Civil Practice and Procedure - Survey of Illinois Law for the Year 1955-56

Chicago-Kent Law Review

Follow this and additional works at: https://scholarship.kentlaw.iit.edu/cklawreview

Part of the Law Commons

Recommended Citation
Available at: https://scholarship.kentlaw.iit.edu/cklawreview/vol35/iss1/3

This Notes is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact dginsberg@kentlaw.iit.edu.
nant in the bond to pay the amount of all damage sustained, and the measure of the liability having been specified at the penal sum of $1,000, the Appellate Court for the First District rather quickly concluded that the obligor could not be held, either in debt or in assumpsit, for anything more than the penalty amount. In *Davis v. Moore*, on the other hand, the obligee under an appeal bond given in connection with a forcible entry and detainer suit was permitted to bring suit to have the bond reformed to include a covenant to pay the rent accruing during the pendency of the case, and to then enforce such covenant, on the theory that all statutory requirements concerning appeal bonds are parts of the bond whether recited therein or not. A judgment in favor of the obligee for the amount of the unpaid rent as well as for costs in relation to the appeal was affirmed by the Appellate Court for the Fourth District.

III. CIVIL PRACTICE AND PROCEDURE

AVAILABILITY OF REMEDIES

Cases illustrating the structure of the judicial department of the state, or the functions to be performed by judicial officials, are relatively rare but could be of profound importance since it is basic law that courts and judges may validly act only in their respective jurisdictional spheres. In that connection, it had one time been understood that Illinois courts were denied the right to entertain jurisdiction over wrongful death cases involving non-residents, based on deaths occurring outside the state, except in those instances where a denial of jurisdictional power could result in a denial of relief. That view had been exposed to a degree of criticism as the result of the outcome of two earlier cases, one arising under a comparable statute of a sister state and the other

---

21 7 Ill. App. (2d) 519, 130 N. E. (2d) 117 (1955).
1 An instance of the seldom used original jurisdiction of the Supreme Court may be found in the case of People ex rel. Castle v. Daniels, 8 Ill. (2d) 43, 132 N. E. (2d) 507 (1956).
coming up through a federal court sitting in Illinois, but it was not openly attacked, so far as Illinois state courts were concerned, until the institution of the case of Allendorf v. Elgin, Joliet & Eastern Railway Company. The Illinois Supreme Court there decided that the statutory limitation on wrongful death cases invoked by the defendant was unconstitutional and, as a result of so holding, has now recognized a form of case jurisdiction in the state trial court which was not heretofore open to use.

Powers of county courts located within the state were discussed in three separate cases. In People ex rel. Andrews v. Hassakis, the Supreme Court held such courts powerless to suspend an attorney from practicing therein on the ground they lack specific statutory authority on the point and possessed no inherent authority in this respect. It was said, in the confiscation proceeding entitled People v. 123 Punch Boards, however, that county courts could exercise quasi-criminal powers without reference to the value of the property sought to be destroyed as contraband for the maximum monetary jurisdictional limit placed on such courts applied solely to the jurisdiction in relation to civil suits in which claims for damages were advanced. Similarly, in People v. Gentry, the Appellate Court for the Third District held the criminal jurisdiction of county courts extended to prosecutions for vagrancy on the theory the jurisdiction of such courts was equated with that conferred on lesser judicial officials, such as

---

6 In general, see Ill. Const. 1870, Art. VI, §§ 1 and 18, and Ill. Rev. Stat. 1955, Vol. 1, Ch. 37, § 171 et seq.
7 6 Ill. (2d) 463, 129 N. E. (2d) 9 (1955).
8 Ill. Rev. Stat. 1955, Vol. 1, Ch. 13, § 6, restricts the power to strike the name of an attorney from the roll of lawyers to the justices of the Supreme Court, but it does permit a judge of a circuit court, or of the Superior Court of Cook County, to order a period of suspension from practice before these tribunals.
justices of the peace and police magistrates, whose powers in this respect were not exclusive.

Lesser state judicial officials were reminded, by two cases, that they may have obligations to perform as well as possess powers which they may not heretofore have suspected. Thus, in *People v. Reiner*\(^{13}\) the Supreme Court held that it was the responsibility of a police magistrate to report convictions for drunken driving to the Secretary of State, in order to permit him to perform his duty with respect to the suspension of the driving license,\(^{14}\) and that a palpable omission of this duty\(^{15}\) could well involve the magistrate in a criminal prosecution.\(^{16}\) A claim there advanced that the requirement as to making reports imposed a non-judicial duty on a judicial officer in violation of the constitutional provision as to separation of powers\(^{17}\) was rejected as calling for a too jealous regard for the time and energy of judicial officers. In the case of *Stark v. Stark*,\(^{18}\) however, a master in chancery was held empowered to investigate a question relating to custody of children of parties to a divorce proceeding, despite the absence of specific authority in the statute on the subject.\(^{19}\) The case quite probably turned on the fact that the report of the master was no more than one of advisory character for it could not be said that work of this nature falls within the inherent powers of masters.

Venue requirements, as well as jurisdictional limitations, should be observed if a given court is to have authority to proceed with the case. In three separate instances during the year, defendants urged that venue requirements had been violated but in each instance the court found no error had been committed in connection with the choice of the county in which to institute suit. In

\(^{13}\) 6 Ill. (2d) 337, 129 N. E. (2d) 159 (1955).
\(^{15}\) Ibid., Ch. 95½, § 73.32.
\(^{16}\) Ibid., Vol. 1, Ch. 38, § 449.
\(^{17}\) Ill. Const. 1870, Art. III.
\(^{18}\) 7 Ill. App. (2d) 442, 129 N. E. (2d) 776 (1955). Leave to appeal has been denied.
the case of *People ex rel. Carpentier v. Lange*,\(^{20}\) a suit to collect additional truck license fees, the licensee contended that suit could be maintained only in the county of his residence, from whence he had mailed his license application, but the Supreme Court,\(^{21}\) on noting that the application had been received at and acted upon in the office of the Secretary of State at the state capital, held the acts done there constituted at least a part of the transaction "out of which the cause of action arose,"\(^{22}\) hence concluded that suit in Sangamon County was not inappropriate. The place where the breach of contract occurred was held to be controlling in the case of *Bagarozy v. Meneghini*,\(^{23}\) rather than the place where the contract had been entered into, since until breach occurred there was no "transaction" giving rise to a cause of action.\(^{24}\)

The issue in the case of *Gordon v. Gordon*\(^{25}\) was slightly different. The plaintiff therein, a resident of Cook County, sued there for separate maintenance from her non-resident husband\(^{26}\) and endeavored to enforce her right to support by sequestration proceedings directed against certain banks and trust companies, also resident in Cook County, which held assets belonging to her husband. One such trust company, holding title to land in Kane

---

20 8 Ill. (2d) 437, 134 N. E. (2d) 266 (1956).
21 Direct appeal to the Supreme Court was proper, pursuant to Ill. Rev. Stat. 1955, Vol. 2, Ch. 110, § 75, as the case involved a question concerning the state revenue.
24 The contract had been made in New York by a resident thereof with an opera singer who, at time of suit, was domiciled in Italy. The breach occurred when the singer performed in an opera given in Chicago without securing plaintiff's permission and without paying plaintiff his managerial commission. The defendant also claimed the action violated a principle related to venue matters described as the doctrine of *forum non conveniens*, relying particularly on the case of Whitney v. Madden, 400 Ill. 185, 79 N. E. (2d) 593 (1948), and arguing that the matter was easily determinable in the courts of Italy. The Appellate Court for the First District, however, found a difference between the two situations in that, in the Whitney case, the plaintiff had an appropriate forum in a sister state whereas, in the case at hand, the plaintiff would have been relegated to the courts of a foreign country. The court held that it would be inappropriate to force an American citizen to sue outside of the United States on a cause of action which arose therein.
26 Venue in Cook County would be unquestionably correct as to this aspect of the case: Ill. Rev. Stat. 1955, Vol. 1, Ch. 68, § 22.
County in trust for the husband's benefit, resisted a sequestration decree on the ground the action should have been conducted in the last-named county, claiming that, since title to land was involved, the suit appropriately belonged in the county "where the real estate or some part of it" was located. Recognizing that if the suit had been one in which the title to land had been directly concerned the venue requirement would have been violated, the Supreme Court nevertheless held that, as the relief sought was of in personam character, to-wit: the execution of a deed by the trustee, the problem was one with respect to venue limitations in relation to parties rather than property, and it approved the plaintiff's choice as to venue.

