it is generally granted only if the debtor has been guilty of that unreasonable or vexatious delay referred to in the statute for there was no common-law duty to pay interest.\textsuperscript{49} It was for that reason, therefore, that the Illinois Supreme Court in part reversed the holding in \textit{Woodruff v. City of Chicago},\textsuperscript{50} a suit brought to recover payments made under a special assessment proceeding for a street widening which had been abandoned by the municipality, because it was of the opinion that the city had done nothing to impede the creditor in his efforts to recover the money so paid other than to insist upon a judicial determination of its liability in that respect.\textsuperscript{51}

\section*{III. CIVIL PRACTICE AND PROCEDURE}

In the years since the adoption of the Civil Practice Act most of the debatable problems concerning the conduct of litigation under the reformed system of procedure have been ironed out although questions do still arise. Cases which have dealt therewith are here summarized and arranged in much the same order as these questions are likely to develop in the conduct of a given case.

\subsection*{AVAILABILITY OF REMEDIES}

As the fruits of litigation can rise no higher than the source, the practitioner's first concern should be with aspects of jurisdiction for if that is lacking all other efforts will prove wasted. No questions have arisen as to the power of the major nisi prius courts to entertain suits\textsuperscript{1} and only one minor and indirect point

\begin{itemize}
\item \textsuperscript{49} Totten v. Totten, 294 Ill. 70, 128 N. E. 295 (1920).
\item \textsuperscript{50} 394 Ill. 542, 69 N. E. (2d) 287 (1946), in part reversing 326 Ill. App. 577, 63 N. E. (2d) 124 (1925).
\item \textsuperscript{51} In that regard, see Ritter v. Ritter, 381 Ill. 549, 46 N. E. (2d) 41 (1943), reversing 313 Ill. App. 407, 40 N. E. (2d) 565 (1942).
\item \textsuperscript{1} But see the discussion dealing with the jurisdiction of city courts in divorce matters elsewhere in this survey under the topic of Family Law. Attention might also be called to legislative revision of the statute relating to courts for cities and incorporated towns: Laws 1947, p. 766, S. B. 36, Ill. Rev. Stat. 1947, Ch. 37, § 333 et seq.; to some increases in compensation for judicial officials: Laws 1947, p. 773, S. B. 154, p. 776, S. B. 580, and p. 796, S. B. 187; as well as to some changes in pension arrangements for judges: Laws 1947, p. 775, H. B. 136, and p. 774, H. B. 512.
\end{itemize}
has been made with respect to the inferior tribunals. Jurisdiction of magistrates and justices of the peace is county-wide\(^2\) and, by constitutional mandate, is required to be uniform in character.\(^3\) Any attempt, therefore, by a municipal corporation to provide that prosecutions for violations of municipal ordinances should be instituted before some favored magistrate or justice of the peace would be clearly unconstitutional as well as directly violative of the provisions of the Cities and Villages Act.\(^4\) Such being the case, it was held in *Harms v. Wuerth*\(^5\) that a favored magistrate could not complain of the revocation of an ordinance directing prosecution of violators before him, even though the apparent effect thereof was to deprive him of the fees of his office during his term in contravention of another constitutional provision,\(^6\) for the reason that no provision of that character should have been enacted in the first place.

Jurisdiction also necessarily involves control over the person of the defendant, typically obtained by service of valid process. Under present rules, a summons is to be made returnable on a return date not less than twenty days nor more than sixty days after its date and then only upon the first and third Mondays in the month.\(^7\) There is further direction that the summons should be served, if practicable, more than twenty days prior to the first return date,\(^8\) but in case it is not, the defendant is still allowed not less than twenty days in which to appear. The defendant in *Bogden v. Laswell*\(^9\) argued that as the summons therein was issued on a date only nineteen days before the first return date it was necessarily null and void and, even though personally served, could not become the basis for the acquisition of jurisdiction despite the fact that more than twenty days elapsed between the date of service and the alternative return date. The court held

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\(^2\) Ill. Rev. Stat. 1947, Ch. 79, § 16.
\(^3\) Ill. Const. 1870, Art. VI, § 21.
\(^5\) 396 Ill. 73, 71 N. E. (2d) 26 (1947).
\(^6\) Ill. Const. 1870, Art. IV, § 22, and Art. IX, § 11.
\(^7\) Ill. Rev. Stat. 1947, Ch. 110, § 259.4(1).
\(^8\) Ibid., § 259.4(3).
\(^9\) 331 Ill. App. 395, 73 N. E. (2d) 441 (1947). Leave to appeal has been denied.
that the error, if any, in no way prejudiced the defendant in view of the fact that it was not practicable to serve the summons in time to require his attendance on the first return day and he lost no rights because he was thereby given additional time in which to appear.

Substitute service, however, is permissible only within statutory limitations. A previously unnoticed limitation upon the right to serve the Secretary of State as agent for the non-resident automobile operator in causes of action growing out of the use of the local highways may be observed in a New York case, that of Smalley v. Hutcheson,\textsuperscript{10} which has significant implications as to the Illinois law. The non-resident driver there involved was killed in a highway accident in this state. The injured plaintiff first brought suit in Illinois against the New York administrator for the tort of his decedent and served process in the fashion suggested by the Motor Vehicle Act.\textsuperscript{11} The defendant appeared specially and challenged jurisdiction on the ground that the service provision extended only to cases against the operator himself.\textsuperscript{12} His objection appears to have been sustained by the nisi prius court but since no review was sought of that holding, no report thereof appears among the Illinois cases. When the injured plaintiff later sued the administrator in a New York court the defense of the statute of limitations was upheld against the contention that the pendency of the Illinois proceeding was sufficient to prevent the running of the statute. The local attorney, in such a situation, ought to give serious consideration to the advisability of taking a chance in bringing suit in this state on the expectation of being able to vindicate the service of process in contrast to the obvious remedy of suing the wrongdoer's estate at the place of his domicile.\textsuperscript{13}

