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REAL PROPERTY

The propriety of words is the safety of property.—Latin
Maxim, Jenkins, Exchequer Reports No. 16 (1885).

CURRENT CHANGES IN ILLINOIS REAL PROPERTY LAW

HUGH A. BRODKEY

INTRODUCTION

Within the last decade significant changes have taken place in the Illinois law of Real Property. The General Assembly has labored diligently and well. Notable contributions include the Marketability of Title Act, the Reverters Act, the Twenty-year Limitations Act with respect to mortgages and the amendments reducing the redemption period in mortgage foreclosure sales. Our court decisions during this period also mark a long step forward in the struggle for justice. Conspicuously present in recent times is the tendency to lay less stress on stare decisis and to look beyond the borders of the state for guidance. For example, in holding that a surviving joint tenant cannot acquire title by murder our court cited decisions from other jurisdictions and overthrew a relatively recent Illinois Supreme Court holding. In the unreported Garfield Park case, which has now become moot, our court indicated that it would overrule a prior Illinois decision and follow decisions from other jurisdictions. The requirement of mutuality of remedy in specific performance suits was discarded in like fashion. And so the story goes. A lesson to be gleaned in culling through the recent decisions is that it is unsafe for the practicing lawyer nowadays to rely upon the Illinois case in point. The precedent itself must be examined and its true worth analyzed. If it embodies a rule unworthy of perpetuation the chances are good that our Supreme Court will discard it. To be sure, the burdens thus placed upon the practicing lawyer are rigorous and exacting. He must keep abreast of developments in the law elsewhere. He must determine when a rule is ripe for revision. To aid the court in writing an opinion like that in Dini v. Naiditch requires legal scholarship of a high order. That is on the plus side. If a lawyer wishes to be treated as a member of a learned profession, he must equip himself for the task. In the article by Mr. Brodkey that follows the scholarship is of a high order and the research painstaking and exhaustive. It is worthy of the reader's careful attention.

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* 20 Ill.2d 406, 170 N.E.2d 881 (1960) (holding that a landowner owes a duty of reasonable care to a fireman rightfully on the premises).
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Perhaps no branch of the law is so thoroughly permeated with ancient common-law rules, forms, and concepts as Real Property. The rule of decision in Illinois is the general aspect of the common law of England as modified by statute prior to the fourth year of James the First (1606-1607). The courts and legislature of Illinois have given this statutory pronouncement the serious consideration which it deserves, but it seems, at times, that it weighs as a millstone rather than giving the security of an anchor. Illinois has been slower than many other commercial states in modifying or eliminating the forms and technical requirements of the common law, and this has been felt particularly in the area of Real Property Law. With this tradition, it is interesting to note the many situations which have arisen over the last decade in which the courts or the legislature, or the two together, have shaped the law to the needs of a highly complex industrial and commercial state. Some of these changes have been greeted by practitioner and scholar alike with a hearty, "Good riddance." Others have created a storm of controversy over what may be interpreted as a governmental interference with the basic property rights which are a foundation for our present society. Some changes occurred as the result of painstaking work and advocacy by organizations of the Bar and other areas of civic and governmental concern; others represented sudden legislative reaction to a particular fact situation which presented itself.

I. SCOPE OF THE ARTICLE

In looking at changes in the Illinois law of Real Property, two things must be borne in mind—one is the interrelation of Real Property Law with other "fields" of law, and the other is the effect of federal decisions and statutes on state law. The American Bar Association and many state bar associations have a single "Section on Real Property, Probate and Trust Law." This designation recognizes the difficulty (and practical futility) of separating the three. Disposition of real property by will and descent, claims against decedents' estates, future interests, powers and duties of fiduciaries with regard to real estate, are all linked. Taxation has become closely related to the ownership of real estate, creating new interests both on behalf of the government and of private individuals. The laws of divorce and adoption affect rights in

1 ILL. REV. STAT. ch. 28, § 1 (1959). Specified statutes and purely local laws are excepted.
land. Corporation law includes the power of corporations to hold and deal with land. For purposes of this symposium, the present article excludes many changes in these areas of the law and it is hoped that information on these points will be found in other articles.

The subject of Real Property Law does, however, lend itself to certain subdivisions. Perhaps the greatest volume of case law and statutes concerning real property over the last ten years is in the area of direct governmental control of real property through zoning, condemnation, and the creation of new public bodies. The powers of municipal corporations to hold and use land, urban renewal, area planning, and similar subjects will be treated elsewhere.

The second major consideration is the effect of federal law on Illinois Real Property Law. The Internal Revenue Code of 1954 has had a broad effect on real estate practices in Illinois. Whatever practices the Illinois law might permit, the decision as to the form to use often depends on the tax consequences. A more direct effect of federal law on local law is in the area of federal tax liens. The federal government can establish a claim against Illinois real estate under any one of a number of tax laws. Many cases over the past ten years have dealt with the question of the relative priority of federal tax liens and other forms of liens and interests created by state law. Some cases dealt with constitutional questions relating to governmental powers with regard to land. Some federal statutes dealt with specific interests in land owned by the federal government. The present article will not deal with these federal

2 See, e.g., Young, Tax Consequences of Real Estate Financing, 1957 U. Ill. L. F. 360.

3 Nonpayment of any of the following may result in a federal tax lien: income taxes, withholding taxes on wages, estate and gift taxes, employment taxes under the Federal Insurance Contributions Act, the Railroad Retirement Tax Act and the Federal Unemployment Tax Act, retailer's excise taxes, manufacturer's excise taxes, a wide variety of miscellaneous excise taxes, taxes on alcohol, tobacco, and other items.


5 E.g., in Charlotte Park & Recreation Comm'n. v. Barringer, 242 N.C. 311, 88 S.E.2d 114 (1955), it was held that a racial restriction on land created by means of a fee determinable on a special limitation enforceable by reverter required no action by a court and, hence, was not prohibited by the fourteenth amendment as interpreted in Shelley v. Kramer, 334 U.S. 1 (1948).

6 Exec. Order No. 9908, 12 Fed. Reg. 8223 (1947), required, under the terms of the Atomic Energy Act of 1946, that all conveyances of government land expressly reserve
matters but will limit itself to Illinois cases and legislation during the period from 1951 through 1960.

It would be a monumental and, possibly, meaningless task to catalogue every appellate decision and statute over the last ten years affecting real estate. What has been attempted is the notation of those particular developments in Real Property Law which give the clearest insight into the method and direction of legal change in this area.

II. TRANSFERRING TITLE—MARKETABILITY

Perhaps the most far-reaching trend in decisions and legislation over the past decade has been in the area of making real estate titles more easily transferable. This trend has taken two paths—by direct elimination of some conveyancing "technicalities," and by extension of "limitations" acts to eliminate potential attacks on title. Both are characterized by gradually broadening legislative action. The first of these paths is typified by the 1951 statute abolishing the need for private seals on written contracts, deeds, mortgages, or any other written instrument or document which heretofore required a seal. The legislature simultaneously amended the deed, mortgage, and acknowledgment forms of the Conveyance Act to reflect the fact that a seal would not be necessary. It was safe to assume, and it has been true in practice, that despite these statutory changes, deeds and mortgages would continue to be drawn reflecting a personal seal of the grantor. In anticipation of this, the statute states that the addition of such a seal to an instrument shall not in any manner affect its force, validity, character, or construction.

The legislative abolition of the ancient form followed a succession of "half-way" measures, such as the statute creating the federal government the rights to all uranium, thorium, or other materials essential to the production of fissionable material. The Atomic Energy Act of 1954 permitted release of these rights. 42 U.S.C.A. § 2098(b) (1957). A further amendment in 1958 quitclaimed all rights previously reserved. 42 U.S.C.A. § 2098(b) (Supp. 1960). However, a corporate seal is not dispensed with by the statute. Ops. Ill. Att'y Gen., 41 Ill. B.J. 92 (1952).

