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III. CIVIL PRACTICE AND PROCEDURE

AVAILABILITY OF REMEDIES

Only one case seems to have dealt directly with the jurisdictional power of state tribunals to entertain causes.¹ It was noted, in *Keel v. Illinois Terminal Railroad Company*,² that, while a state court would have the power to determine the right of a railroad employee to recover damages for an alleged wrongful discharge from his employment, it would lack authority to order his reinstatement in view of the exclusive character of the grievance procedure set forth in the federal Railroad Labor Act.³ Federal courts sitting in Illinois, however, are not, under the holding in *First National Bank of Chicago v. United Air Lines, Inc.*,⁴ to be considered bound by the restrictions in the Illinois Wrongful Death Act,⁵ a section of which purports to forbid the maintenance of suits in this state on certain types of wrongful deaths occurring elsewhere. As the holding of the United States Supreme Court therein would appear to have rejected any thought of a difference between the Illinois statute and the one from Wisconsin, previously considered to be unconstitutional in the case of *Hughes v. Fetter*,⁶ the decision would also appear to have freed state courts in Illinois from any similar restraint.

While no serious issues of consequence have arisen regarding the acquisition of jurisdiction over the parties to litigation, or the time within which suit must be brought, venue provisions being what they are,⁷ three decisions during the year may be

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¹ The Appellate Court, in *Parkin v. Damen-Ridge Apartments, Inc.*, 344 Ill. App. 301, 100 N. E. (2d) 632 (1951), reaffirmed the proposition that a state court has concurrent jurisdiction with a federal court in a matter arising under a federal statute in the absence of an express limitation therein reserving jurisdiction to the federal courts.
³ 45 U. S. C. A. § 151 et seq.
⁴ 342 U. S. 396, 72 S. Ct. 421, 96 L. Ed. 441 (1952), reversing 190 F. (2d) 493 (1951). Reed and Frankfurter, JJ., each wrote a dissenting opinion.
⁷ Ill. Rev. Stat. 1951, Vol. 2, Ch. 110, § 131, provides generally for suit in the county of the defendant’s residence but permits suit in a county “in which the transaction or some part thereof” occurred.
considered important for the light they shed on the place where suit must be brought.\textsuperscript{8} In the first, that of \textit{First National Bank of Lacon v. Bauer Poultry Corporation},\textsuperscript{9} a suit based on a check issued and delivered in Cook County and drawn on a bank located there, the plaintiff, a transferee for value of such check who took the same by negotiation in Marshall County, was permitted to maintain his action in Marshall County, primarily because the defendant's motion to transfer the cause\textsuperscript{10} was not filed until after a general appearance had been made.\textsuperscript{11} The Appellate Court for the Second District did, however, there intimate that it considered the act of negotiation to be a sufficient part of the transaction to meet venue requirements. In a somewhat similar case, that of \textit{Winn v. Vogel},\textsuperscript{12} the Appellate Court for the Fourth District sustained defendant's objection that he ought not be sued in Williamson County on a check issued in, and drawn on a bank in, Douglas County, where defendant also resided, even though deposited for collection by the payee in Williamson County, since the act of deposit in the latter county occurred between the payee and a third person and was not, therefore, part of the transaction between the parties to the suit. The third case, that of \textit{Christopher v. West},\textsuperscript{13} followed the line of some earlier decisions\textsuperscript{14} for the Appellate Court for the Third District there held that a suit in Sangamon County, growing out of a real estate contract made in Ford County for the sale of land in Iroquois County, observed venue requirements because the abstract of title had been delivered for examination in Sangamon County and many of the conferences between the parties regarding the clearing up of objections to title had occurred there.

\textsuperscript{8} Ibid., Ch. 110, § 135, saves a judgment entered in the wrong county if no protest is made.
\textsuperscript{9} 345 Ill. App. 315, 103 N. E. (2d) 160 (1952). Leave to appeal has been denied.
\textsuperscript{11} Iles v. Heidenreich, 271 Ill. 480, 111 N. E. 524 (1916).
\textsuperscript{12} 345 Ill. App. 425, 103 N. E. (2d) 673 (1952).
\textsuperscript{13} 345 Ill. App. 515, 104 N. E. (2d) 309 (1952).
If jurisdictional requirements have been observed, so that no attack may be made on the basis thereof, the defendant should be conscious of the fact that provisions have been made, in the Civil Practice Act, for the filing of an appearance and a demand for jury trial, all within a limited period of time, although the court may, for good cause shown, grant an extension of time for the taking of any other step in the case such as the filing of a motion or an answer. The decision in *Vail v. City of Paris* should serve as warning not to delay the entry of appearance, and particularly not the demand for jury trial if one is desired, even though the court may see fit to extend time for other purposes, for it was there held proper to strike a late request for jury trial despite the fact the same had been presented within the period fixed by an extension of time in which to answer. The prior liberal holdings in *Stephens v. Kastens* and in *Mason v. Continental Distributing Company, Inc.*, were distinguished on the basis the facts thereof showed an extenuation for the delay.

