signed to facilitate immediate reabsorption of the technologically unemployed.[39] In addition, the desirability and nature of a particular improvement—whether it performs a new job or merely does an old one cheaper—might be considered. Such legislation would not replace, but would rather supplement, existing anti-injunction legislation.

Procedure—Illinois Civil Practice Act—Power of Appellate Court to Consider Evidence Not Offered at Trial—[Illinois].—The plaintiff's husband, insured under the provisions of a life insurance policy issued by the defendant insurance company, had obtained a lower premium rate by dating the policy back approximately two months. The insured failed to pay a premium and died a few days after the expiration of the thirty-one day period of grace. Had the policy been dated as of the date of issuance, insured's death would have been prior to the anniversary date of the policy. The non-forfeiture clause gave the insured the right to elect, within a period of three months after default, any of the following three options: a) to receive the cash surrender value less any indebtedness, b) to apply this net amount to purchase paid-up insurance, or c) to continue extended term insurance for a period purchasable by the cash value reduced by any indebtedness. No election had been made by the insured. The plaintiff-beneficiary brought an action in the Circuit Court of Cook County on the theory that the insured had really died before default, because the anniversary date of purchase was the date of issuance rather than the earlier date stated in the policy. The defendant's demurrer to the complaint was sustained. On appeal to the Appellate Court for the First District, it was held that the plaintiff's contention that the policy was in full force because the date of issuance was its real anniversary date was erroneous, but that the plaintiff had a cause of action based upon the non-forfeiture clause in the policy.[1]

Before the trial court on remand the defendant insurance company filed an affidavit of merits which stated that the insured had borrowed on his policy so large a sum that the loan plus interest would reduce the cash surrender value of the policy to $1.48. The affidavit further stated that the term of extended insurance which $1.48 would purchase was only four and a fraction days, and that therefore the policy had lapsed before the date of the insured's death. A motion by the plaintiff to strike the defendant's affidavit for insufficiency on the theory that the sum available for the purchase of any option was the gross surrender value rather than the net cash surrender value was sustained by the circuit court. The defendant chose to stand on its affidavit and judgment was entered against the defendant. On appeal, it was held that the company had the right to reduce the benefits available under any of the options by an amount in proportion to the indebtedness outstanding.[2]

On remand again, judgment was entered for the defendant after trial without a jury. On appeal, plaintiff argued that the policy necessarily remained in force because no option had been exercised during the three month period and no alternative method for filling this period was provided. It was held that the death of the insured before he had made an election did not deprive the beneficiary of rights under the options,[3]

[39] Philip Murray, in TNEC Hearings, op. cit. supra note 34, at 16508.

[1] Schmidt v. Equitable Life Assurance Society, 282 Ill. App. 439 (1935).

[2] Schmidt v. Equitable Life Assurance Society, 290 Ill. App. 378, 8 N.E. (2d) 535 (1937).

[3] Schmidt v. Equitable Life Assurance Society, 304 Ill. App. 261, 26 N.E. (2d) 742 (1939).

and on petition for rehearing, it was held that there could be no change in the status of the policy during the three month option period until an election had been made. Since no election was made, the insurance was in full force at the death of the insured.[4]

The supreme court granted defendant's petition for leave to appeal.[5] The plaintiff for the first time argued that the insured had a right to pay off the loan and that this right survived to the beneficiary so that she might obtain the full benefits of option (c). Held, that the insured had a right, implied from the absence of any provision in the policy denying that right, to pay back the loan during the option period and to receive the full benefits of any one of the three options. This right survived upon his death to the beneficiary, who may recover under option (c) the face value of the policy less the indebtedness. Judgment affirmed, two justices dissenting.[6]

On petition for rehearing, the defendant moved that it be permitted to introduce, pursuant to Section 92 of the Illinois Civil Practice Act,[7] photostatic copies of a loan agreement, which by its terms specifically denied the right of the insured to pay back in cash any indebtedness outstanding after default in premium payment. *Held*, that Section 92 is unconstitutional[8] insofar as it "attempts to give the Supreme Court original jurisdiction on the appeal of a cause of matters germane upon the trial." Petition denied in a per curiam opinion. *Schmidt v. Equitable Life Assurance Society*.[9]

A motion by the defendant that the court reverse the judgment and remand for a partial new trial so that the new evidence might be offered was denied without opinion.[10]

The court's disposal of the instant case may be criticized upon two grounds. First, if the case be considered only upon the evidence in the record before the court, the view of the majority as to the nature of the beneficiary's right to elect an option is questionable. Under the level payment plan of life insurance premiums, the insured pays in his younger years an amount in excess of that necessary to insure him against

[4] Ibid., at 270 and 746 (1940).