The effect on contracts is open to question. See Comment, 1 De Paul L. Rev. 250 (1952); Note, 1954 U. Ill. L. F. 113. The common-law effect of a seal to purport consideration raises a question as to the proper form for a conveyance of land by gift—that is, a conveyance without either "good" or "valuable" consideration. Must a consideration be stated in every conveyance instrument? See Hill v. Bowen, 8 Ill.2d 527, 134 N.E.2d 769 (1956); Redmond v. Cass, 226 Ill. 120, 80 N.E. 708 (1907); Catlin Coal Co. v. Lloyd, 180 Ill. 398, 54 N.E. 214 (1899); (all decided prior to the act "abolishing" the need for private seals), and see Note, 1956 U. Ill. L. F. 513.
a presumption that a recorded instrument was under seal if it so recited (even though the recorded copy showed no seal), and the statute declaring that when a deed recited it had been sealed, the grantor shall be held to have adopted whatever seal appears on the instrument (including that of the notary public taking the acknowledgment).

Case law serving to soften the omission of traditional conveyancing forms includes the decision in Berigan v. Berrigan, that an unacknowledged deed is entitled to the presumption that it was executed and delivered on the date it bears.

The second path to easier transferring of titles—by extension of "limitations" acts—has within it the seeds of both a semantic and practical problem. The term "limitations act" is often used loosely to describe both the type of act which declares a maximum time for the bringing of an action and the type of act which declares an interest to be terminated upon failure to perform a certain act. Ease in transferring titles is facilitated in inverse proportion to the number of places a buyer must go to check ownership. If all matters affecting title could be determined without going outside the record, and the record were kept up to date, the most serious problems of marketability would be solved. Query: What kind of "limitations act" best accomplishes this purpose?

The extension of these acts in the field of real property was highlighted by the passage of the so-called Reverter Act in 1947. This act declared possibilities of reverter and rights of re-entry for breach of a condition subsequent inalienable, limited the life of such rights to fifty years from the date of creation, and limited the time for enforcement of such rights where they were created more than fifty years before. Certain exceptions are specified. The constitutionality of this act was upheld in 1955 in Trustees of School v. Batdorf. In that case, the Illinois Supreme Court rejected the contention that such an act impaired the obligation of contracts, was an ex post facto law, or deprived persons of their property without due process of law in viola-

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11 Ill. Rev. Stat. ch. 30, § 34a (1959). This 1941 legislation included a section validating all unsealed deeds or mortgages previously made. Ill. Laws 1941, at 416.
12 413 Ill. 204, 108 N.E.2d 438 (1952).
13 This does not, of course, do away with the need for an acknowledgment, especially as a requisite for the release of homestead. Ill. Rev. Stat. ch. 52, § 4 (1959).
15 6 Ill.2d 486, 130 N.E.2d 111 (1955).
tion of the state and federal constitutions. The court also made specific mention of the commercial and social desirability of such legislation.16

In 1953, the Legislature added to the Limitations Act three sections which served to limit to seven years the time for bringing an action for the recovery of land by reason of the breach of a condition subsequent,17 or by reason of the termination of an estate upon limitation or of an estate upon conditional limitation.18 Existing actions are limited in the time in which they may be brought and mortgages and leases are specifically excluded from the effect of the statutes.19 The old question of when the statute starts to run—that is, whether a continuing breach is a series of separate breaches which would entitle subsequent owners to bring an action—is specifically resolved in the negative by section 1a of the act. Continuing, successive, or recurring breaches shall not extend the time for commencing the action or making the entry. In the past, the effect of this statute was achieved through the application of a doctrine of waiver20 or adverse possession.21

In 1955, the Supreme Court of Illinois was also asked to rule on the constitutionality and effect of section 11b of the Limitations Act,22 which placed certain restrictions on the term of lien of existing mortgages, trust deeds, and vendor’s liens. By this section, the lien was limited in time and would cease at the end of the limitation period unless affirmative action were taken by the person claiming such lien by way of recording an instrument.

Prior to this statute, the existing limitations act, section 11, had required that any action or foreclosure sale must be brought within ten years of the time when the right of action or sale accrued. This section had, however, been construed by the court in connection with the limitation statute on promissory notes (permitting unrecorded extensions),23 and the effect was to keep the mortgage alive until the debt

16 Id. at 492, 130 N.E.2d at 113. The court did, however, question whether such a result could not have been better achieved by extending the powers of Equity over such interests.
was barred. In *Livingston v. Meyers*, the court was faced with a specific performance suit based upon a 1954 abstract showing a 1930 trust deed which secured a note due in 1933. There had been no recording as required by section 11b and the court had to determine whether the effect of the section was to terminate the lien completely. After reviewing the legislative intent to make titles merchantable and to replace in the “flow of commerce” properties “needed in our social, economic and commercial life,” the court dismissed the constitutional argument that the act takes away a mortgagee’s right to possession and his title after condition broken, by stating that “Section 11b could under no circumstances be the operative fact of vesting or divesting title in a mortgagee, since it only determines whether a lien does or does not exist.”

Two points should be noted in connection with this act and the decision construing it: (1) The act does more than limit the bringing of an action; in effect, it limits the length of existence of a property right in the absence of affirmative action. But (2) that is not to say that if a mortgagee fails to file the necessary instrument of record the right is extinguished *as between the parties.* The net result, then is, as the court points out, an aid to merchantability—a means for keeping the record up to date.

If section 11b had this effect on mortgages, why not have legislation affecting all ancient claims? In 1959, the Legislature passed the so-called “Merchantability of Title Act.” In the publicity accompanying this legislation, lawyers sometimes tended to overlook the fact that Illinois has had a marketable title act since 1941. This latter act specified that no document or fact which was over seventy-five years old could be considered notice of any claim or right in real estate and could not be admitted in evidence or used to make any title unmarketable; nor

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24 Kraft v. Holzmann, 206 Ill. 248, 69 N.E. 574 (1903).
26 Id. at 332, 129 N.E.2d at 15.
27 Id. at 336, 129 N.E.2d at 17.
28 Zyks v. Bowen, 351 Ill. App. 491, 115 N.E.2d 557 (1953), petition for leave to appeal denied, 5 Ill. App.2d v (1955), involving a suit between a trustee under a trust deed and the heirs of the mortgagor. A written, unrecorded extension agreement was in existence.
29 See also Comment, *The Statute of Limitations as a Defense to Foreclosure in Illinois*, 1957 U. Ill. L. F. 469.
would it serve as the basis for an action to affect real estate. The act designates that it protects "parties hereafter coming into possession of such real estate under claims or color of title," so it would not upset rights existing at the time of the act. The claimant can extend his claim for ten years by appropriate recording and persons under disability are given additional time after removal of the disability to record. While it may be debated whether this act is a limitation act or a true marketability act, it shares the following two characteristics with the usual limitation act: (1) It excepts the interest of a lessor or vendor where possession is held by the lessee or vendee during the period for recording claims and that of a person who has not had a legal or equitable right to sue on his claim, interest, or title; and (2) it makes an exception for persons under disability. The effect, then, is to require a person to go outside the record to examine questions of possession and competence. It has been observed that this statute is much relied upon by title examiners, and that the Illinois State Bar Association has suggested a Title Standard based upon this act. It is interesting to note that in the twenty years since its passage, no appellate level litigation has arisen concerned with this statute.

The new statute is explicitly a limitation statute, stating: "No action based upon any claim arising or existing more than 40 years before the commencement of such action shall be maintained. . . ." to enforce a claim in real estate against the holder of record title who has a forty-year chain of title. To preserve such a claim, the claimant must record an appropriate instrument within a specified time. The act does not protect the holder of record title where the real estate is in the adverse possession of another, and does not apply to the interest of lessor or lessee, an easement which either is apparent or can be proved by physical evidence of its use, a mortgagee where the due date of the mortgage is stated or ascertainable from its face and is not barred by section 11b of the Limitations Act, or any encroachment on a street, highway or on public waters. It explicitly applies to claims of the State

32 Yoder, Marketability of Title, 1949 U. ILL. L. F. 438, 447, refers to the "seventy-five-year Statute of Limitations." SIMES & TAYLOR, IMPROVEMENT OF CONVEYANCING BY LEGISLATION 330 (1960), analyzes the act in the chapter of " Marketable Title Legislation."