Few questions have been generated regarding the proper parties to litigation but, even where permitted, the use of third-party practice is not without limitation, judging by the holding in the case of *Western Contractors Supply Company v. T. P. Dowdle Company*. The plaintiff there, suing in the Municipal Court of Chicago for the price of goods sold and delivered, found himself embroiled in a dispute between the original defendant and a third party, added pursuant to rule of court, who had allegedly converted the goods so sold at some time later than the dates mentioned in plaintiff's statement of claim. The Appellate Court, on

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16 Ibid., Ch. 110, § 183.
18 388 Ill. 127, 48 N. E. (2d) 508 (1943).
19 333 Ill. App. 128, 76 N. E. (2d) 780 (1948).
20 The provisions of the Civil Practice Act, Ill. Rev. Stat. 1951, Vol. 2, Ch. 110, § 149, regarding the bringing of new parties into suits pending in courts regulated by that statute, do not appear to be broad enough to authorize a general application of third-party practice. See 28 CHICAGO-KENT LAW REVIEW 33.
22 Rule 25 of that court specifically sanctions the use of third-party practice. It is modelled on Federal Rule 14.
finding that the dispute between the defendants in no way related to the plaintiff’s case nor involved any element by which the third-party defendant could be said to be liable for “all or part” of plaintiff’s claim, ruled the addition of the third-party defendant to be improper, reversed the judgment pronounced against such party, and directed that it be dismissed from the case.

In the absence of significant cases regarding the availability of legal remedies, a few cases concerning the scope of equitable proceedings may be mentioned. According to Coven Distributing Company, Inc. v. City of Chicago, neither an injunction proceeding nor one for declaratory judgment would be the proper vehicle to determine the legality of certain automatic amusement devices, for the operation of which the city had there refused a license on the assumption they were instruments to be used for gambling. Mandamus was said to be more appropriate for this purpose. In much the same way, it was held, in Bloome v. Juergensmeyer, that a court of equity would have no general jurisdiction to test the title to a public office, or to prevent the officer from performing his functions, at least not until proceedings had been otherwise conducted to determine his right to the office.

An equity court should also be slow to grant a temporary injunction against the enforcement of a statute by a properly constituted public official, although this may sometimes become necessary to preserve the status quo. The case of Thillens, Inc. v. Cooper illustrates one circumstance where injunctive relief might be considered to be appropriate. The plaintiff there, operating certain ambulatory currency exchanges, contended that compliance with the 1951 amendments to the Community Currency

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23 See ante, Division I, Business Organizations, notes 1 to 4, for discussion of Champan v. Barton, 345 Ill. App. 110, 102 N. E. (2d) 585 (1951), dealing with the power of an equity court to prevent an interference with the management of an Illinois corporation. See also post, Division VI, Property, notes 25 to 29, for the case of Jonas v. Meyers, 410 Ill. 213, 101 N. E. (2d) 509 (1951), which deals with equitable jurisdiction to reform a mistake in a deed.

24 346 Ill. App. 448, 105 N. E. (2d) 137 (1952). Leave to appeal has been denied.


Exchange Act would require the obtaining of approximately eight hundred individual licenses, would force plaintiff to discontinue business, and would produce an irreparable loss, hence was impossible to obey. The Appellate Court, recognizing the desirability of preserving the status quo until a test could be made of the constitutionality of the amendments, approved the granting of a temporary injunction.

The granting or withholding of an injunction may also be made to turn on questions of public interest. It was on that basis that the Appellate Court approved the decree in People v. Metropolitan Disposal Company, conceiving it to be in the paramount interest of the adjoining village, as well as of nearby property owners, that a garbage dump should be filled in rapidly under the supervision of a sanitation engineer. It did not, however, appear to take into consideration the interests of the population of a large city, utilizing the pit in question, to a more orderly method for garbage disposal.

The improper securing of a temporary injunction may be attended with an obligation to pay damages upon its later dissolution, but the case of Lake County v. Cuneo suggests an important qualification on that doctrine when the petitioner is a quasi-public corporation and a subdivision of the state. Bearing in mind that the state and its subdivisions are not generally liable for damages arising from a tort inflicted on an individual, the court there refused to approve an allowance for damages growing out of a wrongfully-obtained injunction which the county had secured against the individual property owner, particularly since the injunction had been sought in connection with the county's governmental function of enforcing certain zoning ordinances.