[5] The plaintiff stated her theory of recovery as follows: "The plaintiff is not seeking to recover under any of the three options or because of an election thereof, but because the policies necessarily remained in effect and in status quo until such election should be made." Answer to Petition for Leave to Appeal, at 19.

[6] Schmidt v. Equitable Life Assurance Society, 376 Ill. 183, 33 N.E. (2d) 485 (1941).

[7] Ill. Rev. Stat. (1941) c. 110, § 216. Several other states have enacted similar provisions. Calif. Civ. Proc. Code (Deering, 1937) § 956a; Kan. Gen. Stat. Ann. (Corrick, 1935) § 60–3316; Mass. Ann. Laws (1933) c. 231, § 125. For discussion of the purpose of such statutes, consult McCaskill, Illinois Civil Practice Act Annotated 329–34 (1933); Clark, The New Illinois Civil Practice Act, 1 Univ. Chi. L. Rev. 209, 222–23 (1933). For a discussion of the litigants' rights to a jury trial under such a provision, consult Albertsworth, Leading Developments in Procedural Reform, 7 Corn. L. Q. 310, 327–28 (1922); 36 Yale L. J. 570 (1927), noting Haynes v. Greene, 48 R.I. 38, 134 Atl. 853 (1926).

[8] The supreme court's original jurisdiction is limited to "cases relating to the revenue, in mandamus and habeas corpus. . . . ." Ill. Const. art. 6, § 2. The decision in the instant case might have been anticipated after Goodrich v. Sprague, 376 Ill. 80, 32 N.E. (2d) 897 (1941), noted in 8 Univ. Chi. L. Rev. 786 (1941). Cf. Wideman v. Faivre, 100 Kan. 102, 163 Pac. 619 (1917).

[9] 376 Ill. 183, 197, 33 N.E. (2d) 485, 492 (1941).

[10] Motion to Set Aside Judgment, Remand Cause for Partial New Trial and Modify Opinion, and Suggestions in Support Thereof.

death at that time so that the later premiums, when death becomes imminent, will not be prohibitive. This excess forms the reserve or cash surrender value which the courts protect as the equity of the insured in the policy.[11] To prevent the insurance company from retaining this equity as a windfall and to avoid its forfeiture, courts will construe any ambiguous language most strongly against the insurer.[12] The right of election, under the type of non-forfeiture clause involved in the instant case, has been quite generally held to survive to the beneficiary;[13] and, where the beneficiary has failed to make a formal election, it has often been held that the beneficiary would have chosen the most favorable option.[14] In none of these cases, however, is the right of the beneficiary to repay outstanding loans involved. The implied right of the insured himself to repay any indebtedness after default has been refused by some courts until after reinstatement of the policy,[15] but even if the insured does have the right it does not necessarily follow that this right survives to the beneficiary. After the death of the insured, the risk insured against has occurred and the beneficiary would seem to have no claim to further protection, but only a right to the proceeds of the insurance purchased by the insured prior to his death.[16] To hold otherwise permits the bene-

[11] Friend v. Southern States Life Ins. Co., 58 Okla. 448, 160 Pac. 457 (1916); Girard Life Ins. Co. v. Mut. Life Ins. Co., 97 Pa. 15, 26 (1881).

[12] Cf. Mack v. Liverpool and London and Globe Ins. Co., Ltd., 329 Ill. 158, 163, 160 N.E. 222, 225 (1928); 15 Iowa L. Rev. 104 (1929). Many states have enacted legislation protecting the reserve in insurance policies. Ill. Rev. Stat. (1941) c. 73, § 836(g); Ind. Stat. Ann. (Burns, 1933) § 39-4206; Mass. Ann. Laws (Supp. 1940) c. 175, § 144; N.Y. Ins. Law (McKinney, Supp. 1941) § 208; Pa. Stat. Ann. (Purdon, Supp. 1940) tit. 40, § 510.

[13] Afro-American Life Ins. Co. v. La Berth, 136 Fla. 37, 186 So. 241 (1939); Equitable Life Ins. Co. v. Germantown Trust Co., 94 F. (2d) 898 (C.C.A. 3d 1938); New York Life Ins. Co. v. Noble, 34 Okla. 103, 124 Pac. 612 (1912). Contra: Lange v. Metropolitan Life Ins. Co., 252 App. Div. 696, 1 N.Y.S. (2d) 821 (1937), leave to appeal den., 253 App. Div. 866, 2 N.Y.S. (2d) 622 (1938), aff'd 278 N.Y. 626, 16 N.E. (2d) 293 (1938).