\textsuperscript{10} 296 N. Y. 63, 70 N. E. (2d) 161 (1946).
\textsuperscript{11} Ill. Rev. Stat. 1947, Ch. 95\hspace{0.17em}/,. § 23.
\textsuperscript{12} In that respect, see Jones v. Pebler, 296 Ill. App. 460, 16 N. E. (2d) 438 (1938), noted in 17 \textit{Chicago-Kent Law Review} 69, reversed in 371 Ill. 309, 20 N. E. (2d) 592 (1939), as to validity of service on non-resident owner for tort of agent operating the automobile on a local highway.
\textsuperscript{13} As to whether or not local administration of the tort-feasor's estate is permissible under Ill. Rev. Stat. 1947, Ch. 3, §§ 206-7, see Furst v. Brady, 375 Ill. 425, 31 N. E. (2d) 606 (1941), noted in 19 \textit{Chicago-Kent Law Review} 293.
The existence of valid jurisdiction will also involve aspects of venue which ought not be overlooked. As originally enacted, the Civil Practice Act directed that whenever the parties to litigation appear "without making objection to the venue" no order in the cause should be deemed void for want of jurisdiction.\(^{14}\) There was occasion to believe, therefore, that if the defendant chose to default a judgment for failure to contest would be valid even though the plaintiff had instituted the suit in the wrong county.\(^{15}\) Any such thought, however, was nullified by the decision in *Heldt v. Watts*\(^{16}\) wherein it was held that it was necessary to vacate a default judgment, entered for want of appearance or answer, on the ground that, as the suit had been brought in a county lacking venue of the cause, the court was without jurisdiction to enter any judgment whatever.\(^{17}\) By that holding, it would seem that venue is to be regarded as much of a jurisdictional fact as is the power to hear and determine the controversy itself or the power to control the person of the defendant. As venue is essentially a matter of trial convenience rather than one of jurisdiction, the holding mentioned would seem to go too far, but there is occasion to believe that its effect has been sterilized for the legislature has since amended the statute so that it now reads: "No order, judgment or decree shall be deemed void for want of jurisdiction because rendered in the wrong venue."\(^{18}\) It is likely, therefore, that except in cases where judgment is taken by confession\(^{19}\) the defendant must hereafter act in a prompt and positive fashion to deprive the court of its jurisdiction should the suit, by chance, be instituted in the wrong county.

\(^{14}\) See Ill. Rev. Stat. 1945, Ch. 110, § 135.


\(^{17}\) See also Argondelis v. Rosin, 330 Ill. App. 463, 71 N. E. (2d) 908 (1947), where suit was brought in Cook County on a foreign cause of action and an attempt made to serve defendant at his alleged residence in Will County. A default judgment was declared a nullity by reason of Ill. Rev. Stat. 1947, Ch. 110, § 131.


\(^{19}\) Ill. Rev. Stat. 1947, Ch. 110, § 174(5).
The pleader should, of course, be conscious of the fact that the action he is about to begin should be promptly brought to avoid the possibility of it being barred by limitation. In that regard, two cases are worthy of notice. The present statute declares that a civil action shall be "commenced" by the filing of a complaint. Since the limitation statute imposes no further requirements, it was decided in Massman v. Duffy that the mortgage foreclosure proceeding there involved was not barred, even though no attempt was made to serve process until long after the limitation period had expired, for the complaint had been filed in apt time. More complicated, however, is the problem of the right, by amendment, to expand a suit promptly brought to cover other claims and parties. There is occasion to believe that the confusion created by the decision in Piper v. Epstein may have been abated by the holding in Bairstow v. Phillips State Bank & Trust Company, for the court there specifically held that an amendment which does add new causes and parties, after the limitation period has expired, may not be given retroactive effect so as to prevent the raising of the defense of the expiration of the limitation period. The fact that the added claims happened to relate to the same property described in the original foreclosure suit begun in apt time was held not to be enough. The test to be applied would seem to be one as to whether or not the evidence offered to support the initial claim and the relief originally sought could be made applicable to the claim asserted through the amendment. If not, the two claims are to be treated as distinct demands so the second one is not to be regarded as instituted until the time the amendment is made.

Choice of an appropriate remedy may also be important for,

20 Ibid., Ch. 110, § 129.
21 Ibid., Ch. 83, § 11.
23 326 Ill. App. 400, 62 N. E. (2d) 139 (1945), noted in 24 CHICAGO-KENT LAW REVIEW 170.
24 331 Ill. App. 187, 72 N. E. (2d) 871 (1947). Leave to appeal has been denied.
25 Ill. Rev. Stat. 1947, Ch. 110, § 170, purports so to do as to causes which "grow out of the same transaction or occurrence set up in the original pleading."
26 See also Mann v. City of Chicago, 315 Ill. App. 179, 42 N. E. (2d) 862 (1942), noted in 21 CHICAGO-KENT LAW REVIEW 100.
despite the abolition of distinctions which existed at common law, a legal proceeding today should proceed on the same theories, and be modelled along the lines of, the earlier remedies. In that respect, it might be noted that, as replevin provides a much more efficient remedy for the restoration of possession of personal property than any other known action, the old remedy of detinue has been falling into disuse. It is remarkable, therefore, to find two detinue cases being argued in the reviewing courts during the past year although it is not surprising to note that the plaintiff lost in each instance because of a failure to refresh his recollection as to the essential elements of this little-used action. In Martin v. Cole, the judgment for the defendant was affirmed since the plaintiff had not alleged that he owned the articles in question or was in possession thereof when the same were taken by the defendants and also because he failed to give that certainty of description made requisite by the form of judgment to be entered in his behalf. In Germania Club v. City of Chicago, where recovery was sought of money which had been contained in certain slot machines confiscated from the plaintiff's premises, the plaintiff lost because it was unable to show that it had either title to or right to possess the coins in question and could not recover simply on the weakness of the defendant's title.