33 Yoder, supra note 32.

34 ILL. REV. STAT. ch. 83, § 12.1 (1959). The effective date of the statute is July 14, 1959. Claims and interests arising more than forty years prior to that date may be eliminated unless a notice of the claim is recorded prior to July 14, 1961.

35 Simultaneously, the Reverter Act was amended to reduce its fifty-year period to forty years. ILL. REV. STAT. ch. 30, §§ 37b–h (1959).
of Illinois but not to claims of the United States unless Congress assents. It does not apply to Torrens property. The act specifically permits recording of claims to be made by representatives of persons under disability and unborn and unascertained persons. This act is based on marketable title acts of other states. It is like the Iowa statute\textsuperscript{36} in approach, but has the advantage of a procedure for including claims of persons under disabilities (so that one need not go outside the record to examine these questions) and, while it excludes property in the adverse possession of another, it does not require, as the Iowa statute does, that the record owner be in actual possession (so that vacant property would be covered by the act). The act, then, will serve to keep the record up to date but will not protect against possessory interests or governmental interests, and leaves protection against mortgage liens to the mortgage limitation statute.

The question of the act’s constitutionality has yet to be decided, but since the act serves only to require a recording or re-recording, rather than cutting off rights or requiring a suit for enforcement, and since the act is in the form of a limitations act, purporting to affect procedure only and not rights, it is probable that its constitutionality will be upheld.\textsuperscript{37} Many questions remain unanswered concerning interpretation of the act. For example, does the act protect a subsequent purchaser regardless of his actual knowledge of a claim? At what time does an interest “arise” so that one can start counting the forty years? Much has been written on this type of act, but many ramifications are uncertain.\textsuperscript{38} The important thing to note in terms of legal trend is the final provision of the act\textsuperscript{39} which provides that the act is to be liberally

\textsuperscript{36} 36 IA. CODE ANN. § 614.17 (1958).

\textsuperscript{37} See SIMES & TAYLOR, op. cit. supra note 32, app. A, at pp. 251–69, 271–73, which discusses all of the constitutional concepts involved in marketable title legislation. The favorable attitude of the Illinois court can be implied from Trustees of Schools v. Batdorf, 6 Ill.2d 486, 130 N.E.2d 111 (1955), and Livingston v. Meyers, 6 Ill.2d 325, 129 N.E.2d 12 (1955), referred to in the text.

\textsuperscript{38} The most thorough investigation of the theory of this type of legislation, the existing statutes, and proposed legislation is contained in a 1960 treatise entitled THE IMPROVEMENT OF CONVEYANCING BY LEGISLATION, prepared for the Section of Real Property, Probate, and Trust Law of the American Bar Association and for the University of Michigan Law School by LEWIS M. SIMES & CLARENCE B. TAYLOR. A Bibliography on pp. 359–61 lists some fifty-nine works on marketable title legislation, including BASYE, CLEARING LAND TITLES (1953); Aigler, Constitutionality of Marketable Title Acts, 50 Mich. L. Rev. 185 (1951); Aigler, A Supplement to 'Constitutionality of Marketable Title Acts’—1951–1957, 56 Mich. L. Rev. 225 (1957); Cribbett, A New Concept of Merchantability, 43 Ill. B. J. 778 (1955); Comment, Marketability Acts, A Step Forward for Title Examinations In Illinois, 1957 U. Ill. L. F. 488.

\textsuperscript{39} ILL. REV. STAT. ch. 83, § 12.4 (1959).
construed to achieve “the legislative purpose of simplifying and facilitating land title transactions by allowing persons to rely on a record chain of title as described in . . . [the act].” This section also specifies that the claims extinguished by the act “include any and all interests of any nature whatsoever, however denominated . . . .”

Marketability was further enhanced by modification and, finally, legislative elimination in 1959 of the lien provisions of the Dram Shop Act.\(^4\) The act gives the injured party the option of suing the tavern operator, the owner of the premises who knowingly permitted liquor to be sold, or both.\(^4\) Such a judgment could, of course, create a lien against the real property of the person against whom it was rendered, but the act went further and made the tavern premises liable for a judgment against either the knowing lessor or the lessee, such liability being enforceable by proceedings for the sale of the premises. It was feared that such a lien might exist from the date of the injury. In the 1953 case of *Hyland v. Waite*,\(^4\) the Appellate Court refused to enforce a lien against a bona fide purchaser of the tavern property whose interest arose prior to the filing of the damage suit under the act. While the suit did not answer the question of whether the lien came into existence from the date of the complaint, the date of the judgment, or the date of the initiation of supplemental proceedings to enforce the judgment against the land, the question was made moot by the 1959 legislation. While this potential secret lien was eliminated, the benefit of the more widely used secret lien—the Mechanic’s Lien—was extended to professional engineers and land surveyors.\(^4\)

Marketability was also furthered by certain validating statutes\(^4\) and by at least one major change in Chancery practice. The doctrine of Lis Pendens, codified as a section of the Chancery Act\(^4\) had the effect of “tying up” land titles while chancery suits were pending since all persons acquiring an interest subsequent to the complaint or petition took subject to the outcome of the suit. By amendment in 1959, the court was empowered to permit, “for good cause shown,” the sale,\(^4\)

\(^{44}\) E.g., Ill. Rev. Stat. ch. 95, § 30 (1959), validating certain titles coming through foreclosures.
mortgage, lease, or other transfer of interests in the property free of the result of the suit.\textsuperscript{40} Necessary precautions may be taken, including the posting of a bond, and such an order cannot be granted where the object of the suit is specific performance.

The law relating to adverse possession—long the enemy of those who “rely on the record”—has not changed appreciably over the last ten years.\textsuperscript{47} There has been a tendency, however, to protect some possessory rights which do not fall within the technical scope of the adverse possession laws.\textsuperscript{48} For example, adjoining owners who use a common driveway by mutual verbal agreement may be treated as having created revocable licenses (which could never ripen into an easement by prescription)\textsuperscript{48} or as having made a verbal promise to grant an easement, which, being partially performed, may be irrevocable.\textsuperscript{50} This last point is consistent with some earlier decisions which hold that where large expenditures have been made in reliance on a license, the license may be held to be irrevocable.\textsuperscript{64}

III. MORTGAGES

The adaptation of laws to the needs of a commercial society through legislation is strongly illustrated in the field of mortgage lending. A 1953 statutory amendment was designed to protect foreign banks and insurance companies which loan money on the security of Illinois real estate. This statute states that any foreign corporation whose charter permits it to invest and loan money “may, without qualifying to transact business in this state purchase or contract to purchase notes or other evidences of indebtedness or interests therein secured by any security instrument.”\textsuperscript{52} Such a purchase by itself is not to be deemed doing business and the foreign corporation is assured of the same rights and powers for the recovery, servicing, protection, and enforcement of such notes as private persons, citizens of this state. The power to

\textsuperscript{40} Ibid.

\textsuperscript{47} The case of Montgomery v. Downey, 17 Ill.2d 451, 162 N.E.2d 6 (1959), is noteworthy by virtue of the fact that it puts a prescriptive easement against a natural drainage easement.

\textsuperscript{48} See ILL. REV. STAT. ch. 83, §§ 1, 4, 6, 7 (1959).

\textsuperscript{49} Muller v. Keller, 18 Ill.2d 334, 164 N.E.2d 28 (1960).

\textsuperscript{50} Anastoplo v. Radford, 14 Ill.2d 526, 153 N.E.2d 37 (1958).


