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Civil Practice and Procedure - Survey of Illinois Law for the Year 1949-1950

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tempt to return occurred and the buyer continued to sell the baskets up to the date of the trial. The Court of Appeals affirmed a judgment disallowing rescission. It emphasized the fact that the buyer had a choice of defenses under the Uniform Sales Act, which has been adopted in Illinois. The buyer could have kept the baskets and set up the breach of warranty in diminution of the sales price; could have kept the baskets and sued the seller for damages for breach of warranty; or could have rescinded the contract and offered to return the baskets. But, said the court, "rescission implies renunciation of the sale and disclaimer of the ownership of the goods." As the buyer had continued to sell the baskets long after discovery of the defects in the merchandise, an affirmance of the contract had occurred, thereby nullifying the later attempt to rescind. No partial rescission was possible for the sales contract was entire, involving one sale of one type of waste basket at a uniform price. The fact that delivery was to be made in installments did not change the nature of the contract nor permit of any deviation from the principles governing rescission.

III. CIVIL PRACTICE AND PROCEDURE

AVAILABILITY OF REMEDIES

Of prime importance to the attorney who is about to commence litigation is the fact that he must be certain that the tribunal to which he expects to present his case is one competent to grant the desired relief or, stated differently, is one possessed of jurisdiction both in terms of power to hear and determine the controversy and in ability to exercise control over the litigants. As to the first of these points, the unsettling influences growing out of the decision in Werner v. Illinois Central Railroad Company, which spoke particularly with regard to the jurisdiction of city courts in Illinois, culminated during the year in the surprising decision of the

43 Ill. Rev. Stat. 1949, Vol. 2, Ch. 121 1/2, § 1 et seq. Section 69 in particular delineates the remedies of the buyer.

1 379 Ill. 559, 42 N. E. (2d) 82 (1942).
Appellate Court for the First District in *United Biscuit Company of America v. Voss Truck Lines, Inc.*, where it was held that the Municipal Court of the City of Chicago was without power to entertain a transitory tort cause of action arising beyond the city limits even though personal jurisdiction could properly be obtained over the parties. That result was attained on the basis that the court in question, although created under a special "home rule" amendment to the state constitution, was similar in character to those courts "in and for" cities authorized by Section 1 of Article VI thereof, hence, like the other city courts in the state, was limited by the decision in the Werner case. Neither the legislature, the courts, nor the bar have been satisfied with the jurisdictional limits imposed by the Werner decision and attacks have been made thereon from time to time. It is not surprising, therefore, to learn that a certificate of importance has been issued in the United Biscuit Company case in an effort to secure clarification on this vital point of jurisdiction.

Concerning the acquisition of jurisdiction over the litigants, some points respecting service of process were made in the case of *Cannata v. White Owl Express, Inc.*, in which wrongful death action a summons addressed to both a non-resident corporate defendant and its truck driver was served by delivering copies thereof to the truck driver while he was attending a coroner's inquest. The corporation did not learn of the suit until default judgment had been pronounced against it. In support of a motion to vacate such judgment, it argued that (1) being a non-resident, its only official agent within the state was the Secretary of State

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3 Ill. Const. 1870, Art. IV, § 34, adopted November 8, 1904.
4 In *Turnbaugh v. Dunlop*, 406 Ill. 573, 94 N. E. (2d) 438 (1950), not in the period of this survey, the Supreme Court held that a city court could entertain transitory causes arising beyond city limits. By so doing, it nullified the holding in the Werner case.
5 The Supreme Court, on November 27, 1950, not in the period of this survey, announced its reversal of the Appellate Court holding: 407 Ill. 458, 95 N. E. (2d) 439 (1950). The basis for the Municipal Court of the City of Chicago was said to rest on Ill. Const. 1870, Art. IV, § 34, which contains no limitation on the right to entertain jurisdiction over transitory causes. As personal jurisdiction and venue requirements were satisfied, the court was ordered to proceed with the case.
6 339 Ill. App. 79, 89 N. E. (2d) 56 (1949). Leave to appeal has been denied.
and no attempt had been made to serve him;⁷ (2) no copy of the summons had been mailed to the office of the corporation, and (3), the driver in question was immune from service at the time because he was present in the state solely for the purpose of attending the inquest. An order denying the motion to vacate was affirmed when the court held that there was nothing in the law to prevent a non-resident corporation from having two or more agents on whom process might be served; that there was no legal requirement for the mailing of a copy of the summons where substitute service is had by delivering the same to the corporate agent in person; and that there is no immunity granted to one within the state for the purpose of attending an inquest, at least not with regard to causes growing out of the conduct which necessitates the holding of the inquest.⁹

It would seem obvious that if prejudicial error occurs in an attempt to serve a summons, only the defendant affected thereby should be allowed to complain. In Giles v. Fenska Furniture Company,¹⁰ process against the corporate defendant had been served on one who was said to be its agent. He appeared in person and, on special appearance filed in his own name supported by his personal affidavit, moved to quash the service on the ground he was not, nor ever had been, agent for the company. It was held not to be error to deny his motion since he was, to all appearances, a total stranger to the litigation, hence had no standing to question any error which may have occurred therein.

Recognized differences, of course, exist as to the form of service necessary for the acquisition of jurisdiction over a defendant in an in personam proceeding in contrast with that form which may be sufficient in an in rem action. Although authority may exist for the joinder of two or more causes of action in the

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⁸ The defendant apparently confused Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 137, which has to do with substituted service on another for an individual defendant, and does require the mailing of a copy of the summons, with Ibid., § 141, relating to service of process on private corporate defendants.


same suit, the fact that one of the claims may be of in rem character does not warrant the assumption that an in rem type of service will be sufficient to confer jurisdiction over the same defendant as to the in personam aspects of the same case, except that the defendant may, by general appearance, submit to the exercise of in personam jurisdiction. The trial judge, in Myers v. Myers, apparently acting on the idea that any attempt to induce the defendant to come within the jurisdiction and to file such an appearance smacked too much of fraud, ordered the plaintiff to withdraw the in personam claims there made against the non-resident defendant notified by publication under penalty of sustaining a motion to quash the in rem service. When the plaintiff failed to do as directed, the service by publication was quashed and the entire suit was dismissed. It was held to be error to so decide, for the court was empowered to proceed, and should have proceeded, as to the in rem aspects of the case, although it was competent to dismiss the other portion of the proceeding.

Legislative tinkering with the statute concerning substitute service of process in cases growing out of the use of the highways has been noted. Prior to these changes, there may have been some doubt as to the outcome of an attempt to use substitute service against a resident motorist who departed from the state before suit could be instituted, but the abstract opinion in Glineberg v. Evans would tend to indicate that normal methods for service remain available at least until such time as the resident

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13 Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 259.5(2), permits a court, on its own motion, to dismiss an action when it appears that the plaintiff fails to show "reasonable diligence" to obtain service. A plaintiff's inability to obtain service should have the same effect as a lack of diligence, otherwise the court calendar would become clogged with cases which it never would be able to hear.
15 In that regard, see Carlson v. District Court, 116 Colo. 330, 180 P. (2d) 525 (1947), noted in 26 CHICAGO-KENT LAW REVIEW 159.
16 341 Ill. App. 332, 93 N. E. (2d) 520 (1950), abst. opin.
17 The process was there served on a member of the defendant's family at his usual place of abode in accordance with Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 137.
motorist has reached his intended destination and has taken up a permanent residence there.\(^\text{18}\)

Where jurisdiction over the person, in an \textit{in rem} proceeding, rests entirely upon service by publication, the statute advisedly permits the defendant an opportunity to appear and be heard touching the default decree which may have been entered against his property or status. The practice at one time made it mandatory to permit such a defendant to plead and obtain a hearing as if no decree had been entered,\(^\text{19}\) but the present provision contemplates a prior hearing on the sufficiency of the notice before any order is made setting aside the decree, reopening the case, and permitting a course of pleading to the suit.\(^\text{20}\) Some confusion appears to have been evident, on the part of the trial judge, in \textit{Vancuren v. Vancuren},\(^\text{21}\) for a decree of divorce was there set aside and the action was ordered abated because of the death of one of the parties although no hearing had been had, nor finding made, as to the sufficiency of the notice by publication. The order was reversed on appeal with a direction to proceed in the fashion laid down in the statute.

In addition to obtaining jurisdiction by proper service, the attorney should see to it that the court is advised of the incapacity of a party to conduct his own defense in order that adequate representation may be provided for such person. Reminder is again served, through the medium of the decision of the Appellate Court for the Second District in the case of \textit{Jacklich v. Starks},\(^\text{22}\) that no valid judgment can be pronounced against a minor defendant unless he has been represented by a guardian ad litem and that any such judgment is subject to be reversed even though the ques-

\(^{18}\) The headnote would indicate that the defendant left Illinois two days before the process server called at his place of abode but that the service was accomplished prior to the time the defendant reached California and while he was en route to that state.

\(^{19}\) Ill. Rev. Stat. 1929, Ch. 22, § 19, repealed by Laws 1933, p. 785.


\(^{21}\) 340 Ill. App. 231, 91 N. E. (2d) 616 (1950). Leave to appeal has been denied.