Acquisition of jurisdiction over the person of the defendant is another essential element to the effective conduct of a suit. Such jurisdiction is usually obtained by the proper service of process which correctly names the defendant and furnished him with pertinent information so that he could know when and where to appear. Misnomer of a defendant may provide a basis for objection to the further conduct of the proceedings but, according to the case of Janove v. Brown, if a summons bearing an incorrect designation for a defendant is served on the person intended to be sued, he may not neglect the notice so given and claim that the judgment pronounced against him is void, for jurisdiction over him would be acquired by the fact of service.

When substitute personal service is attempted, strict compliance with statutory requirements is usually demanded for due process might well be denied if too liberal an interpretation were to prevail. The case of Dalton v. Alexander, therefore, should

28 Ibid., Ch. 110, § 5, was held to be the controlling provision.
29 6 Ill. (2d) 245, 128 N. E. (2d) 706 (1955).
30 The court also there noted that the fact a corporation had been dissolved by judicial order more than two years before suit had been instituted against it did not necessarily render the service, and the judgment based thereon, absolutely void since the corporation may have been continued with de facto existence sufficient to permit suit. The holding may be said to be colored by the fact that the rights of a purchaser at a judicial sale based on the judgment had intervened.
31 10 Ill. App. (2d) 273, 135 N. E. (2d) 101 (1956). Leave to appeal has been denied.
serve as a reminder to the bar that the so-called "long arm" statute relating to service of process on non-resident automobile drivers is limited in its application to persons who use and operate motor vehicles over the highways of the state. It may not, therefore, be invoked to support the acquisition of jurisdiction over the bailor of a vehicle, as was attempted in that case, provided it is made to appear that the bailor neither drove in person nor through an agent and had, as his only connection with the events, the fact of his ownership of the car in question. In the case of Anchor Finance Corporation v. Miller, by contrast, the statutory reference to service of process on "some person of the family" of the individual defendant was given a fairly liberal construction by the Appellate Court for the First District in a case where the summons was handed to a married sister of the defendant, in his absence, after she responded to the ringing of the doorbell at the defendant's apartment. While the sister actually resided in another apartment in the same building, the court elected to treat her as a member of the defendant's "family" for this purpose and upheld the service.

Despite the emphasis given by the apparently mandatory language of the revised Civil Practice Act on the subject of the time of making the demand for jury trial, a point to be watched quite early in litigation, the courts appear to have been fairly liberal in the matter of allowing late demands, particularly where the rights of a defendant would otherwise be in jeopardy. The significance of the holding in the case of Hudson v. Leverenz, 

34 8 Ill. App. (2d) 326, 132 N. E. (2d) 81 (1956). Leave to appeal has been denied.
36 The holding would seem, in some degree, to be strengthened by the fact that the defendant admitted receiving a copy of the summons by mail and thereby gained personal knowledge of the pending action, together with the additional fact that the sister received her mail, and frequently ate her meals, at the location of the defendant's apartment.
37 Ill. Rev. Stat. 1955, Vol. 2, Ch. 110, § 64(1), states that a plaintiff "must file a demand" at the time the action is commenced and that a defendant, desirous of a trial by jury, must make his demand "not later than the filing of his answer."
therefore, lies not so much in the fact that the Appellate Court for the Third District there held it to be error for the trial court to deny to a defendant an opportunity to make a late demand as in the reasons assigned for that holding. The court there seized upon other portions of the statute and the accompanying rules, designed to authorize the granting of extensions of time in appropriate situations, as being indicative of a purpose to leave this point open to an exercise of a degree of discretion.

Attention should, of course, be given to applicable statutes of limitation for the effect that they may have on the contemplated litigation. In that connection, two landmark decisions have been achieved by the Supreme Court within the past year. A long step toward the clearing of land titles from possibilities of reverter and rights of re-entry was taken when the court, in the case of Trustees of Schools of Township No. 1 v. Batdorf, upheld both the constitutionality and the retroactive effect of the 1947 addition to the Conveyances Act which had not only placed a time limitation on the potential duration of such interests but had also fixed a relatively short period, one year after the enactment thereof, for the bringing of suit on old breaches which may have brought reversions into existence or given rise to rights of re-entry. Under the holding in the case of Smith v. Carlson, the court treated the scire facias proceeding to revive an earlier judgment as being no different than a separate suit in debt based on that judgment, hence regarded the former as being sufficiently instituted to obviate the limitation period when the judgment creditor had caused the scire facias writ to be issued within an appropriate time even

41 6 Ill. (2d) 486, 130 N. E. (2d) 111 (1955), noted in 34 CHICAGO-KENT LAW REVIEW 250.
43 The period of limitation as to future causes may vary from not less than seven years to as much as twenty years: Ill. Rev. Stat. 1955, Vol. 2, Ch. 83, §§ 1, 1a, and 1b.
46 Ibid., Vol. 2, Ch. 110, § 55.
though the actual revival itself did not occur until after the statutory period had expired.

The proper or improper selection of parties, both plaintiffs and defendants, could have profound consequences on the outcome of planned litigation. Little of significance has been said with regard to the proper persons to be plaintiffs but some points have been made with respect to nonjoinder and misjoinder of defendants. Thus, in the case of Babington v. County Board of School Trustees, a proceeding to secure review of administrative action under a petition for the detachment of school territory, it was said that all signers of the petition were necessary parties defendant and, as a consequence, the case could not proceed without their presence. By contrast, in two related cases, while the court could find no error in permitting a number of distinct and separate plaintiffs to combine in one equity proceeding to secure injunctive relief against certain blasting operations, it did sustain an objection predicated on a misjoinder of defendants when it found an absence of joint or collective action by the several quarry owners, who in fact were competitors, after it was made to appear that none of them had knowledge of or control over the activities of the others. Mention could also be made of the holding of a local federal district court in the case of Torcazo v. Statema.

47 The Appellate Court for the First District, in the case of United Mail Order, etc., Local 20 v. Montgomery Ward & Co., 6 Ill. App. (2d) 477, 128 N. E. (2d) 645 (1955), reiterated the proposition that a suit could not be conducted in the name of an unincorporated union for lack of a legal entity distinct from the members thereof. The Supreme Court, when affirming the decision therein, dealt solely with principles of substantive law and made no reference to the procedural point: 9 Ill. (2d) 101, 137 N. E. (2d) 47 (1956).


49 The court noted that the legislature, when enacting the Administrative Review Act, Ill. Rev. Stat. 1955, Vol. 2, Ch. 110, § 264 et seq., made no provision therein for any form of representation by parties before the court, possibly because a simplified and inexpensive method of service of process by the use of registered mail had been devised.


51 The court preferred the liberal view illustrated by the New York case of Akely v. Kinnicutt, 238 N. Y. 466, 144 N. E. 682 (1924), to the more confining rule as to multifariousness applied by the Appellate Court for the Second District in the case of Gombi v. Taylor Washing Machine Co., 290 Ill. App. 53, 7 N. E. (2d) 929 (1937).

52 141 F. Supp. 769 (1956).
The court there permitted the joinder of a Wisconsin insurance company as a defendant in an automobile collision case which arose in that state not so much because the "direct action" statute of Wisconsin was applicable, it being simply procedural in character, but because another statutory provision, deemed to be a part of the insurance contract, was treated as creating a direct liability in favor of the plaintiff under substantive contract principles.