Class suits, being solely of equitable cognizance in this state, are marked by certain equitable principles regulating the right of one, or a few, to maintain such actions on behalf of others. In

27 Ill. Rev. Stat. 1951, Vol. 1, Ch. 16 1/2, § 30 et seq.
30 344 Ill. App. 242, 100 N. E. (2d) 521 (1951). Leave to appeal has been denied.
Kimbrough v. Parker, however, the court found an observance of these principles so it upheld the right of the plaintiffs to proceed with a representative action. The case was one in which some five contestants, participating in a puzzle contest conducted under the auspices of the defendants, instituted a class suit for the benefit of numerous others in order to have a trust imposed upon the proceeds because of the defendant's fraudulent dealings therewith. Inasmuch as there was a common fund to which all contributions flowed, and the contestants were many in number, but the inducements offered each were substantially identical, a class suit was deemed to be appropriate, particularly since there was no conflict of interest between the plaintiffs and those whom they sought to represent.

The rapid use which has been made of the quasi-equitable proceeding for a declaratory judgment, a remedy strictly sui generis in character, reveals that the bar is not entirely familiar with some restrictions adhering thereto. In Goodyear Rubber Company v. Tierney, for example, it was necessary for the Supreme Court to point out that, where another and long-standing statutory remedy is already available, recourse should not be had to the proceeding for a declaration of rights. The case of Lentin v. Continental Assurance Company, by contract, indicates how close is the parallel between a declaratory judgment proceeding and an equitable action for reformation. It having been there determined, in a suit over the effective date of an insurance policy, that reformation was not needed but that a construction and clarification of ambiguous language was enough to settle the dispute, the Supreme Court approved the use made of a declaratory judgment action against the objection that a true suit in equity was the only proper and available method for the securing of relief.

33 411 Ill. 421, 104 N. E. (2d) 22 (1952), noted in 40 Ill. B. J. 535.
34 In that instance, the remedy was one by way of objection to a tax sale, based on Ill. Rev. Stat. 1951, Vol. 2, Ch. 120, § 675.
35 412 Ill. 158, 106 N. E. (2d) 735 (1952). See also the discussion of the insurance features of this case ante, Division II, Contracts, notes 18 to 23.
PREPARATION OF PLEADINGS

While the Civil Practice Act purports to abolish the distinctions which heretofore existed between the several forms of action, it has not proceeded so far as to permit a pleader to allege a case without giving due observance to the essential elements of a cause of action, hence the pleader should, before preparing a complaint, adopt a theory for his proposed suit and should check the complaint, when drawn, against that theory to make sure he has alleged every essential element. If he has failed in that respect, he may, nevertheless, by accident, have stated a case on some other theory, one which would be sufficient to sustain his complaint against a motion to strike. It was on this basis that the Appellate Court for the Second District, in Burr v. State Bank of St. Charles, reversed a judgment sustaining a motion to strike a complaint when it found the complaint was inadequate to state a cause of action as in trespass, the intended theory, but was adequate for the purpose of stating what would formerly have been an action in trespass on the case. If the complaint is fatally defective on every possible theory, however, the court must grant relief to the defendant, according to the holding in Gustafson v. Consumers Sales Agency, Inc., and that whether the point is urged by way of motion to strike, by motion for judgment notwithstanding the verdict, or even for the first time on appeal.

Some points have also been made with regard to the preparation of defensive pleadings. The requirement that a pleader should, in an answer, set forth as affirmative defenses those matters likely to take the opposite party by surprise, ought not be understood to mean that all such affirmative statements are necessarily intended to shift the burden of proof, or to

37 Ibid., Ch. 110, § 166(2), declares that no pleading shall be deemed bad in substance which “shall contain such information as shall reasonably inform” the opposite party of the nature of the claim.
38 344 Ill. App. 332, 100 N. E. (2d) 773 (1951). Leave to appeal has been denied.
39 346 Ill. App. 493, 105 N. E. (2d) 557 (1952). Leave to appeal has been allowed.
require the filing of a reply\textsuperscript{41} under penalty of admission for failure to deny,\textsuperscript{42} for certain of such matters, while affirmative in form, are really no more than negations of material elements of the plaintiff’s case. It was for that reason that the court, in \textit{Hestand v. Clark},\textsuperscript{43} refused to concede that the plaintiff had admitted the facts contained in the defendant’s answer, when neglecting to move to strike the same, or to reply thereto, because analysis revealed the alleged “affirmative” defenses amounted to no more than a traverse of plaintiff’s allegation of freedom from contributory negligence. Although affirmative in form, the allegations were treated as being nothing more than special denials, to which no reply would be needed.