Another commonly used type of non-forfeiture clause provides for automatic application of the proceeds to a particular type of insurance upon default with the right of the insured to change the type of secondary insurance within the three months period. The right to elect under this alternative clause does not pass to the beneficiary. Browne v. John Hancock Mut. Life Ins. Co., 119 Pa. Super. 222, 180 Atl. 746 (1935); Rawson v. John Hancock Mut. Life Ins. Co., 288 Ill. App. 599, 6 N.E. (2d) 474 (1937). Contra: Knapp v. John Hancock Mut. Life Ins. Co., 214 Mo. App. 151, 259 S.W. 862 (1924).

[14] Veal v. Security Mut. Life Ins. Co., 6 Ga. App. 721, 65 S.E. 714 (1909). It is said that time is no longer of the essence after the death of the insured and that a formal notice of election by the beneficiary during the option period is not necessary. Ibid., at 728 and 718; Afro-American Life Ins. Co. v. La Berth, 136 Fla. 37, 47, 186 So. 241, 245 (1939).

[15] McCall v. Internat'l Life Ins. Co., 196 Mo. App. 318, 193 S.W. 860 (1917); cf. Kimball v. New York Life Ins. Co., 98 Vt. 192, 126 Atl. 553 (1924). In one case similar to the instant case, it was held that the beneficiary had no right to pay the indebtedness, because the insured did not have that right before his death. Rick v. John Hancock Mut. Life Ins. Co., 230 Mo. App. 1084, 93 S.W. (2d) 1126 (1936).

[16] As the cash value of the policy is decreased by borrowings it seems that the proceeds would decrease proportionately. Jeske v. Metropolitan Life Ins. Co., 113 Pa. Super. 118, 172 Atl. 172 (1934); cf. Toncich v. Home Life Ins. Co., 309 Pa. 336, 163 Atl. 673 (1932); Afro-American Life Ins. Co. v. La Berth, 136 Fla. 37, 49, 186 So. 241, 246 (1939); see Gallagher v. Mutual Life Ins. Co., 36 N.E. (2d) 780, 783 (Ind. 1941).

ficiary to insure against the death of a man already dead. The Georgia case, *Metropolitan Life Ins. Co. v. George*,[17] relied upon by the majority, may be objected to on this ground. Since the equity in the instant case was so small that it could purchase only a term of extended insurance that would have expired prior to the death of the insured, it seems that there would have been no forfeiture in a small judgment of a few dollars based upon paid-up insurance.[18]

A second ground for criticism is the court's handling of the offer of evidence under Section 92 of the Illinois Civil Practice Act. The importance of this refusal is indicated by the fact that the court distinguished the case of *Equitable Life Assurance Society v. Brandt*[19] on the ground that there was a loan agreement in that case providing that the insured could not repay borrowings after default and thus secure the full benefits of an option elected under the non-forfeiture clause. This provision was identical with the one the defendant attempted to introduce in the instant case. Presumably, then, if the court had permitted the introduction of the agreement, it would have decided for the defendant. The refusal of the court to consider the offer of evidence denied the defendant any relief from a judgment based upon an argument to which the defendant seems to have had no real opportunity to present refuting evidence. The supreme court's considering of the new argument seems in itself to be a departure from former practice.[20] In the instant case, the court may have felt that hearing the new argument did not constitute unfair surprise,[21] that the insurance company should have anticipated this new argument by the last time the case was in the trial court. But it seems difficult to find in the previous history of the case any warning that the plaintiff intended to advance the theory.

With the possibility that new arguments may be advanced and heard on appeal and with no partial new trial thereafter, opposing counsel will now be burdened by

[17] 56 Ga. App. 191, 192 S.E. 514 (1937).

[18] No other cases have been found in which the net equity was so small that it would not purchase a sufficient term of extended insurance. In the George case, note 17 supra, the non-forfeiture clause did not provide that the term be reduced, but simply that the amount of recovery be reduced by an amount proportionate to the ratio between the loan and the cash surrender value.