\(^{22}\) 338 Ill. App. 433, 87 N. E. (2d) 802 (1949). Leave to appeal has been denied.
tion be not raised prior to the time the same reaches the reviewing tribunal.\textsuperscript{23}

The right to maintain a wide variety of legal remedies is generally limited by the requirement that suit should be promptly brought, for varying periods of limitation will operate to bar such remedies if not begun in apt time. Some new points have been made this year in that regard. No specific reference, for example, has been made in any statute to a period of limitation on the right to seek a writ of mandamus. The Supreme Court once declared that the ten-year statute is inapplicable,\textsuperscript{24} so it was urged, in \textit{People ex rel. Stubblefield v. City of West Frankfort},\textsuperscript{25} that proceedings of that character would necessarily be controlled by the five-year rule of Section 15 of the Limitation Act,\textsuperscript{26} for they constitute a type of civil action “not otherwise provided for.”\textsuperscript{27} The court, however, refused to follow that line of reasoning and, lacking acceptable precedent, held that a mandamus action based on a failure of a public official to act for more than ten years was not barred by the mere lapse of time.\textsuperscript{28} The court did recognize that the doctrine of laches might be invoked, particularly against a private relator,\textsuperscript{29} but regarded that issue as being one which should be presented as an affirmative defense,\textsuperscript{30} hence not included under an answer relying specifically on a bar by reason of lapse of time.

\textsuperscript{23}The court also there noted that, since the enactment of Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 216, it is permissible for the reviewing court to affirm a judgment against an adult co-defendant at the same time that it reverses as to the unrepresented minor, for judgments no longer possess the unitary character they enjoyed under the older procedure. See also \textit{Shaw v. Courtney}, 317 Ill. App. 422, 46 N. E. (2d) 170 (1943), noted in 21 \textit{CHICAGO-KENT LAW REVIEW} 249, affirmed in 385 Ill. 559, 53 N. E. (2d) 432 (1944).

\textsuperscript{24}Murphy v. City of Park Ridge, 298 Ill. 66, 131 N. E. 256 (1921).

\textsuperscript{25}340 Ill. App. 443, 92 N. E. (2d) 531 (1950).


\textsuperscript{27}There is dicta to that effect in Murphy v. City of Park Ridge, 298 Ill. 66 at 74, 131 N. E. 256 at 259 (1921), for the court there said: “The only statute of limitations, if any was applicable, was the five-year limitation.”

\textsuperscript{28}In general, see 35 Am. Jur., Mandamus, § 313.

\textsuperscript{29}See \textit{Preston v. City of Chicago}, 246 Ill. 26, 92 N. E. 591 (1910).

\textsuperscript{30}Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 167(4), refers to “laches” as being a particular form of affirmative defense which must be “plainly set forth in the answer.”
Novel arguments were offered, in *Horn v. City of Chicago*,\(^{31}\) to establish the proposition that there could be no valid bar to a suit brought to recover damages suffered by a property owner as a consequence of the making of a public improvement or, if there was an applicable period of limitation, that the property owner had at least ten years in which to sue. The first argument proceeded on the theory that a constitutional guarantee for the payment of just compensation\(^{32}\) could not be rendered nugatory by any legislative enactment designed to place a limitation on the time within which proceedings to secure such compensation might be brought. The second was based on the proposition that the constitution was a form of "written contract" within the meaning of Section 16 of the Limitation Act.\(^{33}\) Neither argument prevailed,\(^{34}\) for the court dismissed the suit on the ground the action, being one for "injury done to property," should have been instituted within five years.\(^{35}\)

A tremendously important holding on an obscure question of limitation has also been achieved by the action of the Supreme Court in affirming the decision in *Wilson v. Tromly*.\(^{36}\) It was there pointed out, apparently for the first time anywhere in the United States, that a counterclaim for wrongful death, although filed in apt time under Rule 8 of the Supreme Court,\(^{37}\) is nevertheless to be regarded as barred by the one-year limitation fixed on such actions\(^{38}\) if the same is not filed within the stated period from

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34 The first was denied on the authority of *Burrill v. Locomobile Co.*, 258 U. S. 34, 42 S. Ct. 256, 66 L. Ed. 450 (1922). The second was not specifically answered, the court being content to say: "Neither are we of the opinion that appellant's case is aided by section 16 of the Limitations Act..." The social compact theory of constitutional government was not, apparently, being repudiated, for that section relates to bonds, notes, bills of exchange, leases, contracts, and "other evidences of indebtedness."
38 Ibid., Vol. 1, Ch. 70, § 2.
the date of death. The fact that the counterclaimant did not learn of the pending suit in which the counterclaim was sought to be offered until after the one-year period had expired was said to be a matter of no consequence.

Little has been said of significance with respect to the availability of particular legal remedies designed to meet fact situations of recurrent character. One replevin suit is, however, of interest. In *Milhahn v. Sapp*, the tenant of a mortgagee who held a defaulted chattel mortgage on certain farm machinery was directed, by the mortgagee, to take possession thereof from the defaulting mortgagor. In order to accomplish this, the tenant went with his son to the situs of the property and the son, acting as the servant of his father, actively took charge of the removal of the machinery and turned the property over to his father. Thereafter, the mortgagor brought replevin against the son for a certain steam tractor on the ground the item in question, while similar in nature to the mortgaged property, was not covered by the mortgage. Despite the fact that the mortgagor was fully advised as to the foregoing events, he persisted in his suit against the tenant’s son on the theory that he had violated the Replevin Act by wrongfully taking the property in question. He lost in the trial court. That judgment was affirmed on appeal to the Appellate Court for the Third District on the ground that the remedy lies not so much against the one who, as servant, actually performs the physical act of taking but rather against the one in whose behalf the trespass occurs. As replevin will not lie against one who merely wrongfully withholds as servant for another, nor can be maintained by one whose only interest in the property is that of a servant holding for another, the court deemed that symmetry in the law required a like result where the servant took wrongfully in another’s behalf, especially where he had relinquished possession prior to suit. Having decided that

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42 Pease v. Ditto, 189 Ill. 456, 59 N. E. 983 (1901).
the plaintiff was not entitled to have the possession obtained under the replevin writ confirmed in him, the court was then faced with a quandary as to what to do insomuch as the defendant, as servant, was likewise not entitled to have the property restored. It solved the difficulty by directing the sheriff to return the articles seized to the place from whence they had been obtained, leaving it to further action, if necessary, to settle the rights of the mortgagor against those who might then assert a claim to the property.

One recognized change has also come about in the law relating to the use of ejectment proceedings, so that it is now possible to assert an equitable defense, if one exists, in this essentially legal form of action, but there would seem to be some confusion over whether the same thing is possible in a forcible entry and detainer proceeding. It was urged, in *Bartelstein v. Goodman,* that insomuch as it was possible for the tenant to have every advantage of his equitable defense in the pending forcible detainer proceeding, there was no need for the maintenance of a separate equitable action to enjoin the prosecution of the law case. The temporary injunction there granted was, however, affirmed on appeal not so much because of any doubt of the right to use an equitable defense but rather because, admitting that possibility, it still did not serve as a reason to bar a long established equitable right. The tenant was regarded as having a choice to proceed either by way of a separate equitable complaint to enjoin the landlord's suit or by way of an answer raising the equitable matters in the statutory fashion. Having the choice, no one else could dictate how the tenant should exercise his election.

The doctrine of election of remedies may also operate to limit

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45 The abstract opinion in *Northern Trust Co. v. Watson,* 310 Ill. App. 263, 33 N. E. (2d) 897 (1941), would seem to indicate that the equitable defense is available. The more recent holding in *Winitt v. Winitt,* 330 Ill. App. 75, 89 N. E. (2d) 71 (1949), relying on the old decision in *St. Louis National Stock Yards v. Wiggins Ferry Co.,* 102 Ill. 514 (1882), a case decided long prior to the present Civil Practice Act, would appear to hold otherwise. It should be noted that the Ejectment Act, Ill. Rev. Stat. 1949, Vol. 1, Ch. 45, § 50, has a conformity provision slightly different from the one in the Forcible Entry and Detainer statute, ibid., Vol. 1, Ch. 57, § 11.

the choice of the pleader, for if he has a choice and has chosen to follow one potential source for recovery he may, thereby, lose the right to follow another, but inconsistent, course.\textsuperscript{47} That doctrine was relied on, by the defendant in the case of \textit{Stewart v. Nathan-son},\textsuperscript{48} as ground for dismissing a suit in equity to enforce the lien of a judgment which had been entered against the tavern operator in a dram shop case. The defendant, owner of the building, charged that the plaintiff had, by dismissing the law suit as to the building owner and proceeding to judgment against the tavern proprietor, elected to pursue his remedy against the tavern proprietor only. The court, however, on the authority of \textit{Gibbons v. Cannaven},\textsuperscript{49} held that the remedies provided by Sections 14 and 15 of the Dram Shop Act\textsuperscript{50} were not inconsistent with one another, hence there was no room for any application of the doctrine in question.\textsuperscript{51}

Questions concerning the scope of equitable jurisdiction were presented in several cases. In \textit{Atchison, Topeka \& Santa Fe Railway Company v. Andrews},\textsuperscript{52} for example, two railroad companies filed suit against certain attorneys as well as a number of alleged "chasers" to enjoin the prosecution of a large number of personal injury actions which had been filed, under the federal Employers' Liability Act, against the railroads in Chicago courts. It was shown that the attorneys in question had maintained a wide-spread system designed to induce injured railroad employees, some of whom had suffered injuries as far away as California, Arizona, or New Mexico, to bring suit in Illinois with the expectation that verdicts would be for greater sums than could be realized in those states where the accidents occurred. Further inducement ap-

\textsuperscript{47} Glezos v. Glezos, 346 Ill. 96, 178 N. E. 379 (1931).
\textsuperscript{48} 341 Ill. App. 217, 93 N. E. (2d) 154 (1950). Leave to appeal has been denied.
\textsuperscript{50} Ill. Rev. Stat. 1949, Vol. 1, Ch. 43, §§ 135-6.
\textsuperscript{51} The factual circumstances which might underlie the Gibbons case and also the instant one would seem to suggest that the property owner gains but a hollow victory if he succeeds in obtaining a dismissal of the law action as to himself. That victory is one which he might well forego, if for no other reason than to insure that the judgment entered against the tavern operator is not one obtained by means of the latter's fraud or indifference.
\textsuperscript{52} 338 Ill. App. 352, 88 N. E. (2d) 364 (1949). Leave to appeal has been denied.
peared in the fact that the railroads concerned might be more inclined to reach settlements because of the difficulty of summoning witnesses from far-away places. The Appellate Court upheld the award of an injunction against such practices.

