bankruptcy,<sup>16</sup> or other affirmative matters exist which could serve to avoid the legal effect of, or defeat, the claim or demand.<sup>17</sup> The court is not limited, as heretofore, to considering simply the affidavits<sup>18</sup> offered in support of a motion under this Section but may also now receive "other proof," presumably intended to include oral testimony, in much the same way as would be done in connection with hearings on petitions for temporary restraining orders or the like.

Despite the distinctions which have, for a long time, existed between the two motion sections of the Civil Practice Act, it is evident that courts, as well as lawyers, often fail to observe these distinctions and grant relief under one form in a manner which would be proper only with respect to the other and vice versa. Thus, in *Davis v. Foreman*,<sup>19</sup> a motion to strike a complaint on the ground it contained false, impertinent and scandalous matter, one which could only be offered under Section 45 of the statute,<sup>20</sup> was submitted with supporting affidavits, so as to be a form of "speaking" demurrer, and was upheld despite the fact that a motion of this type is permitted only under Section 48 and then only if it rests upon one or more of the grounds there enumerated. By contrast, in the case of *Nordland v. Poor Sisters of St. Joseph of Perpetual Devotion*,<sup>21</sup> the Appellate Court for the First District appears to have fallen into an error of a type previously noted,<sup>22</sup> that of permitting the use of a motion to dismiss, based on Section 48 but specifying that the plaintiff lacked the right to sue, whereas, by that section, such a motion would lie only in

<sup>15</sup> Ill. Rev. Stat. 1955, Vol. 2, Ch. 110, § 48(1) (b).

<sup>16</sup> *Ibid.*, Ch. 110, § 48(1) (f).

<sup>17</sup> *Ibid.*, Ch. 110, § 48(1) (i).

<sup>18</sup> See also revised Rule 15 of the Illinois Supreme Court.

<sup>19</sup> 6 Ill. App. (2d) 343, 127 N. E. (2d) 503 (1955).

<sup>20</sup> See Ill. Rev. Stat. 1955, Vol. 2, Ch. 110, § 45(1), which specifies that the grounds for the motion shall be stated therein and lists, among possible forms of relief, that "designated immaterial matter be stricken out."

<sup>21</sup> 4 Ill. App. (2d) 48, 123 N. E. (2d) 121 (1954), noted in 33 CHICAGO-KENT LAW REVIEW 280.

<sup>22</sup> *Classen v. Heil*, 330 Ill. App. 433, 71 N. E. (2d) 537 (1947), note in 36 Ill. B. J. 194.



cases where the defect is one bearing on the plaintiff's capacity to sue. In the case of *F & F Laboratories v. Chocolate Spraying Company*,<sup>23</sup> the court appears to have expanded the statutory ground for dismissal under Section 48, provided it can be shown that there is another action pending between the same parties, by upholding the dismissal of a counterclaim<sup>24</sup> because the demand there asserted had already been placed in litigation, although there was a failure to show full compliance with restrictions heretofore existing on the right to seek abatement of a cause for this reason.<sup>25</sup> More in harmony with statutory concepts is the decision reached in *Holland v. Richards*<sup>26</sup> where the court said it was appropriate to use a motion to dismiss because of laches, provided the defect appeared on the face of the complaint, despite an objection that the party was limited to the sole remedy of raising this point by way of an affirmative defense in an answer.<sup>27</sup>

Defects in pleadings may, of course, be cured by amendment.<sup>28</sup> While little has been said on that score,<sup>29</sup> the case of *Martin v. Kozjak*<sup>30</sup> should evoke a degree of interest for it was there held

<sup>23</sup> 6 Ill. App. (2d) 299, 127 N. E. (2d) 682 (1955). Leave to appeal has been granted.

<sup>24</sup> Ill. Rev. Stat. 1955, Vol. 2, Ch. 110, § 48(2), extends this form of motion practice to any party "against whom a claim or demand is asserted."

<sup>25</sup> *Allen v. Watt*, 69 Ill. 655 (1873); *McJilton v. Love*, 13 Ill. 486 (1851).

<sup>26</sup> 4 Ill. (2d) 570, 123 N. E. (2d) 731 (1955).

<sup>27</sup> A point was urged in the case of *McWane Cast Iron Pipe Co. v. Aetna Casualty & Surety Co.*, 3 Ill. App. (2d) 399, 122 N. E. (2d) 435 (1954), but not determined because not properly preserved for review, that a motion pursuant to Section 45 of the Civil Practice Act was insufficient because it failed to point out wherein the complaint failed to state a cause of action. The motion did say that the complaint was "insufficient in law, being contrary to and in derogation of the provisions of" the statute cited, although it did not point out, with particularity, that there had been a failure to allege compliance with certain notice provisions contained in the statute. One is left to speculate as to how much notice a pleader is entitled to have with respect to defects in his pleadings.

<sup>28</sup> By an addition to Section 46(1) of the Civil Practice Act, a bill of particulars, as well as other pleadings, may be amended. On that point, see *McNeff v. White Eagle Brewing Co.*, 294 Ill. App. 37, 13 N. E. (2d) 493 (1938).

<sup>29</sup> But see above, this section, note 71, first series, for the remarkable holding in the case of *Geneva Construction Co. v. Martin Transfer & Storage Co.*, 4 Ill. (2d) 273, 122 N. E. (2d) 540 (1954), regarding the right to add new parties plaintiff, by amendment, after running of the statute of limitations. See also the rather extensive revision made in Ill. Rev. Stat. 1955, Vol. 2, Ch. 110, § 48(4), dealing with the relation back of amended pleadings to overcome, to some degree, the holding in *Fitzpatrick v. Pitcairn*, 371 Ill. 203, 20 N. E. (2d) 230 (1939).

<sup>30</sup> 5 Ill. App. (2d) 390, 125 N. E. (2d) 690 (1955).

to be error to deny to a defendant permission to amend an answer, which had initially admitted possession and control of the premises out of which the injury arose, when it was later discovered that another, in fact, had all the time been responsible for the control and maintenance of the property. The fact that it was too late for the plaintiff to do anything to cure the defect by way of proceeding against the third person<sup>31</sup> was said not to be material inasmuch as, if the point had been promptly made in the original answer, any such remedy would, by then, have likewise been barred.<sup>32</sup> It should be noted that there was nothing in the record of the case to indicate collusion between the defendant and the third person to suppress the defense. If collusion had been present, a denial of the right to amend might have been supported on the basis that a trial judge is permitted to exercise a degree of discretion by imposing "just and reasonable terms" on the privilege of amendment.<sup>33</sup>

#### THE TRIAL OF THE CASE

Antecedent to the trial itself, some questions may be generated regarding such things as summary judgment procedure, pre-trial discovery and the like. In that connection, it should be noted that a trial ought not take place until the pleadings have been completely made up and issues have been reached thereunder. It was for this reason that the default divorce decree in favor of the plaintiff entered in the case of *McKeon v. McKeon*<sup>34</sup> was ordered set aside as the plaintiff there had neglected to file a reply or answer to the defendant's counterclaim<sup>35</sup> and, when the case was called for trial, the full pleading record had not

<sup>31</sup> See *Chicago Union Traction Co. v. Jerka*, 227 Ill. 95, 81 N. E. 7 (1907).

<sup>32</sup> In *Marsden v. Neisius*, 5 Ill. App. (2d) 396, 126 N. E. (2d) 44 (1955), a late amendment designed to correct the name of the defendant was held to relate back and thereby obviate a possible defense based on the Limitation Act.

<sup>33</sup> Ill. Rev. Stat. 1955, Vol. 2, Ch. 110, § 46(1).

<sup>34</sup> 4 Ill. App. (2d) 515, 124 N. E. (2d) 564 (1955).

<sup>35</sup> An answer to a counterclaim is now specifically required by Section 38(4) of the Revised Civil Practice Act. Heretofore, the requirement depended on an inference based on Section 32 thereof, which called for a reply in the event "new matter by way of defense" appeared in the answer.

then been completed.<sup>36</sup> After all pleadings are on file, there is still opportunity, prior to trial and with court approval, to withdraw an existing pleading and substitute some appropriate motion in lieu thereof, one which might have been presented earlier and which, if allowed, might serve to make trial unnecessary. The case of *Kovalik v. Baldwin*,<sup>37</sup> while pointing out that a request of this nature should be given liberal consideration, unless the opposing party could show a loss of rights or damage in some respect from the granting thereof, nevertheless criticizes the practice as being entirely inappropriate where the proposed motion is one to dismiss the suit and would require, for its determination, a resolution of disputed issues of fact, particularly where a trial by jury would be proper and had been demanded.<sup>38</sup>

Control over the matter of voluntary dismissal of proceedings has been, since 1933, in the hands of the courts and has not been one left to the untrammelled judgment of the litigant.<sup>39</sup> The holding in the case of *Gonzalez v. Gonzalez*,<sup>40</sup> however, would indicate that a clear-cut exception exists in the event the suit is one for divorce or separate maintenance. It was there held to be error, after trial and finding in favor of the counterclaimant, to deny such a party the privilege of foregoing a determination in his favor under penalty of dismissal of his claims with prejudice. A public policy designed to protect the continuance of the marriage relation was said to be adequate justification for the creation of this exception and to outweigh any counter policy in-

<sup>36</sup> The court there also held that, under Rule 21 of the Superior Court of Cook County, it was error to dispense with notice to the opposite party, who had entered an appearance, of the proposed submission of the decree for judicial approval.

<sup>37</sup> 3 Ill. App. (2d) 210, 121 N. E. (2d) 53 (1954), noted in 33 CHICAGO-KENT LAW REVIEW 191.

<sup>38</sup> Section 48 of the Civil Practice Act has been amended, in this respect, to require denial of a motion to dismiss in suits at law where a jury demand has been filed only in those instances where "a material and genuine disputed question of fact" has been raised by the pleadings. Heretofore, the presence of any "disputed questions of fact" would have been enough to preclude the court from granting a motion of this nature: Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 172.

<sup>39</sup> Section 52 of the Civil Practice Act has now been enlarged so as to extend to counterclaimants and third-party plaintiffs, as well as to original plaintiffs. A companion section, based on Fed. Rules Civil Pro., Rule 23(c), has been enacted to cover compromise and dismissal of class suits: Ill. Rev. Stat. 1955, Vol. 2, Ch. 110, § 52.1.

<sup>40</sup> 6 Ill. App. (2d) 310, 127 N. E. (2d) 673 (1955).

tended to bring litigation to a speedy and final determination according to the substantive rights of the parties.<sup>41</sup>

Summary judgment and pre-trial procedure, as well as discovery and deposition practices, have been subjected to extensive revision, both by statutory changes and revision of court rules.<sup>42</sup> Any enumeration of the changes so made would result in undue extension of this survey, so the most that could be said now is that, to a large extent, the state practice will follow closely, if not parallel, the federal rules on the subject and, in all probability, federal decisional interpretation thereof will be found helpful, if not controlling, in doubtful instances. For the purpose of bringing the entire law on the subject together at one place, some sections have been removed from the Evidence Act<sup>43</sup> and, as rewritten, are now imbedded in the Revised Civil Practice Act where they control in matters of discovery, intended to possess limited use, as well as with respect to evidence depositions, heretofore regulated under principles controlling a *dedimus potestatem*. The explanations and comments of the Joint Committee, offered in support of these matters, should prove most helpful to an understanding of, and the possible applications for, these revisions.

Two cases decided during the year may be of interest in relation to the matter of assembling proof by way of preparation for trial. In *Krupp v. Chicago Transit Authority*,<sup>44</sup> the Appellate Court for the First District declared that there was no provision in law to compel one party, on interrogatory, to furnish to the other the names and addresses of the witnesses he intends to call. In *Ross v. Wells*,<sup>45</sup> however, the same court, in a case of first im-

<sup>41</sup> Ill. Rev. Stat. 1955, Vol. 2, Ch. 110, § 4.

<sup>42</sup> Particular attention should be given to Sections 57, 58, 58.1, and 60 of the Revised Civil Practice Act and to Revised Rules 15 to 22, inclusive, of the Illinois Supreme Court.

<sup>43</sup> Sections 24 to 37 and 40 to 46, inclusive, of Ill. Rev. Stat. 1953, Vol. 1, Ch. 51, have been repealed. Section 39 of the Evidence Act, relating to the perpetuation of testimony, has been recast into a new form effective January 1, 1956.

<sup>44</sup> 4 Ill. App. (2d) 222, 124 N. E. (2d) 13 (1955). Leave to appeal has been granted.

<sup>45</sup> 6 Ill. App. (2d) 304, 127 N. E. (2d) 519 (1955).

pression, required a lawyer, when suing for fees allegedly due, to produce his client's books and papers in response to a subpoena *duces tecum* served by the client despite the attorney's claim that he had a right to retain such material in support of his charging lien. While it could be said that the attorney, by suing, had recognized that the lien was of little value, hence did not justify the retention of the client's papers, the court put the professional duty to make full and frank disclosure with respect to arrangements between the attorney and his client ahead of any privilege to insure payment by refusal to surrender in support of the lien.

In the realm of evidence law, at least as the same related to proof in civil cases,<sup>46</sup> about the only case of significance is that of *Kettlewell v. Prudential Insurance Company*,<sup>47</sup> one which presents no novel propositions of law but does increase the emphasis on the presumption against suicide and the fact that the burden of proof is on the insurer to prove that a suicide occurred. The facts of the case were close, nevertheless the jury came to the conclusion that it was possible that the insured had come to his death by carelessness or gross neglect without the intention of destroying himself. Under this conclusion, the affirmative defense of the insurer that the death was one by suicide was said not to be proven by "clear and convincing" evidence sufficient to destroy the presumption.

Trial tactics have not been changed to any appreciable extent<sup>48</sup> but provisions do now exist against the burdensome use of subpoenas,<sup>49</sup> for the impanelling of not to exceed two alternate jurors, with necessary adjustment as to the number and distribu-

<sup>46</sup> Matters of evidence peculiar to criminal cases are discussed below, Division IV, Criminal Law and Procedure, notes 47 to 57.

<sup>47</sup> 4 Ill. (2d) 383, 122 N. E. (2d) 817 (1954), noted in 43 Ill. B. J. 674, reversing 1 Ill. App. (2d) 300, 117 N. E. (2d) 568 (1954).

<sup>48</sup> A welcome note has been struck by Supreme Court Rule 14-1, which states that a "reference to a master shall be the exception and not the rule," thereby indicating an intention to minimize some of the costs heretofore placed on litigants in equity cases. In that connection, see also Ill. Rev. Stat. 1955, Vol. 2, Ch. 95, § 22b, which directs that, in the trial of a foreclosure suit, the evidence shall be "taken in open court" except in the instances there mentioned.