It could also be noted that a statutory provision for pleading in quo warranto actions\textsuperscript{44} is much like a provision of the Civil Practice Act, one which permits the plaintiff to plead generally, as in the case of allegations relating to the performance of conditions precedent, and puts the responsibility on the defendant to point out precisely wherein the plaintiff may have failed to perform.\textsuperscript{45} These provisions, however, do not deny to the plaintiff the right to be specific if he chooses. If he should be specific, a problem could be generated as to the manner in which the defendant should respond. The Appellate Court for the Second District, in the quo warranto case of \textit{People ex rel. Koch v. Wilson},\textsuperscript{46} has now indicated, for the first time in Illinois, that the defendant is entitled to be content with a denial of plaintiff’s specific allegations and is not required to make his answer in the same form as would be necessary if plaintiff had pleaded in a more general fashion. It was there held to be error to strike an answer which did not set out the facts by way of justification for the defendant’s assumption of civil authority because the plain-

\textsuperscript{41} Ibid., Ch. 110, § 156, states: “When new matter by way of defense or counterclaim is pleaded in the answer, a reply shall be filed by the plaintiff.”

\textsuperscript{42} Ibid., Ch. 110, § 164(2).

\textsuperscript{43} 345 Ill. App. 480, 103 N. E. (2d) 652 (1952).

\textsuperscript{44} Ill. Rev. Stat. 1951, Vol. 2, Ch. 112, § 11.

\textsuperscript{45} Ibid., Ch. 110, § 259.13(3).

\textsuperscript{46} 346 Ill. App. 175, 104 N. E. (2d) 559 (1952).
tiff, by elaborate specification, had already indicated the basis of the alleged illegal assumption of power. A mere denial was, therefore, considered sufficient to generate the issues to be tried.

While it is not generally necessary that pleadings should be verified,\textsuperscript{47} there are times when the law requires the filing of sworn pleadings.\textsuperscript{48} A failure to observe such a requirement might well result in an admission for want of proper contest. If not, then the failure should be sufficient, according to \textit{Lindquist v. Village of Island Lake},\textsuperscript{49} to justify the striking of the unverified pleading.

Inasmuch as pleaders are only human and, for that reason, do commit error, it should be expected that liberality would be displayed in the matter of permitting amendments to pleadings in order that a party should be able to get a decision on the merits of the claim, or defense, intended to be offered,\textsuperscript{50} and this even though the amendment may not occur until after the statute of limitations had run, provided the action had been begun in time.\textsuperscript{51} The holding of the Appellate Court for the Third District in the case of \textit{In re Schafer's Estate}\textsuperscript{52} is, therefore, to be commended for the court there held it to be error to deny permission to amend a claim filed in certain probate proceedings\textsuperscript{53} when the only purpose of the proposed amendment was to cure a misnomer which had occurred and was not intended to enlarge upon the demand being asserted.\textsuperscript{54} An amendment intended, after trial, to change the cause from an equitable proceeding into a law suit

\textsuperscript{47} Ill. Rev. Stat. 1951, Vol. 2, Ch. 110, § 159, is permissive in form with respect to verification of the initial pleading in the case.

\textsuperscript{48} See, for example, Ill. Rev. Stat. 1951, Vol. 2, Ch. 110, § 174(7), relating to the vacation of a final judgment entered as by default.

\textsuperscript{49} 344 Ill. App. 400, 101 N. E. (2d) 120 (1951).

\textsuperscript{50} Ill. Rev. Stat. 1951, Vol. 2, Ch. 110, § 170.

\textsuperscript{51} But see note in 24 \textsc{Chicago-Kent Law Review} 170 on the point of the right to add new parties after the limitation period has expired.


\textsuperscript{54} See also Thomas v. Douglas, 346 Ill. App. 277, 105 N. E. (2d) 129 (1952), where the amendment, offered after the period of limitation had expired, was intended to more fully disclose the liability of a defendant who had been named in the caption, and who had been served and had appeared, but who had not been named in the body of the complaint. The amendment was held both proper and retroactive.
for damages, however, was held properly denied in Bartman v. Bartman when it appeared that the finding of the chancellor as to the non-existence of the alleged contract relied upon had militated against the possibility of either legal or equitable relief.

THE TRIAL OF THE CASE

Three cases throw some light on procedure antecedent to the trial itself. One, the lamented holding of the Supreme Court in Agran v. Checker Taxi Company, has served to strike down, as unconstitutional, the recent amendments to the Civil Practice Act intended to prevent the rendition of an ex parte judgment, such as one for dismissal for want of prosecution, by surprise and without warning. Another, that of Harwood v. Harwood, extends the summary judgment procedure of the Civil Practice Act to ejectment proceedings, although another section thereof would purport to exclude such proceedings from the operation of that statute. In the third, that of Zegarski v. Ashland Savings & Loan Association, the point was raised, but not decided, that evidence obtained by pre-trial discovery or deposition could not be utilized in support of a motion for summary judgment. While noting that the point was a novel one, as yet undetermined, the court avoided settling the problem by finding the affidavits