\textsuperscript{52} ILL. REV. STAT. ch. 32, § 212 (1959). (Emphasis added.)
deal with the security property is broad except that if the foreign corporation acquires title to the property it must resell within five years. While this act aids the investing of money in Illinois by outside lenders, it raises the question of whether the investor may make direct loans or must purchase existing loans.\textsuperscript{53}

The use of combined real estate mortgages and chattel mortgages to secure loans was simplified by a 1951 statute exempting public utilities from the recording requirements of the Chattel Mortgage Act,\textsuperscript{54} and in 1955 the recording section of the Chattel Mortgage Act was modified to extend the time for which a chattel mortgage can remain effective.\textsuperscript{55} The old statute, under which notice could be maintained for a maximum of five years, was amended to permit the periodic filing of affidavits to extend the notice to up to twenty years and ninety days. This facilitates the use of long-term mortgages combining real and personal property.

During the last ten years, the courts and Legislature were again faced with the struggle of borrowers and lenders for protection. This see-saw battle through the ages had resulted in the law of Illinois affording fairly broad protections to mortgagors and persons claiming through them, in the form of a fifteen-month statutory redemption period after sale.\textsuperscript{56} Only two other states have a longer statutory redemption period, and it has been estimated that an average foreclosure in Illinois covers seventeen months.\textsuperscript{57} Does this redemption period help the borrower more than it hurts the lender? The lenders thought not, pointing out that less than one per cent of properties foreclosed are ever redeemed.\textsuperscript{58}

On the other end of the scale, as a protection for the lender, was the statutory right to a deficiency judgment covering the portion of the debt not realized from the property by the foreclosure sale.\textsuperscript{59} Was this

\textsuperscript{53} Prior to the amendment, Ill. Laws 1897, at 176, purported to authorize direct loans.

\textsuperscript{54} Ill. Rev. Stat. ch. 95, § 1 (1959).


\textsuperscript{56} Ill. Rev. Stat. ch. 77, § 18 (1959). In 1952, the Supreme Court extended this right to a judgment creditor of the mortgagor whose judgment was not even entered until after the foreclosure sale, and the court also rejected the contention that Torrens property was not subject to redemption. Wojcik v. Stolecki, 411 Ill. 443, 104 N.E.2d 288 (1952).

\textsuperscript{57} Prather, Foreclosure of the Security Interest, 1957 U. Ill. L. F. 420, 450.

\textsuperscript{58} Id. at 452.

\textsuperscript{59} Ill. Rev. Stat. ch. 95, § 17 (1959).
a valuable safeguard for the lender? Apparently not, since it was estimated that only seven per cent of the dollar amount of deficiency judgments is ever realized. The result of these two statistics (plus the arguments of many interested parties) was a set of broad changes in redemption law enacted by the Legislature in 1957 and 1959. To begin with, the fifteen-month statutory redemption period—twelve months for redemption by the defendant or any person claiming through or under the defendant, and an additional three months for redemption by judgment and decree creditors—was consolidated into a single twelve-month period. The first nine months are open to redemption only by the defendant and those claiming through or under him, and the last three months are open to redemption by these parties or by judgment and decree creditors. The question of priority of redemptions and successive redemptions is spelled out in the statute.

Secondly, the authority to waive the statutory redemption period was extended. Corporations had long been permitted by statute to waive this right at the time of executing the mortgage instrument. The effect of this waiver was to limit the redemption period to three months, during which time judgment and decree creditors could redeem. In practice, many mortgagees asked corporate trustees to waive the redemption period in the mortgage, relying on this act. Whether the beneficiaries would be bound by such a waiver was uncertain. Part of the 1957 legislation was to add section 18b to the Judgment Act to permit a corporate trustee to waive the redemption right when so authorized by the trust instrument or by the beneficiaries. The waiver would not eliminate the right of judgment and decree creditors of the trust to redeem within three months of the sale and is not permitted where the property involved is improved with a dwelling for not more than four families, where the proceeds of the loan secured are to be used for such an improvement, or where the land is agricultural.

Two entirely new sections were added to the Judgment Act in 1957.
to create methods of foreclosure which would reduce the statutory redemption period to a minimum. The first provided that if: (1) the decree of foreclosure found the value of the property to be less than ninety per cent of the amount of the debt owing and if, (2) the mortgagor executed a written waiver of his right to a deficiency decree, the defendant and persons claiming through him would be limited to three months after sale to make redemption, and judgment and decree creditors would have the succeeding three months. The procedure is limited to the foreclosure of mortgages made after the effective date of the act, July 1, 1957. While a deficiency judgment may not be too valuable to a mortgagee, the right to collect rents during the ensuing redemption period is of value. Did the waiver of a deficiency decree mean that the mortgagee was abandoning this right to rents during the redemption period? In 1959, the Legislature clarified this by amending section 18c to state explicitly that the waiver barred any action or remedy for the collection of the indebtedness against any and all persons liable therefore, but that it did not bar the collection by the mortgagee of the rents, issues, and profits of the land during the redemption period for the purpose of applying these sums to the deficiency.

The second method of foreclosure, introduced in 1957 by Section 18d, requires only that the mortgagor, after the institution of foreclosure proceedings, consent to the entry of a decree vesting absolute title in the mortgagee and declaring the debt satisfied. Any defendant or any person interested in the premises through or under a defendant has three months to redeem. Judgment and decree creditors share the same three-month period. In either case, since there has been no sale, the amount of money necessary for redemption is based on the amount which the decree found was due on the mortgage. The original wording of this section left this procedure to the complete discretion of the mortgagor. If he felt the property would bring little money at a foreclosure sale and a large deficiency decree would result, he could "beat" the decree by filing his consent to the entry of a decree vesting title in the mortgagee and satisfying the debt. This "loophole" was remedied by an amendment in 1959.

The constitutionality of these changes in the statutory redemption period has still to be passed on. Prior to the last-mentioned amendment

66 ILL. REV. STAT. ch. 77, § 18c (1959).
68 ILL. REV. STAT. ch. 77, § 18d (1959).
70 ILL. REV. STAT. ch. 77, §18c (1959).
to section 18d, requiring the consent of the holder of the indebtedness to any decree substituting the property for the debt, it could well have been contended that vested rights of the mortgagee were being taken away. It would also seem that if any of the changed provisions were applied to instruments executed prior to the effective date of the statute, the effect would be to impair the obligation of contracts. It is interesting to note, therefore, that a retroactive effect was given to one of these changes by the Illinois Supreme Court in *Mt. Morris Sav. & Loan Ass'n v. Barber.* In that case, a judgment creditor of the mortgagor was held to have no right to redeem fourteen months after the date of the foreclosure sale, despite the fact that the mortgage in question was dated prior to the effective date of the amendment. The court argued that judgment creditors still had three months to redeem as they had before the amendment, and that moving the three-month period up to the nine- to twelve-month period (rather than the twelve- to fifteen-month period) was merely a procedural change. In answer to an allegation that this retroactive application of the amendment tended to impair the obligation of contracts, the court pointed to the fact that the judgment creditor was not a party to the mortgage. Query: Can the amendment be applied retroactively as against a party to the mortgage?

Two other 1959 statutes concerned with foreclosures are worth noting. One is designed to protect purchasers at the foreclosure sale and the other, to protect mortgagors. The first provides a method for

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71 In Chicago Title & Trust Co. v. Robin, 361 Ill. 261, 270, 198 N.E. 4, 8 (1935), it was stated: "Each bondholder has the absolute right to determine for himself, in case of default, whether he shall take his loss and quit, or continue to gamble; if the property is sold at public sale, he has a right to take his proportion of the best bid that can be secured in cash, and cannot be compelled to become an owner of an undivided interest in the property" (quoting from Werner, Harris & Buck v. Equitable Trust Co., 35 F.2d 513, 514 (10th Cir. 1929)). See also Bronson v. Kinzie, 42 U.S. (1 How.) 311 (1843); McCracken v. Hayward, 43 U.S. (2 How.) 608 (1844); Fisher v. Green, 142 Ill. 80, 31 N.E. 172 (1892); Richardson v. U.S. Mortgage & Trust Co., 194 Ill. 259, 62 N.E. 606 (1901).