Parties also get into litigation in other ways than by naming them in the first instance. Intervention provides one such illustration, but intervention is not allowed unless the petitioner can disclose an interest in himself with respect to the subject matter of the suit. It was, therefore, held in the case of Art Institute of Chicago v. Castle that it was proper to deny to a private party leave to intervene as a plaintiff in a case affecting the administration of a public charitable trust because the exclusive right to conduct suits of this nature is vested in the Attorney General and that which a private litigant would not be permitted to do by direct action would not be permitted by indirect intervention. The scope of intervention does, however, appear to have been liberalized for, in the case of Steiner v. Rig-A-Jig Toy Company, there would appear to be a tacit recognition of the fact that intervention is now to be permitted in law actions where, heretofore, the subject was one generally of equitable rather than of legal cognizance. Specific statutory authority may also exist for intervention in par-

54 Ibid., § 85.93.
55 Note might also be taken of the holding in the case of Romadka v. Schroff, 7 Ill. (2d) 202, 130 N. E. (2d) 277 (1955), for the length to which the court went to sustain a decree alleged to be erroneous for lack of proper parties when it could have disposed of that aspect of the problem by a simple reference to Ill. Rev. Stat. 1955, Vol. 2, Ch. 110, § 42(3).
57 9 Ill. App. (2d) 473, 133 N. E. (2d) 748 (1956).
59 10 Ill. App. (2d) 410, 135 N. E. (2d) 166 (1956). Leave to appeal has been denied.
60 39 Am. Jur., Parties, § 55 et seq.
ticular types of proceedings, as is the case where an employer, after the payment of workmen's compensation, is allowed to intervene in his employee's suit against a third person to recover damages for the disabling injury with the thought in mind that the employer could, in that fashion, be able to protect his lien for reimbursement of the compensation paid. After some uncertainty as to the manner by which the employer's right should be afforded protection, a sensible solution appears to have been achieved through the medium of the case of Sjoberg v. Joseph T. Ryerson & Son where the court directed that leave to intervene should be granted to the employer but subject to the condition that the intervenor should not participate in the conduct of the employee's suit unless with the plaintiff's consent. In the case of Dillon v. Nathan, however, the statutory right of lien with its corresponding right of intervention was held to be inadequate in relation to a suit against a third person based upon the Dram Shop Act inasmuch as suits of that character do not rest upon the inflicting of negligent injury upon the employee.

Ordinary legal remedies have gone without change except that, in the case of White v. Prenzler, the statutory limitations placed upon suits for breach of promise to marry were given a liberal construction so as to permit to a plaintiff a full three month period

63 8 Ill. App. (2d) 414, 132 N. E. (2d) 56 (1956), noted in 34 CHICAGO-KENT LAW REVIEW 289.
64 10 Ill. App. (2d) 289, 135 N. E. (2d) 136 (1956). Leave to appeal has been denied.
65 Ill. Rev. Stat. 1955, Vol. 1, Ch. 43, §135. For that matter, according to the case of New Amsterdam Casualty Co. v. Gerin, 9 Ill. App. (2d) 545, 133 N. E. (2d) 723 (1956), an insurance company may not claim reimbursement by way of subrogation in dram shop situations.
67 7 Ill. (2d) 624, 131 N. E. (2d) 540 (1956). Direct appeal was taken to the Supreme Court as the constitutionality of Ill. Rev. Stat. 1955, Vol. 2, Ch. 89, §29, dealing with notice as a condition precedent in breach of promise to marry cases, had been placed in issue. The Supreme Court was, however, able to dispose of the case without reaching the constitutional question.
measured from the time of knowledge of breach in which to give notice of the contemplated action rather than three months from the date when the actual breach occurred and, in *Miller v. Siwicki*, the court again referred to the fact that equitable defenses, such as *laches*, are now available for use in ejectment actions. For that matter, little has been said about statutory remedies although the case of *County Board of School Trustees v. Batchelder* may serve to illustrate the rather slender degree of effort on the part of the condemning authority which may be regarded as sufficient to meet the condition precedent to a proceeding under the Eminent Domain Act to the effect that the action should be instituted only after the compensation to be paid "cannot be agreed upon by the parties interested." The case of *Pasfield v. Donovan* should also prove to be of interest for the Illinois Supreme Court there upheld that portion of the Cities and Villages Act which permits a plaintiff who succeeds in restraining a violation of the zoning law to recover a reasonable sum for attorney's fees as part of the costs. Brief mention could also be made of the case of *Exchange National Bank of Chicago v. County of Cook* since it serves to emphasize as well as to illustrate the nature of the important "actual controversy" which must exist between the parties before resort may be had to a proceeding for a declaratory judgment.

In the field of equity and equitable remedies, the question as to whether or not jurisdiction should be exercised persistently reappears, often in novel form, and the past year was no exception. The question became particularly acute in the case of *Burden v. Hoover* where certain licensed chiropractors sought an injunc-

---

68 8 Ill. (2d) 362, 134 N. E. (2d) 321 (1956).
69 7 Ill. (2d) 178, 130 N. E. (2d) 175 (1955).
71 7 Ill. (2d) 563, 131 N. E. (2d) 504 (1956).
73 6 Ill. (2d) 419, 129 N. E. (2d) 1 (1955).
75 7 Ill. App. (2d) 296, 129 N. E. (2d) 463 (1955). The Illinois Supreme Court, not in the period of this survey, later reversed the holding therein and remanded the cause for further proceedings: 9 Ill. (2d) 114, 137 N. E. (2d) 59 (1956). Daily, J., and Bristow, J., each wrote a dissenting opinion.
tion against unlicensed operators in order to prevent them from carrying on practice in the community. Both the trial court and the Appellate Court for the Fourth District denied relief, primarily on the ground the suit was not one to protect property rights, for which equity could take jurisdiction, but was more nearly designed to enjoin the doing of an act which was subject to criminal punishment, hence came within an area where equitable jurisdiction would be lacking. The Supreme Court, however, reversed these holdings when it declared that a person who holds a license to practice as a chiropractor, like other licensed professional persons, has a property right in such license in the nature of a franchise which would be entitled to receive equitable protection.

If a property right is invoked as the basis for securing equitable relief it should be one which could be proven to possess some value. A failure to establish this fact, together with an evident reluctance on the part of courts of equity to specifically enforce contracts against competition, accounts for the holding of the Appellate Court for the First District in the case of Behn v. Shapiro. The court there reversed a permanent injunction against a former partner, who had sold his interest in the firm and its good will to the surviving partner, restraining against the solicitation of the firm’s customers when it was made to appear that there was no express covenant against competition; no treatment of the good will as an asset on the books of the partnership; and no showing as to whether the customers approached by the defendant had been constant or only occasional customers of the firm. Being unable to find that the alleged good will was a substantial business asset, the court said there was no reason for an injunction to protect the alleged property right.

In another case, that of Shatz v. Paul, the jurisdictional

77 See the case of Smith v. Illinois Adjustment Finance Co., 326 Ill. App. 654, 63 N. E. (2d) 264 (1945), for an instance of the use of an injunction to restrain against unlicensed law practice.
78 8 Ill. App. (2d) 25, 130 N. E. (2d) 295 (1955). Leave to appeal has been denied.
issue arose over the point whether a court of equity could protect a person against an abusive use of legal process in the form of a *capias ad respondendum*.\(^8\) The complaint charged that the defendants had discounted a number of invoices for two corporations in which the plaintiff was an officer but had contended, following upon corporate bankruptcy, that plaintiff had induced the defendants to make the discount by means of fraudulent representations; that defendants had instituted a series of separate suits on these purported frauds and had caused a series of separate capiases to be issued upon which plaintiff had been arrested; that this program had been undertaken to harass plaintiff, for the defendants well knew plaintiff was without property and lacked sufficient funds to pay bail bond premiums to secure relief from the writs already issued; and that still other suits and writs were in the offing. A temporary injunction issued in plaintiff’s behalf was affirmed by the Appellate Court for the First District in an opinion which, while recognizing that writs of this nature were legal, albeit open to criticism, nevertheless held them to be subject to equitable restraint where, as in the case at hand, they were used in an abusive fashion and an adequate remedy at law was lacking.

While adequate protection against an ejectment suit may now exist in that equitable claims and defenses may be interposed therein,\(^8\) that fact alone should not prevent recourse to a separate equitable proceeding if the defendant in the ejectment suit prefers to seek equitable relief, particularly if it is to be of an affirmative character such as the quieting of a title. For this reason, therefore, the Supreme Court, in the case of *Ginther v. Duginger*,\(^8\) held that even though the defendant could have interposed a separate equitable counterclaim in the ejectment action\(^8\) he was free, if he so wished, to institute a separate equitable proceeding to accomplish his purpose. But, according to the holding

\(^8\) See ante, this section, note 68, for reference to the case of *Miller v. Siwicki*, 8 Ill. (2d) 362, 134 N. E. (2d) 321 (1956).
\(^8\) 6 Ill. (2d) 474, 129 N. E. (2d) 147 (1955).
in *Ptaszek v. Konczal,* this principle would not hold true where the statutory remedy is of exclusive character for then resort to equity would result in a circumvention of the statute. It was there held proper to refuse an injunction to restrain the offering of a will to probate on the ground the sole remedy lay in a contest of the will in the event of and after its admission to probate.