55 411 Ill. 487, 104 N. E. (2d) 296 (1952).
56 412 Ill. 145, 105 N. E. (2d) 713 (1952), noted in 30 CHICAGO-KENT LAW REVIEW 383.
58 The Supreme Court may, however, have displayed considerable liberality in providing for relief against such default judgments when, in Ellman v. DeRuiter, 412 Ill. 285, 106 N. E. (2d) 350 (1952), reversing 344 Ill. App. 557, 101 N. E. (2d) 630 (1951), it extended the scope of the motion in the nature of a writ of error coram nobis, presented under Ill. Rev. Stat. 1951, Vol. 2, Ch. 110, § 196, to cover a situation where plaintiff's counsel had, apparently without any justification, misled and lulled the defendant into a belief that no judgment had been taken until it was too late to move to vacate the same. The court likened the motion to a prayer for equitable treatment, not to be limited by those strictures which adhered to the use of the common-law writ of error coram nobis.
59 412 Ill. 131, 105 N. E. (2d) 719 (1952).
61 See Ill. Rev. Stat. 1951, Vol. 2, Ch. 110, § 125. It should be noted, however, that the amendment to the Ejectment Act added in 1935, ibid., Vol. 1, Ch. 45, § 50, purports to make the provisions of the Civil Practice Act applicable to ejectment actions.
and counter-affidavits, offered at the summary judgment hearing, to be sufficient to disclose a dispute as to the facts which required denial of the motion for summary judgment and remandment of the cause for trial.

Concerning proof itself, only a few instances of rules regulating the introduction of evidence have any noteworthy aspects. In *People v. Koseares*, proof that an alleged drawer of a check was a fictitious person was made in a negative fashion. The testimony was to the effect that the alleged maker had never had an account with the bank on which the check was drawn; that a search of telephone directories, and of lists of customers for public utility services, in the vicinity disclosed no such person listed; and a prominent citizen vouched for the fact that he had never heard of a person bearing the name which had been used on the check in question. The evidence was held competent, although the court could find no prior Illinois decision squarely on the point of the use which may be made of negative evidence and had to rely on text authority as well as decisions from other states.

In another criminal case, that of *People v. Gougas*, the Supreme Court reversed a conviction for murder because proof had been made by the prosecution of the fact that the defendant had a beneficial interest in an insurance policy on the life of his alleged victim, which evidence had been introduced to support an inference as to motive. The reversal was made necessary, the court said, because the record failed to show that the defendant knew, or could have known, of the existence of the insurance policy.

One civil case having to do with impeachment of a witness is worthy of comment. In the wrongful death case of *Petersen*

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63 See post, Division IV, Criminal Law and Procedure, notes 8 to 12, for discussion of the case of *People v. Gholson*, 412 Ill. 294, 106 N. E. (2d) 333 (1952), regarding proof in cases of indirect contempt of court. Hereafter, such matters will be determined by formal hearing at which customary proof methods will be applicable in lieu of the doctrine of "purgation by oath" heretofore followed.
64 410 Ill. 456, 102 N. E. (2d) 534 (1941).
v. Midwest Transfer Company of Illinois, the legal representative sued both the employer and the truck driver. The latter, at an inquest held before the suit, had made some damaging admissions. The plaintiff first sought, at the trial of the civil case, to establish these admissions by the testimony of the court reporter who had served at the inquest but the trial judge excluded this evidence on the ground the truck driver was present in court. This ruling was obviously erroneous, and was so held on appeal. Plaintiff then called the truck driver as an adverse witness but, when the trial judge demanded to know if plaintiff was willing to waive the statutory dead-man's disqualification as to "anything that might have transpired before the coroner's jury," the plaintiff's counsel replied that he was not so willing. An objection to the proposed interrogation of the truck driver was then sustained. He was also forbidden, because of his incompetency, from appearing as a witness when he later sought to testify in his own behalf.

The case becomes interesting because the Appellate Court, without giving clear recognition to language in one of the cases it cited, failed to notice that, under proper circumstances, the truck driver may have been regarded as competent to testify, at least as to part of the case. The court, in Merchants Loan & Trust Company v. Egan, had recognized that one who was an incompetent witness under the dead-man's act could be called as a witness for the purpose of proving his admissions and, within this limited area, could have been re-examined, despite his general incompetence. If plaintiff's counsel had seen fit to place a more precise limitation upon what he was willing to waive, the witness might have been taken over the ground covered by his admissions at the inquest and could then have denied, explained, or negated some of the conclusions to be drawn therefrom. The blanket refusal, following upon the grave error of the trial judge in erroneously demanding a total waiver of the incom-

68 222 Ill. 494, 78 N. E. 800 (1906).
petency, represented bad strategy on counsel’s part to say the least.

Although not a novel decision, the holding of the Appellate Court in Walker v. Shea-Matson Trucking Company69 might also be mentioned. It was there said to be error to give a jury instruction couched in the language of a section of the Motor Vehicle Act governing the right of way at intersections,70 not so much because “laying down the law in the words of the law itself” was error71 but because the particular instruction was not made applicable to the facts before the jury.