Confining limitations on other common-law remedies, however, have been made to yield before the ameliorations of the reformed procedure. Ejectment, for example, could once be utilized only for the consideration of purely legal rights and defenses. Although that action was not originally comprehended within the scope of the Civil Practice Act, the statute covering that particular action has been amended so as to make the reformed procedural methods apply. By reason thereof, it was considered proper, in Horner v. Jamieson, to permit the defendant in an 27 Ill. Rev. Stat. 1947, Ch. 110, § 155.
28 331 Ill. App. 597, 73 N. E. (2d) 633 (1947).
31 Ibid., Ch. 45, § 10 and § 50.
ejectment action to interpose an answer and counterclaim setting forth an equitable title as a defense to the same extent as would be permitted in other civil actions. The holding was foreshadowed by other recent decisions but it is the first time that the court has recognized a complete reversal in what had been, prior to 1934, the accepted practice of refusing to accept equitable titles or defenses to defeat an action in ejectment. This fact has, therefore, resulted in a change in the scope of existing legal remedies.

Perhaps the most important function performed by equity is that of adapting the law to the constantly changing needs of social and economic life. This process of adaptation, although not conspicuous, is noticeable in the cases handled in the past year. In Ward v. Sampson, for example, important distinctions were made between general jurisdiction, i.e. the power to hear and determine specified types of causes, and jurisdiction in equity, or the substantive propriety of granting equitable relief in a particular case, even though the court did not make use of such terminology. The husband and wife there involved, several years ago, became parties to a divorce suit which eventually culminated in a decree in favor of the wife granting her a divorce and requiring the husband to convey title to the residence, held in the names of the husband and wife as joint tenants, to his wife alone although she established no special equity thereto. No conveyance in fact was made but the wife continued to reside in the premises until the time of her death, followed thereafter by occupation on the part of one of her heirs. The ex-husband subsequently sued for possession and an accounting, claiming sole ownership as a surviving joint tenant, and prayed for removal of the divorce decree.

33 In Firke v. McClure, 389 Ill. 543, 60 N. E. (2d) 220 (1945), the plaintiff in an ejectment action was held to have admitted affirmative matter in the answer for failure to reply thereto, pursuant to Ill. Rev. Stat. 1947, Ch. 110, § 164. See also State Bank of St. Charles v. Burr, 283 Ill. App. 337 (1936), noted in 25 Ill. B. J. 79, where an equitable defense was accepted in a forcible entry and detainer proceeding.

34 See, for example, Metzger v. Horn, 312 Ill. 173, 143 N. E. 408 (1924).

35 395 Ill. 353, 70 N. E. (2d) 324 (1946).

36 The existence of some special equity is made necessary by Ill. Rev. Stat. 1947, Ch. 40, § 18.
as a cloud on his title on the theory that the same, at least as to
the land, was a nullity. The heirs responded with a counterclaim
requesting specific enforcement of the original decree in their
favor. The trial court therein granted a decree in favor of the
husband, but the Supreme Court reversed, treating the complaint
as a bill of review or one in the nature thereof. As that device is
available, after time for appeal or writ of error has expired, only
where the original decree has been obtained by fraud or rendered
by a court lacking in jurisdiction, the court was obliged to examine
the circumstances relating to the entry of the original decree.
Since there was no claim of fraud, the issue was narrowed to one
of jurisdiction. It was at this point that the Supreme Court,
without so saying, distinguished between equitable jurisdiction in
general and its narrower meaning in relation to divorce, but it
concluded that, as the court had power of both the subject matter
and the parties, any mistaken judgment leading to the original
decree did not make the same void but voidable only, hence not
open to collateral attack. Any error in ordering a conveyance
when special equities were lacking had disappeared by the pas-
sage of time, consequently enforcement of the original decree was
ordered.

The “clean hands” doctrine is well-established but consider-
able divergence of opinion exists as to the circumstances calling
for its application. The case of Mills v. Susanka\(^3\) is interesting
in that regard for it contains a concise and enlightening summa-
ization of the Illinois decisions on that point. While it decides
nothing new, the presence of such an excellent resume of the cases
might well prove helpful to a person dealing with the problem.

Regulations covering the use of class suits were again consid-
ered in State Life Insurance Company v. Board of Education,\(^3\) another offshoot of the tax anticipation warrant troubles that
have beset the Chicago Board of Education since the depression.\(^3\)

\(^3\) 394 Ill. 439, 68 N. E. (2d) 904 (1946).
\(^3\) 394 Ill. 301, 68 N. E. (2d) 525 (1946).
\(^3\) See also Newberry Library v. Board of Education, 387 Ill. 85, 55 N. E. (2d)
147 (1944), noted in 23 CHICAGO-KENT LAW REVIEW 82, 43 Mich. L. Rev. 413, and
The plaintiffs therein were holders of unpaid warrants and sought, through a representative suit, to compel the board to distribute funds on hand, or to be collected, pro rata among the several warrant holders. Right of representation was denied on the ground that, while the several holders were interested in the same insolvent fund, their interest in the method of distribution was not common, for those having low numbers in numerical order of issue would be paid in full if payment in numerical order was proper, while those having high numbers would be interested in obtaining pro rata distribution throughout the entire series. As the issue in controversy was the proper method of distribution, the maintenance of a representative suit where there was at least partial conflict between the parties suing and those being represented was not considered feasible.

An equity court ought to grant relief where conscience and reason require it, so the outcome of the case of *Rice v. United Mercantile Agencies of Louisville*\(^40\) is one to be expected. In that case, a judgment creditor caused levy to be made and sale had of homestead premises worth more than $1,000 but failed to see to it that the sheriff summon three householders to serve as commissioners to set off the homestead exemption due the judgment debtor.\(^41\) A deed was issued to the purchaser in due course for failure to redeem. Subsequent thereto the debtor made a conveyance in remainder to his daughter who expended money in enhancing the equity in the premises. Thereafter the debtor sued to remove the sheriff's deed as a cloud on the title. He was met with the defense that he was not entitled to relief because he could have made application in the original suit, in proper time, to have the sale nullified but had failed so to do. The Supreme Court agreed that the trial court, in the law action leading to the judgment and sale, had ample power to see to it that its processes were executed according to law but nevertheless found that the purchaser's failure to take action and the equities which had arisen

\(^{40}\) 395 Ill. 512, 70 N. E. (2d) 618 (1947).