Reformation of instruments drafted incorrectly because of mistake falls clearly within the jurisdiction of an equity court so the case of *Hyman-Michaels Company v. Massachusetts Bonding & Insurance Company* is significant only because it presents an interesting factual situation involved in a futile attempt to have an insurance policy reformed on the basis of an alleged mutual mistake. The corporation there concerned had insured its officers against death occurring in aviation accidents on regularly scheduled passenger airlines. A new policy with a different company was negotiated through the efforts of an independent broker but it was limited so as to cover only certain designated airlines, which list did not include one carrier on whose airplane a corporate officer came to his death. A suit to reform the new policy was held properly dismissed when the proof showed that the broker was not an agent of the insurer issuing the new policy and that the company was not made aware of the insured’s desire to obtain the same broad coverage it had formerly enjoyed.

Not specifically of equitable cognizance but considered here because the statutory proceeding carries with it some equitable overtones are two points made in relation to partition cases. In *Blancett v. Taylor,* the successful plaintiff orally made a demand on the master, immediately before the sale, to cause the premises to be sold free and clear of an existing mortgage, which demand was observed by the making of a suitable oral announcement to

---

84 7 Ill. (2d) 145, 130 N. E. (2d) 257 (1955).
86 9 Ill. App. (2d) 13, 132 N. E. (2d) 347 (1956). Leave to appeal has been denied.
87 Ill. Rev. Stat. 1955, Vol. 2, Ch. 106, § 1 et seq. Section 44 thereof, for example, directs that the proceeding shall be predicated on a "complaint in chancery."
88 6 Ill. (2d) 434, 128 N. E. (2d) 916 (1955).
that effect before bids were received. It was there held that the plaintiff could not thereafter object to the sale so made on the ground the sale did not comply with the decree, which contained no provision for a sale clear of encumbrance, because the plaintiff was said to be estopped by his own conduct. The case of *Allendorf v. Daily* would indicate that, in the event a partition of the premises is made rather than a sale thereof, it would be competent for the partition commissioners to create an easement when needed, by way of charging one portion of the land with a right of way in favor of another part thereof, if this was essential to achieve a fair and impartial division.

Practice in relation to the issuance of writs of injunction was involved in the case of *American Dixie Shops, Inc. v. Springfield Lords, Inc.*, a case in which the plaintiff endeavored to assert a cross-appeal from part of an order which had dissolved a temporary injunction as to certain defendants at a time when other defendants, whose motion to vacate had been denied, took their appeal from the injunctive order so sustained. The Appellate Court for the Third District, on the basis of the statute then in force and effect, agreed that the cross-appeal was subject to a motion to dismiss since interlocutory appeal, at that time, was permitted only in the event the questioned order had either (1) granted an injunction, (2) had overruled a motion to dissolve the same, or (3) had enlarged the scope of an existing injunction. It should be noted, however, that since the holding in that case, the statute relating to appeal from temporary restraining orders has been amended so that it now permits of an appeal, or a cross-appeal, where the interlocutory order serves to modify the injunction as well as in the cases previously considered.

---

89 6 Ill. (2d) 577, 129 N. E. (2d) 673 (1955).
PREPARATION OF PLEADINGS

Aside from the case of *Nudd v. Matsoukas*,⁹³ which dealt with the sufficiency of a complaint in a wrongful death case to state a cause of action on behalf of a dependent minor child against one parent for having caused the death of the other parent,⁹⁴ the principal holding in the past year relating to the preparation of a complaint in a civil suit is to be found in the case of *Parrino v. Landon*.⁹⁵ The action there concerned was a simple case for personal injury directed against the driver of an automobile and also at the owner thereof, the former being charged with active misconduct in operating the car with the knowledge and consent of the latter but the complaint was silent on the point as to whether or not the driver was the authorized agent and servant of the car owner. The driver was not served with process. The owner, although served, offered no contest until he appealed from a default judgment, urging there was neither pleading nor proof to support a judgment against him. The Appellate Court for the Second District treated the complaint as being sufficient on the theory that the presumption of agency which arises from the fact of ownership plus the giving of permission to another to use the car⁹⁶ was enough to inform the defendant of the nature of the case asserted so as to require an answer of the part of the supposed principal to deny the purported agency relationship, particularly so after judgment had been pronounced.⁹⁷ The Supreme Court affirmed the holding, after noting that the whole dispute could have been avoided by the insertion of a brief additional phrase in the complaint,⁹⁸ under an opinion which reflects a deep concern in stripping litigation from the morass of technicality that is apt

⁹³ 7 Ill. (2d) 608, 131 N. E. (2d) 525 (1956), noted in 34 CHICAGO-KENT LAW REVIEW 333.
⁹⁴ The substantive character of a case of this nature is discussed elsewhere in this Survey. See Division V, Family Law, note 1, and Division VIII, Torts, note 1.
⁹⁸ See, in particular, 8 Ill. (2d) 468 at 470, 134 N. E. (2d) 311 at 312.
to surround it unless defendants see fit to make prompt and proper objection to the sufficiency of complaints at the first opportunity.

While the Civil Practice Act contemplates that the pleader, when drafting the complaint, should set forth "specific prayers for the relief to which the pleader deems himself entitled," there is every reason to believe that such prayers should not limit the power of a court to grant appropriate relief under the case made, particularly where the defendant is present in court. Whether the practice of including a general prayer is appropriate or not, the Supreme Court holding in the case of Pope v. Speiser now makes it evident that not even a general prayer is necessary, provided the trial court, by proper order and on just terms, protects the adverse party from prejudice by reason of surprise in granting whatever relief would be appropriate on the case before it. The court there affirmed a decree granting relief by way of an equitable lien for improvements made on the land even though the plaintiff had been unsuccessful in his endeavor to secure the requested specific relief by way of specific performance of an oral agreement to convey an interest in the land.

Alternative allegations in a complaint are rarely used, generally because the pleader has been able to verify in advance the facts on which he wishes to rely or because he elects to state the several possible causes in separate counts, as if he possessed so many different and distinct claims. There is authority, however, for the use of alternative allegation, whether as to the facts of the case or as to the parties, even within the framework of a single count, so the holding in the case of Wedell v. American Telephone & Telegraph Company should invoke no surprise. The

1 Ibid., Ch. 110, § 33(3) and § 42(2).
2 Ibid., Ch. 110, § 34, might be construed to contain a denial of the right to make use of a general prayer. But see Anson v. Haywood, 397 Ill. 370, 74 N. E. (2d) 489 (1947), and David v. Ridgely-Farmers Safe Deposit Co., 342 Ill. App. 96, 95 N. E. (2d) 725 (1950).
3 111. (2d) 255, 130 N. E. (2d) 507 (1955).
5 Ibid., Ch. 110, §§ 23-4.
particular count there concerned sought relief against an instrument on the ground it had been obtained by fraud, but the pleader had been careful enough to realize the possibility that he might not be able to substantiate this claim so he had alleged, in the alternative, that the signature had been affixed to the instrument under a mistake. The count was, in fact, open to objection under the fraud theory but the Appellate Court for the Third District declared it to be sufficient in its alternative aspect, so it reversed a judgment which had stricken the count for failure to state a cause of action.\(^7\)

The possibility of using a complaint as a device for setting forth a multiplicity of claims is conditioned by the fact that such claims, if asserted by multiple but non-joint plaintiffs, must arise from a common transaction, or series of transactions, and must involve common questions of law or fact, without which separate suits would have to be employed.\(^8\) Mention has already been made, in relation to joinder of parties,\(^9\) of two cases decided during the year which have bearing on this point. The opinion in one of these cases, that by the Appellate Court for the First District in the case of Opal v. Material Service Corporation,\(^10\) is worthy of special mention for the elaborate discussion it contains not only as to the meaning to be ascribed to the phrase "transaction or series of transactions" to be found in the statute authorizing the joinder but also for its careful recognition of the procedural problems which will confront a trial court at the time of hearing the joined claims. The case suggests the proposition that a compound trial, or even a simple trial, might well be divided into two parts; one to deal with the issues concerning liability, and the other, if needed, to be confined to questions concerning the kind or amount of damage. Such a division could well be productive of a substantial saving in judicial time for the second part of the trial might well prove to be unnecessary in many instances. The

\(^7\) It should be noted that, in Illinois, the presence of a bad alternative does not affect a good one: Ill. Rev. Stat. 1955, Vol. 2, Ch. 110, § 43(2).