<sup>49</sup> See Section 62 of the Revised Civil Practice Act.

tion of peremptory challenges in the event alternate jurors are used,<sup>50</sup> for the giving of an oral charge to the jury if the parties consent to the use of this method,<sup>51</sup> for a reasonable handling of the matter of preparing, submitting, and the discussion of proposed written instructions,<sup>52</sup> for the taking of general verdicts except where the nature of the case requires the taking of special verdicts,<sup>53</sup> and for the prompt rendition of judgment upon the verdict after the same has been attained.<sup>54</sup>

While a single post-trial motion will be all that will hereafter be permitted,<sup>55</sup> it may be noted that the Supreme Court, in the case of *Fulford v. O'Connor*,<sup>56</sup> held that it was not unconstitutional to permit a trial court, after verdict had been returned, to grant a motion for judgment *non obstante veredicto* at the request of a defendant<sup>57</sup> without ordering a new trial, despite the absence of any form of common law procedure to this end, since the motion, regardless of its present name, was essentially no more than one for a directed verdict over which the trial judge had, in a proper case, complete and final power. Having found that the procedure had been constitutional in character, the court nevertheless found that the trial judge had decided erroneously inasmuch as the record contained enough evidence favorable to the plaintiff to take the case to the jury and, because of a failure on the part of the defendant to secure the alternative ruling on the motion for a new trial,<sup>58</sup> the court then ordered the trial judge to enter judgment on the verdict. In connection with matters of this character, it is now the law that a plaintiff who consents to

<sup>50</sup> Ill. Rev. Stat. 1955, Vol. 2, Ch. 110, § 66(2).

<sup>51</sup> *Ibid.*, Ch. 110, § 67(1).

<sup>52</sup> *Ibid.*, Ch. 110, § 67(3).

<sup>53</sup> *Ibid.*, Ch. 110, § 65.

<sup>54</sup> *Ibid.*, Ch. 110, § 68(2).

<sup>55</sup> *Ibid.*, Ch. 110, § 68.1. By this section, the parties are saved from the possibility of waiving rights which, heretofore, has occurred in the event the several post-trial motions were not presented in proper sequence.

<sup>56</sup> 3 Ill. (2d) 490, 121 N. E. (2d) 767 (1954), noted in 1954 Ill. L. Forum 710.

<sup>57</sup> The relief there granted was based on a construction of Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 192. Applicable portions thereof have been carried over into Section 68.1 of the Revised Civil Practice Act.

<sup>58</sup> See former Rule 22 of the Illinois Supreme Court. The text thereof is now incorporated in Ill. Rev. Stat. 1955, Vol. 2, Ch. 110, § 68.1(5).

a remittitur<sup>59</sup> as a condition to the denial of a new trial is not barred from asserting error in this respect, in the event of an appeal by the opposite party, and for this purpose no cross-appeal will be required.<sup>60</sup>

Judgment practice has generally been left untouched although it will hereafter be the case that appeals from final judgments as to certain, but less than all, of the parties or causes in cases involving multiple parties or causes will be the exception rather than the rule as an express finding in the judgment order will now be needed, to the effect that there is no just reason for delaying enforcement of the partial judgment or the taking of an appeal thereunder, for support of piece-meal review of a case.<sup>61</sup> In an effort to overcome the constitutional difficulties previously noted operating to nullify the attempted requirement that no default order or judgment should be entered until after notice had been given to all parties who had appeared in the case,<sup>62</sup> the statute now provides that the clerk of the court shall give notice after the fact, presumably with the thought in mind that the error, if any, may be remedied by prompt application to vacate the default judgment.<sup>63</sup> Mention might also be made of the fact that, in the case of *Bell Discount Corporation v. Pete Weck's Auto Service Inc.*,<sup>64</sup> a degree of informality in a judgment order<sup>65</sup> was tolerated when the court found no uncertainty to exist as the case involved a single plaintiff and a single defendant and any ambiguity in the order could be resolved by reference to this fact.

<sup>59</sup> The case of *Yep Hong v. Williams*, 6 Ill. App. (2d) 456, 128 N. E. (2d) 655 (1955), decided subsequent to the period of this survey, contains an interesting point as to the power of a trial court to impose an additur on a verdict in lieu of granting a new trial.

<sup>60</sup> Ill. Rev. Stat. 1955, Vol. 2, Ch. 110, § 68.1(7). It had previously been the law that, by entering the remittitur, the party acquiesced in the decision, hence could not complain of error in this respect: *National Castings Co. v. Iroquois Steel & Iron Co.*, 333 Ill. 588, 165 N. E. 199 (1929).

<sup>61</sup> *Ibid.*, Ch. 110, § 50(2).

<sup>62</sup> Laws 1951, p. 1707, Ill. Rev. Stat. 1951, Vol. 2, Ch. 110, § 50a, was declared unconstitutional in the case of *Agran v. Checker Taxi Co.*, 412 Ill. 145, 105 N. E. (2d) 713 (1952), noted in 30 CHICAGO-KENT LAW REVIEW 383.

<sup>63</sup> See Section 50.1 of the Revised Civil Practice Act but note that the failure of the clerk to give notice does not impair the force of validity of the default order.

<sup>64</sup> 4 Ill. App. (2d) 397, 124 N. E. (2d) 674 (1954).

<sup>65</sup> The order recited that "judgment be entered for the plaintiff" in a specified amount but did not state that it was rendered against the defendant nor did it mention the defendant by name.

## DAMAGES

Three cases appear to have affected the law in relation to damages during the past year, two of them raising questions as to whether or not benefits provided by third persons may be considered in mitigation of the damages suffered. In the first of these cases, that of *Hall v. Chicago & Northwestern Railway Company*,<sup>66</sup> the Supreme Court held that damages for loss of earnings should be computed on the basis of gross earnings without any deductions for federal income taxes and, for that reason, remarks made by defense counsel before the jury to the effect that an award of damages would not be subject to income taxation were considered to be improper. This result seems to be predicated on two considerations; first, that the disposition made of the damages paid is of no concern to the defendant, and second, that a contrary holding would give the defendant a benefit intended by Congress to accrue to injured parties.

An interesting contrast to this holding is provided by the case of *United Protective Workers of America, Local No. 2 v. Ford Motor Company*,<sup>67</sup> wherein an employee had been compulsorily retired in violation of a union contract. Between that time and the time he could have been lawfully retired, he had received certain social security and annuity payments, the latter provided by the company for retired employees. In awarding damages, the court allowed these payments to be deducted from the wages which would have been earned in accordance with the general rule of contract damages, to-wit: to place the injured party in the position he would have been had the contract been performed. The court refused to extend the rule applicable in tort cases, as illustrated in the aforementioned case, on the ground that tort damages involve a flavor of punishment which should find no

<sup>66</sup> 5 Ill. (2d) 135, 125 N. E. (2d) 77 (1955), noted in 33 CHICAGO-KENT LAW REVIEW 377 and 43 Ill. B. J. 810. While the review actually occurred with respect to the holding in 1 Ill. App. (2d) 552, 118 N. E. (2d) 29 (1954), it also, in effect, reversed the decision rendered on an earlier appeal in the same case, to be found in 349 Ill. App. 175, 110 N. E. (2d) 654 (1953).

<sup>67</sup> 223 F. (2d) 49 (1955). For a further discussion of this case, see ante, Division I, Labor Law, note 34.



place in determining awards for breach of contract. It may be significant to note that the breach herein was innocent rather than wilful, having grown out of a misunderstanding of certain facts, so a degree of inconsistency would appear to be present particularly since the tort rule apparently makes no such distinction.

The decision in the case of *People ex rel. Schull v. Massachusetts Bonding & Insurance Company*<sup>68</sup> should prove to be interesting because of its departure from modern practice. The action was one against a surety on a penal bond and the normal result, under the terms of the Civil Practice Act,<sup>69</sup> would be the rendition of a judgment for the face amount of the bond but with execution issuing only for the actual amount of damages which the plaintiff proved had been sustained. However, the Supreme Court held that where a bond has been given to insure compliance with a statute, as was the case herein, such a bond is truly penal in nature and the plaintiff need not prove actual damages but is entitled to an enforceable judgment for the entire penal sum.

Increases in the amount of damages awardable under two statutory remedies were effected by the most recent session of the General Assembly. An amendment, effective July 1, 1956, to Section 135 of the Liquor Control Act<sup>70</sup> has raised the amount recoverable in dram-shop cases from \$15,000 to \$20,000, with specific provision to the effect that such award is available for each person injured as therein specified. This latter provision amounts to no more than a legislative confirmation of a result previously achieved by the Appellate Court in a case based on the statute as it stood prior to the amendment.<sup>71</sup> In addition, the maximum amount recoverable in actions brought for wrongful death has been increased from \$20,000 to \$25,000, with the exercise by the

<sup>68</sup> 4 Ill. (2d) 23, 123 N. E. (2d) 185 (1954). Questions of suretyship law involved in this case are mentioned above, Division II, Contracts, note 26.

<sup>69</sup> Ill. Rev. Stat. 1955, Vol. 2, Ch. 110, § 53.

<sup>70</sup> Laws 1955, p. —, H. B. No. 834; Ill. Rev. Stat. 1955, Vol. 1, Ch. 43, § 135.

<sup>71</sup> See *Childers v. Modglin*, 2 Ill. App. (2d) 292, 119 N. E. (2d) 519 (1954).

legislature of a degree of care to avoid problems heretofore noted<sup>72</sup> as to whether or not the increase should apply to actions based on claims arising prior to the amendment.<sup>73</sup>

#### APPEAL AND APPELLATE PROCEDURE

A few but relatively trivial points were made in the field of appellate procedure as the result of some decisions attained during the survey period. After the basic notice of appeal has been filed in the trial court,<sup>74</sup> other notices, as to steps taken in the course of the appeal, are frequently required by statute or court rule<sup>75</sup> but, according to the case of *Roesch-Zeller, Inc. v. Hollembeak*,<sup>76</sup> none of these other notices possess jurisdictional importance so the failure to serve the same offers no ground for dismissal of the appeal in the absence of a showing that the opposing party has, in some way, been prejudiced by such failure. In much the same way, a failure to name, in the notice of appeal, a party to the proceeding who could be adversely affected by any reversal or modification of the order appealed from<sup>77</sup> may, in the fashion noted in the case of *Biggs v. Cummins*,<sup>78</sup> be obviated by having such person submit a written waiver of the right to be so served. If a motion to dismiss has been made, however, and suggestions have been offered in support thereof and in opposition thereto,<sup>79</sup> the case of *Bramson v. Bramson*<sup>80</sup> would

<sup>72</sup> Laws 1955, p. —, H. B. No. 777; Ill. Rev. Stat. 1955, Vol. 1, Ch. 70, § 2. But there is evidence of lack of care in another direction for the legislature also enacted H. B. No. 565, one fixing the maximum recovery at \$20,000, thereby evidencing an intention to keep the prior limitation in effect.

<sup>73</sup> See the discussion of this point, as it related to an earlier statute, in 27 CHICAGO-KENT LAW REVIEW 41.

<sup>74</sup> The time within which this notice is to be given has been shortened from 90 days to 60 days by Section 76(1) of the Revised Civil Practice Act. Other changes have also been made in the controlling dates within which varied forms of appellate action must be taken.

<sup>75</sup> See, for example, Ill. Rev. Stat. 1955, Vol. 2, Ch. 110, § 83, as to notice with respect to examination of the surety on the appeal bond, or Section 88, as to notice of filing the mandate, and Supreme Court Rule 36(2) (f), concerning notice of the filing of the record on appeal.

<sup>76</sup> 5 Ill. App. (2d) 94, 124 N. E. (2d) 662 (1955).

<sup>77</sup> This notice requirement appears in Ill. Rev. Stat. 1955, Vol. 2, Ch. 110, § 34(1).

<sup>78</sup> 5 Ill. (2d) 512, 126 N. E. (2d) 208 (1955).

<sup>79</sup> See Rule 49 of the Illinois Supreme Court.

<sup>80</sup> 4 Ill. App. (2d) 249, 124 N. E. (2d) 33 (1955). Leave to appeal has been denied.

indicate that there is no provision in law for the moving party to file a reply to the suggestions of the opposition and, if such a reply is filed, it will be stricken from the record.

In only two instances did the courts have anything to say concerning the order appealed from, one which must, generally, be of final character and still open to enforcement.<sup>81</sup> In the case of *LaSalle National Bank v. City of Chicago*,<sup>82</sup> the plaintiffs sought both a declaration that certain frontage consent requirements in a municipal ordinance were invalid and also an order for a license to operate a nursing home. The trial court, over the objection of certain intervening petitioners, granted relief on both aspects of the case. After an appeal had been taken, the municipality issued the desired license, so plaintiff moved to dismiss the appeal on the ground the case was thereby rendered moot.<sup>83</sup> The higher court agreed that, as to the license question, the appeal had to be dismissed but, since dismissal would have denied the intervenors of an opportunity to procure consideration of the other point involved, yet would have left them bound by the trial court determination which would, on dismissal of the appeal, have become a *res judicata* judgment on the merits, it reversed that portion of the judgment and directed the trial court to dismiss the suit. If the order in question, as in the case of *Pierce v. Pierce*,<sup>84</sup> has been entered by an intermediate reviewing court but lacks finality because that court has reversed and remanded the cause for further proceedings, it might still be possible to carry the case to the Supreme Court if the losing party, by way of analogy to the practice permitted by Section 75(2)(e) of the

<sup>81</sup> See Division IV, Criminal Law and Procedure, at notes 67 to 69, for a discussion of some criminal cases in which review was granted despite the fact the defendants there concerned had paid the fines or served the sentences imposed.

<sup>82</sup> 3 Ill. (2d) 375, 121 N. E. (2d) 486 (1954).

<sup>83</sup> See also *Trust Company of Chicago v. Covnot*, 3 Ill. (2d) 553, 121 N. E. (2d) 779 (1954), where an appeal from a judgment in a forcible detainer case was dismissed because the tenant had later vacated the premises. By this action, the court was deprived of jurisdiction to pass on the validity of Ill. Rev. Stat. 1955, Vol. 1, Ch. 57, § 17.1, relating to stay of execution.

<sup>84</sup> 4 Ill. (2d) 497, 123 N. E. (2d) 511 (1955), affirming 351 Ill. App. 336, 115 N. E. (2d) 107 (1953).

Revised Civil Practice Act,<sup>85</sup> will stand by his motion to dismiss the original appeal and waive the right to have further proceedings taken in the case.

Despite the liberal powers given to reviewing tribunals with respect to the granting of judgments or the entering of orders which ought to have been given or entered in the lower courts,<sup>86</sup> parties to an appeal should understand that affirmative relief can be given only to an appellant unless the other parties, by appropriate action, take steps to perfect a cross-appeal.<sup>87</sup> Because the plaintiff-appellee had not taken these cautionary measures, the Supreme Court, in the case of *Schmitt v. Heinz*,<sup>88</sup> although affirming the decree, held it was without power to pass upon the failure of the trial judge to assess the amount of damages after granting reformation of certain deeds because the plaintiff was in no position to seek a review of the adverse disposition of this aspect of the claim.

As most of the other changes made in the statute or court rules with respect to appellate procedure were adopted to bring the system into a degree of conformity with the set of uniform rules for the Appellate Courts,<sup>89</sup> adopted in 1953, as to which the bar has now had an opportunity for experience, there is no occasion to make extended comment with respect thereto. There will, hereafter, be but one form of review in civil cases, that by way of notice of appeal, which will encompass all matters formerly considered under either appeal or writ of error<sup>90</sup> which will be available as to both earlier forms of review for the same limited but uniform period of time.<sup>91</sup> The jurisdiction of the reviewing

<sup>85</sup> Ill. Rev. Stat. 1955, Vol. 2, Ch. 110, § 75(2)(c), permits the party to file an affidavit stating that, on any future trial, he would have no other proof to offer and requesting the Appellate Court concerned to delete the portion of the decision remanding the case for further proceedings.