In so doing, it recognized that there was no room for the application of the principle of *forum non conveniens* for the plaintiffs in the various injury actions were not parties to the injunction case. But the activities of the defendants amounted to champerty and maintenance and caused the railroads to suffer an injury which could not be measured in dollars. Lack of precedent in Illinois or elsewhere was said not to deprive the equity court of its power to grant relief. The claim that jurisdiction was lacking to enjoin the attorneys from representing their clients, and that any challenge had to be made before the Supreme Court which had granted the license to practice law, was answered by the statement that the injunctional order did not serve to disbar the attorneys nor generally restrain them from practicing their profession.

The testing of the validity of zoning ordinances, as well as the prevention of any violation of such ordinances, by the process of injunction is a well-recognized matter of equity jurisdiction. It is not surprising, therefore, to note that in *Drueck v. Peterson* the Appellate Court sustained a decree enjoining a co-operative housing association from maintaining a small co-operative unit with a single kitchen in a district which had been zoned for family residences only. The adverse effect such use had on the value of the property of plaintiff, a neighbor, was sufficient to justify the injunction.

There were cases, however, where the equity court refused to take jurisdiction. A high school teacher, in *Eveland v. Board of Education of Paris Union School District*, had received a dismissal notice from a competent board of education but sought an injunction restraining the board from holding a hearing or denying to him his right to the performance of his contract and the payment of his salary. The petition was grounded on an alle-

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53 340 Ill. App. 164, 91 N. E. (2d) 124 (1950). Leave to appeal has been denied.
gation that the charges assigned as cause for dismissal were incorrect and discharge would lead to irreparable damage. The Appellate Court, reversing the injunction decree, held that the statutory remedy available to the teacher offered opportunity for adequate relief in the absence of a charge of clear abuse of discretionary powers.

While temporary injunctions are to be issued to preserve the status quo until the cause can be disposed of on its merits, difficulties are often met with in the application of this rather simple rule. Thus, in *Northern Illinois Coal Corporation v. Langmeyer*, a coal company alleged in its complaint that access to land owned by it, on which it desired to begin mining operations, could be accomplished only by crossing two township highways where weight limit restrictions were in force. These weight limitations served to prevent the company from moving its heavy equipment, absolutely needed in the carrying out of the contemplated operation, over the highways. It claimed that irreparable injury would occur unless a temporary injunction was issued against the enforcement of the weight limitations. When reversing a decree granting such injunction, the Appellate Court pointed out that, at the time of suit, the company’s operations had not been started but were merely contemplated. There was, then, no occasion for the court to act to preserve the status quo, for that referred to the last, actual, peaceable, noncontested status preceding the pending controversy.

The Appellant Court was not so harsh in its views in *Van Kleeck v. Vente*, a case revealing the strange tale of the operation of a combined dance studio and collection agency. Plaintiffs there were various small-salaried employees who, by allegedly false and alluring promises, were induced to take dancing lessons at defendant’s studio and to sign cognovit notes for the tuition. These notes were then assigned to a collection agency, owned and maintained by the defendant, which agency proceeded to serve

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demand notices for payment. A temporary injunction restraining the defendant, pending the determination of the issues, from collecting or attempting to collect on the notes was upheld when the court found that it was a matter of common knowledge that the mere receipt of a demand notice by a debtor's employer was often sufficient to produce a termination of employment, particularly where the corporate employer had rules designed to save it from such annoyance. Waiver of bond in favor of the plaintiffs was justified by reason of the small salaries earned by the plaintiffs.

Injunction practice was also concerned in a case which was a by-product of the decision in *Shelley v. Kraemer*, where racially restrictive covenants were declared unenforceable by means of judicial action. In *Amschler v. Remijasz*, a temporary injunction had been obtained restraining the defendants from violating such a covenant. The injunction had been obtained at a time when covenants of that character were deemed to be judicially enforcible. Following the decision in the Shelley case, the plaintiffs moved to dismiss the complaint and, on the same day, defendants moved to dissolve the temporary injunction and presented a suggestion of damages. The motion to dissolve was overruled while the motion to dismiss the suit was granted. The court later struck the suggestion of damages. That action was affirmed on the ground that the only authority for assessment of damages, upon the dissolution of an injunction, was Section 12 of the Injunction Act, one which permits an award of damages where an injunction is improperly sought. Prior to the Shelley case, every court of review had sustained racially restrictive covenants on constitutional grounds so it had come to be a settled rule of law that, when application for a temporary injunction was made, the trial judge had no alternative but to grant the request. As the injunction had been properly issued at the outset, the subsequent turn of events did not bring the case within the statute.

A case of first impression, one which has done much to con-

59 334 U. S. 1, 68 S. Ct. 836, 92 L. Ed. 1161, 3 A. L. R. (2d) 441 (1948).
60 341 Ill. App. 262, 93 N. E. (2d) 386 (1950).
tribute to an understanding of the law in the field of reformation of instruments, came before the Supreme Court in the suit entitled *Reinberg v. Heiby*. The donor there concerned had two daughters, the plaintiff and the defendant, who were his only heirs. He owned two tracts of contiguous land, acquired at different times and of differing size, which he wished to leave to his daughters, after his death, in equal but independent shares. He engaged a surveyor to survey and divide the land into two equal tracts and to provide appropriate legal descriptions for the two parcels. He then retained an attorney to prepare a trust agreement and conveyance by which the property could be turned over to a trustee who was directed thereby to convey, after the donor’s death, one tract to one daughter and the other to the second child. The attorney did as instructed but, due to a mistake, used the original instead of the new legal descriptions. The mistake was not discovered until after the donor’s death when the trustee, following the trust agreement, offered to convey the land in unequal shares to the designated beneficiaries. Plaintiff, offered a deed to the smaller parcel, brought suit for reformation of the trust agreement. The plaintiff won in the lower court and the Supreme Court affirmed the decision.

It distinguished the present case from those instances where a voluntary grantee seeks to reform a deed for mistake against his grantor or anyone claiming through or under the grantor as heir, devisee, purchaser, creditor, or subsequent grantee. In those situations, reformation is customarily denied since it would be manifestly unjust to permit “a grantee who has given neither a valuable nor a meritorious consideration to enlarge upon the grantor’s bounty against the interest of the donor grantor or those deriving their title through him.” Thus, if a grantor should intend to convey a tract of land to a voluntary grantee, yet through mistake of a scrivener, ends up by retaining title to the tract, the grantee will not be entitled to reformation of the deed for this would amount to specific performance of an execu-

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63 404 Ill. 247 at 253, 88 N. E. (2d) 848 at 851.
tory promise to make a gift. In the instant case, however, the grantor’s interest in the property was not involved. He had divested himself of all interest in the tracts of land. The litigation did not affect his rights but was a contest between the co-beneficiaries under a voluntary trust through which one beneficiary was trying to enrich herself at the expense of the other. Perpetuation of the mistake by denial of relief would be a clear violation of the declared intention of the grantor. Equity, therefore, not only had the right but also the duty to reform the instrument.

Some additional light on the nature of a declaratory judgment proceeding has been provided by the dissenting opinion in the case of Magnusen v. Klemp. The issue over which the court divided was whether or not the plaintiff’s action for an accounting as to commissions due or to become due was premature, but in the course of his dissent, Niemeyer, J., noted that a request for a declaratory judgment would not be proper if the court, at the time, is lawfully entitled to enter a coercive judgment particularly where the latter would have served, under the principle of res judicata, to settle future controversies. It would seem, therefore, as if the declaratory judgment proceeding is one to be utilized prior to the advent of actual wrongdoing.

PREPARATION OF PLEADINGS

The relative decline in cases dealing with issues over pleading may be an indication of an understanding and acceptance of those sections of the Civil Practice Act which deal with what

64 Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 181.1, first enacted in 1945, authorizes the use of a declaratory judgment proceeding where persons seek only “binding declarations of rights.”