\(^8\) Ibid., Ch. 110, §§ 23-4.

\(^9\) See ante, this division, note 50.

\(^10\) 9 Ill. App. (2d) 433, 133 N. E. (2d) 733 (1956).
thought is one which would bear investigation, especially in an area where court calendars are clogged with a heavy back-log of cases.

From the standpoint of the preparation of defensive pleadings, some additional light has been shed by some of the recent cases on the form of answer which should be used to generate a variety of issues of utility to the defendant. A denial type of answer would, of course, add nothing new to a case beyond that which had already been alleged. For this reason, it was urged, in the case of *Moore v. Daydif,*\(^1\) that it would be error to permit a defendant to offer proof that the plaintiff in a personal injury case was intoxicated at the time, since this fact ought to be pleaded as an affirmative defense. The court there concerned held otherwise, treating the evidence as being relevant under the issue created by defendant's denial of the essential allegation that plaintiff was exercising due care and caution at the time for his own safety.\(^2\) By contrast, in the case of *Penrod v. Smith,*\(^3\) the court held that evidence intended to show a purported illegality in a partnership arrangement in a margin account was properly excluded because the defendant had not generated an issue with respect thereto by reason of the failure to use an affirmative answer.\(^4\) The case of *Galvan v. Torres,*\(^5\) following common law pleading concepts,\(^6\) points out that if the defendant in a battery case wishes to rely on a claim of self-defense, this too must be affirmatively pleaded.

Admissions contained in defensive pleadings may frequently save the plaintiff from the responsibility of proving what might

\(^{11}\) 7 Ill. App. (2d) 534, 130 N. E. (2d) 119 (1955).

\(^{12}\) The Appellate Court for the Second District there distinguished the case before it from its earlier holding in *Blake v. Ewers,* 341 Ill. App. 382, 91 N. E. (2d) 75 (1950), abst. opin., on the ground the earlier case was an "unusual one" in this respect.

\(^{13}\) 9 Ill. App. (2d) 257, 132 N. E. (2d) 675 (1956). Leave to appeal has been denied.


\(^{16}\) The "not guilty" plea in trespass for assault and battery had merely generated an issue as to whether or not, in fact, the defendant had assaulted or battered the plaintiff: *Olsen v. Upsahl,* 69 Ill. 273 (1873).
otherwise be a difficult matter to establish.\textsuperscript{17} The case of \textit{Robinson v. Workman},\textsuperscript{18} however, would reveal that such an admission should be treated as rising no higher than its source. The plaintiff there had charged that his decedent was riding in a motor vehicle "as a guest" of the defendant, which allegation had been specifically admitted by the answer. There being no competent eyewitness to establish the circumstances, plaintiff sought to have the court infer, from this admission, that the defendant, of necessity, must have been the driver of the automobile at the time of the accident so as to relieve the plaintiff of the responsibility of proving that fact. The Appellate Court for the Third District refused to so conclude, being of the opinion that the admission of a guest relationship did not preclude the possible inference that it was the guest who was doing the driving at the time.

The defendant's answer may also be used as a vehicle by which to assert countering demands by defendant against the plaintiff or others, which demands would not, ordinarily, have to bear any degree of relationship to those claims asserted by the plaintiff in the complaint.\textsuperscript{19} In the event a counterclaim is included in an answer to a complaint resting upon a statutory cause of action, however, the enabling statute may qualify the right to use a counterclaim so as to prevent encumbering the record with matters not germane to the original proceeding. It was, therefore, argued in the case of \textit{Allensworth v. First Galesburg National Bank & Trust Company}\textsuperscript{20} that it would be improper for a defendant in a forcible entry and detainer suit to offer an equitable counterclaim seeking to quiet title to the premises concerned as the controlling statute did contain a restriction of the type men-

\textsuperscript{17} The admission may also come about from a failure to deny: Ill. Rev. Stat. 1955, Vol. 2, Ch. 110, § 40(2).

\textsuperscript{18} 7 Ill. App. (2d) 42, 129 N. E. (2d) 32 (1955). The Supreme Court, not in the period of this survey, later reversed the holding therein under an opinion which makes no reference to the pleading question but which deals entirely with the sufficiency of the proof when considered in relation to a motion for judgment notwithstanding the verdict: 9 Ill. (2d) 420, 137 N. E. (2d) 804 (1956).

\textsuperscript{19} In general, see Ill. Rev. Stat. 1955, Vol. 2, Ch. 110, § 38. Third-party practice, which might also involve the use of a counterclaim, is regulated by ibid., Ch. 110, § 25(2).

\textsuperscript{20} 7 Ill. App. (2d) 1, 128 N. E. (2d) 600 (1955), noted in 34 \textit{Chicago-Kent Law Review} 263. Leave to appeal has been denied.
tioned.\textsuperscript{21} The Appellate Court for the Second District came to the conclusion that the counterclaim so offered was within the scope of the restriction and, as a consequence, it affirmed a decree based thereon.

In the event the defensive answer contains new matter, either by way of an affirmative defense or by counterclaim, it becomes incumbent on the plaintiff to prepare and file a reply\textsuperscript{22} or become subject to the penalty of an admission with respect to such new matter from the failure to respond thereto.\textsuperscript{23} If the reply itself is to be drafted in an affirmative form, the plaintiff should be careful to avoid the pleading fault heretofore described as a departure,\textsuperscript{24} for it should be the function of such a reply to reinforce the complaint and to show why the original claim was still enforcible anything in the answer to the contrary notwithstanding. The case of \textit{Norman v. School District No. 1, Pope County}\textsuperscript{25} serves as a good illustration of this point for it was there held proper, in a contractor's suit against a school board for the balance due on a building contract to which the board had made answer on the ground that the balance had not become payable because the building had not yet been accepted in the manner contemplated by the contract, for the plaintiff to predicate his reply to the affirmative defense on a school board resolution which had admitted the validity of the plaintiff's claim and had provided for the making of necessary financial arrangements to permit the payment thereof.\textsuperscript{26}

\begin{itemize}
\item \textsuperscript{21} Ill. Rev. Stat. 1955, Vol. 1, Ch. 57, § 5.
\item \textsuperscript{22} Ibid., Vol. 2, Ch. 110, § 32.
\item \textsuperscript{23} Ibid., Vol. 2, Ch. 110, § 40(2).
\item \textsuperscript{25} 8 Ill. App. (2d) 466, 131 N. E. (2d) 811 (1956).
\item \textsuperscript{26} In the course of the opinion therein, the Appellate Court for the Fourth District indicated that the plaintiff had an option (1) to prepare a complaint in which he might have anticipated the defense and offered facts at the outset to overcome the same, or (2) to wait until the defense was raised by answer and then use a reply for the same purpose: 8 Ill. App. (2d) 466 at 471, 131 N. E. (2d) 811 at 814. The first of these methods would have been entirely appropriate in an equity proceeding, but it is doubted that a plaintiff in a law suit should ever anticipate a defense: Western Union Tel. Co. v. Henley, 157 Ind. 90, 60 N. E. 682 (1901). But see Clark, Handbook of the Law Code Pleading (West Publishing Co., St. Paul, 1947), 2d Ed., pp. 250-2.
\end{itemize}
The new matter so asserted should, of course, be sufficient in law to avoid the affirmative defense; otherwise, the defendant would be entitled to move for a judgment on the pleadings in defendant's favor.\textsuperscript{27} It became necessary, therefore, in the case of \textit{Bowman v. Illinois Central Railroad Company},\textsuperscript{28} for the court to determine whether a reply based on an injured person's lack of capacity to execute a release, which had been pleaded as a defense to a federal employer's liability case, was sufficient to overcome the defense in the absence of an allegation of the restoration, or at least a statement that a tender had been made, of the consideration paid for the release. The court resolved the problem in favor of upholding the reply by reliance upon the federal rather than the state rule on the subject.\textsuperscript{29}