<sup>86</sup> *Ibid.*, Ch. 110, § 92(1)(e).

<sup>87</sup> *Ibid.*, Ch. 110, § 101.35. But see Supreme Court Rule 32(4) with respect to appeals taken from an Appellate Court to the Supreme Court.

<sup>88</sup> 5 Ill. (2d) 372, 125 N. E. (2d) 457 (1955).

<sup>89</sup> These rules appear in 349 Ill. App., pp. xiii-liii, inclusive.

<sup>90</sup> Ill. Rev. Stat. 1955, Vol. 2, Ch. 110, § 74(1).

<sup>91</sup> *Ibid.*, Ch. 110, § 74(3).

courts will remain as before except that, to support direct appeal to the Supreme Court in cases involving the validity of municipal ordinances, in which category county zoning ordinances are also now included, a certificate by the trial judge that public interest so requires will hereafter be needed.<sup>92</sup> It might also be added that abstracts and briefs used on appeal will generally be prepared in the manner previously followed except that, in cases carried directly to the Supreme Court as a matter of right and also in cases proceeding from the several Appellate Courts other than by way of leave to appeal, the appellant's brief must, in an appropriate initial paragraph, disclose the grounds supporting jurisdiction over the appeal.<sup>93</sup>

#### ENFORCEMENT OF JUDGMENTS

Except for a change in the Garnishment Act by which the size of the wage or salary exemption granted the judgment debtor has been raised from \$30.00 to \$35.00 per week,<sup>94</sup> and one addition to the statute relating to judgments and decrees making it imperative that a judgment debtor seized on a *capias ad satisfaciendum* be given an immediate hearing before the court to permit the quashing of the body execution and the release of the debtor in a proper case,<sup>95</sup> the principal alteration in the statutory law regarding the enforcement of judgments has come about in the almost total revision made in the statute relating to citation or supplementary proceedings.<sup>96</sup> The creditor may now not only compel discovery of non-exempt assets but may also force the application thereof toward the payment of the judgment,<sup>97</sup> may require the debtor to apply periodic installments of future income toward the extinguishment of the indebtedness,<sup>98</sup> and may assert

<sup>92</sup> *Ibid.*, Ch. 110, § 75(1).

<sup>93</sup> *Ibid.*, Ch. 110, § 101.39.

<sup>94</sup> Laws 1955, p. —, S. B. No. 44; Ill. Rev. Stat. 1955, Vol. 1, Ch. 62, § 14. The amendment becomes effective on January 1, 1956.

<sup>95</sup> Laws 1955, p. —, S. B. No. 67; Ill. Rev. Stat. 1955, Vol. 1, Ch. 77, § 68.

<sup>96</sup> See Section 73 of the Revised Civil Practice Act.

<sup>97</sup> Ill. Rev. Stat. 1955, Vol. 2, Ch. 110, § 73(2)(a).

<sup>98</sup> *Ibid.*, Ch. 110, § 73(2)(b).

similar rights against third persons who can now be cited into the proceedings and be subjected to appropriate personal judgments.<sup>99</sup> Restraining orders of various types are also now permitted. Practice in this area has been further implemented by an extensive revision of the Supreme Court rule on the point.<sup>1</sup>

It could be considered appropriate, in closing this portion of the survey, to note that judgments may sometimes have to be revived, and sometimes attacked, long after the rendition thereof. On the first of these points, the case of *Smith v. Carlson*<sup>2</sup> indicates that if a judgment is to be revived under *scire facias*<sup>3</sup> rather than by way of a separate action in debt, it will not be enough to cause process to be issued and served within the appropriate limitation period but, in the language of the statute, the judgment must have been actually "revived" within that time. Because, in that case, the twenty-year period had run out between the issuance of the alias writ of *scire facias* and the service thereof on the debtor, it was held proper to dismiss the proceeding for, while it has been said that a judgment, even in the last agony of death, has the power to reproduce itself, such renewal of vigor must come prior to death itself. By contrast, in *Davis v. Cohen*,<sup>4</sup> the court said it was proper, more than thirty days after a decree of partition had been entered but before the same had been carried into effect,<sup>5</sup> to permit the devisee under a subsequently discovered will conferring ownership of the real estate on such devisee to use a bill of review for the purpose of attacking the partition decree. The ground for attack rested upon newly discovered evidence, for which purpose a showing of diligence would be needed. The court had no difficulty, on the facts before it, in

<sup>99</sup> *Ibid.*, Ch. 110, § 73(2)(c) and § 73(2)(d).

<sup>1</sup> Compare revised Rule 24 with Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 259.26A.

<sup>2</sup> 6 Ill. App. (2d) 271, 127 N. E. (2d) 257 (1955). Leave to appeal has been granted.

<sup>3</sup> Ill. Rev. Stat. 1955, Vol. 2, Ch. 83, § 24b.

<sup>4</sup> 5 Ill. App. (2d) 517, 126 N. E. (2d) 401 (1955), cause transferred 3 Ill. (2d) 502, 121 N. E. (2d) 741 (1954).

<sup>5</sup> Ill. Rev. Stat. 1955, Vol. 2, Ch. 110, § 50(6), permits a court, within thirty days of rendition, to set aside any final order on any terms or conditions which may be reasonable.

finding no negligence on the devisee's part so the heirs at law of the decedent were deprived of the benefit of the earlier decree entered in their behalf.<sup>6</sup>

#### IV. CRIMINAL LAW AND PROCEDURE

Changes in, as well as interpretations of, the criminal law of the state have occurred during the period covered by this survey. In the area of substantive law, it might be noted that the General Assembly has amended the definition of forcible rape<sup>1</sup> by changing the age requirement of offenders from sixteen to fourteen years; has redefined arson so as to make the crime extend to the burning of boats or trailers used as dwelling places;<sup>2</sup> and has added television performances to the category of vehicles by which criminal libel may be disseminated.<sup>3</sup> The statute concerning sexual psychopaths<sup>4</sup> has been given a general overhauling, in which connection the most significant amendment has produced a redefinition of a "sexually dangerous person" so as to include not only those against whom criminal charges have been filed but also those who have "demonstrated propensities toward acts of sexual assault or acts of sexual molestation of children."<sup>5</sup> The latter may now be confined even though they are not directly charged with any criminal offense. Another noteworthy change in this statute, which previously only provided for an absolute discharge from detention, now permits the granting of a conditional discharge under the control and supervision of the Director of Public Safety.<sup>6</sup>

New provisions have also been added to the Uniform Narcotic Drug Act to prohibit the unauthorized possession, sale or ex-

<sup>6</sup> The result could well have been different had the land been sold under the decree prior to the discovery of the will: *Ecklund v. Jankowski*, 407 Ill. 263, 95 N. E. (2d) 342 (1950), noted in 29 CHICAGO-KENT LAW REVIEW 265.

<sup>1</sup> Laws 1955, p. —, H. B. No. 791; Ill. Rev. Stat. 1955, Vol. 1, Ch. 38, § 490.

<sup>2</sup> Laws 1955, p. —, H. B. No. 836; Ill. Rev. Stat. 1955, Vol. 1, Ch. 38, § 48.

<sup>3</sup> Laws 1955, p. —, S. B. No. 672; Ill. Rev. Stat. 1955, Vol. 1, Ch. 38, § 404.1 et seq.

<sup>4</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 38, § 820 et seq., as amended by Laws 1955, p. —, S. B. No. 490.

<sup>5</sup> See Ill. Rev. Stat. 1955, Vol. 1, Ch. 38, § 820.01.

<sup>6</sup> *Ibid.*, Vol. 1, Ch. 38, § 825c.

change of hypodermic syringes or needles, except by qualified persons, and records of the sale of these instruments must now be kept.<sup>7</sup> Two new misdemeanors have also been added to the Criminal Code by the legislature. It is now unlawful for a magazine or book distributor to refuse to furnish magazines or books to retailers who have refused to stock obscene books offered by the distributor.<sup>8</sup> By the second, the "remittance agency" business has now been specifically declared to be unlawful<sup>9</sup> in recognition of the fact that, as expressed in the declaration of policy set forth in the new statute, "persons have held themselves out as being engaged in the business of accepting money for remittance to insurance companies, the State and other licensing agencies without, in fact, being connected in any way therewith and without remitting as promised."

Turning to the recent decisions of significance, two cases stand out among all the criminal cases decided during the survey period involving substantive elements of criminal law. The defendant in *People v. Lyons*<sup>10</sup> had defended a charge of bribery by asserting that the bribery statute<sup>11</sup> required both the offeror and receiver of the bribe to act from corrupt motives and that he was not guilty as the person tendering the bribe to the defendant was acting solely for the purpose of catching the defendant. This theory of defense found support in the earlier case of *People v. Peters*<sup>12</sup> but a conviction was upheld when the Supreme Court, overruling the earlier decision, said that the guilt of the defendant was not to be measured by the intent of another but by his own intent.

The second case, that of *People v. Lloyd*,<sup>13</sup> afforded the Appellate Court for the Second District with an opportunity to deter-

<sup>7</sup> Laws 1955, p. —, H. B. No. 86, Ill. Rev. Stat. 1955, Vol. 1, Ch. 38, § 192.33.

<sup>8</sup> Laws 1955, p. —, S. B. No. 118; Ill. Rev. Stat. 1955, Vol. 1, Ch. 38, § 427a.

<sup>9</sup> Laws 1955, p. —, H. B. No. 852; Ill. Rev. Stat. 1955, Vol. 1, Ch. 38, § 498a et seq.

<sup>10</sup> 4 Ill. (2d) 396, 122 N. E. (2d) 809 (1954), noted in 1955 Ill. L. Forum 155.

<sup>11</sup> The prosecution was based on Ill. Rev. Stat. 1951, Vol. 1, Ch. 38, § 78.

<sup>12</sup> 265 Ill. 122, 106 N. E. 513 (1914).

<sup>13</sup> 3 Ill. App. (2d) 257, 121 N. E. (2d) 329 (1954), noted in 33 CHICAGO-KENT LAW REVIEW 186.



mine what a "book" was within the meaning of the provision making bookmaking a crime.<sup>14</sup> Though no definitive explanation of the term came out of the case, the court did determine that the absence of a written record of the wager was fatal to the state's case. The underworld will probably be happy to note that the defendant won a reversal of his conviction because he had, literally speaking, "used his head."

Other cases are entitled to at least brief mention. The defendant in the case of *People v. Guzzardo*,<sup>15</sup> an alderman, employed a unique but an ineffective defense to an unlawful assembly charge. The statute makes it a crime for two or more persons to assemble for an unlawful purpose and permits "public officers" to direct such an assembly to disperse.<sup>16</sup> The defendant took the position that, being an alderman, he was a public officer and, as a public officer, he was entitled to be present at such an assembly for the purpose of breaking it up, hence could not be considered to be among those persons whose conduct was condemned by the statute. Generously conceding that an alderman could be considered to be a public officer, the court nevertheless refused to rule that an alderman could not be one of the other persons referred to, so it affirmed the conviction.

Another crime calling for participation by more than one person, that of conspiracy to sell, possess and dispense heroin in violation of the Uniform Narcotics Drug Act,<sup>17</sup> was charged in the case of *People v. Martin*.<sup>18</sup> The particular defendant was the husband of a woman who had been convicted as his co-conspirator. He sought advantage from this relationship by invoking the common law fiction that the husband and wife were one, hence could not combine to commit the crime of conspiracy. As the case was

<sup>14</sup> Ill. Rev. Stat. 1955, Vol. 1, Ch. 38, § 336.

<sup>15</sup> 4 Ill. App. (2d) 355, 124 N. E. (2d) 39 (1955). The case of *Poyer v. Boustead*, 3 Ill. App. (2d) 562, 122 N. E. (2d) 838 (1954), noted hereafter, would appear to be a companion case.

<sup>16</sup> Ill. Rev. Stat. 1955, Vol. 1, Ch. 38, § 507.

<sup>17</sup> *Ibid.*, Vol. 1, Ch. 38, § 192.1 et seq.

<sup>18</sup> 4 Ill. (2d) 105, 122 N. E. (2d) 245 (1954), noted in 33 CHICAGO-KENT LAW REVIEW 278.

one of first impression in the state, the Supreme Court evidenced a preference for the modern view on this subject, refusing to abide by common law principles. As a consequence, the defendant's conviction was affirmed.

The dual nature of the Illinois statute making the abduction of an infant into a crime<sup>19</sup> was pointed out in the case of *People v. Savage*.<sup>20</sup> The defendant there relied on intoxication as a defense to show lack of specific intent. While the court doubted the sufficiency of the evidence tending to prove this contention, the defendant was given the benefit of any doubt on the point but the conviction was sustained because an actual concealment or imprisonment was found present and this was considered to be sufficient to satisfy one aspect of the statutory crime. It may be noted, therefore, that the crime can be committed either by one who abducts an infant with intent to conceal or imprison or by one who does, in fact, do no more than conceal or imprison without proof of intent.

Essentially the same argument was made in the case of *People v. Vranick*.<sup>21</sup> There the defendant, charged with the crime of aiding a prisoner to escape,<sup>22</sup> sought reversal of a conviction on the ground that the prosecution had failed to allege, and prove, the presence of intent. The court, however, pointed out that the particular statute could be broken down into three separate ways by which this crime could be committed, only one of which would require the presence of an intent. Thus, an aiding of an escape could be committed if (1) the accused conveyed an instrument into a place of confinement with intent to facilitate a prisoner's escape, for which offense an intent was required; but if the accused (2) aided or assisted a prisoner to escape, or (3) concealed or assisted a prisoner after escape, no intent was required. As the particular defendant stood charged with aiding and assist-

<sup>19</sup> Ill. Rev. Stat. 1955, Vol. 1, Ch. 38, § 385.

<sup>20</sup> 5 Ill. (2d) 296, 125 N. E. (2d) 449 (1955).

<sup>21</sup> 5 Ill. (2d) 384, 125 N. E. (2d) 513 (1955), cert. den. 349 U. S. 963, 75 S. Ct. 895, 99 L. Ed. (adv.) 766 (1955).

<sup>22</sup> Ill. Rev. Stat. 1955, Vol. 1, Ch. 38, § 228.

ing in an escape, it was said to be unnecessary to allege or prove the presence of an intent.

An issue as to whether proof of driving at an excessive speed without further evidence of negligence would be sufficient to sustain a conviction under the so-called "reckless homicide" statute<sup>23</sup> was presented in the case of *People v. Potter*.<sup>24</sup> The court there held that such proof, by itself, would not be sufficient as a matter of law to make the operator of the vehicle guilty of driving with reckless disregard for the safety of others.

It may not be considered inappropriate to refer to the case of *People v. Hermans*,<sup>25</sup> one dealing with the theft of certain shoats. The opinion therein possesses significance not because of the profound statements of law expressed but because it represents as farcical a description of an alleged crime as ever appeared in a judicial opinion. This humorous touch in an otherwise humdrum case, tending to add a wholesome degree of levity to the work of the courts, has already made the opinion one of the minor classics of the bar.