66 The suit being one in equity, with an additional request for a declaratory judgment, the majority refused to apply the legal rule that suit may not be instituted prior to maturity of the demand, Ginsburg v. Prudential Ins. Co., 294 Ill. App. 324, 13 N. E. (2d) 792 (1938), but followed the rule in equity: Town of Kaneville v. Meredith, 361 Ill. 556, 198 N. E. 857 (1935).

was once a tricky art known to but few practicing lawyers. A good complaint should, of course, contain a statement of every fact necessary to round out a complete cause of action. In that regard, it might be noted that an essential allegation in every complaint in tort against a municipal corporation is one with respect to the giving of that notice which is required from every injured person by the Cities and Villages Act. A problem arose, in Kennedy v. City of Chicago, as to whether a similar allegation, together with proof thereof, was necessary in cases based upon claims for injury arising not from general negligence but because of municipal failure to suppress rioting within the city limits. The Appellate Court for the First District, by a process of statutory integration, held that such an allegation was required. As a consequence it ordered dismissal of the suit because the complaint, without that allegation, failed to state a cause of action. A somewhat similar result was attained in Hayes v. Chicago Transit Authority where the notice provision of the statute creating the transit authority was construed and held not satisfied by the submission of accident and medical reports offered as the basis for negotiating a settlement, for formal written notice was deemed to be a prerequisite to suit.

Section 36 of the Civil Practice Act requires that a copy of every relevant exhibit on which a cause of action is based should be attached to the complaint or be quoted therein, so as to make it unnecessary for the defendant to crave oyer thereof, or else that a sworn explanation be provided in the event such instrument is not attached because it is inaccessible. The anticipated penalty for failure to comply with this provision would seem to be that the complaint might be stricken on motion. The

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70 Ill. Rev. Stat. 1949, Vol. 1, Ch. 38, § 512 et seq., authorizes a civil suit by the injured person in such cases.
73 Ibid., Vol. 2, Ch. 110, § 160.
74 Ibid., Vol. 2, Ch. 110, § 169, provides for use of a motion where a pleading is "substantially insufficient in law."
Appellate Court for the First District, however, in *Velsicol Corporation v. Hyman*,[75] intimated that another penalty might exist, for the court there, in a suit based on an alleged written agreement between the parties, but one which the plaintiff could not produce and concerning which it had to use secondary evidence, expressed disbelief in the secondary proof because plaintiff had failed to support the complaint with an affidavit as to the non-existence or non-possession of the written contract.

Authority for simplicity in the manner of statement in pleadings should not be mistaken as providing excuse for sloppy work. The degree of tolerance shown by the Appellate Court for the First District, over the question of the extent to which variance between pleading and proof will be permitted, received a deserved rebuke when the Supreme Court, after having granted leave to appeal, reversed the holding in the case of *Central States Cooperatives, Inc. v. Watson Brothers Transportation Company, Inc.*[76] The higher court pointed to a well-established rule that a party is not entitled to relief on proof without allegation any more than he is entitled to receive relief on allegation without proof. The attempt there made to turn an affirmative answer, which had denied the cause charged by showing that some other cause existed, into a weapon to be used to the prejudice of the defendant was there refuted.[77]

A word or two of caution is also needed to those preparing defensive pleadings. It is fundamental law that a person who files an answer to the merits of the case thereby abandons any pending motion he may have made to dismiss the suit for failure to state a cause of action for he is to be regarded as having ad-

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[77] A follow-up to the proposition may be seen in the case of McFarland v. Town of Bourbonnais, 339 Ill. App. 328, 89 N. E. (2d) 849 (1950), where the Appellate Court for the Second District reversed a judgment for a plaintiff who had sued to recover a salary due for a particular year of service but whose proof showed he was entitled only to a lesser sum by way of balance for that year. The fact that this balance, when added to a sum due for a previous year not mentioned in the complaint, equalled the amount for which judgment had been granted, was held inadequate reason for affirming the judgment.
mitted his motion was unsound and to have acknowledged that
the complaint was sufficient in law to require an answer. If
he should, on a later occasion, decide to renew his motion, he
should first obtain permission to withdraw the answer so filed
and then, apparently, refile the original motion in written form
with full specification of the defects relied upon. Failure to
observe these requirements led the Appellate Court, in Lederer
v. St. Clair Hotel, Inc., to reverse a decree dismissing a suit
on motion for the reason that to permit such decree to stand would
result in creating a "far-reaching and dangerous precedent." De-
fendant's claim that plaintiff had acquiesced in an oral re-
newal of a motion to dismiss, while the answer still remained in
the case, was rejected on the ground that counsel for defendant,
and the chancellor, should have known the oral motion was in-
sufficient and that the attempt to bring about dismissal in that
fashion was a "quick and easy method" for disposition which the
chancellor should not have approved. An analogous situation
exists where the plaintiff, after a motion to strike the answer
has been denied, proceeds to file a reply challenging the exist-
ence of the facts alleged in the answer. Having joined issue,
the plaintiff is not, according to City of Naperville v. Steininger,
ettitled to urge the insufficiency of the defense set forth in the
answer, on appeal from an adverse decision, for he is deemed to
have agreed, by his course of action, that the answer, if true,
constituted a sufficient defense.

Issues relating to proper parties are seldom raised. Men-
tion was made last year, however, of a tendency to develop a sys-
tem of third-party practice, either from an evident misconstruc-
tion of the provision for the addition of new parties or because

79 Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 169, requires that the motion "shall point out specifically the defects complained of."
82 The former practice is illustrated in Garden City Sand Co. v. Christley, 289 Ill. 617, 124 N. E. 729 (1919).
83 See 28 CHICAGO-KENT LAW REVIEW 33.
84 Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 149, authorizes the bringing in of new parties "where a complete determination of the controversy cannot be had," but
of an unconscious oversight which has not yet been subjected to questioning. Further illustration thereof may be seen in the case of *Hillman v. Kropp Forge Company*\(^8\) wherein a defendant, by counterclaim, brought in a person who was not a party to the suit, and against whom the plaintiff desired no relief, on the theory that if defendant owed an obligation to the plaintiff then such defendant would have a law action over against the counter-defendant so added. The attempt failed, not so much because of any procedural objection, for none was advanced, but because of the requirements of substantive law. If third-party practice is to be encouraged, it should be regularized by proper statutory amendment or addition.

**THE TRIAL OF THE CASE**

Assurance that the litigant shall have that "fair" trial which is guaranteed to him by the constitution is provided by statutory provisions for change of venue and for challenge to prospective jurors. One reason for seeking, and receiving, change of venue is that personal prejudice exists on the part of the trial judge.\(^8\) It is a rare case, however, wherein wholesale prejudice is likely to exist without there being some specific evidence to which reference could be made. It was for that reason that the Supreme Court, in *Balaszek v. Blaszak*,\(^7\) while noting there was no direct authority requiring any specification of the ground of prejudice, thought it unusual to have an application made for a change of venue directed against a number of judges without such specification. The court designated the practice as one which did not appeal to the judges of the higher court. The comment so made may foreshadow a tightening up of the practice relating to applications for change of venue.

On the subject of peremptory challenges addressed to pros-

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\(^8\) 340 Ill. App. 606, 92 N. E. (2d) 537 (1950). Leave to appeal has been denied.


\(^7\) 405 Ill. 36, 89 N. E. (2d) 796 (1950).
pective jurors, construction of the statute placing limits on the right to so challenge\(^8\) has occurred before but never to the comprehensive degree that may be noted in *Curtis v. Lowe*\(^9\). The court there laid down certain propositions which should clarify trial practice. In the first place, the court said the statutory phrase "each party" really means "each side," and this is true even though two or more persons on the "same side" have, or claim to have, conflicting or hostile interests, as might be the case where several tort-feasors are combined as defendants. Second, although "each side" of the civil suit is entitled to a minimum of five peremptory challenges, three additional peremptory challenges are allowed for each additional party defendant or party plaintiff. The total number is not reached by adding together all litigants in the case but is calculated on the basis of the number involved on one side or the other, whichever is greater. Third, once that number has been determined, the product is to be applied uniformly to both sides so that each side of the case may have an equal number of peremptory challenges to distribute in any manner that may be agreed upon. If no agreement can be reached, a distribution of the allotted challenges among the several parties on the one side in a manner determined by the trial judge will be approved unless there is a clear abuse of the discretionary power.

Avoidance of the effect of a trial, even while it is in progress, may sometimes occur by dismissal or nonsuit of the action. In that regard, the control which a plaintiff once exercised over litigation, particularly with respect to its dismissal, has been severely limited by the enactment of Section 52 of the Civil Practice Act\(^9\) but not until the holding in *Glick v. Glick*\(^\) did it become apparent that the limitations imposed by the statute relate not only to the action itself but also to any aspect thereof. The plaintiff there, in 1945, had secured a divorce, a property settle-


\(^{89}\) 338 Ill. App. 463, 87 N. E. (2d) 865 (1949), noted in 38 Ill. B. J. 516. Leave to appeal has been denied.


\(^{91}\) 338 Ill. App. 637, 88 N. E. (2d) 509 (1949).
ment, and custody of the child of the parties. In 1948, she moved to have the settlement set aside on the ground of a subsequent enhancement in the ex-husband's wealth as well as to secure an increase in the amount payable for the child's support. The first prayer was dismissed on motion, and the second was taken under advisement. While the matter was so pending, defendant obtained an order for visitation and went to California, where the child was then living, to see the child. Plaintiff there caused process to be served on defendant in certain suits begun under the California law to accomplish all that had been attempted in Illinois. Defendant, upon his return, filed a counter-petition in the Illinois proceedings to secure injunctive relief against the prosecution of the California cases. Thereupon, plaintiff sought to dismiss her Illinois petition and withdraw herself from the jurisdiction, but both the trial and the Appellate Court held the request came too late in the absence of any stipulation or the showing of any adequate cause.