\(^{41}\) Ill. Rev. Stat. 1947, Ch. 52, § 10.
by reason of the debtor's conveyance in remainder to his daughter warranted equitable relief.

Elaboration upon the equitable doctrine of election, as applied to interests created by will, was provided through the case of *Ness v. Lunde*. The testator there had made provision for his widow in lieu of "dower, homestead, widow's award and of any and all rights or interest she might have or claim in my estate as heir," but made no disposition of the fee in the real estate after the widow's death. The widow survived, retained the use of the land and accepted the personalty bequeathed, and thereafter died intestate. Her heirs then sued for partition of the real estate claiming to be entitled to one-half thereof which, they asserted, had devolved on the widow under Section 12 of the Descent Act. The heirs of the testator, on the other hand, asserted full ownership to the land on the theory that the widow, by electing to take under the will, had lost any interest she might otherwise have acquired in the real estate. The court recognized the existence of the equitable doctrine of election as a basis for barring the devisee, who had accepted benefits under the will, from claiming rights which, if allowed, would defeat the full operation of the will. That doctrine was held inapplicable, however, inasmuch as no attempt had been made to devise the reversion but the same had been left to pass by operation of law and there was no inconsistency in keeping the property bequeathed and also the share inherited by descent. The heirs of the widow were, therefore, held entitled to have partition.

Cases dealing with specific performance of land contracts are noted elsewhere, but one other equitable proceeding deserves attention. The case of *Montgomery Ward & Company v. United Retail, Wholesale & Department Store Employees Union, C. I. O.* squarely presents the issue as to whether or not a court of equity should enjoin against the making of defamatory statements. The

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42 394 Ill. 286, 68 N. E. (2d) 458 (1946).
44 See post, this survey, under the title Property.
45 330 Ill. App. 49, 70 N. E. (2d) 75 (1946). Appeal to the Illinois Supreme Court is pending.
plaintiff therein, a well-known mail-order house, charged the defendants with a conspiracy to foment distrust among its employees and customers by means of a widespread campaign of untrue statements regarding its business, its policies and its supervisory employees. Defendant's motion to dismiss having been denied and the defendant refusing to plead further, an injunction was issued because the fact of the conspiracy had, at least for this purpose, been admitted by the motion. On appeal, the Appellate Court reversed and ordered the complaint dismissed for want of equity on the ground that the issues grew out of a labor dispute between the plaintiff and certain of its employees represented by the union; that such employees had the right to publicize the "facts" of the dispute; that publication of the "facts" necessarily included publication of what the parties to the dispute claimed to be the "facts," and that to restrain such statements by a court acting as censor would be to interfere with freedoms of speech and press. The fact that a conspiracy was charged did not change the result because the court indicated that to permit the chancellor to assert the power of censorship over publications alleged to be the product of a conspiracy would be to open the way to the muzzling of all publications purporting to be the product of the efforts of two or more individuals.

PREPARATION OF PLEADINGS.

Surprisingly little has been said about the essentials of good pleading or the manner of statement which should be found therein. It would seem that there should be no occasion "for a discussion as to the meaning of the words 'English language,'" at least in connection with the constitutional requirements that judicial proceedings should be preserved in that and no other language. The use of abbreviations in pleading ought to be discouraged for such things are not a part of the common body of words generally accepted as constituting the English language in use among the people of this nation. If used, then, under the

46 See Stein v. Meyers, 253 Ill. 199 at 204, 97 N. E. 295 at 297 (1912).
holding in *Saline Branch Drainage District v. Urbana-Champaign Sanitary District*, there is a likelihood that all the pleader's efforts will come to naught for it was there held that the abbreviated phrase "U & C Sanitary Dist." could not be deemed to be an adequate description of the defendant, hence a judgment rendered in that form was unenforceable.

The only other development, from the standpoint of the plaintiff, has to do with the right to join a number of claims or parties in the same suit. Equity rules against multifariousness had been declared still applicable in *Gombie v. Taylor Washing Machine Company* despite the apparent authority for the joinder of several distinct equitable claims belonging to separate plaintiffs to be found in Section 23 of the Civil Practice Act. It was there said that the joinder section was designed merely to change the rules in law actions. That holding has been subjected to criticism, but the first real opportunity to review the question did not arise again until the Appellate Court of the First District was asked to pass on the appeal taken in *Village of Melrose Park v. Prairie State Bank*. In that case, a number of village employees who had each given wage assignments and judgment notes for monies advanced by the defendant bank combined in one equity proceeding to enjoin the prosecution of twenty-one separate suits at law against the several plaintiffs based on the individual notes so made. The application for relief was made on the theory that the bank had, in a prior suit against the village employer, effected a compromise settlement of the several wage claims in full satisfaction of the notes in question but was nevertheless asserting the nonpayment thereof as the basis for the separate lawsuits. The defendant's claim of misjoinder and multifariousness was rejected, and the decree affirmed, on the ground that the joined claims grew

48 395 Ill. 26, 69 N. E. (2d) 251 (1946).
50 Ill. Rev. Stat. 1947, Ch. 110, § 147.
51 See Baker v. S. A. Healy Co., 302 Ill. App. 634, 24 N. E. (2d) 228 (1939). That suit, however, involved the joinder of several plaintiffs having separate claims in tort for nuisance.
out of the same facts, involved the same legal questions, and that
to permit joinder would avoid a multiplicity of suits. The deci-
sion, to say the least, represents a closer adherence to the liberality
expected of the reformed procedure than has been shown hereto-
fore.