DAMAGES

The necessity for establishing a clear causal connection between the defendant’s wrongful act and the alleged injury to plaintiff was emphasized in the damage question propounded in Ford v. Panhandle Eastern Pipe Line Company.72 The injured plaintiff had there, apparently, recovered from the physical harm sustained in an automobile accident when, some twenty-seven months later, he suffered a cerebral thrombosis which resulted in a total paralysis. Despite expert medical testimony, by both the witnesses of the plaintiff and of the defendant, that a cerebral thrombosis would have to develop in a far shorter period of time, the trial court left the issue to the jury, which returned with a large verdict against the defendant. A judgment thereon was reversed by the Appellate Court for the Third District which held, as a matter of law, that, in the absence of any conflicting testimony on the point, the plaintiff had failed to establish the essential causal connection.73 In Olson v. Chicago Transit Authority,74 however, the Appellate Court for the First District accepted the jury’s verdict on the question of causation but did reverse the judgment

69 344 Ill. App. 466, 101 N. E. (2d) 449 (1951), noted in 1 DePaul L. Rev. 301.
73 The causal connection between the act and the harm was closer in point of time, but still a matter of doubt, in Behles v. Chicago Transit Authority, 346 Ill. App. 220, 104 N. E. (2d) 635 (1952), wherein leave to appeal was denied, but the matter was said to be one for jury determination.
74 346 Ill. App. 47, 104 N. E. (2d) 542 (1952).
for a new trial to be conducted solely on the issue as to the amount of damages.

Damages in wrongful death cases are typically recovered, if at all, by the legal representative of the deceased person's estate who, under the statute, appears to be the only proper person to maintain the action. The case of Thompson v. City of Bushnell, however, suggests an interesting possibility for augmenting the recovery in such a case. A widow was there permitted, in her own name and right, to secure the recovery of medical, hospital and nursing expenses furnished to her husband prior to his death, as well as for the expenses of his funeral, when the Appellate Court for the Third District concluded that she could, under its interpretation of the so-called "family expense" statute, have been held liable therefor. Lacking local precedent on the point, the court relied on the Oregon case of Hansen v. Hayes, a case in which the common law duty of the husband to pay charges of that character was treated as supporting a correlative duty on the part of the wife, thereby enabling her to secure reimbursement for expenses forced upon her by defendant's wrong.

The right of one joint tort-feasor to have the benefit, by way of mitigation of damages, for sums paid by other joint tort-feasors for covenants not to sue has been fairly well settled, but some question may exist as to the method to be pursued to take advantage of such fact. The case of Burns v. Stouffer would appear to suggest that, if such a covenant should be given during the course of a trial, the remaining defendant should seek permis-

77 175 Ore. 358, 154 P. (2d) 202 (1944).
79 In Smith v. Medendorp, 343 Ill. App. 512, 99 N. E. (2d) 571 (1951), for example, it was held to be too late to raise the question by way of motion for judgment notwithstanding the verdict.
80 344 Ill. App. 105, 100 N. E. (2d) 507 (1951).
sion to file a supplemental answer, unless the plaintiff is willing to waive the point, in order to provide a foundation for the offer of proof regarding the amount so paid.

Issues concerning damage law in contract cases were also presented during the year. It is the rule that the victim of a broken sales contract may, at his option, tender performance and sue for the contract price, or dispose of the goods at resale and recover the deficit, if any, by way of suit for damages. If he prefers the latter course, he should, in all fairness, do everything possible to minimize the damage but, according to the case of Corydon & Ohlrich, Inc. v. Kusper Bros. Company, he is under no obligation to act to minimize damage until he has clear notice of the breach. If, at that time, conditions have become such as to make minimization of the damage impossible, as by a total collapse of the market for the article in question, the seller is then entitled to recover the sales price provided he has kept himself ready to perform. The court there indicated that, under such circumstances, no other measure of damage could be calculated.

APPEAL AND APPELLATE PROCEDURE

An extremely delicate issue concerning the propriety of judicial conduct was generated during the year by the events occurring in the course of the appeal taken in Glasser v. Essaness Theatres Corporation. After the original opinion therein had been released, with one judge dissenting, a change was made in the constitution of the division of the Appellate Court for the First District which had heard the appeal, the two concurring judges being transferred to another division and being replaced by two others. A petition for rehearing was then filed and considered by the reconstituted court which thereafter, with one dissent, substituted a new opinion and produced a directly opposite result to

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82 Ibid., Vol. 2, Ch. 121½, §§ 63-4.
83 345 Ill. App. 224, 102 N. E. (2d) 672 (1951). Leave to appeal has been denied.
84 346 Ill. App. 72, 104 N. E. (2d) 510 (1952). Friend, J., wrote a dissenting opinion. Leave to appeal has been granted. See also Weinrob v. Heintz, 346 Ill. App. 30, 104 N. E. (2d) 534 (1952), involving the same problem.
that attained at the first hearing. If the former justices had died or had, by reason of the expiration of terms of office, ceased to function, the action taken would have been the only possible way to proceed to prevent an impasse. As they were, however, still serving in the Appellate Court at the time the petition for rehearing was considered, and could have been re-transferred for the purpose of passing thereon, the unusual result, if sustained, could form the basis for an imputation, no matter how unfounded, that a tampering with the processes of justice had occurred.