Dismissal for want of prosecution, on the other hand, is usually granted only when it appears that counsel's application for a continuance is offered solely with intent to delay the administration of justice. It was, therefore, considered to be error, in Adcock v. Adcock, to dismiss the suit after counsel, by appropriate affidavit, had shown he was engaged in the trial of an emergency proceeding and could not meet the trial date which had been set therein. The fact that such date had been set by agreement between court and counsel was said not to prevent the trial court from exercising a sound discretion as to the granting of an additional continuance.

The only evidence problem of significance, one dealing with the competency of a witness, arose in Sankey v. Interstate Dispatch, Inc. That was a suit for wrongful death brought by an

92 While not so stated, the court apparently acted in reliance on the holding in Arnold v. Arnold, 332 Ill. App. 586, 76 N. E. (2d) 335 (1947), noted in 26 CHICAGO-KENT LAW REVIEW 344-8.
95 339 Ill. App. 420, 90 N. E. (2d) 265 (1950), noted in 28 CHICAGO-KENT LAW REVIEW 384. Leave to appeal has been denied.
administrator against the owner of a truck and the truck driver. The latter was not served with process and did not appear until called as a witness on behalf of the truck owner. The Appellate Court for the First District held that he was not a "party" to the action within the contemplation of the so-called "dead man's" statute, hence was competent to testify. No cases directly in point on the exact facts could be found, but the court had no difficulty in finding analogous cases. It also measured the classification of the driver by a reference to Greenleaf's work on evidence and concluded that he did not fit the definition there propounded, although a successful attempt to serve him with summons would have made him a party. A claim that the driver was an incompetent person because directly interested in the suit was readily disposed of, and denied, by reference to many earlier cases and the decision in Feith v. Chicago City Railway Company in particular.

After the verdict has been received, there may be occasion to present a motion for a new trial. Section 68 of the Civil Practice Act provides, in that connection, that the moving party shall file his points in writing and shall particularly specify the grounds for such motion. No opinion of the Supreme Court bearing directly on the point of the degree of elaborateness of specification which should be present has been announced to date, but there is some disagreement over the construction which should be placed on the rule in the different appellate districts. Lawyers trying cases in the First District should give heed to the case of Pajak v. Mamsch, for the Appellate Court there served warning that it would hereafter require every motion for a new trial

98 Greenleaf, Evidence, Vol. 1, § 535, states: "Parties in the larger legal sense, are all persons having a right to control the proceedings, to make defense, to adduce and cross-examine witnesses, and to appeal from the decision, if any appeal lies."
99 211 Ill. 279, 71 N. E. 991 (1904).
to be in writing and to contain particular specification if error is to be assigned for the denial thereof. General specification such as the one there used, a specification to the effect that the court "erred in giving and reading instructions to the jury" which had been tendered by the opponent, was condemned as inadequate. Prior warning had been given in Krug v. Armour & Company but, despite the fact that leave to appeal was denied therein, the local bar seems to have persisted in the belief that the "shot-gun" assignment of error was a time-honored labor-saving device which sufficiently met statutory requirements. The court, in the Pajak case, spread on its records what had hitherto been an unreported sequence of events growing out of the Krug case, so that all might read and profit thereby. At the same time, it announced the importance which it would hereafter attach to a fair compliance with its understanding of the statutory purpose. Sharpness and clarity in the reasons assigned as ground for a new trial, to the point of singling out the truly objectionable instructions by number or description and noting the precise objection thereto, not only seems to be in accord with the spirit of Section 68 but should also result in a genuine saving of judicial time.

A question arose, in Hughes v. Bandy, as to whether or not a trial judge might add a sum of money to the amount fixed by the jury in their verdict. The case was one of suit and counter-suit wherein the jury had fixed plaintiff's damages in the sum of $615.00 whereas the undisputed amount of damage was $1218.25. Both parties, in due time, made separate motions for a directed verdict and both motions were quite properly denied. Plaintiff then moved for judgment in the larger amount notwithstanding the verdict. This request was granted. Neither party had filed an alternative motion for a new trial. The Appellate Court reversed and remanded with instruction to enter judgment on the verdict. Upon further appeal to the Supreme Court, the decision was affirmed.

4 335 Ill. App. 222, 80 N. E. (2d) 386 (1948), abst. opin.

5 404 Ill. 74, 87 N. E. (2d) 875 (1949), noted in 38 Ill. B. J. 232, affirming 336 Ill. App. 472, 84 N. E. (2d) 664 (1949).
It was clear error on the part of the trial court to allow an *additur* on plaintiff's motion for judgment notwithstanding the verdict for, by such motion, the trial court was limited to the single question of whether or not there was evidence to support the defense. What plaintiff sought was correction in the amount of the verdict, not a redetermination of the question of liability. Under Supreme Court Rule 22, and the construction placed upon it, the motion for judgment notwithstanding the verdict is to be used only where it would have been the duty of the court to direct a verdict in the first instance. Plaintiff, more nearly, should have moved to have the verdict set aside and to secure a new trial. Although Section 92 of the Civil Practice Act permits a reviewing court to remand for a partial new trial, which remand may be limited to the question of damages, the defendant's position in the case would probably have been prejudiced by such a limited order. The question of liability seemed to be a close one and the inadequate amount of damages fixed by the jury probably represented a compromise on the prime issue. The final outcome, therefore, might be said to represent a reasonable solution to the problem.

In direct opposition to the preceding case is the problem which arises when the amount of damages stated in the verdict is so excessive as to furnish ground for a motion to set the verdict aside. The trial judge in such a situation may order a new trial unless the plaintiff will file a *remittur* releasing the excess amount. It should be noted, however, that the theory underlying the use of a *remittur* is that the successful party is willing to surrender the excessive portion of the award for there would be grave constitutional doubt of interference with the right of trial by jury if the trial court were empowered to force surrender of a portion of the established demand. For these reasons, the

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7 Ibid., Vol. 2, Ch. 110, § 216.
8 Merrill v. City of Wheaton, 379 Ill. 504, 41 N. E. (2d) 508 (1942).
9 See the discussion of this point in North Chicago St. Ry. Co. v. Wrixen, 150 Ill. 552, 37 N. E. 895 (1894).
10 He indicates such willingness by filing a statement to that effect: Sandy v. Lake Street Elevated R. Co., 258 Ill. 75, 101 N. E. 211 (1913).
Appellate Court for the First District reversed the judgment rendered in *Augustine v. Kaufman*,\(^\text{12}\) for the trial judge had there ordered plaintiff to remit part of the demand. As the court could not tell, from the record, whether the defendant would wish to move for a new trial\(^\text{13}\) or whether plaintiff would willingly waive the seemingly excessive amount, it was unable to enter a proper judgment\(^\text{14}\) and was obliged to remand the case for further proceedings.

It might also be well to note that the *ad damnum* clause in a complaint at law is not a useless appendage. In default cases, it may well fix the maximum possible recovery,\(^\text{15}\) while in other situations it may aid in a determination of whether or not a given court has jurisdiction to entertain the cause.\(^\text{16}\) A party is not, however, bound by the original statement as to the amount of his damages for he may, on proper motion, amend this portion of his complaint,\(^\text{17}\) just as is true of any other part thereof,\(^\text{18}\) in order to get the benefit of a verdict for a higher figure. The holding in *Curtis v. City of Chicago*\(^\text{19}\) in no way contradicts the law on the subject, but it does add emphasis to the fact that the record should show that such amendment did, in fact, occur for the court there reduced the judgment to the amount originally requested as the appellate record failed to bear out the claim that an oral request for permission to amend the *ad damnum* clause to meet the terms of the verdict had been granted.


\(^{13}\) The defendant had not participated in the appeal as appellee, seemingly being content to have a judgment for the smaller amount affirmed, if such should be the case.

\(^{14}\) Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 216(e), purports to authorize the reviewing court to give "any judgment and make any order which ought to have been given or made."

\(^{15}\) Ibid., Vol. 2, Ch. 110, § 158.

\(^{16}\) See Redwing v. Moncravie, 131 Cal. App. 569, 21 P. (2d) 986 (1933), to the effect that the court does not lose jurisdiction because of an excessive demand, but it must, necessarily, limit the judgment to the jurisdictional amount.

\(^{17}\) There would appear to be a limit on the right of amendment to increase the *ad damnum* in wrongful death cases, if the attempt is made to enhance the damages under Ill. Rev. Stat. 1949, Vol. 1, Ch. 70, § 2, as amended in 1947, in cases occurring before the date of the amendment: *Theodosis v. Keeshin Motor Express Co.*, 341 Ill. App. 8, 92 N. E. (2d) 794 (1950). See also 27 CHICAGO-KENT LAW REVIEW 41.


\(^{19}\) 339 Ill. App. 61, 89 N. E. (2d) 63 (1949).
Elements of damage law were concerned in a few noteworthy cases. It might be appropriate to mention, first, that the views expressed in *Aldridge v. Morris*\(^2\) noted last year, a case concerning the right of one tort feasor to have the benefit, by way of reduction in damages, of sums paid by another tort feasor for a covenant not to sue, appear to be taking hold. Both the Appellate Court for the First District, in *Curtis v. City of Chicago*,\(^21\) and for the Third District, in *New York, Chicago & St. Louis Railroad Company v. American Transit Lines, Inc.*\(^22\) have now approved judicial action in reducing the judgments there rendered below the amount of the verdict by a sum equal to that received as consideration for the covenant not to sue. Both courts referred to the Aldridge case as authority for the proposition that the injured plaintiff is entitled to no more than one recovery for a single wrong.