\section*{THE TRIAL OF THE CASE}

Trial of the case may well become unnecessary in the event the defendant has entered into a valid cognovit by which he has agreed that judgment may be entered against him by confession. The important thing to notice, in this respect, is that the cognovit must be a valid one for, without this, the court entering the judgment would lack jurisdiction. The case of \textit{Goldberg v. Schroeder},\textsuperscript{30} by way of supplementation of an earlier holding,\textsuperscript{31} not only serves to illustrate the factors which could be called upon to show that a cognovit was invalid but also declares inoperative a portion of a local court rule which would limit a defendant, seeking to vacate a judgment taken by confession, to those instances where the jurisdictional defect appeared on the face of the court record.\textsuperscript{32}

\begin{itemize}
\item \textsuperscript{27} Ill. Rev. Stat. 1955, Vol. 2, Ch. 110, § 57.
\item \textsuperscript{28} 9 Ill. App. (2d) 182, 132 N. E. (2d) 558 (1956). Leave to appeal has been granted.
\item \textsuperscript{29} Dice v. Akron, C. & Y. R. Co., 342 U. S. 359, 72 S. Ct. 312, 96 L. Ed. 398 (1952), noted in 30 \textit{CHICAGO-KENT LAW REVIEW} 364.
\item \textsuperscript{30} 10 Ill. App. (2d) 186, 134 N. E. (2d) 615 (1956). Burke, J., wrote a dissenting opinion.
\item \textsuperscript{31} See Green v. Walsh, 5 Ill. App. (2d) 535, 128 N. E. (2d) 398 (1955), dealing with the right of a plaintiff to take judgment by confession in a county other than one which would meet the venue requirements of Ill. Rev. Stat. 1955, Vol. 2, Ch. 110, § 5.
\item \textsuperscript{32} Rules of the Circuit Court of Cook County, Rule 47, § 3.
\end{itemize}
The defendant there, under an appropriate special appearance, was held to be entitled to show that the note relied upon was invalid, both for want of delivery and because of the absence of the signature of certain other essential parties, without being placed under any obligation to plead that he had any other meritorious defense to the plaintiff's claim.

Preparation for trial would appear to have been enhanced greatly by the Supreme Court holding in the case of *Krupp v. Chicago Transit Authority*. In that case, a suit to recover for personal injury, the plaintiff sought by discovery to obtain from defendant the names and addresses of all witnesses to the events involved in the lawsuit. Acting under the authority of Section 58 of the former Civil Practice Act, plaintiff submitted certain interrogatories, two of which were designed to obtain from defendant the names and addresses of any persons known to defendant who had witnessed the accident or the subsequent physical condition of the plaintiff. Defendant refused to give this information on the ground that it was not obliged to disclose the names of those who might be its witnesses at the trial. The trial court, because of this refusal, found defendant guilty of contempt. The Appellate Court for the First District reversed this ruling on the ground that Section 58, while it had provided for new methods of discovery, had not extended the substantive scope of discovery beyond that formerly available. The Supreme Court, on leave to appeal, in turn reversed the Appellate Court when it held that Section 58 did authorize discovery under written interrogatory with respect to the names and addresses of persons known by the opposing party to possess knowledge of the relevant facts. The decision has been criticized, first as being in apparent

---

34 The court indicated that Ill. Rev. Stat. 1955, Vol. 2, Ch. 110, § 101.23, dealing with the manner by which judgments taken by confession may be opened, was inapplicable to cases in which the defendant sought relief on the ground that the trial court lacked jurisdiction.
conflict with another section of the Civil Practice Act which now purports to declare that a party shall not be required to furnish the names and addresses of his witnesses, and second because the distinction which has been drawn between "occurrence witnesses" and "trial witnesses" appears to be a tenuous one. Aside from the problem of statutory construction, however, it may be said that the court has reached a desirable result, one well in accord with the modern liberal trend toward reducing the surprise element in the trial of a lawsuit.

In the realm of evidence law, at least as the same relates to proof in civil cases, reference might be made to the case of Lotta v. Lotta for the application made therein of the so-called "dead man's" restriction concerning the competency of witnesses to a new type of situation. The case was one in which the plaintiffs sued to establish a trust as to certain real property which had been purchased with their funds and the title to which had been taken in the name of their mother. The mother conveyed to an intermediary who, in turn, conveyed to the plaintiffs' father and the father had thereafter devised the property to his wife and all of the children. These facts did not become known to plaintiffs until after the father had died. The foregoing facts were established at the trial by the testimony of the plaintiffs admitted over objection based on Section 2 of the Evidence Act, which provides that no party to a civil action shall be permitted to testify therein, on his own motion or in his own behalf, when any adverse party sues or defends as heir or devisee of a deceased person. The trial court apparently felt that the statute was not applicable, possibly because the facts testified to did not involve the personal knowledge of the decedent in any way and the transaction so established concerned only the plaintiffs and their mother, a living person. The Supreme Court, on direct

38 See comment in 44 Ill. B. J. 784.
39 Some matters of evidence peculiar to criminal cases are discussed below, Division IV, Criminal Law and Procedure.
40 6 Ill. (2d) 393, 129 N. E. (2d) 153 (1955).
41 Ill. Rev. Stat. 1955, Vol. 1, Ch. 51, § 2. The statute contains certain exceptions which are not here relevant.
appeal, brushed this point aside; held that the case fell squarely within the prohibition of statute;\(^2\) and reversed the judgment for error in the admission of the proof. When it is remembered, however, that the rationale underlying the statute is one to protect the estates of deceased persons against fraudulent claims by putting the parties representing a decedent on an equal footing with their opponents,\(^3\) it would seem that the statute should have been held inapplicable, particularly because of the deceased person's total absence of connection with the transaction and the other facts to which the plaintiffs had testified.

In another case falling under the same statute, that of *Belfield v. Coop*,\(^4\) the question concerned dealt with the admissibility of a wire recording of conversations of the testator with one Sara Grate, a beneficiary under the will. These conversations had taken place at the time of and immediately prior to the execution of the will and had a bearing on the issue of lack of testamentary capacity and of execution of the will while under undue influence. Sara Grate was herself clearly incompetent to be a witness but, at the suggestion of the attorney who had drawn the will, she had taken the attorney's tape recorder to the hospital where the decedent was a patient and had there made a recording which consisted of her reading of the will to the testator, his statements at the end of each paragraph, and his response to specific questions concerning whether he knew who he was, what property he owned, and whether he wished to sign the will. This evidence was offered on behalf of the proponents of the will, including the said Sara Grate. No objection was made as to the form of the offer of proof, but the trial court rejected the evidence on the ground that, since Sara Grate would not herself be a competent witness, her reading of the will and the questions and answers recorded were likewise incompetent.

\(^2\) This would be true in the event the statute should be given a literal interpretation.

\(^3\) *Frederich v. Wolf*, 383 Ill. 638, 50 N. E. (2d) 755 (1943); *Vancuren v. Vancuren*, 348 Ill. App. 351, 109 N. E. (2d) 255 (1952). See also Wigmore, Evidence, §§ 578, 1576 and 2065, wherein is a discussion of the basis for the rule and also a criticism of it.

\(^4\) 8 Ill. (2d) 293, 134 N. E. (2d) 249 (1956).
The Supreme Court rejected this contention, stating that the matter was governed by the principle laid down in the earlier case of *Garrus v. Davis*, wherein it had been held that a witness could testify to the contents of a conversation had between the plaintiff-contestant and the testatrix even though the plaintiff herself would be incompetent to testify with respect thereto. The court reasoned that since a competent third person over-hearing the conversation of Sara Grate and the decedent might have related the nature of the occurrence, the fact that there was a wire recording instead of a human witness would not call for a different result. In a sense, however, the case does go a step beyond the earlier holding in that here the mechanical device was under the control of the incompetent witness, whereas the competent witness in the Garrus case presumably was not.