Some issues of importance to defendants about to prepare
pleadings should be noticed. The practice concerning the use of
a motion to dismiss filed pursuant to Section 48 of the Civil Prac-
tice Act is subject to some confusion, but the case of Classen v.
Heil is even the more remarkable because the motion therein
was sustained on a ground on which it should not have been when
a valid ground for its denial was present but was not utilized.
The plaintiff therein, as administrator, sued for damages for the
wrongful death of his decedent. The defendant moved to dismiss
on the ground that the plaintiff lacked capacity to sue because all
parties were under the Workmen’s Compensation Act and the
right of action, if any, was vested in the decedent’s employer. The
motion was supported by the affidavit of the defendant who, at
the trial, would have been an incompetent witness. Plaintiff in
no way challenged the correctness of the motion or the accom-
panying affidavit and the suit was dismissed. On appeal, that
action was affirmed, the court holding that the ground for dis-
missal was proper under Section 48 and the plaintiff, by failing
to object, was prevented from questioning the sufficiency of the
affidavit. The court was unquestionably correct as to the second
point, but the reference in Section 48 to “capacity to sue” relates
primarily to plaintiff’s ability, in law, to be a litigant rather
than to his “right” to recover as the holder or owner of an un-
disputed cause of action, hence the use of the motion to present

53 The Court made no mention of the decision in the Taylor Washing Machine
Company case, supra, in its opinion.
55 See comment in 25 CHICAGO-KENT LAW REVIEW 28-9 concerning the case of
Hansen v. Raleigh, 391 Ill. 536, 63 N. E. (2d) 851 (1945).
58 As, for example, that the plaintiff is an alien enemy, or claims to be ad-
ministrator when in fact he is not.
REVIEW 215 at 229.
a defense to the effect that the plaintiff in fact has no case falls
beyond the limits of the present statute. If such a ground should
exist, it would seem desirable to amend Section 48 by legislative
action rather than by judicial decision.

An important distinction to be observed, when an answering
defendant seeks to avail himself of the fact that he lacks knowl-
dge of the plaintiff's allegations, is noted in the case of In re
Braun's Estate. Although such a defendant is generally entitled
to a constructive denial, provided he will swear to his lack of
knowledge, and thereby avert an admission of the facts, yet if
the charge is one as to the execution of an instrument in writing
his denial of execution, to be sufficient, must be accompanied by a
positive verification unless verification be excused. If the person
seeking to deny execution be not the one alleged to have executed
the instrument, he must still accompany his denial with a verifica-
tion based at least on information and belief. In the case men-
tioned, an executor sought to place the burden of proof on the
claimant to show the genuineness of the signature on notes
allegedly executed by the decedent but his answer was held to be
insufficient, hence amounted to an admission of genuineness,
because he merely swore that he lacked knowledge on the point
and failed to verify as to his information and belief on the sub-
ject. The decision may seem harsh, but it is in line with preced-
ents elsewhere and should be carefully noted.

Wide latitude exists for the use of a counterclaim by a defend-
ant against the plaintiff for the provision thereon is such that the
demand thereby asserted need have no relationship whatever to
the demand which provides the basis for the original suit. It

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61 330 Ill. App. 322, 71 N. E. (2d) 364 (1947). Leave to appeal has been denied.
63 Ibid., § 159(2).
64 An insufficient denial is equivalent to an admission under Ill. Rev. Stat. 1947,
Ch. 110, § 164(2). The Civil Practice Act provisions were applicable to the pro-
593-7.
was urged in *Hedlund v. Miner*[^67] that, despite this, the older rule should still be applied to partition proceedings so that a counterclaim filed therein should be confined to rights arising solely out of the property sought to be partitioned and should not be made the basis for litigating extraneous matters. The court, however, declined so to hold in the belief that there was no occasion to multiply costs and litigation particularly when the procedure adopted by the defendant appeared to have specific sanction in the law.[^68]

**THE TRIAL OF THE CASE**

Nothing new has been decided with respect to rules regulating the production of evidence, but one or two minor points have been established on trial procedure. The obvious right of a litigant to be present during the trial of his case so as to assist his counsel conduct the suit or the defense is a necessary corollary of due process, both in civil and criminal cases.[^69] If he abuses the privilege, as by unwarranted outbursts or other contemptuous conduct, then, according to the decision in *Kopplin v. Kopplin*,[^70] the remedy is not to exclude the litigant from the courtroom but to visit upon him the penalty for contempt of court. The failure of the litigant's counsel to object to the removal of his client from the courtroom was there held no excuse for the erroneous ruling nor did it obviate the error committed.

Protest against the expensive practice of requiring a reference in every foreclosure case to a master in chancery to take testimony and report his conclusions thereon has led to the enactment of a short statute relating to proof in such cases. The trial court is required to hear all except the more complicated cases of account in open court; the sworn complaint becomes evidence as


[^68]: Ill. Rev. Stat. 1947, Ch. 106, § 43, declares that the provisions of the Civil Practice Act shall apply to partition proceedings except as otherwise therein provided. That statute is silent on the subject of cross-demands. For the prior practice, see Kearney v. Kirkland, 279 Ill. 516, 117 N. E. 100 (1947).

[^69]: In the latter situations the right is expressly guaranteed: Ill. Const. 1870, Art. II, § 9.

[^70]: 330 Ill. App. 211, 71 N. E. (2d) 180 (1946).
to all matters not controverted; and, in case of total default, a decree is to be entered upon affidavit disclosing the amount due.\textsuperscript{71}

In that same vein, notice was taken last year of the decision in \textit{Simpson v. Harrison}\textsuperscript{72} which declared it to be error to refer such cases to a special commissioner. It was there suggested that if the parties appeared before the special commissioner and made no objection to the fact that he was \textit{coram non judice}, the result might be that any error would be waived. That suggestion has now been translated into decision by the holding in \textit{Phillips v. O'Connell}\textsuperscript{73} for the court there refused to reverse on the precise ground suggested, distinguishing the earlier holding on that very fact.