The next case reveals that the first state court attempt to enforce the rule of *Daily v. Parker*\(^23\) one dealing with the right of a child to recover damages for the alienation of the parent's affections, appears to have collapsed with the ultimate outcome of the case of *Johnson v. Luhman*.\(^24\) A verdict and judgment for the defendant was there affirmed despite some criticism as to the exclusion of evidence and the refusal to give desired instructions. If the case indicates anything, it does serve as a warning that punitive damages may not be assessed in such cases until there is some evidence, of more than speculative character, that actual loss has been sustained.\(^25\)

Three cases illustrate legal limits which may be placed on the measure of recovery. The classic rule for fixing the damage

\(^{20}\) 337 Ill. App. 369, 86 N. E. (2d) 143 (1949), noted in 27 CHICAGO-KENT LAW REVIEW 313. Leave to appeal denied.

\(^{21}\) 339 Ill. App. 61, 89 N. E. (2d) 63 (1949).

\(^{22}\) 339 Ill. App. 282, 89 N. E. (2d) 858 (1950). Leave to appeal has been granted.

\(^{23}\) 152 F. (2d) 174 (1945), criticized in 25 CHICAGO-KENT LAW REVIEW 90.


\(^{25}\) But see Ill. Rev. Stat. 1949, Vol. 1, Ch. 6S, § 34, and § 41, as to the possibility of recovering punitive damages in cases brought by the spouse.
suffered by the conversion of personal property is said to be one calling for the "market value" thereof at the time of conversion, but it is not always easy to fix upon that figure. In Sachs v. American Bonding Company of Baltimore, for example, the plaintiff, a dealer in beauty supplies, had failed to secure the return of his stock of goods after an unjustified attempt had been made to replevy the same from him. He sued for the value of the property not returned, claiming to be entitled to a figure based on the resale value, set at a price customarily charged by dealers to users of like products. That price would have allowed for a margin of profit over and above the original cost, but plaintiff offered no evidence to establish that he had negotiated for sales of the goods or that he even had any prospective purchasers. He was, therefore, limited to the replacement cost as that figure was deemed to furnish the best evidence of market value.

In actions against bailees to recover for damage done by reason of the destruction of bailed articles, it becomes important to establish the worth of the property so destroyed. In one such suit, over a bailed automobile, the parties stipulated that if an absent witness had been present he would have testified that the "Blue Book" value of an automobile of the type in question would have ranged between two figures agreed upon. The stipulation further recited that the so-called "Blue Book" was a book used by all motor vehicle companies in estimating the values of cars. The reviewing court, in Brown v. Welborn, affirmed a judgment based on such stipulation, not so much because it approved the same as a basis for calculating damages but rather because the actual award fixed by the trial court was below the minimum figure set thereby, hence the defendant was in no position to complain of an error which redounded to his favor. As the normal measure of recovery in destruction cases is the value of the property at the time of destruction, but such fact is not

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28 The court, in fact, said: "...the appellee's proof of damages leaves something to be desired." See 338 Ill. App. 507 at 513, 88 N. E. (2d) 104 at 107.
always easy to demonstrate, the use of circumstantial evidence developed by reference to accepted trade or similar lists has become a fairly acceptable substitute.\textsuperscript{30} The widespread use of the so-called “Blue Book” in the automobile field would seem to offer some basis for the belief that it should serve as a useful device for measuring value, although it would otherwise be objectionable as hearsay.

Personal injury cases frequently require the translation into monetary amounts of such imponderable things as present and prospective loss of health, pain, suffering and the like growing out of the wrong done. When a minor child sues for personal injury there is some doubt whether the jury may also consider, as an element of damage, the sums expended or to be expended by the parent for medical treatment or the loss of potential earning power during the period of minority. These losses would seem to accrue to the parent who well might maintain an independent action for the recovery thereof. It has, however, been held that if the parent sues as next friend for the minor and claims such items as elements of damage in the minor’s case, he is then estopped from thereafter pursuing any further remedy.\textsuperscript{31} To avoid any question on the point, the parent in \textit{Romine v. City of Watseka},\textsuperscript{32} gave a formal written assignment of such claims to the child’s guardian who brought suit on the child’s behalf. That act gave the defendant cause to complain that it was error to exclude proof of the parent’s contributory negligence, which had aided in producing the injury, for it was argued that the assignee must necessarily take the claim subject to all defenses existing between the original parties. The court declined to agree, preferring to hold that the minor was not suing as assignee but rather was proceeding in his own right, for emancipation operated not so much to transfer prior property rights as it did to release former obligations.

Fundamental law forbids the splitting of a cause of action.


\textsuperscript{31} American Car & Foundry Co. v. Hill, 226 Ill. 227, 80 N. E. 784 (1907).

\textsuperscript{32} 341 Ill. App. 370, 91 N. E. (2d) 76 (1950). Leave to appeal has been denied.
under penalty of loss of all damage not claimed in the original action. For that reason, the use of a separate proceeding to recover expenses and attorney’s fees incurred in defending litigation, which subsequent events show should not have been brought, is usually not permitted, either because the recovery thereof should have been obtained in the original action or because there is a public policy against such claims, one based on the belief that it is better to allow recourse to the courts than to stifle the maintenance of misguided suits by threat of heavy penalty. That rule, of course, is not followed when it can be shown that the prior litigation was maliciously conducted, for a clear remedy exists, in tort, against those who engage in unwarranted malicious prosecutions or who invoke malicious abuses of process. The case of Skelly Oil Company v. Universal Oil Products Company, however, excites interest for the basis of the action there begun to recover fees and expenses was not that the prior litigation had been maliciously instituted but that the successful plaintiff, defendant herein, had later been shown to have succeeded in the earlier case by reason of having corruptly bribed a judge of a United States Court of Appeals to decide the appeal in its favor. The action was, to some extent, based on fraud and deceit, but of a dissimilar and more enormous type than that sometimes perpetrated. The fact that it was impossible to catalog the action did not deter the majority of the Appellate Court for the First District from reversing a judgment which had dismissed the complaint for failure to state a cause of action. It considered the case to be one falling within the constitutional mandate that every person “ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property, or reputation,” and, on that

33 See cases cited in annotation in 39 A. L. R. 1218.
34 Ritter v. Ritter, 381 Ill. 549, 46 N. E. (2d) 41 (1943).
basis, deemed it proper that a court should find a remedy against the type of fraud which had been perpetrated. If the suit had simply been one to secure restitution of the money which had been paid to the defendant, there would be little occasion to quarrel with the outcome of the case. There is occasion to doubt, however, that the court should have used the constitutional phraseology to develop a remedy not previously known to exist.

**APPEAL AND APPELLATE PROCEDURE**

Before proceeding with an examination of decisions concerning the right to appeal from trial court judgments and decrees, it is worth noting that some relief from erroneous decisions may be accomplished in the trial court by way of a motion under Section 72 of the Civil Practice Act. Since it is a form of appeal, there should be no surprise over the fact that many of the rules relating to appeal and appellate procedure should be applicable to such a motion. One such rule provides that there can be no review of a judgment or decree which has been entered by the consent of the parties. That principle has now been applied, in *Lefer v. Jones*, to a motion to vacate a former judgment filed in accordance with Section 72. It appeared, in that case, that the earlier judgment had been entered by "agreement between the parties hereto made in open court." An order setting the consent judgment aside was reversed on the ground the court lacked jurisdiction to review the original proceedings.

That doctrine does not carry over to cases in which the state is an interested party, according to *Massell v. Daley*, for the consent decree there previously entered was held properly vacated on the ground that no public official can effectively waive the right of the state to seek review of an adverse determination.

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41 Sims v. Powell, 390 Ill. 610, 62 N. E. (2d) 456 (1945). In City of Kankakee v. Lang, 323 Ill. App. 14, 54 N. E. (2d) 605 (1944), noted in 23 CHICAGO-KENT LAW REVIEW 25, an "O.K.'d" order was deemed to fall in this category.
43 404 Ill. 479, 89 N. E. (2d) 361 (1950), noted in 38 Ill. B. J. 289.
But, in *Nelson v. Nelson*, a majority of the justices of the Appellate Court for the First District applied much the same rule to a case wherein the “approved” decree effected a compromise, between the parents, of the obligation to provide for the support of a child. As the fundamental agreement was deemed void because of a public policy forbidding release of the duty to support, it was held that there could be no such thing as a “consent” decree operating to relieve one of the burden.

If an appeal is sought, the attorney should be watchful of the fact that limitations do exist on the jurisdiction of reviewing tribunals. The jurisdiction of the Supreme Court to entertain a direct appeal, in real property cases, for example, is limited to those situations wherein a freehold is directly involved. In two prior cases, that court had entertained direct appeals in suits involving the riparian rights of land owners, particularly with respect to stream pollution, on the theory that the right to a stream of water was “as sacred as a right to the soil over which it flows.” On further reflection, the court held, in *Clark v. Lindsay Light & Chemical Company*, that since such riparian waters are not technically susceptible of absolute ownership, as would be true of the soil, direct appeal to the Supreme Court was improper. The case was, therefore, transferred to the appropriate Appellate Court.