Turning to criminal procedure, the necessity for an actual physical presence in the demanding state at the time the alleged crime was committed to support a request for extradition<sup>26</sup> has proved to be a particularly perplexing problem to the reviewing courts as may be seen by two cases. In *People ex rel. Goshern v. Babb*,<sup>27</sup> the individual sought was wanted on a charge of non-support. In *People ex rel. Goldstein v. Babb*,<sup>28</sup> by contrast, the crime charged was larceny by trick, an offense easily committed by means of a constructive presence. In both cases, a rather far-fetched and strained construction was placed on the requirement of actual presence so as to make it possible to find that

<sup>23</sup> *Ibid.*, Vol. 1, Ch. 38, § 364a.

<sup>24</sup> 5 Ill. (2d) 367, 125 N. E. (2d) 510 (1955).

<sup>25</sup> 5 Ill. (2d) 277, 125 N. E. (2d) 500 (1955).

<sup>26</sup> Ill. Rev. Stat. 1955, Vol. 1, Ch. 60, § 2.

<sup>27</sup> 4 Ill. (2d) 114, 122 N. E. (2d) 239 (1954).

<sup>28</sup> 4 Ill. (2d) 483, 123 N. E. (2d) 639 (1954), cert. den. 349 U. S. 928, 75 S. Ct. 771, 99 L. Ed. (adv.) 646 (1955).

the defendants were present in the demanding state during the commission of the crimes concerned. The problem so presented emphasizes a sharp need for a change in the law in this area.

Antecedent to prosecution, there is a degree of authority in law for the taking of fingerprints and of other identification data from persons apprehended on certain specified offenses, as well as for the filing of such data, but subject to the requirement that such records shall be returned to the individual so apprehended in the event he is later acquitted or released without being convicted.<sup>29</sup> The statute, however, does not specifically extend to those held for misdemeanors. Nevertheless, the Appellate Court for the Second District, in *Poyer v. Boustead*,<sup>30</sup> reached the conclusion that no right of an arrested person had been violated, hence no injunction could be obtained to prevent the circulation of identification data so taken, even though the petitioner stood charged with no more than a misdemeanor. The alleged bases for that holding are open to question<sup>31</sup> as it is certain that the practices there sanctioned do not conform to American principles but smack strongly of the thing to be expected in a police state.

While no cases of any importance arose involving the former sufficiency of an indictment, the case of *People v. O'Connor*<sup>32</sup> is noteworthy for it was there determined that an apparent ambiguity in the provisions of the Uniform Narcotic Drug Act<sup>33</sup> as to the place of confinement for a convicted first offender who possessed narcotic drugs was to be resolved on the basis the offense was no more than a misdemeanor, hence confinement in the county jail, even though for more than one year, was not

<sup>29</sup> Ill. Rev. Stat. 1955, Vol. 1, Ch. 38, § 780e.

<sup>30</sup> 3 Ill. App. (2d) 562, 122 N. E. (2d) 838 (1954), noted in 33 CHICAGO-KENT LAW REVIEW 276.

<sup>31</sup> See particularly 33 CHICAGO-KENT LAW REVIEW 276 at 277-8.

<sup>32</sup> 4 Ill. (2d) 403, 122 N. E. (2d) 806 (1954), affirming 350 Ill. App. 212, 112 N. E. (2d) 489 (1953), to which court the cause had been transferred: 414 Ill. 51, 110 N. E. (2d) 209 (1953).

<sup>33</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 38, § 192.1 et seq. Section 23 thereof was amended, in 1955, to make the place of confinement for a convicted first offender specifically in the county jail: Laws 1955, p. —, H. B. No. 277; Ill. Rev. Stat. 1955, Vol. 1, Ch. 38, § 192.23. See also comment in 29 CHICAGO-KENT LAW REVIEW 315 (1951), particularly p. 320.

constitutionally objectionable. While a felony prosecution must, ordinarily, rest upon an indictment,<sup>34</sup> the use of an information to charge the offense in question was there held to be proper and, as a consequence, the Municipal Court of Chicago was held to be possessed of unquestionable jurisdiction to deal with the matter.<sup>35</sup>

It should also be noted, in that connection, that the legislature has now provided, except as to the crimes of treason, murder or manslaughter, that criminal prosecutions may be based on indictment or, if the defendant is willing to waive indictment, on information.<sup>36</sup> The waiver must be made in open court but not until after the defendant has been advised as to the nature of the charge and his rights thereunder. Regardless of the method used, the felony prosecution must proceed in conformity with all other statutory requirements such as the furnishing of a copy of the indictment or information, a list of the jurors and witnesses, and the like.<sup>37</sup> There is occasion to believe, despite the desirability of this revision, that the statute may fall afoul of constitutional objections since legislative authority to deal with the grand jury process is restricted to the right to "abolish" the grand jury "by law in all cases."<sup>38</sup> Similar reforms initiated in other states have met with both approval and disapproval.<sup>39</sup>

Points concerning defensive pleas in criminal cases seldom arise but emphasis was given by the holding in *People v. Wash-*

<sup>34</sup> Ill. Const. 1870, Art. II, § 8.

<sup>35</sup> Ill. Rev. Stat. 1955, Vol. 1, Ch. 37, § 357, gives that court power over offenses wherein the punishment is "by fine or imprisonment otherwise than in the penitentiary."

<sup>36</sup> Laws 1955, p. —, S. B. No. 809; Ill. Rev. Stat. 1955, Vol. 1, Ch. 38, § 702. See also revised Rule 26 of the Illinois Supreme Court: Ill. Rev. Stat. 1955, Vol. 2, Ch. 110, § 101.26.

<sup>37</sup> The requirement as to furnishing a copy of the charge has been made mandatory by a slight legislative revision. See Laws 1955, p. —, S. B. No. 809; Ill. Rev. Stat. 1955, Vol. 1, Ch. 38, § 729.

<sup>38</sup> Ill. Const. 1870, Art. II, § 8.

<sup>39</sup> Compare *People ex rel. Battista v. Christian*, 249 N. Y. 314, 164 N. E. 111, 61 A. L. R. 793 (1928), with *Commonwealth ex rel. Stanton v. Francies*, 250 Pa. 496, 95 A. 527 (1915).

ington,<sup>40</sup> in an area where emphasis should hardly be needed, to the proposition that the statutory requirements describing the procedure to be followed in the event a plea of guilty is to be accepted<sup>41</sup> are of more than passing consequence. The failure of the trial judge in that case to explain the nature of the charge, except for a reference to the counts by number, and a total omission of any comment as to the scope of the possible punishment were said to be fatal to the sentence imposed. Even though the defendant had been represented by counsel, both court-appointed and of his own choice, the Supreme Court refused to draw any inference that the guilty plea had been understandingly made, preferring to place the burden of compliance with the statute on the shoulders of the trial judge.

In the event trial becomes necessary, the trial judge must now also be aware that, as the result of the Supreme Court holding in *People v. Spegal*,<sup>42</sup> the defendant possesses a clear-cut right to waive trial by jury and to insist on a hearing before the judge alone.<sup>43</sup> Prior restraints on this right, to be found in some earlier cases,<sup>44</sup> were there expressly rejected and the earlier cases were declared overruled. The waiver, once given, according to *People v. Schwartz*,<sup>45</sup> does not possess conclusive effect so the defendant may, after reversal of a conviction following trial before the judge alone, insist on a jury trial at the next hearing. There would appear to be a divergence in the views followed in this respect between criminal cases on the one hand and civil cases on the other.<sup>46</sup>

Questions relating to proof in criminal cases generated four

<sup>40</sup> 5 Ill. (2d) 58, 124 N. E. (2d) 890 (1955).

<sup>41</sup> Ill. Rev. Stat. 1955, Vol. 1, Ch. 38, § 732. The statute is amplified by former Rule 27A, now Rule 26(3), of the Illinois Supreme Court: Ill. Rev. Stat. 1955, Vol. 2, Ch. 110, § 101.26(3).

<sup>42</sup> 5 Ill. (2d) 211, 125 N. E. (2d) 468 (1955), noted in 33 CHICAGO-KENT LAW REVIEW 379.

<sup>43</sup> See also Ill. Rev. Stat. 1955, Vol. 1, Ch. 38, § 736.

<sup>44</sup> *People v. Scornavache*, 347 Ill. 403, 179 N. E. 909, 79 A. L. R. 553 (1932); *People v. Scott*, 383 Ill. 122, 48 N. E. (2d) 530 (1943).

<sup>45</sup> 3 Ill. (2d) 520, 121 N. E. (2d) 758 (1954).

<sup>46</sup> See *Reese v. Laymon*, 2 Ill. (2d) 614, 119 N. E. (2d) 271 (1954), noted in 32 CHICAGO-KENT LAW REVIEW 345.

important decisions. The case of *People v. Shambley*<sup>47</sup> appears to have engrafted new concepts on the subject of legal and illegal searches and seizures. A wife had there found it necessary to call the police for protection against an assault with a gun threatened by her husband. The husband was arrested and removed from the scene but not until after he had concealed the weapon in a garage on land owned by the defendant and his wife as joint tenants. The wife thereafter told the police they could search the premises and the gun was located. A timely motion to suppress the weapon as evidence was made and overruled and the defendant was convicted. His conviction was affirmed, despite a claim of unlawful search and seizure, on the ground the consent of the wife, as a joint owner, made the search neither unreasonable nor unlawful. Drawing distinctions between cases in which the wife acted as agent for her husband<sup>48</sup> and those in which the consent was given by her in her capacity as a joint owner,<sup>49</sup> the court found an absence of any interference with the constitutional rights of the accused.

An issue as to the competency of a witness was developed in the second case, that of *People v. Palumbo*.<sup>50</sup> In that case, the defendant's wife was called by the prosecution as a corroborating witness to an alleged illegal sale of narcotics between the defendant and an informer which occurred in her presence. A defense objection to the competency of a wife to serve as a witness against her husband was overruled and the conviction was later affirmed when the Supreme Court concluded that both the Evidence Act<sup>51</sup> and the Criminal Code<sup>52</sup> had removed all common-law disquali-

<sup>47</sup> 4 Ill. (2d) 38, 122 N. E. (2d) 175 (1954). Other aspects of the case, discussed hereafter, are noted in 33 CHICAGO-KENT LAW REVIEW 275.

<sup>48</sup> *Amos v. United States*, 255 U. S. 313, 41 S. Ct. 266, 65 L. Ed. 654 (1921); *People v. Lind*, 370 Ill. 131, 18 N. E. (2d) 189 (1938).

<sup>49</sup> *Stein v. United States*, 166 F. (2d) 851 (1948), cert. den. 344 U. S. 844, 68 S. Ct. 1512, 92 L. Ed. 1768 (1948); *State v. Cairo*, 74 R. I. 377, 60 A. (2d) 841 (1948). See also *Skally v. United States*, 210 F. (2d) 69 (1954), cert. den. 347 U. S. 935, 74 S. Ct. 630, 98 L. Ed. 1086 (1954), dealing with consent by one partner in a criminal act as serving to bind another partner.

<sup>50</sup> 5 Ill. (2d) 409, 125 N. E. (2d) 518 (1955), noted in 33 CHICAGO-KENT LAW REVIEW 382.

<sup>51</sup> Ill. Rev. Stat. 1955, Vol. 1, Ch. 51, § 5.

<sup>52</sup> *Ibid.*, Vol. 1, Ch. 38, § 734.

fications between the spouses as witnesses. It should be noted, however, that the communications as to which the wife testified were made in the presence of a third person, so as not to be privileged, hence the case cannot be considered as establishing the point that a wife would be a competent witness against her husband for all purposes.

Matters concerning credibility rather than competency were involved in the third case, entitled *People v. Crump*,<sup>53</sup> in which murder prosecution the defendant sought to cross-examine an important prosecution witness<sup>54</sup> as to drug addiction, asserting that answers to the specific questions propounded would have materially aided in impeaching the credibility of the witness. It was there, for the first time in this state, held to be reversible error for the trial judge to sustain an objection to this line of cross-examination. The Supreme Court, noting that conflicting conclusions on the point had been reached elsewhere,<sup>55</sup> expressed the belief that resolution on the point as to whether or not the witness was a drug addict would be a very important factor going to the general reliability of his testimony.

The fourth case, that of *People v. Siciliano*,<sup>56</sup> recognizes the degree of surprise or chagrin a prosecuting attorney may experience when his star witnesses refuse to testify on the ground of a privilege against self-incrimination but it was the defendant there who complained that it was prejudicial and reversible error to permit the prosecuting attorney to develop this fact in the presence of the jury. The Supreme Court, finding no cases dealing with the point, reached the sensible conclusion that no court, in the orderly conduct of a trial, could anticipate whether, or when, a witness might claim an immunity and that it would produce interminable delay if the judge, out of the presence of

<sup>53</sup> 5 Ill. (2d) 251, 125 N. E. (2d) 615 (1955).

<sup>54</sup> The witness had been jointly indicted with defendant for the murder, had been granted a severance, and was, at the time of the trial, in protective custody but had not been tried or convicted.

<sup>55</sup> See annotation in 15 A. L. R. 912.

<sup>56</sup> 4 Ill. (2d) 581, 123 N. E. (2d) 725 (1955), cert. den. 349 U. S. 931, 75 S. Ct. 774, 99 L. Ed. (adv.) 647 (1955).



the jury, had to conduct a preliminary examination of each witness to ascertain whether or not immunity might be claimed before allowing the witness to take the stand.<sup>57</sup>

Proper trial tactics to be followed in cases where the defendant is charged, among other things, with being an habitual criminal were considered in two cases. In *People v. Wheeler*,<sup>58</sup> after the defendant had testified in his own behalf, the prosecution, over objection, introduced certified copies of the defendant's prior convictions primarily for impeachment purposes.<sup>59</sup> It was urged that this was error as the evidence should have taken the form of authenticated, rather than certified, copies of the earlier conviction<sup>60</sup> but the court held that, at least as to prior convictions within the state, a certified copy, if complete in form,<sup>61</sup> would serve the purpose. The case of *People v. Long*,<sup>62</sup> however, would indicate a degree of dissatisfaction on the part of the Supreme Court with the currently approved practice of drawing the attention of the jury to the defendant's prior convictions, the court noting that the giving of a cautionary instruction, when realistically considered, could hardly be considered "adequate" to prevent prejudice. Provision has been made in some states for a separation of the issues so as to obviate this possibility, but the court was reluctantly forced to concede that, under the law as it now exists in Illinois, proof of the current offense and of the prior conviction must be made during the trial and before the jury. Reformation of the statute on the point could well be considered.

<sup>57</sup> The case of *People v. Bennett*, 413 Ill. 601, 110 N. E. (2d) 175 (1953), was distinguished on the fact that it was there made apparent that the prosecuting attorney forced the witness to repeatedly assert his immunity so as to suggest, by implication, that the witness and the defendant had committed the crime charged.

<sup>58</sup> 5 Ill. (2d) 474, 126 N. E. (2d) 228 (1955).

<sup>59</sup> Ill. Rev. Stat. 1955, Vol. 1, Ch. 38, § 734.

<sup>60</sup> *Ibid.*, Vol. 1, Ch. 38, § 603, does say that "a duly authenticated copy of the record of the former conviction" shall constitute prima facie proof.

<sup>61</sup> See *People v. Novak*, 343 Ill. 355, 175 N. E. 551 (1931), to the effect that an incomplete record of the prior offense would be inadmissible.

<sup>62</sup> 4 Ill. (2d) 598, 123 N. E. (2d) 718 (1955), affirming 2 Ill. App. (2d) 529, 120 N. E. (2d) 51 (1954).