72 It has been pointed out in 3 Jones, Mortgages § 1694 (8th ed. 1928) that the law in force at the date the mortgage was signed is the law controlling foreclosure of that mortgage and redemption from the foreclosure sale, since the remedy became part of the contract.

73 17 Ill.2d 523, 162 N.E.2d 347 (1959).

74 For a complete discussion of the history of the right of redemption and the effect of the current amendments, see Hermann, Redemptions from Foreclosure and Other Judicial Sales in Illinois (1960), an extension of an address by Milton Hermann before the Real Estate Law Section of the Illinois State Bar Association, Nov. 6, 1959.
a purchaser at a foreclosure sale to pay, during the redemption period, principal, interest, or other amounts due under a prior mortgage, and thus protect his interest.\textsuperscript{75} The amount paid is added to the redemption price with interest. This supplements the purchaser’s right to pay and recover taxes and assessments due during the redemption period.\textsuperscript{76} The second statute\textsuperscript{77} gives the mortgagor a temporary breather against the effect of an acceleration clause. When the mortgage (executed after the effective date of the statute) is defaulted and acceleration occurs, the mortgagor is permitted within ninety days of service in a foreclosure suit, or before entry of a decree of foreclosure, to pay the amount then due (including costs and attorney’s fees) other than the accelerated amount. The suit must then be dismissed and the mortgage continues in force. This relief can be used only once in five years.

Query: What is the effect of this statute where acceleration has been occasioned by breach of a covenant to insure or repair, or a covenant not to convey without approval of the mortgagee?

IV. JOINT TENANCIES

The struggle between ancient common-law formalism and the needs of society is typified by the developments in the law concerned with Joint Tenancies. Time and again, the Illinois Supreme Court has reaffirmed the requirement that a joint tenancy requires the “four unities” of title, time, interest, and possession. Unfortunately, it is difficult to determine the exact point at which one of the unities is destroyed and the joint tenancy severed. In \textit{Jackson v. Lacey},\textsuperscript{78} a joint tenant died after his interest had been levied upon by a judgment creditor and sold, but prior to issuance of a sheriff’s deed. The court held that the joint tenancy had not yet been severed and the surviving joint tenant took free of the judgment levy and sale.\textsuperscript{79} In \textit{Schuck v. Schuck},\textsuperscript{80} a joint tenant died after a decree of partition had been entered and a sale

\textsuperscript{75} ILL. REV. STAT. ch. 77, § 28a (1959).
\textsuperscript{76} ILL. REV. STAT. ch. 77, § 28 (1959).
\textsuperscript{77} ILL. REV. STAT. ch. 95, § 17.1 (1959).
\textsuperscript{78} 408 ILL. 530, 97 N.E.2d 839 (1951).
\textsuperscript{79} See Van Antwerp v. Horan, 390 ILL. 449, 61 N.E.2d 358 (1945), holding that the surviving joint tenant takes where the other joint tenant died after the levy but prior to the sale. What if the death occurred after the redemption period but prior to the issuance of a deed? See Hoeffner v. Hoeffner, 389 ILL. 253, 59 N.E.2d 684 (1945), which states that the holder of a certificate of sale from a mortgage foreclosure has real property even before a master’s deed issues.

\textsuperscript{80} 413 ILL. 390, 108 N.E.2d 905 (1952).
had. The court held that the decree of partition severed the unity of possession and hence destroyed the joint tenancy.

In *Klouda v. Pechousek*[^81] one joint tenant executed and delivered a deed of his interest, an act which has always been considered as severing a joint tenancy. In this case, however, the deed was not effective since the property was in Torrens and it had not been registered. The court treated the deed as creating a contract to convey, vesting an equitable title in the grantees and hence, severing the joint tenancy.[^82] Such a contract is to be distinguished from an executory contract signed by both joint tenants. As the court affirmed in *Watson v. Watson*,[^83] the death of one joint tenant after the execution of such a contract by both joint tenants gives the survivor a right to the total proceeds. This is true even though the contract contains no provision that the proceeds will be held jointly, and the doctrine of equitable conversion will not be applied to defeat this as the obvious intention of the parties. The court drew the line as to this carry-over of joint tenancy attributes to the proceeds of sale in the case of *Public Aid Comm'n v. Stille*.[^84] The court affirmed the position of the *Watson* case, but held that when a joint tenant died after the contract of sale was fully executed and the purchase money paid to the vendors, the surviving joint tenant was not entitled to the proceeds as joint tenancy property.[^85] While the result is understandable, it is interesting to contrast the theory of this case with that underlying a 1955 amendment to the Joint Rights and Obligations Act[^86] transferring the right of survivorship to the award for joint tenancy property taken by eminent domain proceedings.

Two other technical questions concerning joint tenancies were settled by legislation in 1953. One was an amendment to section 1 of the Joint Rights and Obligations Act formally permitting the creation of estates in joint tenancy in an undivided interest in land.[^87] (This point had been upheld a few months before in the case of *Klouda v. Pechous*[^81].)[^82]  

[^81]: 414 Ill. 75, 110 N.E.2d 258 (1953).
[^82]: Lawler v. Byrne, 252 Ill. 194, 96 N.E.892 (1911).
[^83]: 5 Ill.2d 526, 126 N.E.2d 220 (1955).
[^84]: 14 Ill.2d 344, 153 N.E.2d 59 (1958).
[^85]: This decision is interesting in its discussion of the literature and decisions of other states, some of which treat a contract signed by all joint tenants as severing the joint tenancy (e.g., Nebraska and Iowa), and some of which, like Illinois, do not (e.g., Wisconsin, Massachusetts, and Florida).
[^86]: ILL. REV. STAT. ch. 76, § 2(d) (1959).
[^87]: ILL. REV. STAT. ch. 76, § 1 (1959).
relying on FREEMAN, COTENANCY AND PARTITION (1874), and on a California appellate court case. The other statute attempted to overcome the technical objection to a conveyance by a title holder to himself and another in joint tenancy. Such a conveyance lacks the unity of time and title required of a joint tenancy and has always been construed as creating nothing more than a tenancy in common. The resulting practice was the use of a conveyance to a "dummy" and back, creating the fiction of the necessary unities. The new statute states that in the future, any conveyance declaring the estate created to be not in tenancy in common but with right of survivorship (or in joint tenancy), shall create an estate with right of survivorship, notwithstanding the fact that the grantor is one of the grantees. This "estate with right of survivorship" "shall have all of the effects of a common law joint tenancy estate." The new estate is not the common-law estate, but is declared to have all its effects. This leaves a number of questions unanswered. How is the tenancy severed? What happens to the creditors of the grantor if he survives the new grantee—that is, does his title date back to the original grant to him or to the date of the second grant?