Other aspects of the law regulating the review of cases have been considered. Provision has been made in the Civil Practice Act under which a party, on reversal of a judgment by an appellate court, may secure further review before the Supreme Court if he will certify that, on a new trial, he would have no further proof to offer and is willing to stake his entire suit on the legal questions contained in the record. The decision of the Supreme Court in *Lees v. Chicago & North Western Railway Company*, however, would indicate that resort to this provision would be improper if the reason advanced to sustain the reversal in the appellate court was such as to constitute only a partial defense to the suit. The court there dismissed further review, taken pursuant to leave granted on the basis mentioned, when it concluded there was an unsettled question as to the sufficiency of the defendant's, rather than the plaintiff's, proof which would have to be determined on remandment, and until this point had been settled there was nothing on which the Supreme Court could act.

The possibility that several judgments may be entered in the one proceeding has opened the door to questions concerning the proper parties to an appellate proceeding. The plaintiff in *Beadles v. Servel, Incorporated*, had filed a complaint to recover for personal injuries, naming two corporations as defendants. One defendant moved to strike the complaint as to it and, when

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86 400 Ill. 536, 100 N. E. (2d) 653 (1951), noted in 1952 Ill. L. Forum 152. Bristow and Maxwell, JJ., dissented.
88 344 Ill. App. 133, 100 N. E. (2d) 405 (1951).
such relief was granted and plaintiff elected to abide by the complaint, the suit was dismissed in its favor. The other defendant had likewise moved to strike the complaint but no ruling had been made on that motion so the case, as to such defendant, remained pending in the trial court. On appeal from the order of dismissal as to the first defendant, the Appellate Court for the Third District held it to be error to make the second defendant a party to the review proceedings, since there was no final order as to it, for which reason a motion to dismiss the appeal as to such defendant was sustained.

Although the provisions of the Civil Practice Act regarding the time and manner of securing review, both of trial court and appellate court decisions, are reasonably comprehensive,⁹⁹ it took the case of Altschuler v. Altschuler⁹⁰ to expose the fact that, in at least one area, the statute appears to be inadequate. The case was one concerning a partnership accounting in which some issues regarding partnership realty were injected but, until the Appellate Court for the First District rendered its opinion,⁹¹ it had not really been decided that a freehold was involved. The plaintiff thereupon filed a petition for leave to appeal to the Supreme Court and also took out a writ of error. A motion was then made to dismiss the writ of error on the ground that it had not been obtained within the ninety-day limit purportedly established by Section 76 of the Civil Practice Act,⁹² but the court refused to grant such request, holding that the constitutional provision for writ of error from the Appellate Court to the Supreme Court⁹³ was not subject to any time limitation and, in the absence of specific regulation, the practice at common law and in equity should prevail.⁹⁴

If there may have been any doubt on the point, the holding in

⁹⁰ 410 Ill. 169, 101 N. E. (2d) 552 (1951).
⁹³ Ill. Const. 1870, Art. VI, § 11.
Millikin Trust Company v. Morris\textsuperscript{95} now makes it clearly apparent that the furnishing of a bond to cover costs in the reviewing court is an essential prerequisite to an appeal from an interlocutory order such as one granting a temporary injunction.\textsuperscript{96} For that matter, the failure of an appellant to sign an appeal bond, probably from oversight, was deemed sufficient, in the case of *In re Hill's Estate*,\textsuperscript{97} to justify dismissal of the appeal even though the bonds had been signed by a competent surety. The court noted that the case was one of first impression as to appeals in probate matters but it followed an analogy provided in the case of appeals from decisions of justices of the peace.\textsuperscript{98}

The rules of the Supreme Court concerning the content of the abstract of the record and the brief on appeal would appear to be clearly phrased,\textsuperscript{99} yet litigants, or their counsel, have been more than once criticized for failure to observe the same. While the Supreme Court, in *Kinney v. City of Joliet*,\textsuperscript{1} was willing to overlook the fact that the appellant had not followed the statement of facts with a statement of errors relied on for reversal, since the order in which the brief presented the issues was not regarded as being of jurisdictional importance, it did dismiss the appeal taken in *Harris v. Annunzio*\textsuperscript{2} because the abstract filed there totally failed to disclose the proceedings had in the trial court, upon review under the Administrative Review Act, and the court declined to search the record for this purpose.\textsuperscript{3} Under no circumstance, however, will the court permit the litigant, even when