Error appearing in the sentence imposed may be disregarded if the erroneous language can be considered to be surplusage<sup>63</sup> so it was on this basis that the Supreme Court refused, in *People v. Stucker*,<sup>64</sup> to set aside a conviction on which a sentence describing a punishment purportedly within statutory limits but actually beyond the maximum fixed by law had been entered when it noted that the optional indeterminate minimum-maximum punishment<sup>65</sup> fixed by the trial judge was within the permissible range. The trial judge may now, under a recent amendment to the statute, receive evidence after conviction, both as to aggravation and mitigation of the offense and as to the prior record of the offender, for the purpose of determining the appropriate punishment to be imposed in cases calling for fixed punishment rather than an intermediate sentence.<sup>66</sup>

Before acting to review convictions in two cases, the reviewing court concerned found itself forced to settle a question as to whether or not a defendant who had paid the fine imposed or served his sentence was entitled to use a writ of error or had, by submitting to the judgment, rendered the case moot. In *People v. Shambley*,<sup>67</sup> the defendant paid the fine and then took prompt action to procure a reversal of the conviction. In *People v. Williams*,<sup>68</sup> the defendant, nearly twenty years after he had served the jail sentence, sought reversal primarily to avoid a heavier penalty which had attached to a later punishment for another offense as a second offender. In each instance, the court refused to dismiss the writ of error and considered the case on the merits when it concluded the defendant had a right to seek reversal of an allegedly erroneous conviction despite his submission to the terms of the sentence. By these holdings, a conflict which previously had existed among two of the Appellate Courts in the

<sup>63</sup> See *People ex rel. Weed v. Whipp*, 352 Ill. 525, 186 N. E. 135 (1933).

<sup>64</sup> 5 Ill. (2d) 55, 124 N. E. (2d) 893 (1955).

<sup>65</sup> Ill. Rev. Stat. 1955, Vol. 1, Ch. 38, § 802.

<sup>66</sup> Laws 1955, p. —, H. B. No. 619; Ill. Rev. Stat. 1955, Vol. 1, Ch. 38, § 801.

<sup>67</sup> 4 Ill. (2d) 38, 122 N. E. (2d) 172 (1954), noted in 33 CHICAGO-KENT LAW REVIEW 275.

<sup>68</sup> 4 Ill. App. (2d) 506, 124 N. E. (2d) 537 (1955).

state<sup>69</sup> has now been resolved. Not so fortunate, however, was the defendant in the case of *People v. Byrnes*<sup>70</sup> for his second writ of error was dismissed, not so much because his claims had received consideration under the first writ but because he had, by his own failure to prosecute that writ effectively, he having fled the state and suffered the forfeiture of his supersedeas bond, lost all right to have his claims considered.

Little of consequence has been accomplished in connection with hearings under the Post-Conviction Act<sup>71</sup> but a few cases could be mentioned. A claim was advanced, in *People v. Morris*,<sup>72</sup> that the defendant had been denied a constitutional right to a speedy trial<sup>73</sup> but the contention was rejected when it appeared that the defendant had not made a motion for discharge on that ground, hence could be said to have waived the point and thus eliminated the basis for post-conviction proceedings. He did, however, succeed in securing a new trial when the court held that the failure on the part of his court-appointed attorney to raise the same issue at the initial trial had resulted in depriving him of due process, including therein the proper representation by counsel. In *People v. Adams*,<sup>74</sup> by contrast, no relief was accorded, despite the failure of his personally selected counsel to move on the point, when defendant claimed that he had been denied the benefit of an impartial jury by being forced, following verdict in one case, to stand trial the next day on another charge before the same panel of jurors, including among them four who had served and six who had been present at the first trial. While the court indicated it did not approve the procedure adopted, it nevertheless affirmed a denial of relief when it noted that (1) the defendant had not exhausted the number of per-

<sup>69</sup> Compare the Fourth District holding in *Lambert v. People*, 43 Ill. App. 223 (1892), with the one attained by the Third District in *People v. Bandy*, 239 Ill. App. 273 (1925).

<sup>70</sup> 4 Ill. (2d) 109, 122 N. E. (2d) 247 (1954), cert. den. 349 U. S. 966, 75 S. Ct. 899, 99 L. Ed. (adv.) 767 (1955).

<sup>71</sup> Ill. Rev. Stat. 1955, Vol. 1, Ch. 38, § 826 et seq.

<sup>72</sup> 3 Ill. (2d) 437, 121 N. E. (2d) 810 (1954).

<sup>73</sup> Ill. Const. 1870, Art. II, § 9; Ill. Rev. Stat. 1955, Vol. 1, Ch. 38, § 748.

<sup>74</sup> 4 Ill. (2d) 453, 123 N. E. (2d) 327 (1954).

emptory challenges available to him,<sup>75</sup> and (2) his attorney, while engaging in some discussion with the trial judge over the subject, had made no specific motion nor evoked any precise ruling on the crucial point.

Newspaper interference with the orderly conduct of criminal trials<sup>76</sup> is reflected in the case of *People v. Hryciuk*.<sup>77</sup> Post-conviction relief was there granted when it was made to appear that all of the jurors, the evening before deliberating on the verdict, had read one or both of two inflammatory newspaper articles about the defendant. Although the jurors, on interrogation, indicated they would not allow themselves to be influenced by these articles and were specially cautioned on the point by the trial judge, a majority of the Supreme Court held that it was the duty of the trial judge to exercise a degree of discretion in the matter and that he could not avoid arriving at a conclusion that a fair trial had or had not been given solely on the basis of the statements and assurances of the jurors.

## V. FAMILY LAW

Problems relating to jurisdiction, with respect to both parties and subject matter, were the chief concern of the courts during the past year. The necessity of jurisdiction over the parties was the crucial issue involved in two decisions handed down by the Appellate Court for the Third District. The first, *Hale v. Hale*,<sup>1</sup> grew out of a situation in which a mother was awarded custody of her child by the terms of a divorce decree. Actual custody, however, was in the defendant's sister and, three years later, she was cited for contempt for refusing to relinquish custody. In the contempt proceeding, she was ordered to surrender the child, but on appeal, the Appellate Court reversed

<sup>75</sup> Ill. Rev. Stat. 1955, Vol. 1, Ch. 38, § 742.

<sup>76</sup> On that point in general, see note in 33 CHICAGO-KENT LAW REVIEW 338.

<sup>77</sup> 4 Ill. (2d) 504, 122 N. E. (2d) 532 (1954), noted in 4 DePaul L. Rev. 323 and 43 Ill. B. J. 512. Daily, J., wrote a dissenting opinion concurred in by Klingbiel, J. Denial of rehearing and an additional dissenting opinion by Hershey, J., may be noted in 125 N. E. (2d) 61 at 69.

<sup>1</sup> 5 Ill. App. (2d) 90, 124 N. E. (2d) 596 (1955).

the lower tribunal on the ground that the original decree could not have determined the sister's right to custody of the child, since she had not been made a party to that proceeding. The second case, that of *Horn v. Horn*,<sup>2</sup> presented a similar but distinguishable set of facts. A husband sued his wife for divorce and the final decree granted custody of the child to the plaintiff's father, though subjecting such custody to further order of the court. A year later, defendant's petition seeking a modification of the decree was granted due to a change in her ability to care for the child. On appeal, it was argued that the court did not have jurisdiction to alter the custody provision since the grandfather had not been made a party to the petition for modification. The Appellate Court affirmed the decision, concluding that the grandfather's only right was that bestowed upon him by the court and, since the latter had specifically retained jurisdiction, it could alter a custody decree without the necessity of having the grandparent before it.

A divorce court's jurisdiction over certain subject matter was in controversy in two other cases. In *Solomon v. Solomon*,<sup>3</sup> a divorce decree awarded custody of the child to the plaintiff mother. Upon her remarriage, she instituted proceedings in order to change her child's name to that of her new husband, the child, then seventeen, having consented thereto. His natural father, however, filed a petition in the original divorce proceeding for an injunction to restrain the change of name. The injunction was granted, and upon appeal, the mother contended that the divorce court had no jurisdiction to enter such an injunction since the Divorce Act<sup>4</sup> did not specifically grant it the power. The appellate tribunal did not agree, stating that the right to change the name of a minor is a matter incidental to the custody of the child and, therefore, is a proper subject for the divorce court's determination. In the other case, that of *Bremer v. Bremer*,<sup>5</sup> the circuit court entered a decree of divorce,

<sup>2</sup> 5 Ill. App. (2d) 346, 125 N. E. (2d) 539 (1955).

<sup>3</sup> 5 Ill. App. (2d) 297, 125 N. E. (2d) 675 (1955).

<sup>4</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 40, § 1 et seq.

<sup>5</sup> 4 Ill. (2d) 190, 122 N. E. (2d) 794 (1954).

specifically retaining, *inter alia*, jurisdiction to enter an order for attorney's fees. Sometime thereafter, an order setting attorney's fees was entered. It will be recalled that the Divorce Act<sup>6</sup> allows the court to reserve the question of attorney's fees and suit money until the final hearing. It was argued that "final hearing" means the hearing at which the divorce decree is entered, and consequently, the court is deprived of jurisdiction to enter such an order thereafter. The lower court overruled this contention, and upon direct appeal to the Supreme Court, a freehold being otherwise involved, that tribunal affirmed. It concluded that this provision was not intended to limit, after a divorce has been granted, the power of equity to dispose of matters necessarily incident to a divorce proceeding.

Although dealt with in more detail elsewhere,<sup>7</sup> it is pertinent to this section to note that the Adoption Act<sup>8</sup> and the Treatment of Dependent, Neglected and Delinquent Children Act<sup>9</sup> were under fire in the case of *People ex rel. Nabstedt v. Barger*.<sup>10</sup> The particular objection was aimed at the provisions which authorize the appointment of a guardian *ad litem* to represent a mentally ill parent and consent to the adoption of the latter's child. The Supreme Court, however, found no defects therein. Also of interest, but probably of minor importance, is the decision in *Hindman v. Holmes*,<sup>11</sup> wherein the Appellate Court for the Fourth District held that the legislative prohibition against interspousal tort actions<sup>12</sup> was to be given retroactive effect. It, therefore, ordered the dismissal of a suit pending at the time the statute was enacted. Although decisions of *nisi prius* courts are not typically included in the survey, mention of the case of *Doornbos*

<sup>6</sup> Ill. Rev. Stat. 1955, Vol. 1, Ch. 40, § 16.

<sup>7</sup> See Section VII, Public Law, note 7.

<sup>8</sup> Ill. Rev. Stat. 1955, Vol. 1, Ch. 4, § 3—4½.

<sup>9</sup> Ill. Rev. Stat. 1955, Vol. 1, Ch. 23, § 209.

<sup>10</sup> 3 Ill. (2d) 511, 121 N. E. (2d) 781 (1954), noted in 33 CHICAGO-KENT LAW REVIEW 249.

<sup>11</sup> 4 Ill. App. (2d) 279, 124 N. E. (2d) 344 (1955), noted in 33 CHICAGO-KENT LAW REVIEW 378.

<sup>12</sup> Ill. Rev. Stat. 1955, Vol. 1, Ch. 68, § 1, states: ". . . provided, that neither husband nor wife may sue the other for a tort to the person committed during coverture . . .".

v. *Doornbos*<sup>13</sup> seems appropriate in view of the notoriety it has received and the social implications incident thereto. Therein, questions relating to the status of a child conceived through artificial insemination where the husband was not the donor were precipitated. The court concluded that the wife was guilty of adultery and the child must be considered illegitimate. It followed, therefore, that the husband had no right or interest in the child.

Several changes, regulating various aspects of domestic relations, have been produced by amendments or additions to existing law during the last legislative session. The so-called "cooling-off period" in connection with divorce actions, once held unconstitutional,<sup>14</sup> has been reinstated in a somewhat different form.<sup>15</sup> Presently, divorce proceedings are to be instituted by the filing of a praecipe for summons, but the filing of the complaint is delayed for sixty days after the summons is served, thus providing a waiting period before charges are made public. Like its predecessor, the present law provides for a waiver of the waiting period in cases of emergency or necessity. In a companion measure, the act adopted in 1953 authorizing counties or cities to employ administrative assistants to aid in divorce and separate maintenance proceedings<sup>16</sup> was repealed and re-adopted in a somewhat modified form.<sup>17</sup>

As the law previously existed, if a wife petitioned for temporary alimony, attorney's fees, or suit money, a showing by the husband that it was probable that he also had grounds for divorce would defeat her petition. An amendment<sup>18</sup> to the Divorce Act now accords the court discretion in such a situation to deter-

<sup>13</sup> Superior Court of Cook County, Illinois, Case No. 54-S-14981, noted in 43 Geo. L. J. 517, and 30 N. Y. U. L. Rev. 1016. It is understood that no appeal has been taken.

<sup>14</sup> *People v. Connell*, 2 Ill. (2d) 332, 118 N. E. (2d) 262 (1954), noted in 42 Ill. B. J. 714, and 1954 Ill. L. Forum 322.

<sup>15</sup> Laws 1955, p. —, H. B. No. 786; Ill. Rev. Stat. 1955, Vol. 1, Ch. 40, § 7 et seq.

<sup>16</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 40, § 7a et seq.

<sup>17</sup> Laws 1955, p. —, H. B. No. 785; Ill. Rev. Stat. 1955, Vol. 1, Ch. 40, § 30 et seq.

<sup>18</sup> Laws 1955, p. —, H. B. No. 421; Ill. Rev. Stat. 1955, Vol. 1, Ch. 40, § 16.

mine whether these allowances should be granted, denied, or reserved until final hearing. It also places the spouses on a par since it applies to both and not merely to the wife as was the case with the prior provision. The uniform law relating to the support of dependents has undergone a revision<sup>19</sup> which substantially enlarges the duty to support dependents or relatives likely to become a public charge. And last, but not least, the Adoption Act has been revised so that venue provisions are now specifically set out.<sup>20</sup> In connection with such proceedings, the legislature has now provided for the effect to be given defects in the pleadings, and the lack of jurisdiction over one or more of the parties involved.<sup>21</sup>

## VI. PROPERTY

### REAL AND PERSONAL PROPERTY

Concerning the acquisition of rights in real estate by way of title to land, a vacuum in the area of case law was filled by the General Assembly when it abolished the doctrine of worthier title in this state.<sup>1</sup> Without attempting to discuss the unhappy history of the worthier title doctrine, suffice it to say that since the decision in *Corwin v. Rheims*,<sup>2</sup> there has been a general dissatisfaction with the law on this point and the need for change was obvious. However, the act is not retroactive, so the doctrine must still be considered in the construction of deeds and wills operative prior to its effective date.

Similarly, with respect to rights in the land of another, there are no significant cases. However, it should be noted that the

<sup>19</sup> Laws 1955, p. —, H. B. No. 372; Ill. Rev. Stat. 1955, Vol. 1, Ch. 68, § 50 et seq.

<sup>20</sup> Laws 1955, p. —, H. B. No. 14; Ill. Rev. Stat. 1955, Vol. 1, Ch. 4, § 1—1.

<sup>21</sup> Laws 1955, p. —, H. B. No. 554; Ill. Rev. Stat. 1955, Vol. 1, Ch. 4, §§ 7—4-5.