Another interesting point was also raised therein, one having to do with the construction of Section 60 of the Civil Practice Act as it has bearing on Section 2 of the Evidence Act. At the hearing in the county court upon the petition to admit the will to probate, the contestants had called Sara Grate and she had been fully examined, over the objections of proponents, under the pertinent section of the Civil Practice Act, for the purpose of showing fraud, forgery, or other improper conduct in connection with the execution of the will. At the later trial in the circuit court, the defendants offered the transcript of this witness’s testimony in the county court but it was excluded on the ground that the witness was not a competent one. Counsel for the defense, assigning error, relied on Section 92 of the Probate Act, which directs that an “authentic transcript of the testimony of any witness taken at the time of the hearing on the admission of the will to probate is admissible in evidence.” The Supreme Court agreed, saying that to hold otherwise would be to read an unauthorized exception into the pertinent section of the Probate Act.

---

45 234 Ill. 326, 84 N. E. 942 (1908).
47 Ibid., Vol. 1, Ch. 51, § 2.
48 Ibid., Vol. 1, Ch. 3, § 244.
The extent to which demonstrative evidence may be used came before the Appellate Court for the Fourth District in two cases, one entitled *Smith v. Ohio Oil Company*\(^4\) and the other entitled *Winters v. Richerson*.\(^5\) The Smith case involved the use of a human skeleton in connection with an explanation of the plaintiff's injuries given by the plaintiff's medical expert, to which the defendant had assigned error on the grounds that such use was unnecessary to an understanding of the issues, was gruesome, and tended to arouse the emotions of the jurors. The court, while recognizing the prejudice which might result from an improper use of such evidence, pointed out that it could be of great value in aiding human understanding and its use was proper when the evidence was relevant and actually explanatory. The court noted that the physician had not used the model in connection with his description of the injuries, of the operation performed, or the method of treatment but only to supplement the description of the present and continuing injury, which involved the pelvic area and one most difficult for the average person to visualize. In particular, the expert had pointed out the displacement of the bones from the normal and the point of excess strain, as well as how this would affect the plaintiff's balance. It concluded, therefore, that no error had occurred even though it refused to announce any flat rule, saying that the question was one of relevance.

In the Winters case, however, the same court reversed a judgment for an improper use made of evidence of the same type when it was deemed to be unnecessary to a clear explanation and exemplification of the medical expert's testimony. In this instance, the plaintiff had produced instruments used in an operation and had caused the medical witness to carry on a demonstration of operative technique in addition to the production of a skeleton and testimony with reference to it. The court, condemning the demonstration of the operative technique as not conducive to a fair and impartial consideration of the issues presented, made it

clear that it was applying the same principle to reach the opposite result.

Admissions of one kind or another may constitute acceptable forms of proof. In the case of People v. Mikka,\(^{51}\) for example, the Supreme Court held that, while it would be generally improper to permit the state to show that a defendant had refused to make a statement following his arrest, principally because the accused has a right to remain silent and his refusal would have no tendency to prove or to disprove the charge against him, if the defendant does later make a statement after first refusing to do so and also takes the stand in his own behalf, it would be proper to admit the testimony of a police officer to the effect that the arrested person had first refused to make a statement. In the eminent domain proceeding entitled City of Waukegan v. Stanczak,\(^{52}\) by contrast, the court excluded evidence of an offer made by the condemnor to purchase the property, sought to be shown as an admission against interest. On appeal, this ruling was affirmed, the Supreme Court holding that as an offer by the condemning authority is a requisite to a showing that the price could not be agreed on and such an offer is often made in the form of a premium for a quick acquisition of the land in the public interest, to permit proof of this offer would penalize the condemnor for taking necessary and desirable steps.

The question of the right of a defendant to show the narcotic addiction of a party, as having a bearing on the issue of self-defense, was raised in the case of People v. Moretti.\(^{53}\) The defendant there claimed that he had been defending himself from one Salvi, who was claimed to have fired the fatal shot in a brawl in which the victim was slain. The trial court excluded the proffered evidence that Salvi was a narcotic addict. The Supreme Court considered it to be the argument of the defendant that "evidence of drug addiction, past or present, is, without more,

\(^{51}\) 7 Ill. (2d) 443, 131 N. E. (2d) 91 (1955), cert. den. 351 U. S. 951, 76 S. Ct. 848, 100 L. Ed. (adv.) 692 (1956).

\(^{52}\) 6 Ill. (2d) 577, 129 N. E. (2d) 673 (1955).

\(^{53}\) 6 Ill. (2d) 494, 129 N. E. (2d) 709 (1955).
admissible in a homicide action for the purpose of determining the aggressor."\(^5\) Recognizing this issue to be an open question in Illinois, and drawing on precedents from other states, the court held that no error had occurred in excluding the evidence as it was deemed to be both irrelevant and incompetent when un-accompanied by proof (1) that Salvi was still an addict at the time of the homicide; (2) that he was dangerous and violent as a consequence of his addiction; (3) that he was dangerous and violent when under the influence of narcotic drugs; and (4) that he was under their influence at the time the homicide occurred. The failure to lay an adequate foundation, of necessity, required exclusion of the evidence but proof of this nature may yet become admissible in a proper case.

Insofar as trial tactics were concerned, mention might be made of a few points established during the year. In *People v. Kelly*,\(^5\) the Supreme Court held that it would not necessarily be reversible error for a petit juror to serve on a traverse jury when her husband had previously served on the grand jury which had returned the indictment against the defendant. The court was careful, however, not to use language which would bind it in future cases, if prejudice should be made apparent from the circumstances, for it pointed out that the case was not one involving fraud or deception; that the husband was out of town at the time of the trial; that the parties had not discussed the case at either time; and that there was not, as a matter of law, any basis for an inference of prejudice from the mere fact of jury service under the circumstances. In *People v. Moore*,\(^6\) the defendant was being tried for burglary and the trial court overlooked giving an instruction of vital importance to the state. The jury had initially retired but had not selected a foreman nor commenced its deliberations. The trial court recalled the jury and gave the omitted instruction. The Supreme Court said that this "perhaps gave undue emphasis" to the importance of

\(^5\) 6 Ill. (2d) 494 at 521, 129 N. E. (2d) 709 at 724.
\(^5\) 8 Ill. (2d) 694, 136 N. E. (2d) 785 (1956).
\(^6\) 6 Ill. (2d) 449, 129 N. E. (2d) 5 (1955).
the instruction but held that the corrective procedure so adopted was not a sufficient ground for reversal. The case of Keller v. Menconi also suggests that, in the event a motion for new trial is inadequate for failure to specify the ground therefor, counsel may not remedy the defect simply by preparing and filing an amended motion with the clerk of the court but must obtain leave for this purpose and then only after notice to the opposite party.

DAMAGES

The extent to which a trial judge may act to alter a jury verdict insofar as the same fixes the amount of damages to be awarded a successful plaintiff appears to have caused the reviewing courts the greatest difficulty during the past year. Following a jury verdict in the case of Yep Hong v. Williams, the plaintiff moved for a new trial on the ground that the verdict was inadequate. The trial judge then ordered the defendant to consent to an additur in an appropriate amount as a condition to the overruling of said motion. On review, the Appellate Court for the First District held that a trial judge would be without power to enlarge upon a jury verdict in a tort action where the damages were unliquidated in character. It should be pointed out, however, that the instant decision is to be distinguished from cases involving liquidated damages where additurs have been allowed.

By contrast, a problem relating to a reduction in a jury verdict arose in the case of Schumacher v. Rosenthal. Although it is now well-settled law that, in a suit against one joint tort-feasor, the amount paid by another tort-feasor for a covenant not to sue should be considered insofar as it may have bearing on the amount of damages to be awarded, the manner in which

57 7 Ill. App. (2d) 250, 129 N. E. (2d) 341 (1955). Leave to appeal has been denied.
60 The defendant failed to enter the required consent and the appeal was taken by him from an adverse ruling on the motion for a new trial.
61 See James v. Morey, 44 Ill. 352 (1867), and Carr v. Miner, 42 Ill. 179 (1866).
that factor is to be introduced into the case does not enjoy like clarity.\textsuperscript{63} When the United States Court of Appeal for the Seventh Circuit, in the aforementioned case, faced this problem it approved the action of a trial judge in reducing the judgment based on a jury verdict by the amount paid for the covenant.