Heretofore, a motion by the defendant in an equity case, at the close of the plaintiff's evidence, for a finding in defendant's favor operated to bar the defendant from offering any testimony in case his motion was denied. In 1941, the legislature amended Section 64 of the Civil Practice Act so as to provide that, upon an adverse ruling, the defendant might adduce evidence in his own behalf if he wished and thereby waive the prior motion.\textsuperscript{74}

The probable purpose of that amendment was to produce a uniformity in trial practice by assimilating the equity view to that which had existed in law cases, but in so providing the legislature neglected to indicate what action should be taken in the event the trial court erroneously sustained defendant's motion and its holding was reversed on appeal. Upon return of the case to the trial court, should defendant be allowed to proceed as if no such motion had been made or ought he be precluded from making any defense since the legislature had only partly remedied the situation? The Supreme Court answered that question, in \textit{Reiter v. Illinois National Casualty Company},\textsuperscript{75} by stating that it would be proper to allow the defendant to proceed with his defense. At approxi-


\textsuperscript{73} 331 Ill. App. 511, 73 N. E. (2d) 864 (1946). Leave to appeal has been denied.

\textsuperscript{74} Ill. Rev. Stat. 1945, Ch. 110, § 188(4).

\textsuperscript{75} 397 Ill. 141, 73 N. E. (2d) 412 (1947), in part reversing 328 Ill. App. 234, 65 N. E. (2d) 830 (1946).
mately the same time, the legislature supplemented the statute in question with language pointing in exactly the same direction.\textsuperscript{76}

The rendition of a proper judgment is also a matter of significance. Although Section 50 of the Civil Practice Act authorizes the court to enter more than one judgment in a civil case,\textsuperscript{77} the general purpose underlying that statute was simply to provide an effective means by which to avoid the complications and delay which might arise if the court was obliged to enter a unit judgment when several distinct claims were being asserted in one suit under the liberality relating to joinder which now exists\textsuperscript{78} or where, to do so, would require plaintiff to wait until the whole of his demand were tried when a part thereof was admittedly due.\textsuperscript{79} The Appellate Court decision in \textit{Shaw v. Courtney}\textsuperscript{80} served to introduce a possible misconception by apparently attributing to that section an authority, not expressed therein, for the rendition of separate judgments against joint tort-feasors.\textsuperscript{81} That imputation has now been flatly rejected by the decision in \textit{Stoew-sand v. Checker Taxi Company}\textsuperscript{82} wherein it was held error to accept separate verdicts, and to pronounce separate judgments thereon, dividing the damages between defendants sued as joint tort-feasors when their concurrent negligence had caused the plaintiff's harm. The use of separate judgments, therefore, should be confined to cases where distinct and separate demands are being asserted in the same suit.

If an erroneous judgment has been entered there may be occasion for an application to vacate the same. In that regard a


\textsuperscript{77} Ibid., Ch. 110, § 174.

\textsuperscript{78} Ibid., §§ 147 and 168.


\textsuperscript{80} 317 Ill. App. 422, 46 N. E. (2d) 170 (1943), noted in 21 \textit{Chicago-Kent Law Review} 249.

\textsuperscript{81} Although the Supreme Court affirmed, it was careful to say that its opinion should "not be considered as giving sanction to, or disapproval of, any of the questions of law" considered by the Appellate Court: 335 Ill. 569 at 565, 63 N. E. (2d) 432 at 435 (1944).

\textsuperscript{82} 331 Ill. App. 192, 73 N. E. (2d) 4 (1947).
division of authority appears to have developed between the First and the Fourth District Appellate Courts over the right of a judgment debtor, upon judgment by confession, to move to vacate the judgment because of the existence of a counterclaim held by the debtor against the creditor, even though that counterclaim be extraneous to the original demand upon which the judgment by confession was secured. The First District, in *State Bank of Blue Island v. Kott*, had held that the liberality of construction demanded by the Civil Practice Act required treating such a counterclaim as a defense "on the merits" sufficient to warrant vacation of the judgment by confession. The Fourth District, however, in the case of *Vella v. Pour*, has reached an opposite conclusion, preferring to follow the older view expressed in *Stead v. Craine*. It might be possible to draw a distinction between the two cases on the basis of the fact that in the second case, while ground for an equitable counterclaim for reformation might appear to exist, no attempt was made to offer it as a counterclaim in fact but rather to utilize it simply as a defensive measure. There is no doubt, though, that the former of the cases represents a desirable advance over the older procedure.

**DAMAGES**

Although inferential evidence may, in proper circumstances, be used to show the extent of loss or damage which has been suffered, the question of when and to what extent such inferential evidence satisfies the plaintiff's burden of proof seems to be a matter of constant recurrence. Three examples arising in the period of this survey illustrate this fact. In *Duval v. Coca-Cola Bottling Company*, plaintiff sought damages for a sickness allegedly produced by drinking from a bottle of the defendant's beverage product which contained a deleterious substance. A

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83 323 Ill. App. 27, 54 N. E. (2d) 897 (1944), noted in 23 CHICAGO-KENT LAW REVIEW 31-2.
85 Ibid., § 259.26.
87 256 Ill. App. 445 (1930).
verdict was given based on damages which had not, and in the nature of things could not have, been proven by direct evidence. Verdict and judgment were upheld when the court declared it was sufficient for the plaintiff to describe the acts leading to the discovery of the deleterious substance and the details of his subsequent illness. The same lack of proof of a causal connection between defendant's negligence and plaintiff's injury is displayed in *Ford v. Friel*, but again it was held that plaintiff's narrative as to how she was thrown from defendant's bus by a sudden lurch of the vehicle at the moment when she was alighting plus a description of the pain, suffering and medical care that followed thereafter were sufficient to sustain an award of damages. In one other case, that of *Garshon v. Aaron*, the same result was achieved in a suit to recover for personal injuries sustained by plaintiff when he fell through a defective guard-railing on a stairway located on the demised premises. The defendant-landlord urged that the verdict for plaintiff should be disregarded as the pain and suffering upon which the damages were assessed did not represent an injury attributable solely to the accident in question, but the court, on the basis of the case last mentioned, affirmed the award as originally given.