It should next be remembered that appeals typically lie only from final orders, judgments or decrees. Any liberality which may have been displayed, in conformity with the spirit underlying the Civil Practice Act, respecting the finality of a trial court

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45 Dwyer v. Dwyer, 366 Ill. 630, 10 N. E. (2d) 344 (1937).
47 See Barrington Hills Country Club v. Village of Barrington, 357 Ill. 11, 191 N. E. 239 (1934); City of Kewanee v. Otley, 204 Ill. 402, 68 N. E. 388 (1903).
48 City of Kewanee v. Otley, 204 Ill. 402 at 417, 68 N. E. 388 at 393.
49 405 Ill. 129, 89 N. E. 900 (1950).
50 The judgment of the trial court was affirmed after transfer of the cause: 341 Ill. App. 316, 93 N. E. (2d) 441 (1950).
judgment as condition precedent to an appeal therefrom\textsuperscript{52} would seem to have been withdrawn under the holding in \textit{Anderson v. Samuelson.}\textsuperscript{53} After verdict for the defendant therein and denial of a motion for a new trial, the trial judge entered judgment to the effect that the defendant should recover his costs and that execution should issue therefor. The judgment order did not contain any phrase to the effect that the plaintiff should "take nothing by his suit" or that the defendant should "go hence without day." The reviewing court, on its own motion, decided the judgment was not one calling for final disposition of the case and dismissed the appeal.\textsuperscript{54} It is true that the trial judge could have found a better expression to indicate his intention and purpose to dismiss the suit, but slavish regard for old forms hardly comports with the spirit of modern procedure, nor is litigation "speedily and finally determined" by holdings such as the one in this case.

Where review of interlocutory orders is permitted, such as in the case of the granting of a temporary injunction,\textsuperscript{55} the scope of the review is generally confined to an examination into the exercise of discretion in the entry of such order, but would necessarily include an examination into the sufficiency of the complaint to determine whether it would support any order.\textsuperscript{56} The case of \textit{Biehn v. Tess}\textsuperscript{57} introduced a novel point for the defendant there concerned had, prior to an appeal from an interlocutory order granting a temporary injunction, first moved to dismiss the complaint for failure to state a cause of action and, when that motion had been overruled, had then answered as to the merits. At the ensuing appeal from the interlocutory order, plaintiff desired


\textsuperscript{53}340 Ill. App. 528, 92 N. E. (2d) 343 (1950). It is worthy of note that Justice Dove, who wrote the dissenting opinion in Gould v. Klabunde, 326 Ill. App. 643, 63 N. E. (2d) 258 (1945), now appears to have convinced the other justices of the Appellate Court for the Second District to follow his view on the point.

\textsuperscript{54}It is admitted that the jurisdiction of a reviewing court is generally limited to appeals from "final" orders: Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 201.

\textsuperscript{55}Ibid., Vol. 2, Ch. 110, § 202.


to limit appellate consideration to the sole question of the proper exercise of discretion on the theory that the defendant, by answering, had admitted the sufficiency of the complaint and could not, therefore, urge its insufficiency for the purpose of undermining the interlocutory order. The Appellate Court, nevertheless, examined into the sufficiency of the complaint, taken by itself, disregarded the course of pleading in the trial court, and finding the complaint to be defective then ordered the temporary injunction set aside.

A few points have also been made concerning procedure on appeal. No appeal operates as a supersedeas unless, and until, the appellant provides bond pursuant to Section 82 of the Civil Practice Act, but no distinction is there made between a bond simply to cover the cost of appeal and one intended to insure the payment of the judgment or decree in case the same is affirmed, for the only requirement is that the bond be "in a reasonable amount to secure the adverse party." Naturally, once bond is provided, no action may be taken to carry the judgment or decree into effect nor may the expenses of suit be enhanced by any action taken thereunder. It was urged, in Harrison v. Kamp, that a difference, in fact, did exist between a bond for costs and one given to secure payment, so that expenses incurred after an appeal had been taken were properly chargeable as costs, when only the former type of bond had been used, because supersedeas had not then become effective. The argument was seemingly reinforced by the fact that the appellant, having provided a nominal bond in the trial court, later applied to the Supreme Court for a writ of supersedeas to prevent sale of the real estate in question and was there, as a condition to the issuance of such writ, obliged to give a much more substantial

59 This statement is not accurate as to a judgment or decree which is self-executing. In Gumberts v. East Oak Street Hotel Co., 404 Ill. 386, 88 N. E. (2d) 883 (1949), the Supreme Court noted that the appeal there taken from a decree dismissing a complaint, even after bond had been provided, did not operate to stay the power of the appellee to sell the property in question for, after dismissal, there were no further proceedings to be stayed, except perhaps those relating to enforcement of a judgment for costs.
60 403 Ill. 542, 87 N. E. (2d) 631 (1949), reversing 335 Ill. App. 260, 81 N. E. (2d) 754 (1948).
bond. The Supreme Court, nevertheless, decided that the trial court lost all jurisdiction as soon as a bond, in any amount, had been approved and that the decree creditor should have attacked the sufficiency thereof before attempting to enforce the decree. The extra expense incurred was, therefore, disallowed.

Due observance of time limitations on the right to appeal is essential, for an untimely appeal may well be dismissed, either on motion or by the reviewing court without any motion. Disparity, of course, exists in the manner of measuring the operation of the time limit in law cases when contrasted with equity proceedings because of an intrinsic difference in the manner of rendering a binding final decision. The law judgment becomes final, and the time for appeal begins to run, from the moment the judgment is uttered.61 By contrast, the equity decree takes effect only after it has been reduced to writing, has been signed by the chancellor, and has been filed for enrolling with the clerk of the court.62 In either event, according to Jones v. City of Carterville,63 the date shown on the appellate record for the entry or enrolling of the decision controls the period for permissible appeal and the court will not permit extraneous matters to enlarge that time.64

Along that same line, it should be noted that there is a spread of ten days between the time when the appellant should file the report of the trial proceedings in the lower court65 and the time when the same should be transmitted to the reviewing tribunal.66 That ten-day lag was sufficient, in Kohn v. Kohn,67 to save an appeal from a motion to dismiss. The appellant had, within the time fixed by law, obtained an ex-

61 Chicago Great Western R. Co. v. Ashelford, 268 Ill. 87, 108 N. E. 761 (1915).
64 The facts indicated that the record showed entry of the decree on May 3rd, although the clerk certified that the decree had not been received by him until July 28th. An appeal taken on October 10th, more than ninety days after May 3rd but well within the period if the same was to be measured from July 28th, was ordered dismissed on the state of the record. There was intimation that if an effort had been made to correct the record, the appeal might have been saved.
66 Ibid., § 259.36(2) (a).
tension of time from the trial court within which to file the trial report. Prior to the expiration thereof, and on stipulation, the appellant secured an additional extension from the reviewing court, which court fixed a precise day for the filing. The trial record was filed below on the day named but did not reach the reviewing court until some eight days later. It was held that the appeal had been properly taken for the rule in question served to add the ten-day period for transmittal of the record to any period of extension which might be properly granted.

The appellate record should, of course, be complete in every respect so that the reviewing tribunal may, if necessary, turn to it with ease and there find every step taken in the case below. In addition, the accompanying abstract of the record should, by appropriate marginal page numbering, facilitate the work of the court by making reference to the record a simple matter. It is not to be wondered, therefore, that a reviewing court should express displeasure if the appellant has not provided these time-saving devices and even carry that displeasure to the point of dismissing the appeal. Such was the case in People ex rel. Rose v. Craig where the judgment of the trial court was affirmed because the appellate record was incomplete and the abstract inadequate to reveal any reversible error. In Jacobs v. Metropolitan Life Insurance Company, however, the attack on the appeal failed because the alleged omissions in the record arose from the act of the clerk of the trial court in leaving out the covers of the various pleadings, etc., on which had appeared the customary filing data, but the omission had been supplied by a photostatic copy of the docket sheet which showed the actual dates of filing. The higher court described the record as "confusing," thereby intimating that the practice should not be followed hereafter, but denied the motion to dismiss the appeal on the ground the original record, plus a proffered additional transcript, adequately presented questions for review.

69 Ibid., § 259.38.
70 404 Ill. 505, 89 N. E. (2d) 409 (1950).
ENFORCEMENT OF JUDGMENTS

A final and unreversed judgment having been obtained, the issue then becomes one as to the manner of its enforcement. General doctrines have gone unchanged, but three interesting cases falling in this area have been decided. The first to be noted is that of Corrigan v. Miller for there, under a broad application of Section 78 of the Bulk Sales Law, it was determined that the ex-wife of the vendor involved, having secured a judgment against him for accrued alimony, could successfully levy upon a portion of the property sold to the vendee, even though such portion constituted only a third of the total business assets of the debtor. The divorced vendor had been engaged in a combination rubber tile and marble contracting business which he decided to sell out to his employees. The particular vendee bought the tile branch of the business while another purchased the marble branch. The deals were consummated simultaneously with both buyers knowing of the sale to the other. Together, they constituted a disposition of the total assets of the business.