The attempt of the Supreme Court to make the classic theory of joint tenancy comply with the demands of justice without the assistance of the legislature, was illustrated in two cases dealing with the question of one joint tenant murdering the other. In the first case, Welsh v. James, the heirs of the wife contended that the surviving husband (who was insane and had not been convicted of murder) held the legal title to the whole property, but that one-half was held on a constructive trust for the benefit of these heirs and that the other half was held on a trust for his own benefit for life with the remainder to these heirs. The court rejected this contention on the ground that "joint tenants have one and the same interest accruing by one and the same conveyance, at one and the same time, and held by one and the same undivided possession," and that to hold that the husband was

88 414 Ill. 75, 110 N.E.2d 258 (1953).
89 Id. at 88, 110 N.E.2d at 266; 75 Cal. App.2d 580, 171 P.2d 152 (1946).
91 ILL. REV. STAT. ch. 76, § 1b (1959).
92 For an excellent discussion of this and related problems, see Mann, Joint Tenancies Today, 1956 U. ILL. L. F. 48.
93 408 Ill. 18, 95 N.E.2d 872 (1951).
94 Id. at 23, 95 N.E.2d at 874.
only a trustee "would be to hold that by the unjustifiable killing of his wife, for which he has not been convicted, he forfeited his right to an estate in property which was vested in him, not by the death of his wife, but by the instrument creating the joint tenancy long before her death." (citing Illinois Constitution of 1870, article II, section II, that "no conviction shall work corruption of blood or forfeiture of estate. . ."). In 1955, in the case of *Bradley v. Fox*, the same court explicitly rejected "the legal fiction that a joint tenant holds the entire property at the date of the original conveyance, and acquires no additional interest by virtue of the felonious death of his cotenant." The principle which influenced the court was the maxim that no man shall profit by his own wrong. After reviewing cases of insurance law and statutes relating to a murderer taking by devise or descent from his victim, the court considers the way in which various states have handled the joint tenancy problem. After commending the constructive trust approach recommended by legal writers, including the Restatement of Restitution (section 188b), the court takes a contract approach instead, stating that there is an implied condition in every joint tenancy agreement that neither party will acquire the interest of the other by murder, and concluding: "It is our conclusion that Fox by his felonious act, destroyed all rights of survivorship and lawfully retained only the title to his undivided one-half interest in the property in dispute as a tenant in common with the heir-at-law of Matilda Fox, deceased."

When a person buys property and has title conveyed to another, experience indicates that in the absence of evidence of an intention to make a present gift, the purchaser probably did not intend the title

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95 Id. at 24, 95 N.E.2d at 875.
99 Divesting the murderer of the entire estate: N.Y.—Bierbrauer v. Moran, 244 App. Div. 87, 279 N.Y.S. 176 (1935); N.J.—Merrity v. Prudential Ins. Co., 110 N.J.L. 414, 106 Atl. 333 (1933); depriving him of one-half of the property; Mo.—Grose v. Holland, 357 Mo. 874, 211 S.W.2d 464 (1948); imposing a constructive trust on the entire estate held by the murderer for the benefit of the heirs of the victim; Minn.—Vesey v. Vesey, 237 Minn. 295, 54 N.W.2d 385 (1952); Del.—Colton v. Wade, 32 Del. Ch. 122, 80 A.2d 923 (1951); Mo.—Barnett v. Covey, 224 Mo. App. 913, 27 S.W.2d 757 (1930); constructive trust modified by a life estate in one-half of the property; N.C.—Byrant v. Bryant, 193 N.C. 372, 137 S.E. 188 (1927); N.J.—Nieman v. Horff, 11 N.J. 55, 93 A.2d 345 (1952).
holder to be the beneficial owner of the property. Courts of Equity looking at this situation will declare that the new title holder is, in fact, holding the land on a resulting trust for the benefit of the person who supplied the consideration.\textsuperscript{103} On the other hand, a purchaser may have title transferred to himself and someone else in joint tenancy. In the absence of evidence of an intention to make a present gift, two probabilities present themselves rather than one: Either the purchaser intended his joint title holder to be merely his nominee (holding on a resulting trust) or, while no intention of present gift existed, the joint tenancy device was intended as a substitute for a testamentary gift. Either way, the two "joint tenants" do not share the unity of interest technically necessary to the creation of a valid joint tenancy.\textsuperscript{104} The limitations of this approach were examined in several relatively recent cases. In 1953, in \textit{Paluszek v. Wohlbrab},\textsuperscript{105} some contribution to the purchase price was made by each of the joint grantees, but the contributions were unequal. The court refused to apply the resulting trust theory and held that a valid joint tenancy had been created. The other variation on this fact situation—that in which two people contribute to the purchase price and the conveyance is made to one of them—was considered in the Appellate Court in \textit{Merschat v. Merschat}.\textsuperscript{106} In that case, two brothers acquired title "in joint tenancy" but on the death of one, his widow came forward to show that she had contributed part of the purchase price of his share. The court reasoned that if he held a portion of his interest as trustee for his wife, then the two brothers did not have a unity of interest and the joint tenancy failed.

A final variation centered on the established practice of an owner conveying to a "dummy" who immediately reconveys to the owner and others in joint tenancy. In \textit{Kraft v. Kretchman},\textsuperscript{107} the Illinois Supreme Court considered a conveyance from a mother to a "dummy" and a conveyance from the "dummy" to the mother and two children in joint tenancy. The court was presented with the argument that since the total consideration for the second conveyance was supplied by the mother, no joint tenancy was created and on her death the two children (or the survivor) held as trustees for her heirs. This argument

\begin{footnotes}
\item[101] E.g., Baughman v. Baughman, 283 Ill. 55, 119 N.E. 49 (1918).
\item[102] Kane v. Johnson, 397 Ill. 112, 73 N.E.2d 321 (1947).
\item[103] 1 Ill.2d 363, 115 N.E.2d 764 (1953); see Comment, 42 Ill. B.J. 496 (1954).
\item[105] 17 Ill.2d 71, 160 N.E.2d 806 (1959).
\end{footnotes}
was rejected by the court, stating that the fact of prior ownership by the mother took this case out of the rule concerning consideration advanced by one grantee and that the relationship of the parties created a presumption of gift.

V. LEASES

The leasehold cases over the last ten years were concerned to a large extent with a further definition of a lease as an interest in real property. A lease has been defined as a chattel real partaking of the nature of personality. For many purposes, a lease is treated as personal property, but in an increasing number of statutes, a leasehold estate is classified as real property. This is true of the Judgment Act which states that the lien of a judgment attaches to the debtor's "real estate" including leaseholds with an unexpired term of more than five years. It is true of the Conveyancing Act, which applies to "real estate" including "lands, tenements and hereditaments" and "chattels real." It is true of the Revenue Act, which treats leases as real estates for purposes of including them for taxation. In 1954, the Illinois Supreme Court held that a long term leasehold was subject to the terms of the Partition Act affecting "lands, tenements and hereditaments." Under the new Illinois Savings and Loan Act, a savings and loan association is permitted to loan funds "on the security of real estate" which includes "a leasehold title of not less duration than 14 years beyond the maturity of the loan." On the other hand, the Illinois Insurance Code, which formerly permitted domestic insurance companies to invest in first mortgages on "improved unencumbered real estate," had to be specifically amended in 1955 to permit investments in first mortgages "upon leasehold estates in improved real property for a term of years where twenty-five years or more of the term is unexpired, and where

107 E.g., on the death of the lessee, the estate passes to the decedent's personal representative, Thornton v. Mehring, 117 Ill. 55, 25 N.E. 958 (1885).
114 Ill. Laws 1953, at 1263.
unencumbered except by rentals accruing therefrom to the owner of the fee.”

A leasehold is not subject to dower, but it is subject to homestead. Not only must a lease for more than a year be in writing and the estate mortgaged with the formality of a real estate mortgage, but a 1953 decision affirmed that to be valid, it must be delivered.

The relationship of the courts and the legislature in declaring the law is shown by several cases dealing with the contract aspect of a lease and how far the freedom of contract extends before public policy is violated. The question focused on the right of a landlord, by appropriate language in the lease, to protect himself from liability for his own (or his agent’s) negligent acts. In 1953, in the case of *Jackson v. First Nat’l Bank*, the Illinois Supreme Court upheld an exculpatory clause in a lease of business property and permitted the landlord to escape liability for injury to a tenant occasioned by a latent defect in a stair railing on common stairs—i.e., a condition outside both the knowledge and control of the tenant. While recognizing certain exceptions, the court held that there was nothing inherent in the landlord-tenant relationship which created inequality of bargaining power and that the agreement was not against public policy.