A problem concerning the right to an award of compensatory damages for loss of prospective profits was generated in *Industrial Natural Gas Company v. Sunflower Natural Gas Company*. Under an agreement of several years standing, the plaintiff there involved had been supplied with natural gas by the defendant and had built up a system of pipelines and business connections in reliance upon supplies of a certain volume and constancy. Because of defendant's failure to maintain the promised supply, plaintiff claimed its business had suffered considerably in the past and was at present losing and would continue to lose patronage. Specific performance was sought with an alternative prayer for damages, past, present and future. The court found that plaintiff had made

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out a proper case for damages, but limited the recovery to compensation for the loss of profits from only the definite and known customers. This, it was thought, complied with prior decisions requiring that there be a "fair degree of probability" as a basis for awarding damages for the loss of prospective profits.

One striking statutory change has been made in the law of damages. Only compensatory damages may hereafter be recovered in any action sounding in alienation of affections, criminal conversation or breach of promise to marry, for all punitive damage is forbidden therein and any punishment for offenders of that character is to be administered through application of the criminal laws.92

**APPEAL AND APPELLATE PROCEDURE**

The time within which to appeal from judgments entered in courts of record is regulated by the Civil Practice Act,93 but as that statute is inapplicable to forcible entry and detainer proceedings94 a person seeking to appeal from an adverse judgment therein is required to act in a much more speedy fashion.95 The fact that, on appeal from a decision of a justice of peace, the forcible detainer proceedings are heard *de novo* in a court of record does not, under the holding in *Prasnikar v. Harmeling*,96 in any way change the situation or make the Civil Practice Act provision regulating the time within which to appeal control. As a consequence, appeal in such cases must be taken within five days rather than within the ninety days allotted in other civil cases.97

Not only must the appeal be taken within proper time but it must be based on a proper notice of appeal. That notice can confer appellate jurisdiction only over orders entered at the time the

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94 Ibid., § 125.
95 Ibid., Ch. 57, § 19.
97 The holding in Gentle v. Butler, 278 Ill. App. 371 (1935), and in Veach v. Hendricks, 278 Ill. App. 376 (1935), was there repudiated. Since those decisions, the Forcible Entry and Detainer Act has been amended to cure the defect therein noted. See Laws 1937, p. 611: Ill. Rev. Stat. 1947, Ch. 57, § 19.
notice is given, according to Savit v. Chicago Title & Trust Company, hence the court is not empowered to pass on a judgment or decree rendered subsequent thereto even though the later order be one modifying or amending the order actually appealed from. There is also no authority, under that decision, for the higher court to accept the case as if on leave to appeal granted pursuant to Section 76 of the Civil Practice Act for that remedy is to be regarded as available only where time has run on the right to use a notice of appeal.

It has long been the law that no appeal can be taken from an order denying a motion to dismiss a complaint for, at that stage of the case, the essential finality required for an appealable order is lacking. A way around that rule, at least in some equity proceedings, appears to be suggested by the determination in Peterson v. Grisell. In that case, plaintiff sued to enjoin an attempted redemption from a foreclosure sale. A temporary injunction was entered on stipulation. Thereafter the defendants filed a single motion to dismiss the complaint for failure to state a cause of action and also for dissolution of the temporary injunction. That motion was denied in toto. On appeal taken by the defendants from that order, the plaintiff urged that the appeal should be dismissed for lack of an appealable order but the court nevertheless retained the case on the ground that the denial of a motion to vacate or dissolve an injunction does support an appeal. Having retained the case for that purpose, the court then declared that, in the interest of the prompt termination of litigation, it should also go into the question of the sufficiency of the complaint and, upon so doing, found that that motion to dismiss had been properly denied as the complaint clearly stated a cause of action. It therefore affirmed with direction to enter a final judgment for plaintiff on the undisputed facts.

1 Ibid., Ch. 110, § 201, and American Radiator & Sanitary Corp. v. Wilhelmi, 308 Ill. App. 316, 31 N. E. (2d) 277 (1941), abst. opin.
Further review of a decision rendered by one of the Illinois Appellate Courts is permissible only under the circumstances set forth in Section 75 of the Civil Practice Act and, if no certificate of importance is issued, the presence of the jurisdictional amount can be determined only by reference to the judgment sought to be reviewed. It was urged, in *Matthews v. Trinity Universal Insurance Company*, that the jurisdictional feature was present, when the Appellate Court reversed a judgment dismissing plaintiff’s action on a penal bond and directed judgment thereon if no further defense was offered, for the reason that such judgment, when entered, would be in excess of $1500. The Supreme Court, however, sustained a motion to dismiss the appeal to it on the ground that resort to the pleadings to determine the amount of the claim would be improper as the judgment itself provided the only criterion of that fact. As the judgment therein specified no amount whatever, additional review could only be granted upon certificate of importance and none had been issued.