<sup>1</sup> Laws 1955, p. —, H. B. No. 69; Ill. Rev. Stat. 1955, Vol. 1, Ch. 30, § 188-9. The doctrine is frequently stated to be that if a man devises his land by will to his heir at law and his heirs, in such case the devise, as such, is void, and the heir will take by descent and not by purchase, for the reason that the title by descent is the worthier and better title: *Ellis v. Page*, 7 Cush. (Mass.) 161 (1851); *Doctor v. Hughes*, 225 N. Y. 305, 122 N. E. 221 (1919); *Carey and Schuyler*, Illinois Law of Future Interests (Burdette Smith Co., Chicago, 1941), § 123 et seq.

<sup>2</sup> 390 Ill. 205, 61 N. E. (2d) 40 (1945).



legislature, during its most recent session, repealed prior drainage laws,<sup>3</sup> and enacted an entirely new and comprehensive drainage code.<sup>4</sup>

Aspects of conveyancing law and the rights of parties concerned in a sale of real property came before the courts in a few cases. In that connection, the case of *Whitelaw v. Brady*<sup>5</sup> may serve as a starting point for the issues there revolved around the sufficiency of a memorandum signed by the vendor, designated as an "option" but more nearly in the nature of a continuing offer, to satisfy the requirements of the Statute of Frauds.<sup>6</sup> Unfortunately for the vendee, the memorandum left a couple of essential points in an alternative or indefinite form<sup>7</sup> so the court held the memorandum to be insufficient, even though the parties later came to an oral accord with respect to these points. Of necessity, therefore, the basic writing to support an enforceable sale of real property must be sufficiently complete that the court, in a suit for specific performance, will not need to go beyond the terms thereof in order to spell out the bargain to be enforced.

The wisdom of requiring the signature of the spouse of the seller to the contract of sale, so as to make the same completely enforceable, was again evidenced by the case of *Ennis v. Johnson*,<sup>8</sup> except that there the wife's signature was particularly required because she was a joint tenant and, as such, held title to the land in question with her husband. The husband's promise, in which the wife had not joined, was there enforced with a suitable abatement in the price<sup>9</sup> when the court followed customary

<sup>3</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 42, § 1 to 76c, and 82 to 246b.2.

<sup>4</sup> Laws 1955, p. —, S. B. No. 76: Ill. Rev. Stat. 1955, Vol. 1, Ch. 42, § 1—1 et seq.

<sup>5</sup> 3 Ill. (2d) 583, 121 N. E. (2d) 785 (1954).

<sup>6</sup> Ill. Rev. Stat. 1955, Vol. 1, Ch. 59, § 2.

<sup>7</sup> The amount of the down payment was stated as "\$2,500 or \$3,000." The date for the commencement of monthly payments on the unpaid balance of the price was left blank.

<sup>8</sup> 3 Ill. (2d) 383, 121 N. E. (2d) 480 (1954).

<sup>9</sup> For this purpose, the court found the wife entitled to a one-half interest in the land and observed that the process of closing the contract involved no more than "a matter of simple arithmetic." It might be noted, however, that the property was encumbered by an existing mortgage for more than 50% of the sale price, which

doctrines<sup>10</sup> despite the argument that a different rule should be applied where a joint tenancy was concerned.<sup>11</sup>

In order that a suit for damages for breach of contract to sell real property might lie it would be essential for the plaintiff, prior to suit, to tender performance on his part since, without this, the other party is under no obligation to act hence cannot be said to have breached any duty. Such a tender before suit would also probably be desirable if the plaintiff plans to seek relief in equity by way of specific performance. The case of *Moehling v. Pierce*,<sup>12</sup> however, would indicate that, in the latter instance, the tender may come as late as the hearing of the case, consonant with the fundamental equitable principle that the right to relief is to be conditioned according to the circumstances as they exist at the time the decree is to be entered. The case is also somewhat unusual in that the arrangement enforced was one by which a seller of land had reserved to himself an option to repurchase a portion of the land sold to use for roadway purposes. This option had been transferred to certain remote grantees who had acquired adjoining property formerly owned by the original grantor. Specific performance of the option was directed at the instance of these remote grantees, possibly on the theory the option was, to some degree, appurtenant to the premises which they had acquired but the court did not go into any discussion on this point.

Matters relating to priority of right were concerned in two cases. In the first of them, that of *Neuberg v. Clute*,<sup>13</sup> a lawyer had contracted to purchase an improved parcel of real estate and,

---

mortgage the vendee had contracted to assume. Query, therefore, whether he was to pay one-half of the price and assume one-half of the outstanding mortgage or take over the entire mortgage and give the husband virtually nothing for his equity in the property.

<sup>10</sup> See *Moore v. Garigletti*, 228 Ill. 143, 81 N. E. 826 (1907), for an abatement case where the vendor held no more than a two-fifths interest in the property.

<sup>11</sup> The court distinguished the case before it from the one concerned in *Spadoni v. Frigo*, 307 Ill. 32, 138 N. E. 226 (1923), also a joint tenancy case, on the ground that, in that case, the entire contract was conditioned upon the wife's consent and she had never consented to sell.

<sup>12</sup> 3 Ill. (2d) 418, 121 N. E. (2d) 735 (1954).

<sup>13</sup> 6 Ill. (2d) 58, 126 N. E. (2d) 648 (1955).

realizing that the vendor would be unable to convey full title until certain outstanding interests had been acquired, had agreed to defer the closing of the deal until a long time after the making of the contract. This contract was not recorded. In the passage of time, a tenant came to reside in the building and, on learning that the property was to be sold at partition sale under a proceeding begun by the original seller to clear title, the tenant caused the property to be bid in by a third person who became the buyer at such sale. The tenant-purchaser had no actual knowledge of the outstanding prior contract.<sup>14</sup> When the lawyer-buyer learned of these events, he sued to compel specific performance of his agreement but recovery was denied when it was held that the tenant, by taking possession and acquiring a contract purchaser's interest in the property, even though this contract had likewise not been recorded, had given notice of his later rights and had thereby acquired a superior equitable interest in the premises over the lawyer-purchaser who had failed to record.

Even more complicated, because the title to the vacant land there concerned had been registered under the Torrens System, was the priority problem involved in the case of *Prassas v. Jana*.<sup>15</sup> An owner of registered land had there encumbered the same with a trust deed for security purposes and had later conveyed the property subject to this lien, the grantee receiving an owner's duplicate certificate of title. Almost twenty years later and long after the debt had gone into default, the holder of the note and trust deed instituted a strict foreclosure proceeding and, in time, obtained a decree in his favor based on service by publication. He then conveyed the premises to another who, in turn, conveyed to a third, each claiming to be a bona fide purchaser by reason of relying on the basis of the original Torrens certificate. These deeds and the foreclosure decree were duly registered but the

<sup>14</sup> An attempt to impute notice to the tenant because he had utilized the services of an attorney who had represented the original seller and who had drafted the contract of purchase was rejected on the basis that the ordinary rule, by which notice to the agent is imputed to the principal, is not to be applied where the attorney-agent would be obliged to divulge a professional confidence if he were to impart his knowledge of one client's affairs when acting as agent for another.

<sup>15</sup> 4 Ill. App. (2d) 385, 124 N. E. (2d) 643 (1955).

owner's duplicate certificate of title was not surrendered nor was it, by the decree, ordered cancelled. Within one year of the strict foreclosure,<sup>16</sup> the holders of certain unregistered deeds to the property, claiming title from and under the original mortgagor, instituted proceedings to vacate the decree of foreclosure.<sup>17</sup> Their petition was denied by the trial court but, on review, this order was reversed on the ground the failure on the part of the petitioners to register their deeds, and thus give notice of their rights, did not prevent them from seeking relief as the transferees of the mortgagee could not be said to be purchasers without notice of the possibility of outstanding claims. About the only basis for any notice that could exist was the uncanceled notation on the Torrens register that an owner's duplicate certificate had been issued and that it had not been surrendered nor judicially declared cancelled,<sup>18</sup> but this was said to be sufficient for the purpose. It would appear, therefore, that no one can claim to be a purchaser without notice of registered lands if he ignores suspicious entries on the original Torrens certificate or takes title while an outstanding duplicate certificate remains unsurrendered and uncanceled.

One remaining point of concern might be mentioned. Heretofore, a plat of subdivision was required only in the event the owner contemplated dividing his land for the purpose of laying out a town or making an addition to an existing municipality.<sup>19</sup> By legislative action, a statutory plat of subdivision is now required whenever land is divided into parts and any divided portion thereof is less than five acres in extent, regardless of the

<sup>16</sup> Ill. Rev. Stat. 1955, Vol. 2, Ch. 110, § 50(8), allows a defendant served by publication one year within which to act to vacate the decree.

<sup>17</sup> The application was based on the premise the lien had expired by limitation, there was no proof of insolvency on the part of the debtor, the property was not shown to be scant security for the debt, and the mortgagor no longer held title to the premises. For the conditions under which strict foreclosure will be permitted, see *Farrell v. Parker*, 50 Ill. 274 (1869).

<sup>18</sup> Ill. Rev. Stat. 1955, Vol. 1, Ch. 30, § 91, directs the Torrens Registrar to stamp the surrendered duplicate certificate "cancelled." *Ibid.*, § 125, declares that no transfer based on a judicial sale shall be registered unless the duplicate owner's certificate is surrendered or an order of court is filed directing the transfer and the cancellation of the outstanding certificate.

<sup>19</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 109, § 1.

purpose of subdivision. Enforcement of this requirement is left in the hands of the Recorder of Deeds who is commanded not to record any deed or lease designed to convey an interest in property in violation of the amended provision.<sup>20</sup>

Two interesting personal property cases were decided within the survey period and are worthy of mention. In the case of *In re Schneider's Estate*,<sup>21</sup> the decedent took one Ralston to the bank and opened two joint savings accounts in his and Ralston's names. The transaction involved the execution of a typical joint savings account contract which, *inter alia*, permitted withdrawals by either party and provided for rights of survivorship. On trial, the court, over objection, admitted parol evidence which tended to prove that Ralston had provided none of the funds and that the joint savings accounts were opened for the purpose of placing Ralston in a position to obtain Schneider's money for him in the event of illness, and not with the intent of making an *inter vivos* gift to Ralston. Ralston based his claim to the accounts on the theory that the instrument was a contract between himself and Schneider and parol evidence was inadmissible to vary its terms. The Supreme Court held, however, that the form of the instrument was not conclusive and that parol evidence was admissible to show what the decedent intended.

The theory of a gift *inter vivos* was the only contention upon which the petitioner could prevail in the case of *In re Whaley's Estate*,<sup>22</sup> because there the petitioner was claiming the proceeds of a savings account that was in the decedent's name alone. The key to the petitioner's case was his possession of the bank book together with some evidence that the decedent intended her to have the proceeds of the account. However, the key didn't open any doors for lack of sufficient evidence of an intended gift.

<sup>20</sup> Laws 1955, p. —, H. B. No. 783; Ill. Rev. Stat. 1955, Vol. 2, Ch. 109, § 1 and § 5a.

<sup>21</sup> 6 Ill. (2d) 180, 127 N. E. (2d) 445 (1955), affirming 2 Ill. App. (2d) 560, 120 N. E. (2d) 353 (1954), noted in 33 CHICAGO-KENT LAW REVIEW 189. Hershey, J. filed a dissenting opinion in which Klingbiel, J. concurred.

<sup>22</sup> 3 Ill. App. (2d) 333, 122 N. E. (2d) 46 (1954).

## LANDLORD AND TENANT

Although there are no startling developments in this area, it would be a fair inference to state that the liability of a landlord for injuries sustained on leased premises is expanding, as is exemplified in the recent cases of *Alaimo v. DuPont*<sup>23</sup> and *Durkin v. Lewitz*.<sup>24</sup> In the *Alaimo* case, an employee of the tenant was fatally injured by a defective elevator which the landlord had covenanted to keep in repair. Although the court conceded the majority rule to be that a covenant to repair does not carry with it liability for injuries sustained,<sup>25</sup> it construed the covenant as one requiring the landlord to keep the elevator in a safe condition, the breach of which would carry liability for injuries. Thus, it was ruled that the trial court erred in directing a verdict for the landlord.

In the *Durkin* case, liability was again imposed on the landlord, on this occasion for injuries sustained by the household employee of a tenant resulting from a fall on a stair landing which formed a part of a common passageway. A defective drain gutter permitted water to run on the landing which froze and created a hazardous condition. One of two conflicting rules could govern the landlord's responsibility in this area. The Massachusetts rule is that the landlord is under no obligation to keep leased premises safe, the only obligation being to maintain the premises as they were when let.<sup>26</sup> The Connecticut rule requires the landlord to keep the leased premises in a reasonably safe condition and this includes the removal of ice and snow from common passageways when required.<sup>27</sup> In spite of at least one prior decision in this state adopting the Massachusetts rule,<sup>28</sup> the Appellate Court for the First District distinguished between

<sup>23</sup> 4 Ill. App. (2d) 85, 123 N. E. (2d) 583 (1955).

<sup>24</sup> 3 Ill. App. (2d) 481, 123 N. E. (2d) 151 (1954). Leave to appeal has been denied.

<sup>25</sup> 4 Ill. App. (2d) 85 at 89, 123 N. E. (2d) 583 at 585.

<sup>26</sup> *Woods v. Naumkeag Steam Cotton Co.*, 134 Mass. 457 (1883), is the leading case.

<sup>27</sup> *Reardon v. Shimelman*, 102 Conn. 383, 128 A. 705 (1925).

<sup>28</sup> *Cronin v. Brownlie*, 348 Ill. App. 448, 109 N. E. (2d) 352 (1952).

the general application of that rule and the facts of this case and ruled that Illinois requires the landlord to keep common passageways reasonably safe. Thus, it is clear that the landlord has a positive duty to remove accumulations of ice and snow from common passageways to the extent that the safety of the premises is affected.

The failure of a lessee to hold a race meet at the lessor's track was the cause of a lawsuit entitled *Fox v. Fox Valley Trotting Club*.<sup>29</sup> The lease gave the lessee the sole right to hold horse race meets and other sporting activities at the lessor's track. The rent was a base sum plus a percentage of the total amount wagered each year. During one year of the lease, the lessee failed to hold a meet at the lessor's track but did hold a meet at another track. The lessor brought an action for an accounting for rent due and pressed the argument that the agreement between the parties obligated the lessee to use and occupy the track for its intended purpose. The reviewing court was unable to discover any language in the lease requiring the lessee to operate at the lessor's track, nor could the court find an implied obligation as would be the case if the rent was based solely on operating revenues without a base rent.

Lastly, the Supreme Court affirmed the decision of the Appellate Court for the First District in the case of *Pierce v. Pierce*.<sup>30</sup> It is thus settled in this state that the Partition Act of 1949<sup>31</sup> permits the partition of long term leasehold estates.

#### SECURITY TRANSACTIONS

Cases falling in the realm of mortgage law and related topics are not rare but few of them can be said to possess novelty. Nevertheless, a few points have been made which call for notice. In the case of *Atkins v. Wallace*<sup>32</sup> the old problem as to whether

<sup>29</sup> 4 Ill. App. (2d) 94, 123 N. E. (2d) 595 (1954). After the period covered by the survey, the Supreme Court reversed in — Ill. (2d) —, 129 N. E. (2d) 739 (1955).