\textsuperscript{95}345 Ill. App. 105, 102 N. E. (2d) 561 (1951).
\textsuperscript{96}Ill. Rev. Stat. 1951, Vol. 2, Ch. 110, § 202, in part provides: "The party taking such appeal shall give bond, to be approved by the clerk or the judge of the court below." Italics added.
\textsuperscript{98}Harrison v. Nelson, 96 Ill. App. 397 (1901).
\textsuperscript{1}411 Ill. 289, 103 N. E. (2d) 473 (1952).
\textsuperscript{2}411 Ill. 124, 103 N. E. (2d) 477 (1952).
\textsuperscript{3}See, however, the decision of the Appellate Court for the Fourth District in *Ellet v. Wyatt*, 345 Ill. App. 420, 103 N. E. (2d) 526 (1952), where the court expressed a belief that the Supreme Court had begun to show a liberal tendency which it felt bound to emulate in a case where it was claimed, on motion to dismiss the appeal, that the abstract failed to disclose (1) the date of the judgment sought to be reviewed, (2) the date and manner of serving notice of appeal, and (3) the date of filing of the record, although the abstract did show that each of these acts had occurred.
acting *pro se*, to fill the records of the court with scandalous and vituperative material. It did, therefore, in *Biggs v. Spader*,\(^4\) strike the brief and dismiss the appeal, albeit noting while it did so that it had serious doubts as to the propriety of the judgment from which the appeal had been taken and indicating that it might have reversed the same had the question been argued in proper fashion.\(^5\)

**ENFORCEMENT OF JUDGMENTS**

Cases, other than in bankruptcy, involving unusual features of law regarding the enforcement of judgments have been conspicuous by their absence. The federal district court decision in *Landers, Frary & Clark v. Vischer Products Company*\(^6\) would, however, appear to be sufficiently pertinent to bear mention. The case was one in which the plaintiff, in connection with a patent license, had loaned the defendant company a large sum of money on unmatured and unsecured notes. The principal defendant some time afterward realized that, with the greater portion of its income being derived from royalties under the patent license, it was exposed to a serious tax problem as a holding company,\(^7\) so a reorganization was arranged whereby it turned over its small-scale manufacturing operations to another company, assigned its patents and royalties to its shareholders as tenants in common, and then dissolved, but not before securing the promise of the transferee corporation to assume its debts. The former shareholders, while fully aware of the outstanding debt to the plaintiff, neither assumed this debt nor did they formulate any plan for its liquidation. Plaintiff then sought a declaratory judgment as to its rights and particularly prayed for equitable relief. Although the court well understood the law to be that the holder of an unmatured promissory note, absent an acceleration clause, has no present cause of

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\(^4\) 411 Ill. 42, 103 N. E. (2d) 104 (1952).

\(^5\) Notice might even be taken of the court's action in *McCabe v. Hebner*, 410 Ill. 557, 102 N. E. (2d) 794 (1952), wherein it taxed the appellant with all the costs for having submitted an abstract of 1028 pages and a brief of 241 pages, in a case where the appellant was said to have unnecessarily prolonged the litigation and made the record excessively long, although the court had first contemplated refusing to receive the brief at all.


\(^7\) 26 U. S. C. A. § 500 et seq.
action, it was of the opinion that the facts warranted equitable relief against the constructively fraudulent transfer of the debtor’s property into the hands of the former shareholders, so an equitable lien was impressed thereon for plaintiff’s benefit. That decision accords both with the general rule and some earlier Illinois cases on the subject of creditors’ rights. The novelty of the case, if there is any, lies in the use of the modern declaratory judgment procedure as a substitute for the old-fashioned creditor’s bill with its attendant formalities.

IV. CRIMINAL LAW AND PROCEDURE

Significant cases in the field of criminal law divide about equally into those dealing with substantive issues and those concerning procedural points. In the first of these categories, mention might be made of the fact that the 1874 statute, which prohibits the unlawful possession of burglar’s tools,1 was construed for the first time this year by the Supreme Court through the medium of the case of People v. Taylor.2 The defendant, an unemployed handyman, was arrested by police on suspicion while walking through a neighborhood where burglaries had been frequent. In his pocket at the time were a pair of pliers, a screwdriver, and a pencil flashlight. He was convicted for a violation of the statute in the trial court and the Supreme Court, on writ of error, had little difficulty in reaching the conclusion that the tools possessed by the defendant came within the statutory prohibition. The conviction was reversed, however, on the ground the circumstantial evidence presented was insufficient to support an inference regarding the presence of the necessary felonious intention. The holding in People v. Beacham3 was distinguished

8 See 10 C. J. S., Bills and Notes, § 529.
2 410 Ill. 469, 102 N. E. (2d) 529 (1951), noted in 30 CHICAGO-KENT LAW REVIEW 278.
3 358 Ill. 373, 193 N. E. 205 (1934).