In 1958, in *O’Callaghan v. Waller & Beckwith Realty Co.*, this same position was adopted by the court in a case involving a residential lease, but it was suggested by the court that the question of defining public policy in this area was a matter for legislative concern. A dissent was entered in this case based primarily on the inequality of bargaining power between residential landlords and tenants at the time the lease was entered into. The *O’Callaghan* opinion was handed down in Novem-

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115 ILL. REV. STAT. ch. 73, § 737.2 (1959).
117 ILL. REV. STAT. ch. 52, § 1 (1959).
122 15 Ill.2d 436, 155 N.E.2d 545 (1958).
123 The dissent, Id. at 442, 155 N.E.2d at 548, noted the authorities relied on in Simmons v. Columbus Venetian Bldg., 20 Ill. App.2d 1, 155 N.E.2d 372 (1958), which reluctantly followed the *Jackson* decision. A supplemental opinion was filed in the *Simmons* case, based on the *O’Callaghan* case, and denying a petition for rehearing, 20 Ill. App.2d 33 (1958).
ber of 1958, and one of the first bills introduced and passed by the legislature when it met in 1959 was an act declaring unenforceable a lease provision exempting the lessor from liability for damages for injuries to person or property caused by or resulting from the negligence of the lessor or his agents, servants, or employees in the operation or maintenance of the premises.\textsuperscript{124} Such a covenant is declared to be against public policy, but the statute exempts from its provisions any business lease involving a governmental body or agency.\textsuperscript{125} In fairness to the court, it should be pointed out that the benefits of strict contract theory were extended to the tenant as well as to the landlord, and in \textit{Cerny-Pickas \& Co. v. C. R. Jahn Co.},\textsuperscript{126} a commercial lease containing clauses requiring the surrender of the premises in good condition "loss by fire and ordinary wear excepted," was held to absolve a lessee from liability for losses from a fire caused by the lessee.\textsuperscript{127} The decision was based in large measure on the \textit{Jackson} decision, but while the \textit{Jackson} decision was unanimous, \textit{Cerny-Pickas} had two Justices dissenting.\textsuperscript{128} The dissent refused to interpret the terms of the lease as creating an exculpatory clause. Meanwhile, numerous appellate court cases reviewed and reworked the question of a landlord's general liability for injuries to tenants\textsuperscript{129} and strangers.\textsuperscript{130}

\textsuperscript{124} \textit{Ill. Rev. Stat.} ch. 80, § 15a (1959).

\textsuperscript{125} In \textit{Valentin v. D. G. Swanson \& Co.}, 25 Ill. App.2d 285, 167 N.E.2d 14 (1960), this act was held not to apply to a case which arose prior to the act, but since the tenant's wife was the person sustaining the injury, the court refused to bind her to the terms of the lease.

\textsuperscript{126} 7 Ill.2d 393, 131 N.E.2d 100 (1956), reversing 4 Ill. App.2d 164, 123 N.E.2d 858 (1956), and 347 Ill. App. 379, 106 N.E.2d 828 (1952).

\textsuperscript{127} It should be noted, however, that while the court held the clause valid, it proceeded to construe it \textit{against} the lessee in this case.

\textsuperscript{128} 7 Ill.2d at 399, 131 N.E.2d at 105.


\textsuperscript{130} In \textit{Wagner v. Kepler}, 411 Ill. 368, 104 N.E.2d 231 (1951), the court restated the existing law to the effect that a landlord is liable for injuries to strangers occasioned by a defective or dangerous condition of which he has actual or constructive knowledge and which existed at the time of the leasing. The court then set to rest the question of whether a month-to-month tenancy is a single continuous tenancy or constitutes a new letting at the beginning of each month. Reviewing numerous old English and American cases, it held such a tenancy to be continuous.
Since a lease is both a contract and an interest in real property, both contract law and real property law came into play in the courts' consideration of other individual lease provisions as well.\textsuperscript{131}

VI. CONTRACTS FOR THE SALE OF LAND

The process by which law is changed by the court alone was displayed most clearly in a 1958 case dealing with specific performance of a contract for the sale of land. In \textit{Gould v. Stelter},\textsuperscript{132} the Illinois Supreme Court was asked to consider a contract which had been signed by the seller and a nominee of the buyer. In dismissing the buyer's petition for specific performance, the lower court relied on the equitable doctrine of "mutuality of remedy"—the doctrine which states that specific performance is a permissible remedy only where the contract is such that it might, at the time it was entered into, have been enforced by either of the parties against the other. The buyer's failure to sign at the time the contract was entered into meant that the contract was unenforceable against him then, and so he could not be permitted to enforce it now. In reversing the lower court, the Supreme Court took two separate approaches. The majority, through Justice Schaefer, after reviewing the 1858 case of \textit{Gage v. Cummings},\textsuperscript{133} which sets forth the doctrine, noted that: (1) numerous exceptions had grown up in Illinois; (2) other jurisdictions have rejected the doctrine as enunciated; and (3) legal scholars have criticized the doctrine. The decision then specifically rejected the doctrine as a bar to specific performance, and used a quotation by Justice Cardozo: "'What equity exacts today as a


\textsuperscript{132}14 Ill.2d 376, 152 N.E.2d 869 (1958).

\textsuperscript{133}209 Ill. 120, 70 N.E. 679 (1904). This decision was based on a statement in \textit{Fry, Specific Performance} § 286 (1858).
condition of relief is the assurance that the decree, if rendered, will operate without injustice or oppression either to plaintiff or defendant. ... Mutuality of remedy is important in so far only as its presence is essential to the attainment of that end." 184 Gage, and part of a subsequent decision, 185 are specifically overruled. Mr. Chief Justice Daily filed an opinion concurring in the result but rejecting the reasoning of the majority. 186 He first found fault with the majority's statement of the doctrine, maintaining that the Gage decision—which emphasized that mutuality must be present at the time of inception of the contract—had been modified by subsequent decisions, all of which were consistent. He then pointed out that the facts of the present case would bring it within this modified doctrine, and criticized the new rule laid down by the majority. "Such a doctrine, having been considered in scores of cases and by many learned judges of this court, should be discarded only when the case at hand demands it and then only upon the strongest evidence of inadequacy." 187

It should be noted in passing that both the majority and minority opinions refer to the 1956 case of Laegeler v. Bartlett, 188 which stated that where an unbound party submits to the jurisdiction of the court for the purpose of asking for specific performance, he thus makes the contract mutual. 189 The majority in a sense treated this as the exception that broke the camel's back. The minority treated it as a natural outgrowth of a rule which had already been modified. 190

VII. LEGAL CONCESSIONS TO URBAN NEEDS

A number of points considered by the court and Legislature over the last ten years were necessitated by the pressures of urban living. Illinois

187 Id. at 384, 152 N.E.2d at 873.
188 10 Ill.2d 478, 140 N.E.2d 702 (1957), citing Ullsperger v. Meyer, 217 Ill. 262, 75 N.E. 482 (1905).
189 Moehling v. Pierce, 3 Ill.2d 418, 121 N.E.2d 735 (1954), holding that tender of performance by the plaintiff in a specific performance suit can come at any time prior to the decree since Equity acts on conditions as they exist at the time of the decree, not—as in Law—at the time of filing the suit.
190 For a consideration of the related problem of trying to obtain an order for specific performance where one of two owners failed to sign the contract, see Madia v. Collins, 408 Ill. 338, 97 N.E.2d 313 (1951), and Ennis v. Johnson, 3 Ill.2d 383, 121 N.E.2d 480 (1954).
had long recognized the doctrine of lateral support, based on a property right which the owner of land has to have his land supported by adjoining land. In theory, this right is limited to the support of land in its natural state, and not support of buildings and improvements. The law in this area, and the related tort area dealing with negligent excavation, has become fairly well defined over the years except for the most practical question of who has responsibility for safeguards during excavation—the excavator or the owner of the adjoining property. Decisions on this point implied that if a building stood on the lot in question, the owner of the lot had the responsibility for protecting it, but in at least one case, the excavator who expended funds to protect the adjoining improved land was denied recovery from the landowner. This question was settled by enactment of a statute in 1957 which provided that the owner or possessor of land on which an excavation is to be made must give reasonable written notice to adjacent owners stating the depth of the proposed excavation and the date when it will begin. If the excavation is to be not more than the "standard depth" of foundations—defined as eight feet below street grade or below the adjoining land—but it is deeper than the foundations of the adjoining buildings and so close as to endanger the same, the owner of the adjoining building must be given at least thirty days to protect his property, together with a license to enter the property to be excavated. The excavator need then take only reasonable care to support the adjoining lands—exclusive of buildings. If the proposed excavation is to be deeper than "standard depth of foundations," the owner of the land upon which the excavation is to be made must protect the adjoining land and buildings at his own expense.