<sup>30</sup> 4 Ill. (2d) 497, 123 N. E. (2d) 511 (1954), affirming 351 Ill. App. 336, 115 N. E. (2d) 107 (1953), noted in 32 CHICAGO-KENT LAW REVIEW 265.

<sup>31</sup> Ill. Rev. Stat. 1955, Vol. 2, Ch. 106, § 44 et seq.

<sup>32</sup> 6 Ill. App. (2d) 362, 127 N. E. (2d) 500 (1955).

or not an absolute conveyance could be treated as a masked security transaction developed with a new twist. The land owners there concerned, apparently unable to keep up with mortgage payments, interested a third person to advance funds to cure the default and gave him a quit-claim deed to the premises in return for a sealed written agreement under which he undertook to make future payments.<sup>33</sup> The agreement recited that the deed had been given "as security" and the grantee promised to reconvey "when and if payment advances are repaid in full" but the grantors in no way obligated themselves to reimburse the third person. In suit to have the quit-claim deed declared to be a mortgage and to permit redemption of the premises, the court held, in conformity with some earlier cases,<sup>34</sup> that the right to redeem had to be reciprocal to a right to foreclose so that if the alleged mortgagee was unable to enforce payment of the advances made<sup>35</sup> the alleged mortgagor had, at best, a mere option to repurchase. On the basis of this reasoning, the quit-claim deed was declared to be an absolute one. Despite this, the court recognized the validity of the agreement as adequate to constitute an enforceable option for a reconveyance so it can be assumed that the once desperate grantors were able to regain their property. From their standpoint, then, the precise reasoning followed to support the result could well be considered as being immaterial.

In the event a real estate mortgage or trust deed is used, it is fundamental law that the mortgagor can grant no greater estate for security purposes than he then has, save as he may later acquire additional rights in the premises which may then be said to inure to the mortgagee's benefit. There is indication, in the case of *South Side Bank & Trust Company v. Sherlock*

<sup>33</sup> No figures of consequence were provided in the opinion, but inadequacy of price is a factor to be considered in determining whether a mortgage or a sale was intended.

<sup>34</sup> *Caraway v. Sly*, 222 Ill. 203, 78 N. E. 588 (1906); *Robison v. Moorefield*, 347 Ill. App. 508, 107 N. E. (2d) 278 (1952).

<sup>35</sup> No consideration appears to have been given thus far to the possibility of an implied in law promise to compel repayment. Such a promise, resting on equitable grounds, should not be difficult to establish, particularly if the advances are made at the debtor's request.



*Holmes, Inc.*,<sup>36</sup> that the mortgagee's position may be improved beyond that which existed at the time the mortgage was given by subsequent events other than the acquisition of some additional title. Under the facts of that case, a loan had been made and a mortgage taken on adjoining portions of two vacant lots. The mortgagor was the full owner of one portion but held no more than a one-half interest as tenant in common with another as to the other portion and the co-tenant had not joined in the mortgage. The mortgagor later improved the land in such a way that a portion of the structure stood on the land held by the co-tenants. In partition proceedings thereafter instituted, the non-joining co-tenant became owner in full of this portion of the entire tract. Following default under the mortgage, a foreclosure suit was instituted to which the former co-tenant was made a party and, when a decree was entered directing the sale of the mortgagor's interest and giving the mortgagee a first lien on the improvements, the former co-tenant appealed. The decree was affirmed when the court, using principles applied in partition and similar cases,<sup>37</sup> reached the result that, when one co-tenant makes improvements at his own expense and the land cannot be so divided as to allot the improved portion to him, such person is entitled to a lien upon the proceeds of sale for the enhancement in value caused by his improvement. This lien was, therefore, declared to be available to the mortgagee as so much additional security for his debt.<sup>38</sup>

While the mortgagee's security interest can become greater by subsequent events, the case of *Kling v. Ghilarducci*<sup>39</sup> demonstrates that it cannot be diminished by later acts on the part of the mortgagor. According to the facts of that case, a parcel of

<sup>36</sup> 6 Ill. App. (2d) 138, 126 N. E. (2d) 742 (1955).

<sup>37</sup> *Oppenheimer v. Szulerecki*, 297 Ill. 81, 130 N. E. 325, 28 A. L. R. 1439 (1921); *Noble v. Tipton*, 219 Ill. 182, 76 N. E. 151, 3 L. R. A. (N. S.) 645 (1905).

<sup>38</sup> Apparently, in the event the mortgagee became purchaser under the foreclosure sale, he would acquire full title to one part of the premises, an undivided one-half interest in the other part, and a lien on the proceeds of sale arising from some future partition proceeding as to the part so held in common for the enhanced value thereof, the nature and extent of which would still have to be determined.

<sup>39</sup> 3 Ill. (2d) 454, 121 N. E. (2d) 752 (1954).

land had, at one time, been improved with two separate buildings. One of the structures, with its part of the land, was subjected to an encumbrance by way of mortgage under which the defendants eventually claimed title through foreclosure and sale. The other structure, in the rear of the lot, was later occupied by the plaintiff who had earlier taken title to the entire property but who had lost the front portion through the aforementioned foreclosure, to which suit plaintiff had been made a party. Prior to foreclosure sale but after the mortgage had been given and suit thereon had been instituted, the plaintiff had tapped into a water service pipe in the front building to supply her needs with respect to the rear building. When defendant shut off this supply, she sued to establish an easement in her favor.<sup>40</sup> It was there decided that, if plaintiff ever had any right to assert an easement for this purpose, it had been lost by reason of her failure to assert the same in the foreclosure suit. Even if this had not been the case, the title acquired by the defendants through foreclosure was said to relate back to the date when the mortgage had been given, had operated to cut off any intervening equities, and could not be affected by any subsequent acts intended to create easements in the land to the prejudice of the rights of the mortgagee.

One small point concerning foreclosure law<sup>41</sup> was made through the medium of the case of *Skach v. Sykora*.<sup>42</sup> After foreclosure and sale, at which the premises were sold for an amount in excess of the debt due but for considerably less than the stipulated value, the mortgagors were able to raise funds with which to redeem. Well within the one-year period permitted for this purpose,<sup>43</sup> the mortgagors addressed an inquiry to the

<sup>40</sup> Other easements, such as one to maintain an external stairway which overlapped the boundary line between the parts of the lot, and of ingress and egress over a sidewalk, were also asserted.

<sup>41</sup> See above, this division at note 15, for a discussion of the case of *Prassas v. Jana*, 4 Ill. App. (2d) 385, 124 N. E. (2d) 643 (1955), which grew out of an attempt at strict foreclosure, a process seldom used. The case, however, turned on other issues.

<sup>42</sup> 6 Ill. (2d) 215, 127 N. E. (2d) 453 (1955).

<sup>43</sup> Ill. Rev. Stat. 1955, Vol. 1, Ch. 77, § 18.

master in chancery concerned with the case as to the amount needed for purpose of redemption and deposited the amount fixed by him and were given a certificate of redemption. By error, the master had calculated interest on the sale price at the rate of five per cent. whereas the rate should have been six per cent., hence the deposited amount proved to be inadequate. The error was not discovered until after the one-year period had run but, on learning of the fact, the mortgagors promptly tendered the deficit. In a suit by the purchaser at foreclosure sale to compel the issuance of a deed in his favor, the Supreme Court, borrowing from views expressed in tax redemption and similar cases,<sup>44</sup> declared it would be inequitable to deny relief against an error on the part of the landowners who had made an honest attempt to redeem but who had been frustrated by the mistake of another, particularly where there was a gross inadequacy in the sale price. While admitting that the statutory right to redeem was one which could not, normally, be exercised except within the time period and in the manner fixed by law,<sup>45</sup> the court announced that it would be the policy hereafter, unless injury would result to the purchaser at the sale, to give a liberal construction to the statute at hand.

Insofar as security interest in personal property may have been involved in the cases, little of moment has occurred. The case of *Dasher v. Bruno*,<sup>46</sup> however, might prove to be interesting for the court there, unable to classify the creditor's interest as falling within any one of the more conventional patterns, achieved the result that an equitable lien had arisen under the facts before it. The debtor-buyer there concerned had undertaken to purchase a block of corporate stock pursuant to an arrangement by which

<sup>44</sup> See *Converse v. Rankin*, 115 Ill. 398, 4 N. E. 504 (1886), as to redemption from tax sales, and *Block v. Hooper*, 318 Ill. 182, 149 N. E. 21 (1925), as to redemption from sales based on writs of execution.

<sup>45</sup> By contrast, in *Muir v. Mierwin*, 385 Ill. 273, 52 N. E. (2d) 801 (1944), redemption was denied to certain co-tenants, who sought to protect their interests in the premises by tendering only their fractional portions of the sale price, because the amount tendered had been inaccurately calculated by virtue of the same error over the rate of interest as the one made in the instant case.

<sup>46</sup> 5 Ill. App. (2d) 500, 126 N. E. (2d) 404 (1955).

the shares were transferred to the buyer, who was to enjoy all the privileges of ownership until default occurred, and the same shares were immediately endorsed in blank and placed in escrow to secure the amount due on the purchase price which was payable in monthly installments.<sup>47</sup> After several payments had been made, the buyer defaulted but insisted that the seller was limited by the contract<sup>48</sup> to the return of only part of the stock so deposited in escrow, supposed to be the seller's exclusive remedy. Upon finding that the contract term provided no more than one of several elective methods under which the seller could withdraw, the court proceeded to consider whether a foreclosure of some form of seller's lien would be appropriate. As the transaction involved neither a pledge, a conditional sale, or a chattel mortgage, because lacking in essential elements of each, but did serve to subject specific personal property to the payment of a debt, the court achieved the conclusion that an equitable lien had been intended, a lien which could properly be enforced by the sale of the entire block of stock.<sup>49</sup>

Independently of judicial remedies for the enforcement of claims to security in personal property, the legislature acted to make some changes in the statutory law relating to chattel mortgages. Under the first of them, the time for filing a chattel mortgage so as to validate the lien thereof has been enlarged from fifteen to twenty dates from the date of execution and, to accommodate the practice of taking a combination real estate and chattel mortgage as security, the lien so created may, by the filing of appropriate affidavits of extension from time to time, be made to run as long as twenty years in lieu of the five-year

<sup>47</sup> The buyer was not to be entitled to the return of any of his stock so deposited until he had made full payment of the price.

<sup>48</sup> The contract did state that, in the event of default, the seller "shall be entitled to receive one share of said stock for each One Hundred Dollars (\$100) of unpaid principal and interest."

<sup>49</sup> The contract lacked an acceleration clause but all unpaid installments had matured by the time the appeal had been determined so the court, following a common equitable practice to fashion the decree according to the circumstances as they existed on the date of the decree, experienced no difficulty in arriving at the conclusion that the whole block of stock should be sold for the purpose of realizing funds to pay the entire balance due on the purchase price.

limitation heretofore in effect as to chattel mortgage security.<sup>50</sup> By the second amendment, the requirement that a note secured by a chattel mortgage shall so state on its face, under penalty of being declared absolutely void if it does not bear such a legend, has been made inoperative as to notes given by corporate debtors.<sup>51</sup> The business of factoring, *i.e.* the loaning of money on goods in process, on finished goods intended for sale, and on accounts receivable, has now been made the subject of statutory regulation with provision for the filing of a general notice of intention to engage in this method of financing as a basis for providing protection as to priority of right.<sup>52</sup> The statute does not apply to bailments, pledges, consignments of merchandise, or field-warehousing operations wherein possession, actual or constructive, may still serve to give a degree of notice to third persons.

Proceedings to enforce mechanic's liens<sup>53</sup> afforded an opportunity for the resolution of two debatable points. It had previously been announced that no lien of this character could arise where the work done by the mechanic had resulted in a violation of law for, in such a case, the court would be asked to base its sanctions upon an illegal undertaking.<sup>54</sup> An important distinction to this principal has now been drawn by the case of *Meissner v. Caravello*.<sup>55</sup> The work performed there, upon which the lien was sought, had been done by a sub-contractor in the mistaken belief that an essential municipal permit for certain remodelling had been obtained when none had, in fact, been issued. Not until the hearing of the case, long after completion and acceptance of the work, did the owner base an objection to a lien because of the lack

<sup>50</sup> Laws 1955, p. —, H. B. No. 47; Ill. Rev. Stat. 1955, Vol. 2, Ch. 95, § 4.

<sup>51</sup> Laws 1955, p. —, S. B. No. 229; Ill. Rev. Stat. 1955, Vol. 2, Ch. 95, § 26. Such notes would also now appear to be free from defenses which might be asserted against the payee in the event of a transfer to a third person.

<sup>52</sup> Laws 1955, p. —, S. B. No. 579; Ill. Rev. Stat. 1955, Vol. 2, Ch. 82, § 102 et seq. The statutory form of notice is comparable to the one used in trust receipt transactions pursuant to Ill. Rev. Stat. 1955, Vol. 2, Ch. 121½, § 178, but is to be filed in the office of the recorder of deeds for the county where the factored merchandise is located, kept or stored, rather than in the office of the Secretary of State.

<sup>53</sup> See Ill. Rev. Stat. 1955, Vol. 2, Ch. 82, § 1 et seq.

<sup>54</sup> *Bairstov v. Northwestern University*, 287 Ill. App. 424, 5 N. E. (2d) 269 (1936).

<sup>55</sup> 4 Ill. App. (2d) 428, 124 N. E. (2d) 615 (1955). Appeal therein has been dismissed.

of the permit, whereupon the lien claimant procured the late issuance of this permit, an act which could apparently have been done initially as there was nothing to indicate that the job would lead to any violation of the local building ordinance. Although the ordinance provided for penalties in case work was done without a permit, the court refused to declare the basic contract illegal, so it permitted the lien to stand when it found the public welfare had been in no way endangered by the oversight. To accomplish this result, the court differentiated between those cases where no permit had been secured because, under law, no such permit would or could be granted and those wherein a permit might have been obtained but, inadvertently, had not been secured. The point to this distinction should be an obvious one.

Procedural rather than substantive issues were generated in the other mechanic's lien case, that of *Wise v. Jerome*.<sup>56</sup> The trial court there, upon finding a total absence for the assertion of a statutory lien as the parties had not dealt with one another as owner and materialman,<sup>57</sup> denied a lien but did grant a personal judgment in favor of the claimant for an amount found to be due. This judgment was reversed on appeal when it was said that there was nothing in the Mechanic's Lien Act<sup>58</sup> which conferred jurisdiction on the court to enter such a judgment and that nothing in the Civil Practice Act had operated to change the law on the point.<sup>59</sup> While recognizing that certain of the Appellate Courts had approved the rendition of law judgments in actions which began as proceedings in equity but in which no basis for equitable relief had been found to exist,<sup>60</sup> the court

<sup>56</sup> 5 Ill. App. (2d) 214, 125 N. E. (2d) 292 (1955).

<sup>57</sup> They had, apparently, been joint adventurers in the erection and operation of a motel and a restaurant.

<sup>58</sup> Ill. Rev. Stat. 1955, Vol. 2, Ch. 82, § 1 et seq.

<sup>59</sup> The former practice is illustrated by *Green v. Sprague*, 120 Ill. 146, 11 N. E. 859 (1887), and *McCarthy v. Neu*, 93 Ill. 455 (1879). A statutory attempt to confer such jurisdiction was declared unconstitutional in *Turnes v. Brenckle*, 249 Ill. 394, 94 N. E. 495 (1911), as tending to deprive the defendant of the right to trial by jury.