Where the equity had been entirely dissipated no recovery under any option has been allowed. Meridian Life Ins. Co. v. Hobbs, 200 Ala. 487, 76 So. 429 (1917); Black v. Franklin Life Ins. Co., 133 Ga. 859, 67 S.E. 79 (1910); Pitt v. Berkshire Life Ins. Co., 100 Mass. 500 (1868). But cf. Francis v. Prudential Life Ins. Co., 243 Pa. 380, 90 Atl. 205 (1914), where the policy did not provide for reducing the benefits in the event of indebtedness.

[19] 240 Ala. 260, 198 So. 595 (1940).

[20] Hayward Co. v. Lundoff-Bicknell Co., 365 Ill. 537, 7 N.E. (2d) 289 (1937); Roof v. Rule, 348 Ill. 370, 180 N.E. 807 (1932); Consumers Petroleum Co. v. Flagler, 310 Ill. App. 241, 33 N.E. (2d) 751 (1941); Davis v. Robinson, 302 Ill. App. 365, 23 N.E. (2d) 816 (1939).

[21] "For our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." Hormel v. Helvering, 312 U.S. 552, 556 (1941); cases cited note 20 supra; cf. Blair v. Oesterlein Machine Co., 275 U.S. 220 (1927); Duignan v. United States, 274 U.S. 195 (1927).

the necessity of anticipating all possible theories of recovery embraced in the pleaded facts and of offering all evidence material to any argument which might be advanced later. If such evidence is objected to as irrelevant, offering counsel will be faced with the dilemma either of gambling that the argument at which it is aimed will not be advanced later or of revealing to his opponent a better theory than that upon which the opponent is proceeding. If surplus facts have been pleaded the only alternative open to perplexed counsel would seem to be to move that certain facts, irrelevant to the argument then being urged by the opposition but possibly relevant to another argument, be stricken from the pleadings.[22] Such tactics may result in a virtual return to "theory pleading" in spite of the intent of the Illinois Civil Practice Act to establish "fact pleading."[23]

Procedure—Federal Rules—Service of District Court Process Outside the District—[Federal].—The plaintiff brought an action for damages against the Franklin County Distilling Company in the United States District Court for the Western District of Kentucky and also named the National Distillers Products Corporation a party defendant. Franklin, a Delaware corporation, carried on business solely within the eastern district of Kentucky, while National, a Virginia corporation, had its principal place of business in the western district, in Louisville. The plaintiff, also of Louisville, caused both corporations to be served personally with process issued from the western district court. Upon Franklin's appearance to protest jurisdiction, *held*, that despite Rule 4(f)[1] of the Federal Rules of Civil Procedure, process of the district court does not extend beyond the boundaries of the district. *Richard v. Franklin County Distilling Co.*[2]

Before the adoption of the new federal rules in 1938, it was well established that service of process could not be made outside the federal district where suit was brought.[3] It was also settled that where two or more defendants "resided" in different

[22] Such a procedure would not have been open to the defendant in the instant case because there were no additional, nonessential facts in the pleadings. The plaintiff's amended complaint upon which the case was tried set forth the policy and the relevant facts as to the payment of premiums by the insured until the last premium upon which he had defaulted. All the facts alleged were appropriate to each of the arguments subsequently urged by the plaintiff.

[23] Ill. Rev. Stat. (1941) c. 110, § 157. For a discussion of fact pleading and a justification for allowing change of theory at trial, consult Clark, Code Pleading 174–78, especially 176 n. 137 (1928).

[1] Rule 4(f) provides that "All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and when a statute of the United States so provides, beyond the territorial limits of that state." Consult 28 U.S.C.A. foll. § 723c (1941) for the rules in their entirety.

[2] 38 F. Supp. 513 (Ky. 1941).

[3] Robertson v. Railroad Labor Board, 268 U.S. 619 (1925); Toland v. Sprague, 12 Pet. (U.S.) *300 (1838); United States Judicial Code §§ 51–52, 36 Stat. 1101 (1911), 28 U.S.C.A. §§ 112–13 (1927). This rule was applied to corporations. Herriage v. Texas & Pacific R. Co., 11 F. (2d) 671 (D. C. La. 1926); Gioia v. Clyde S. S. Co., 3 F. (2d) 822 (D.C.N.Y. 1924); J. E. Petty & Co., Inc. v. Dock Contractor Co., 283 Fed. 338 (D. C. Pa. 1922); Tauza v. Pennsylvania R. Co., 232 Fed. 294 (D.C. N.Y. 1916). At least one case allowed service of process outside the district. Wefel v. Brown & Son Lumber Co., 58 F. (2d) 667 (D.C. Ala. 1932); Lemon v. Imperial Window Glass Co., 199 Fed. 927 (D. C. Va. 1912) (semble).