The practice of dividing tracts of land into smaller and smaller pieces by means of metes and bounds description—free of the regulation of the Plat Act—was severely limited by a 1955 amendment to that act. The amendment requires the filing of plats showing ap-

141 City of Quincy v. Jones, 76 Ill. 231 (1875).
143 Korogodsky v. Chimberoff, 256 Ill. App. 225 (1930). See also Note, 24 MINN. L. REV. 852 (1940); Note, 50 YALE L. J. 1125 (1941).
144 ILL. REV. STAT. ch. 70, § 10 (1959).
146 ILL. REV. STAT. ch. 109, § 1 (1959).
provals by specified governmental bodies, in practically every situation where a tract of land is divided into two or more parts any one of which is less than five acres in size. The enforcement of the act was placed in the hands of the Recorder, who can refuse to accept instruments which do not conform to the act. The exceptions to the amendment underwent a revision in 1959 which purported to broaden the exceptions, but which in fact had a restricting influence as well.

As urban land becomes more scarce, and the needs of the community more pressing, park land attracts the attention of many. To some, a park is a piece of wasted land which would better serve the community by being converted into home sites, public parking facilities, or schools. To others, parks are valuable havens to be preserved at all costs. Both sides have centered attention on the question of defining the terms of dedication and the diverse property interests which arise from the designation or creation of a park. In 1952, Grant Park was once again the center of the controversy—this time caused by the proposed construction of an underground parking lot. In Michigan Blvd. Bldg. Co. v. Chicago Park Dist., the Illinois Supreme Court reaffirmed its prior position with regard to dedications in general and Grant Park in particular, stating that while a park cannot be diverted by the Park District from the purpose for which it was dedicated, and while Grant Park was dedicated solely for use for a “public purpose” or for a park, and while the circumstances surrounding the dedication of Grant Park resulted in a restriction against the construction of buildings in the park, the construction of a public underground parking garage would not violate any of these restrictions. The prior cases concerning Grant Park also established that the dedication created certain property rights in abutting landowners, which rights are in the nature of easements. This 1952 case describes the easement in question as one for light, air, and view.

148 E.g., under the 1955 provisions, the act did not apply to “the division of lots and blocks in recorded subdivisions.” Ill. Laws 1955, at 2018. Under the 1959 amendment, this exception is limited to “the division of lots or blocks of less than 1 acre in any recorded subdivision which does not involve any new streets or easements of access.” Ill. Rev. Stat. ch. 109, § 1 (3) (1959).
151 The only prior attempt at defining the easement was in McCormick v. Chicago Yacht Club, 331 Ill. 514, 163 N.E. 418 (1928), which included an easement for “passage.”
The other major decision concerning public lands was City of Aurora v. Y.M.C.A. In this situation, property had been conveyed to the city by deeds and the court interpreted the deeds as creating an express trust for public purposes. The court ruled that the city was not authorized to convey property held on express trust, but volunteered that if conditions warranted a change in use of the land the courts of equity would have jurisdiction to modify the use through the application of cy pres. A recent decision dealing with Garfield Park would have substituted condemnation for equitable supervision of park land held in trust.

Another rule based on housing practice is that concerning the enforceability of "protective covenants" placed on houses in a "development." In Merrionette Manor Homes Improvement Ass'n v. Heda, it was held that where the builder reserved the right to assign the power to enforce these covenants to a homeowners association, such an assignment is valid and the organization can bring actions in its own name. While the result is not inconsistent with prior law, a new rationale had to be developed.

The last noteworthy concession to urban life was a 1955 ordinance creating a new lien in favor of a municipality which is forced to bear the expense of cutting weeds by virtue of a refusal of the owner to do so. While the lien purports to be superior to all other liens and encumbrances on the affected real estate, other than tax liens, notice of the weed-cutting lien must be recorded within sixty days after the expense is incurred. The lien is specifically ineffective against any rights

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152 9 Ill.2d 286, 137 N.E.2d 347 (1956).

153 It would seem that the general power of Equity to supervise trusts would include the power to permit the trustee to deviate from the terms of the trust where necessary to preserve the trust purpose. See Fisch, Cy Pres Doctrine in the United States 198-201 (1950). If cy pres were applied, rather than the deviation doctrine, the only necessary parties to such a suit would appear to be the trustee, the settlor, and the Attorney General. Stoner Mfg. Co. v. Y.M.C.A. 13 Ill.2d 162, 148 N.E.2d 441 (1958).

154 People v. Chicago Park Dist., Nos. 36171, 36172, Sup. Ct. Ill., Jan. 17, 1961, overruling South Park Comm'rs v. Montgomery Ward & Co., 248 Ill. 299, 93 N.E. 910 (1910). This decision was later withdrawn when the suit became moot.


156 Van Sant v. Rose, 260 Ill. 401, 103 N.E. 194 (1913), upheld the right of a former owner to enforce the covenant despite his not retaining any benefited land. See Note, 1956 U. Ill. L. F. 651.

in the real estate acquired after the work is done and before the notice is filed.

Besides the legislation mentioned, a certain amount of "housekeeping" legislation modified existing laws to keep up with the rising cost of living or the complexity of governmental record keeping.\(^{158}\)

**CONCLUSION**

The last decade has seen a great amount of change in Illinois Real Property Law. Working individually and together, the courts and the legislature have struggled with established rules and forms to make them serve the function they were intended to perform as a meaningful guide to conduct. Some trends are clear; some areas of the law seem to have been stirred by controversy but are still unresolved. It could be asked: "Is the change coming too fast, or not fast enough?" It could also be asked: "Has Real Property Law really changed at all, or only put on a new appearance?" Perhaps the situation is best described by Professor Karl N. Llewellyn:

Our society is changing, and law, if it is to fit society, must also change. Our society is stable, else it would not be a society, and law which is to fit it must stay fixed. Both truths are true at once. Perhaps some reconciliation lies along this line; that the stability is needed most greatly in large things, that the change is needed most in matters of detail.\(^{159}\)

\(^{158}\) E.g., in 1952, the value of the homestead exemption and interest was increased from $1,000 to $2,500. Ill. Rev. Stat. ch. 52, §§ 1, 4, 6, 9, 10, 11, 12 (1959). Mortgage and trust deed releases can be effected by separate instrument rather than by entries on the margin of the record. Ill. Rev. Stat. ch. 95, § 9 (1959). Mechanic's lien notices and releases are to be filed in the Recorder's Office rather than in the Circuit Court Clerk's Office. Ill. Rev. Stat. ch. 82, §§ 7, 25, 35, 38, 42, 44 (1959). The recorder can demand six copies of any plat left for recording. Ill. Rev. Stat. ch. 109, § 2 (1959). Microfilming of records has been expanded. Ill. Rev. Stat. ch. 116, §§ 31-34.1 (1959). All deeds must have names typed or printed near the signatures and a reference as to the name and address of the party to whom the future tax bills should be sent, and all metes and bounds descriptions must be drafted so as to start with a general description of the quarter section, or lot, or lot and block. Ill. Rev. Stat. ch. 30, § 34c (1959). Failure to comply with this section does not invalidate the instrument. Ibid.

\(^{159}\) Llewellyn, The Bramble Bush 66 (1950).