<sup>60</sup> See particularly the case of *Westerfield v. Redmer*, 310 Ill. App. 246, 33 N. E. (2d) 744 (1941), criticized in 20 CHICAGO-KENT LAW REVIEW 59-60. Equity courts

refused to apply this principle to matters resting purely on a statutory foundation, particularly when the statute was one to be given strict construction.<sup>61</sup>

Some slight changes have been made by the legislature in certain of the lien statutes. Hereafter, the statutory mechanic's lien notice which serves as the basis for a claim against real estate because of improvements made thereon is to be filed in the office of the recorder of deeds for the appropriate county instead of in the office of the clerk of the circuit court<sup>62</sup> and, consonant with that change, suitable textual revisions have been made in other portions of the statute.<sup>63</sup> The several recorders of deeds are now entitled to demand increased fees for the registration of notices regarding internal revenue tax liens<sup>64</sup> and the same thing is true with respect to claim notices concerning liens for work done on oil and gas wells and pipe lines.<sup>65</sup>

#### TRUSTS

The problem as to when *inter vivos* trusts constitute attempted testamentary dispositions has plagued the courts for many years. The liberal tendency manifested by some of the courts in the last decades towards recognizing and upholding such trusts as valid *inter vivos* transactions was forcefully demonstrated by the remarkable decision of the Supreme Court in *Farkas v. Williams*.<sup>66</sup> The settlor purchased several stock certificates and ordered the corporation whose stock he bought to

---

have, of course, long exercised jurisdiction to grant incidental relief, even of legal character, provided some fundamental basis for the granting of equitable relief can be found present in the case.

<sup>61</sup> Support for this holding may be found in the case of *Edwin Pratt's Sons' Co. v. Schafer*, 290 Ill. App. 80, 7 N. E. (2d) 901 (1937), where a mechanic's lien was permitted to attach to a fund arising from a public improvement as a claim in rem but a personal deficiency decree for a balance due in excess of the fund was held to be extrajudicial.

<sup>62</sup> Laws 1955, p. —, H. B. No. 874; Ill. Rev. Stat. 1955, Vol. 2, Ch. 82, § 7.

<sup>63</sup> See Ill. Rev. Stat. 1955, Vol. 2, Ch. 82, §§ 25, 35, 38, 42, and 44.

<sup>64</sup> Laws 1955, p. —, H. B. No. 872; Ill. Rev. Stat. 1955, Vol. 2, Ch. 82, § 69.

<sup>65</sup> Laws 1955, p. —, S. B. No. 606; Ill. Rev. Stat. 1955, Vol. 2, Ch. 82, § 80.

<sup>66</sup> 5 Ill. (2d) 417, 125 N. E. (2d) 600 (1955), reversing 3 Ill. App. (2d) 248, 121 N. E. (2d) 344 (1954), noted in 33 CHICAGO-KENT LAW REVIEW 192.

issue the stock in his name as trustee for a named beneficiary. At the same time he executed a declaration of trust in which he stated that he was holding the stock certificates in trust for the beneficiary. Therein, he reserved to himself far-reaching powers with respect to the stock, such as the right to receive and to use the dividends during his lifetime and to vote, sell and deal with the stock. He further provided that upon a sale of the stock the trust should terminate and that the same result should follow if the beneficiary should predecease him. Last but not least, he reserved to himself the right to change the beneficiary and to revoke or modify the trust at any time he chose to do so. Despite that vast array of powers which the settlor retained in the trust property, the court felt that no testamentary disposition was attempted, inasmuch as the settlor made it clear that he acquired and held the property as a trustee. The fact that he could change the beneficiary and terminate the trust by selling the trust property were only incidents and powers encompassed by the greater right to revoke the trust at any time. The right to revoke a trust has never been considered to be a reservation of such control over the trust property as would constitute a testamentary disposition.

The right of contingent beneficiaries to protect their interest in a trust was reaffirmed in the case of *Burrows v. Palmer*.<sup>67</sup> Therein, contingent beneficiaries were permitted to file a suit against a trustee who was charged with appropriating trust property to his own use.

With respect to contingent interests, reference should be made to the interesting problem arising in *Shamel v. Shamel*,<sup>68</sup> which involved some very tenuous interests of possible beneficiaries. The trust agreement left the identity of remaindermen subject to a power of appointment, with appropriate alternative provisions in the event the power was not exercised. The real estate which constituted the trust corpus contained deposits of

<sup>67</sup> 5 Ill. (2d) 434, 125 N. E. (2d) 484 (1955).

<sup>68</sup> 3 Ill. (2d) 425, 121 N. E. (2d) 819 (1954).



coal. Circumstances arose which made it desirable to sell the mining rights since, if not then sold, the possibility of removing the coal would, as a matter of economics, be lost forever. On appeal from a proceeding brought under Section 50 of the Chancery Act,<sup>69</sup> the Supreme Court affirmed the decree of the lower court which appointed a trustee of the mineral and mining rights and authorized the sale thereof. The court took the position that this statutory provision was intended to apply to every possible future interest, whether legal or equitable, and did not attempt to classify the future interests here involved, though it did point out that a potential appointee had none and any which did exist were in those persons who would take under the alternative provisions. Moreover, it is well recognized under the common law that a court may order a deviation from the trust instrument when the interests of the beneficiaries require it.

Of the greatest importance was the enactment of the so-called testamentary pour-over provisions. Under a new section<sup>70</sup> added to the Probate Act,<sup>71</sup> it is now possible for a testator to provide in his will for additions to an existing trust, although the trust is subject to amendment, modification, revocation or termination. Unless the will provides otherwise, the property so added to the trust will be governed by the trust instrument, regardless of any amendments or modifications of the trust made before or after the making of the will and before the testator's death.

#### WILLS AND ADMINISTRATION

Both the General Assembly and the courts have been busy with the law of wills and probate administration during the survey period. For purposes of presentation, the significant decisions of the reviewing courts are discussed first.

<sup>69</sup> Ill. Rev. Stat. 1955, Vol. 1, Ch. 22, § 50, which, in essence, authorizes the action taken herein with respect to contingent future interests arising in certain enumerated ways, "or otherwise".

<sup>70</sup> Laws 1955, p. —, H. B. No. 100; Ill. Rev. Stat. 1955, Vol. 1, Ch. 3, § 194a.

<sup>71</sup> Ill. Rev. Stat. 1955, Vol. 1, Ch. 3, § 151 et seq.

The interesting case of *In re Ostrowski's Estate*,<sup>72</sup> raised the question of whether the following instrument, set forth verbatim, should be admitted to probate: "All my Property belong to Borton Stollar all together with Lot land. Lena Ostrowski."<sup>73</sup> The signatures of two attesting witnesses were also on the instrument. The circuit court reversed the probate court and denied admission of the instrument to probate on the ground that it made no disposition of property. On appeal, the circuit court decision was reversed for two reasons. First, the lower courts having jurisdiction over the admission of wills are required to admit wills to probate that comply with the requirements of Sections 43 and 69 of the Probate Act<sup>74</sup> and, in the absence of fraud, undue influence, or the like, may not inquire into testamentariness for the purpose of determining admission. Second, the testatrix did, in fact, succeed in disposing of her property through the above instrument since the word "belong", as it appeared in context, was sufficient to show an intent to dispose of property.

Two cases involved problems of construction. In *Stites v. Gray*,<sup>75</sup> the testator left his personal property and a life estate in his realty to his wife. The remainder interest in the realty he gave to such persons who, at his death, would be his heirs by the Illinois law of descent. Technically, of course, this would include the surviving spouse and that was her theory in claiming a share of the remainder interest in the realty. Though armed with at least two rules of construction suggesting a result in her favor,<sup>76</sup> she lost the case. The Supreme Court held that the

<sup>72</sup> 3 Ill. App. (2d) 431, 122 N. E. (2d) 596 (1954), noted in 43 Ill. B. J. 677.

<sup>73</sup> 3 Ill. App. (2d) 431 at 432, 122 N. E. (2d) 596 at 596.

<sup>74</sup> Ill. Rev. Stat. 1955, Vol. 1, Ch. 3, §§ 194 and 221.

<sup>75</sup> 4 Ill. (2d) 510, 123 N. E. (2d) 483 (1954), noted in 1955 Ill. L. Forum 186.

<sup>76</sup> (1) When a gift of a life estate is made to a named person and a gift of a remainder in the same property is made to a class which will include the life tenant, the life tenant is not necessarily excluded from the class which will take the remainder: *Dillman v. Dillman*, 409 Ill. 494, 100 N. E. (2d) 567 (1951).

(2) The word "heirs" is a technical word and is to be given its fixed legal meaning even though the testator uses inconsistent words, unless such inconsistent words are of such a nature as to make it perfectly clear that the word "heirs" was not used in its proper and legal sense: *Le Sourd v. Leinweber*, 412 Ill. 100, 105 N. E. (2d) 722 (1952); *Richardson v. Roney*, 382 Ill. 528, 47 N. E. (2d) 714 (1943).

testator plainly intended the contrary, thus making unnecessary the application of the rules of construction relied on by the widow.

And in *Williams v. Fulton*,<sup>77</sup> the testator gave a quarter section of land to his son for life with the remainder in fee to the heirs of his body and if he (the son) should die without descendants, then to the son's nearest of kin according to the Illinois rules of descent. The phrase, "nearest of kin", properly and technically means "closest blood relatives",<sup>78</sup> whereas the modifying clause referring to the Illinois rules of descent includes other than blood relatives, specifically, the surviving spouse. Thus, upon the death of the son without descendants, the question arose whether his widow was included or excluded from the devise. The Supreme Court ruled in favor of the widow and in so doing was again obliged to place a non-technical construction upon technical language. Justification for this position was found in the qualifying clause making reference to the Illinois rules of descent.

Though the decision in the case of *In re Kent's Estate*<sup>79</sup> is not surprising,<sup>80</sup> it does serve to emphasize the rule that in this state a spouse is not a competent attesting witness to the other spouse's will. This is apparently the first time that the Illinois courts have been faced with the precise question.

The question of who is an "interested person"<sup>81</sup> for the purpose of bringing a will contest was before the Appellate Court for the First District in *Young v. Pelouquin*.<sup>82</sup> In this case, the decedent's will was typewritten except for an interlineation which specifically named the residuary beneficiary. Plaintiff's theory was that fraud and undue influence were exerted by the named beneficiary to secure his name and description in the will and

<sup>77</sup> 4 Ill. (2d) 524, 123 N. E. (2d) 495 (1954).

<sup>78</sup> *Hammond v. Myers*, 292 Ill. 270, 126 N. E. 537 (1920). The rule was recognized in *Sloan v. Beatty*, 1 Ill. (2d) 581, 116 N. E. (2d) 375 (1954).

<sup>79</sup> 4 Ill. (2d) 81, 122 N. E. (2d) 229 (1954), noted in 33 CHICAGO-KENT LAW REVIEW 283 and 1955 Ill. L. Forum 182.

<sup>80</sup> See Ill. Rev. Stat. 1953, Vol. 1, Ch. 51, § 8.

<sup>81</sup> Ill. Rev. Stat. 1955, Vol. 1, Ch. 3, § 242.

<sup>82</sup> 6 Ill. App. (2d) 258, 127 N. E. (2d) 252 (1955).

that if the interlineation was stricken together with the type-written word, "fifteen", he, the plaintiff, would be the only person who could answer the description of the residuary legatee as it was intended to read. Even though the plaintiff was not an heir of the decedent and the removal of the interlineation could well have rendered the residuary clause void for indefiniteness, the court held that the plaintiff was an interested person and could bring the action.

Turning to new legislation in the field, a search reveals some important changes in the Probate Act. One such change<sup>83</sup> provides that a testator may devise and bequeath property to a trustee of an amendable and revocable trust in existence at the time the will is executed. Henceforth, the pour-over will technique is made more certain and convenient as it is no longer necessary to repeat the terms of the trust in the will.

Another addition<sup>84</sup> provides for the acceleration of certain future interests upon renunciation of the will by the surviving spouse. Heretofore, the problem of acceleration had proved to be a troublesome one for the courts and the law was by no means settled, especially in the area of contingent remainders. This act should remove some of the uncertainty.

The "anti-lapse" statute<sup>85</sup> has been amended so that those legacies and devises which are not prevented from lapsing fall into the residuary clause.<sup>86</sup> Before this amendment, the disposition of lapsed legacies and devises depended upon the common law rules and the testator's intent.

There is now a specific seven year limitation<sup>87</sup> upon suits brought against heirs or devisees by creditors under the frauds and perjuries statute in Illinois.<sup>88</sup> Heretofore, the general statute

<sup>83</sup> Laws 1955, p. —, H. B. No. 100; Ill. Rev. Stat. 1955, Vol. 1, Ch. 3, § 194a.

<sup>84</sup> Laws 1955, p. —, H. B. No. 23; Ill. Rev. Stat. 1955, Vol. 1, Ch. 3, § 168a.

<sup>85</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 3, § 200.

<sup>86</sup> Laws 1955, p. —, H. B. No. 71; Ill. Rev. Stat. 1955, Vol. 1, Ch. 3, § 200.

<sup>87</sup> Laws 1955, p. —, S. B. No. 127; Ill. Rev. Stat. 1955, Vol. 2, Ch. 83, § 24d.

<sup>88</sup> Ill. Rev. Stat. 1955, Vol. 1, Ch. 59, § 10 et seq.

of limitation had governed the bringing of such actions. In a sister act,<sup>89</sup> Section 15 of the frauds and perjuries statute was repealed. This section provided that a separate suit may be brought against the heirs or devisees on all undertakings by the decedent if an estate had not been opened within one year after death.<sup>90</sup>

Along the same line, an amendment<sup>91</sup> to the Limitations Act adds a new section imposing a specific limitation on actions to enforce a contract to make a will. Such actions must be brought within two years after the decedent's death or within the time provided for the filing of claims if letters testamentary or of administration have been applied for within the two year period.

Turning to the administration of estates, the General Assembly passed an act permitting a non-resident testator to select the law of Illinois as the law governing the disposition of his personal property if the situs of such property is in this state.<sup>92</sup> In the absence of such a direction the law of the situs of personal property would not ordinarily apply. Another act validates the sale or mortgage of real property by an executor made pursuant to a power of sale when the will containing the power is set aside.<sup>93</sup> This, of course, is a codification of the general rule at common law.<sup>94</sup>

Numerous other amendments were recently made to the Probate Act but no effort is made here to either discuss or record them as their importance is of a limited nature.

*(To be continued)*

<sup>89</sup> Laws 1955, p. —, S. B. 126.

<sup>90</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 59, § 15.

<sup>91</sup> Laws 1955, p. —, S. B. No. 127; Ill. Rev. Stat. 1955, Vol. 1, Ch. 83, § 24e.

<sup>92</sup> Laws 1955, p. —, H. B. No. 103; Ill. Rev. Stat. 1955, Vol. 1, Ch. 3, § 241b.

<sup>93</sup> Laws 1955, p. —, H. B. No. 1092; Ill. Rev. Stat. 1955, Vol. 1, Ch. 3, § 400.

<sup>94</sup> *Smith v. Smith*, 168 Ill. 488, 48 N. E. 96 (1897).