A different method of dealing with this problem, and in relation to the proper procedure to be followed in correcting a jury's verdict, is indicated in the case of \textit{Paul Harris Furniture Company v. Morse}.\textsuperscript{64} The suit was one for property damage resulting from an explosion and fire caused by escaping gas. The jury had returned a verdict which was grossly inadequate in view of the fact that the parties had entered into stipulations which virtually fixed the amount of damages in a liquidated sum. Nevertheless, the jury, apparently after being informed as to amounts paid by one of the tort-feasors for a covenant not to sue, while finding another defendant guilty on the question of liability or not, fixed the measure of damage at an amount which paralleled exactly that paid for the covenant. The plaintiffs thereupon moved for judgment notwithstanding the verdict or, in the alternative, for a new trial to be limited solely to the question of damages. The Appellate Court for the Third District applied the rule that, in the event the size of the verdict indicated that it was the result of a compromise, the entire verdict should be considered as tainted and a new trial ordered but ended with the conclusion that since the plaintiffs had not moved for a new trial generally, the verdict had to be sustained.\textsuperscript{65}

\textsuperscript{63} In the case of DeLude v. Rimek, 351 Ill. App. 466, 115 N. E. (2d) 561 (1953), the Appellate Court for the First District held that the amount paid for the covenant should be deducted from the verdict of the jury. But in Aldridge v. Morris, 337 Ill. App. 369, 86 N. E. (2d) 143 (1949), the Appellate Court for the Second District held that the fact of the covenant should be submitted to the jury to consider along with all other elements of damage. The problem becomes acute in actions where liability is limited because, in either event, the jury will be instructed to bring back a verdict not in excess of the statutory limit.

\textsuperscript{64} 7 Ill. App. (2d) 452, 130 N. E. (2d) 16 (1955).

\textsuperscript{65} The Supreme Court, on leave to appeal and subsequent to the period of this survey, held that it would be appropriate to hold a new trial to be limited solely to the question concerning the proper amount of damages to be assessed: 10 Ill. (2d) 28, 139 N. E. (2d) 275 (1957).
APPEAL AND APPELLATE PROCEDURE

With one exception, the few cases which dealt with novel problems in relation to the conduct of appeals were of trivial consequence. Thus, in certain instances, it is a condition precedent to the proper conduct of an appeal that the costs of the clerk of the trial court be paid either at the time the appeal is taken or within a competent time thereafter,\(^6\) otherwise the appeal would be subject to a motion to dismiss the same.\(^6\) While there has been some disposition to accept a good-faith endeavor to meet this requirement as being sufficient for the purpose,\(^6\) the case of In re Wolz's Estate\(^6\) would indicate that a late payment, without more, would be insufficient to sustain an appeal. Observance of the appropriate time schedule for the taking of essential steps in relation to the appeal is also a matter of concern, unless an enlargement thereof is obtained\(^7\) but, according to the case of Sparacino v. Ferona,\(^7\) the mere filing of a motion for an extension of time in the office of the clerk of the court is not enough for this purpose, as a court order on the point would be essential. In addition, the case of Gray v. Gray\(^7\) would indicate that there is no provision in the rules governing the conduct of appeals to permit the filing of an additional or supplemental abstract of anything in the record in support of a petition for rehearing so that, if one is filed, it will be stricken.

The sole case of consequence in this area of the law is the one entitled Lind v. Spannuth,\(^7\) which deals with the extent of

---

\(^{66}\) See, for example, Ill. Rev. Stat. 1955, Vol. 1, Ch. 3, § 484.

\(^{67}\) Davison v. Heinrich, 340 Ill. 349, 172 N. E. 770 (1930).

\(^{68}\) In the case of McClelland v. Estate of Gorrell, 327 Ill. App. 224, 63 N. E. (2d) 884 (1945), the appellant's attorney left several duly signed blank checks with the clerk and gave authorization to complete the same by the filling in of the appropriate figures when the several amounts of the cost items had been ascertained. It was there held proper to deny a motion to dismiss the appeal which had been predicated on the ground of non-compliance with the statute.

\(^{69}\) 7 Ill. App. (2d) 517, 130 N. E. (2d) 116 (1955).


\(^{71}\) 9 Ill. App. (2d) 422, 133 N. E. (2d) 753 (1956). Leave to appeal has been denied.

\(^{72}\) 6 Ill. App. (2d) 571, 128 N. E. (2d) 602 (1955). Leave to appeal has been denied.

\(^{73}\) 8 Ill. App. (2d) 442, 131 N. E. (2d) 706 (1956). The earlier proceedings in the case may be noted at 3 Ill. App. (2d) 112, 120 N. E. (2d) 381 (1954).
notice needed, following an appeal, before the trial court should be permitted to reinstate the case and proceed with a new trial or hearing therein to be conducted pursuant to the mandate or direction of the reviewing tribunal. The Civil Practice Act purports to specify that, upon the filing of the mandate, the cause shall be reinstated "upon ten days' notice being given to the adverse party or his attorney." Actually, in that case, the notice as to the filing of the mandate and for reinstatement of the cause was not in excess of three days from its date although the trial court took no action thereon other than to permit the filing and to schedule a rehearing date which fell more than ten days after the date of the notice but shorter than ten days from the day on which the reinstatement order was entered. Following judgment on rehearing, the appellant again sought review, this time contending that the new judgment was void on the theory that the prescribed notice was essential to give the trial court renewed jurisdiction over the person of the appellant. The Appellate Court for the First District, after noting a line of decisions which have provided a series of confusing results in this respect, reached the conclusion that the statutory notice was not a jurisdictional feature hence the failure to give a full ten-day notice made the new judgment no worse than voidable.

ENFORCEMENT OF JUDGMENTS

It could be considered appropriate, in closing this portion of the survey, to note that the Supreme Court, in the only case of significance relating to the enforcement of judgments, the case of *Smith v. Carlson,* took a long step forward in clarification of the procedural methods involved in the revival of a dormant judgment. The holder of such a judgment may, if he wishes, institute a separate action in debt for the purpose of giving

---

75 The Supreme Court, on certificate of importance but not in the period of this survey, later affirmed the holding so achieved when it indicated that Section 88(2) of the Civil Practice Act was no more than directory in its operation: 9 Ill. (2d) 311, 137 N. E. (2d) 360 (1956).
renewed effect to the old judgment\textsuperscript{77} but he is also free to pursue the common-law remedy, by way of a writ of \textit{scire facias} issued in the original proceeding, if this would serve his purpose.\textsuperscript{78} A difference in the language of the applicable limitation statute as to the former,\textsuperscript{79} when compared with common law concepts regulating the use of \textit{scire facias}, had led the Appellate Court for the First District to conclude that, while the mere institution of the separate action in debt would be enough to prevent the bar of limitation from operating, it was essential, for this purpose, to carry the \textit{scire facias} proceeding to completion before the dormant judgment had actually expired, otherwise the attempted revival would be ineffective. The Supreme Court, following the granting of leave to appeal, reached an opposite result when it concluded that there was no legitimate reason for differing rules in this respect and that the simple institution of either type of proceeding would be sufficient, if begun in ample time, to permit of the eventual revival of the judgment.

\textbf{IV. CRIMINAL LAW AND PROCEDURE}

In the area of substantive criminal law, the only case of consequence is that of \textit{People v. Riggins}\textsuperscript{1} in which the Supreme Court was called upon to interpret a special statute relating to embezzlement.\textsuperscript{2} Therein, the defendant, a collection agent, entered into an agreement to collect the delinquent accounts of the prosecuting witness and was given the right to deduct his commissions from the amounts collected. Upon being prosecuted for failure to remit the balance of the sums collected to the prosecuting witness, the defendant argued that he could not be convicted of embezzlement since he had an interest in the money. By way of

\textsuperscript{78} Ibid., Ch. 83, § 24b.
\textsuperscript{79} Ibid., Ch. 83, § 24b, states that a civil action "may be brought" upon the judgment "within twenty years next after the date of such judgment" and not after that time.
\textsuperscript{1} 8 Ill. (2d) 78, 132 N. E. (2d) 519 (1956). Schaefer, J. filed a dissenting opinion in which Klingbeil and Maxwell, JJ. concurred, which appears at 8 Ill. (2d) 78, 132 N. E. (2d) 928.