**ENFORCEMENT OF JUDGMENTS**

No new paths were charted in the law relating to the enforcement of judgments and decrees but a few cases do cast illumination in the darker corners thereof. In *Mohr v. Sibthorp*, for example, the right of a spouse of a judgment debtor to secure relief from the sale of land on execution was considered. The premises there involved, worth over $20,000, had been sold at judgment sale for $1,714, but no effort had been made to set off to the debtor’s spouse the value of her inchoate right of dower. The spouse was allowed to redeem, despite the fact that the redemption period had expired, on the ground that it was the policy of this state, where no innocent parties were involved, to permit redemption where the judgment creditor might otherwise gain a benefit he was not entitled to as by acquiring valuable property at relatively little or no outlay. But the court was equally firm,

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5 397 Ill. 174, 73 N. E. (2d) 284 (1947).
6 395 Ill. 418, 69 N. E. (2d) 487 (1947).
in *Bauman v. Schoaff*, in denying to the holder of an unrecorded deed to vacant land any right to move to vacate the sale thereof made by an execution creditor under a judgment against the former owner even though that judgment was rendered subsequent to the execution and delivery of the deed. Such a person was deemed entitled to no equities in view of the fact that he was not only no party to the judgment proceeding but had also failed to preserve his rights by prompt recording.

That there are important distinctions between the use of scire facias to revive a judgment and a separate proceeding in debt based upon the existence of a judgment is forcibly borne out in the case of *Industrial National Bank of Chicago v. Shalin*. In the case of the former, the court must necessarily have jurisdiction of all the parties to the original judgment so that, if one has died since the entry thereof, revival is not possible. But, in the case of the latter, as the judgment binds all debtors jointly and severally, jurisdiction over any one of them is enough to support a new judgment even though it would be impossible to acquire jurisdiction over the others. The fact that the relief by way of an action in debt is sought in the same court as the one in which the original judgment was entered does not operate to change these principles, so it was decided in that case that it was error to dismiss a complaint in debt on grounds which would have been valid only if the relief sought had been by way of scire facias proceedings.

Some issues as to garnishment and attachment may be noted. A common provision in public liability and similar insurance policies requires that the insured, when requested, will

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8 331 Ill. App. 38, 72 N. E. (2d) 571 (1947).
9 Ill. Rev. Stat. 1947, Ch. 30, § 29, declares an unrecorded deed to be void as to all “creditors and subsequent purchasers.” The term “creditors” has been held to include judgment creditors.
11 Fender v. Stiles, 31 Ill. 460 (1863).
12 The court again had occasion to point out that a motion to dismiss should “point out specifically the defects complained of,” and that it is not proper for the court to consider other grounds orally urged on it: 330 Ill. App. 498 at 501, 72 N. E. (2d) 52 at 54.
13 The only legislative change consists of a short amendment to the Attachments Act which now makes it unnecessary for the state government, its departments or officers, to file a bond as plaintiff in any such proceeding: Laws 1947, p. 292, S. B. 296; Ill. Rev. Stat. 1947, Ch. 11, § 4a.
co-operate with and aid the insurer in the defense of litigation growing out of matters covered by the policy. If there is breach of such a provision by the insured, that fact will operate as a defense in case the insurer is subjected to garnishment proceedings based on the policy for if there is no liability to the insured there can be none as to his judgment creditor. The case of *Patton v. Washington Insurance Exchange* had indicated that a failure on the part of the insured to respond to a demand from the insurer for assistance was enough to serve as a defense for the court there said it was the duty of the insured “to keep in touch with his attorneys” in regard to proceedings involving liability under the policy. It was, therefore, urged in *Durbín for use of Ferdman v. Lord* that the failure of the insured to notify the insurer of a change of address, so that it was impossible to communicate notice to him of his desired assistance in defending the principal claim, should be a sufficient breach of duty to avoid liability on the policy. The court, however, held otherwise indicating that as it did not appear that the insured was concealing himself in order to defraud the insurer the fact of removal alone did not amount to a breach of the provision calling for co-operation. In *Hart v. Evans* the simple question was whether the holder of an unliquidated claim on which suit was pending was a creditor within the meaning of the Bulk Sales Act. The court, despite many persuasive reasons urged for a contrary holding, decided he was not. It is rather difficult to understand, therefore, why the court should devote so much space to a discussion of the sufficiency of the affidavit made by the seller. It did, however, say that an affidavit based on “information and belief” was not sufficient since if an indictment charging the making of a false statement under the Bulk Sales Act had been based thereon it would not survive a motion to quash.

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IV. CRIMINAL LAW AND PROCEDURE

As might be expected, little has been said during this period with respect to the substantive elements of a crime. One case, that of *People v. Jones*,\(^1\) involved an alleged public nuisance in permitting a well drilled for oil or gas to remain unplugged after the abandonment thereof.\(^2\) The defense was that the action was barred for failure to initiate proceedings within eighteen months after the cessation of production.\(^3\) In answer thereto, the court explained that the acts constituting the public nuisance were not consummated when the well was abandoned and the nuisance first appeared but rather continued as long as the well remained uncapped, for it was the conduct of permitting the well to remain uncapped rather than the original abandonment which was the real subject of the statutory prohibition. It also held that the law was not rendered invalid as being an ex post facto statute for each day of omission constituted a new occurrence hence there was no occasion to consider whether the statute made acts unlawful which were not unlawful at the time they originally took place. In cases of that character, however, the judgment is limited to the criminal penalty only and may not, according to *People v. Livingston*,\(^4\) also include an order that the defendant abate the nuisance. It was, therefore, there held error for a county court to impose an additional penalty for contempt of court for refusing to abate the nuisance in question.

Another case which gives content to the substantive definition of a breach of the peace is *City of Chicago v. Terminiello*\(^5\) wherein the defendant was arrested for aiding in the creation of a riot, disturbance and breach of peace, in violation of a city ordinance,\(^6\) by the use of insulting and abusive language in a speech

\(^1\) 329 Ill. App. 503, 69 N. E. (2d) 522 (1946).
\(^2\) The prosecution was based on Ill. Rev. Stat. 1947, Ch. 38, § 466.
\(^3\) Ibid., § 631.
\(^4\) 331 Ill. App. 313, 73 N. E. (2d) 136 (1947).
\(^5\) 332 Ill. App. 17, 74 N. E. (2d) 45 (1947). Niemeyer, P.J., wrote a dissenting opinion.
\(^6\) Mun. Code 1939, Ch. 198, § 1(1).