Seizure of the assets at the instance of the judgment creditor was upheld, despite the contention advanced by the particular vendee that his sale did not come within the compass of the Bulk Sales Act, because it was said the sale was one of goods and chattels used by the contractor in his business and because the purchase did constitute a transfer of a major part of the vendor’s goods. It is well-settled law that the particular nature or character of the goods is a matter of no moment so long as the items do represent goods and chattels of the vendor’s business. The decision on the second point, however, leaves one in doubt. Conceded that the statute would be applicable to a case wherein the vendees purchase for their joint account, still in the instant case the buyers, although buying at the same time, acted inde-

pendently of one another. The sale of the marble branch of the business to the second buyer was clearly within the act for it covered a major part of the business. 76 But was the sale to the particular vendee held vulnerable because he knew that the entire assets were being sold or because he had purchased the entire assets of one branch of the business? The opinion fails to provide an answer. If it is based on the second proposition, there is occasion to doubt whether the statutory language is applicable simply because a vendor has seen fit to divide his operations into several departments.

Section 49 of the Chancery Act authorizes the use of a creditor’s bill to reach trust funds payable to a debtor-beneficiary, with some limitations.77 It has been decided, in Illinois, by construction of that statute, that an unsatisfied judgment creditor may not reach funds due his debtor where the source of those funds rises from a trust established in good faith by one other than the debtor. A creditor’s bill will be of no avail against such a trust,78 nor will a garnishment action79 or an attachment proceeding80 be effective. Even though the debtor becomes bankrupt, it has been said that the trust funds are still protected, for title does not pass to the bankruptcy trustee,81 although the Bankruptcy Act would seem to so provide.82 The law, of course, places no restriction on the beneficiary’s right to make a voluntary transfer of his interest.83

77 Ill. Rev. Stat. 1949, Vol. 1, Ch. 22, § 49, denies the right when the trust has "in good faith, been created by, or the fund so held in trust proceeded from, some person other than the defendant himself."
78 Binns v. LaForge, 191 Ill. 598, 61 N. E. 382 (1901).
80 Dunham v. Kaufman, 385 Ill. 79, 52 N. E. (2d) 143 (1944), noted in 22 CHICAGO-KENT LAW REVIEW 80.
82 52 Stat. 879; 11 U. S. C. § 110. Bankruptcy Act, § 70, sub-section (a) (5), declares that the trustee in bankruptcy is vested, by operation of law, with the bankrupt's title to "property, including rights of action, which prior to the filing of the petition he could by any means have transferred."
83 Merchants' Loan & Trust Co. v. Patterson, 308 Ill. 519, 139 N. E. 912 (1923); Hiss v. Hiss, 228 Ill. 414, 81 N. E. 1056 (1907); Binns v. LaForge, 191 Ill. 598, 61 N. E. 382 (1901); Blair v. Linn, 274 Ill. App. 23 (1934).
The recent federal court decision in the case of Young v. Handwerk raises serious question as to the effect of earlier Illinois cases which had held that the statute above noted prevented the transfer of the bankrupt's interest in a trust to his trustee in bankruptcy where the nature of the trust was non-spendthrift in character. Long prior to that proceeding, the beneficiary of the trust had been adjudicated a bankrupt. The proceeding was opened up some eleven years later on the ground of a failure to schedule certain assets. The trust interest was then scheduled by amendment and the bankruptcy trustee, by plenary action, sought an accounting against the trustees of the trust. The district court, deeming itself bound by the earlier Illinois cases, dismissed the complaint on motion of the defendant. The Court of Appeals for the Seventh Circuit, however, refused to be so bound, ruling that as the beneficiary could have made a voluntary disposition of his interest at any time his vested equitable interest passed to the bankrupt's trustee.

It might be suggested that the view expressed in the case is the only one tenable in view of the express provision of the Bankruptcy Act, but the law is left in a sorry state. So long as there is conflict between state and federal law, creditors who find themselves stopped cold in the state court may yet benefit by placing the debtor-beneficiary in bankruptcy, if that is possible. Even then, benefit will result only if the bankruptcy trustee can bring his plenary action to reach the trust fund in a federal court by reason of diversity of citizenship. If not, things deemed to be assets for one purpose will not be assets for other purposes.

One other case merits attention. A purchaser at a judgment or decree sale sleeps on his rights at his peril for, during the

84 179 F. (2d) 70 (1949), noted in 1950 Ill. L. Forum 269.
85 See In re Joslyn's Estate, 171 F. (2d) 139 (1948).
86 Plenary action was necessary for the trustee of the trust was viewed as an adverse holder to the beneficiary: Collier, Bankruptcy, Vol. 2, § 23.06, n. 24, 14th Ed.
87 Defendant relied on Erie R. Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487 (1938). There is ample authority, however, for the refusal to follow state law if it is in conflict with the Bankruptcy Act, both before and after the Erie-Tompkins case: Marine Harbor Properties, Inc. v. Manufacturer's Trust Co., 317 U. S. 78, 63 S. Ct. 93, 87 L. Ed. 64 (1942), and Page v. Edmunds, 187 U. S. 596, 23 S. Ct. 200, 47 L. Ed. 318 (1903), are but two of many cases in point.
redemption period, he must keep a watchful eye and be ready to act promptly and properly or he may find that his bargain is gone. That lesson is amply driven home by the outcome of the case of *Hart v. Brown*. It appeared therein that an obligor on certain mortgage bonds had defaulted and the trustee had sued to foreclose, joining all necessary parties. Foreclosure, sale, and deficiency judgment followed in regular order, with plaintiff becoming the holder of master's certificate of sale. Defendant, one of the bondholders, who allegedly had been represented by the trustee in the foreclosure action, later secured a law judgment in another court on his bonds and, on the last day for redemption by a judgment creditor, redeemed from the foreclosure sale and received a bailiff's deed. Plaintiff then sought to have the bailiff's deed declared void. He alleged that the judgment which was the basis of redemption was void, hence open to collateral attack, because the court of rendition lacked jurisdiction over the subject matter. That claim was advanced on the basis that the bonds sued on had been merged in the foreclosure decree. He also charged that the judgment had been fraudulently obtained because of a failure to notify the court of rendition that the bonds were a part of the series which had been included in the foreclosure proceeding so as to make the decree therein res judicata. Defendant, on the other hand, contended that the judgment was valid and immune from collateral attack. His motion to dismiss the complaint was sustained and the Supreme Court affirmed.

It held that the matter, being a suit in contract, was one over which the court of rendition had jurisdiction so as to expose its judgment only to attack by direct proceeding. It recognized that the presence of fraud would justify a collateral

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89 404 Ill. 498, 89 N. E. (2d) 370 (1950), noted in 38 Ill. B. J. 365.
90 Wyman v. Hageman, 318 Ill. 64, 148 N. E. 852 (1925); Hoit v. Snodgrass, 315 Ill. 548, 146 N. E. 562 (1925). The court expressed some doubt over the point as to whether or not the bonds were sufficiently identified to be merged in the prior decree.
91 The obtaining of a judgment, for the purpose of making a redemption, where no debt in fact is present, has been held to be a fraud on the court: Elting v. First Nat. Bank, 173 Ill. 368, 50 N. E. 1095 (1898); Atlas National Bank v. Moore, 152 Ill. 528, 38 N. E. 684, 43 Am. St. Rep. 274 (1894). That rule was reaffirmed only last year in Balassek v. Blaszak, 405 Ill. 36, 89 N. E. (2d) 796 (1950).
attack, but disposed of plaintiff's charges on the basis that the allegation was lacking in clarity and definiteness. It was said that the mere fact that a person has pursued his remedy as a bondholder in order to establish a standing as a judgment creditor for the purpose of effecting a redemption is not presumptive evidence of fraud. The decision may, however, be but a reflection of a policy to encourage redemption so that a debtor's property may go to satisfy as much of his liability as is possible. It would also appear that if a court is asked to determine rights between a redeeming judgment creditor and a purchaser at foreclosure sale, it will, if at all possible, favor the former over the latter.

IV. CRIMINAL LAW AND PROCEDURE

Cases involving new developments in substantive criminal law are, as usual, limited in number for the basic principles undergo slight change during a survey period. Some expansion of substantive criminal law has, however, resulted from the application of basic principles to novel fact situations. It is, for example, a well established principle that an individual has the right to commit homicide in defense of his habitation, if necessary, but that principle was, for the first time applied, in People v. Eatman, to the defense of a rented apartment. It was there said that a tenant in possession had the right to use force, including homicide if necessary, if the landlord should illegally attempt to force an entrance into the premises in an effort to collect rent. But an attempt, in People v. Smith, to expand the definition of habitation to include a public mine office which joined the defendant's living quarters failed when the court there declined to find that any defense of the habitation was involved.

92 Williams v. Williston, 315 Ill. 178, 146 N. E. 143 (1924).
93 Karnes v. Lloyd, 52 Ill. 113 (1869); Phillips v. Demoss, 14 Ill. 409 (1853).
94 Nudelman v. Carlson, 375 Ill. 577, 32 N. E. (2d) 142 (1941); Strauss v. Tuckhorn, 200 Ill. 75, 63 N. E. 683 (1902); Whitehead v. Hall, 148 Ill. 253, 35 N. E. 871 (1893).
1 People v. Osborne, 278 Ill. 104, 115 N. E. 890 (1917); Foster v. Shepherd, 258 Ill. 164, 101 N. E. 411 (1913); Hayner v. People, 213 Ill. 142, 72 N. E. 792 (1905).
2 405 Ill. 491, 91 N. E. (2d) 387 (1950).
3 404 Ill. 125, 88 N. E. (2d) 444 (1949).