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## Recent Illinois Decisions

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## RECENT ILLINOIS DECISIONS

COURTS—COURTS OF LIMITED OR INFERIOR JURISDICTION—WHETHER STATUTORY AMENDMENT INCREASING JURISDICTION OF MUNICIPAL COURT OF CHICAGO OVER FOURTH CLASS PERSONAL INJURY SUITS IS VALID—A decision of particular interest to Chicago attorneys should be found in the holding in the case of *Secco v. Chicago Transit Authority*.<sup>1</sup> The plaintiff therein filed suit in the Municipal Court of Chicago alleging that, by reason of the defendant's negligence, she had sustained personal injuries and was entitled to damages in the sum of \$5,000. Defendant's motion to dismiss, based on the contention that the court in question lacked jurisdiction to hear personal injury cases when the amount involved exceeded \$1,000, was sustained. Plaintiff thereafter took an appeal and the Appellate Court for the First District, after it had interpreted the controlling statute, reversed and remanded the case with direction to the trial court to proceed with the matter.

As originally constituted, the Municipal Court of Chicago was given jurisdiction to entertain civil suits, with some exceptions, which fell into one of two categories, *i. e.*, those of the first class, excluding personal injury claims, where the amount involved exceeded \$1,000, and those of the fourth class, which included personal injury suits under the generic description of "civil actions . . . for the recovery of money only,"<sup>2</sup> where the amount claimed, exclusive of costs, did not exceed \$1,000. Pursuant thereto, a sharp distinction existed with reference to claims based on contracts, either express or implied, and a definite limitation was imposed over tort jurisdiction, particularly in the personal injury field. By the 1951 amendment, insofar as the same pertains to the recovery of money, the legislature increased the fourth class limit to \$5,000 but left the basic minimum for first class cases at \$1,000. As a consequence, the defendant propounded the theory that the amendment was invalid for ambiguity and uncertainty.<sup>3</sup>

<sup>1</sup> 2 Ill. App. (2d) 239, 119 N. E. (2d) 471 (1954). The cause was originally appealed to the Illinois Supreme Court but was transferred for lack of a constitutional issue.

<sup>2</sup> See Ill. Rev. Stat. 1949, Vol. 1, Ch. 37, § 357. The statute, as amended by Laws 1951, p. 1726, defines the jurisdiction of the Municipal Court of Chicago, with respect to fourth class cases, to include actions "for the recovery of money only" when the amount claimed does not exceed \$5,000, but places a ceiling as to other types of fourth class actions at \$1,000: Ill. Rev. Stat. 1953, Vol. 1, Ch. 37, § 357.

<sup>3</sup> If a statute is vague or uncertain, and cannot be made clear by proper interpretation, it will be held invalid: *People v. Hurley*, 402 Ill. 562, 85 N. E. (2d) 26 (1949); *Barnett v. County of Cook*, 388 Ill. 251, 57 N. E. (2d) 873 (1944); *Krebs v. Thompson*, 387 Ill. 471, 56 N. E. (2d) 786 (1944); *Wagner v. Retirement Board*, 370 Ill. 73, 17 N. E. (2d) 197 (1938).

Actually, of course, the uncertainty, if one existed, related solely to suits based on contracts for the provision with regard to fourth class personal injury suits is without any conflicting counterpart in the section describing the first class cases. The court could have disposed of the case before it by so noting,<sup>4</sup> but it did interpret the amendment so as to permit the Municipal Court of Chicago, under the classification of fourth class actions, to entertain non-contract cases not otherwise specifically described in amounts up to \$5,000 while still preserving the old distinctions as to contract suits. This enlargement in jurisdiction will probably operate to relieve some of the pressure which has been placed on the County Court of Cook County<sup>5</sup> as well as work to solve some of the interminable delay between suit and trial,<sup>6</sup> but it is clear that problems of the character presented by the instant case could be obviated by a thorough-going revision of the judicial article of the state constitution.

DISMISSAL AND NONSUIT—VOLUNTARY DISMISSAL AND NONSUIT—WHETHER COUNTER-PLAINTIFF IS ENTITLED TO NONSUIT WITHOUT PREJUDICE AFTER TRIAL BEGINS OTHER THAN ON COMPLIANCE WITH STATUTE REGULATING NONSUIT—A practice question of importance was involved in the recent case of *Wilhite v. Agbayani*<sup>1</sup> wherein the counter-plaintiff and counter-defendant had originally been co-defendants along with others. Each had filed cross-claims against the other as well as against the plaintiff and other co-defendants.<sup>2</sup> Subsequently, on stipulation, all causes of action with the exception of counter-plaintiff's claims were ordered dismissed. During a pretrial conference, the counter-defendant raised a question as to the competency of certain evidence which was to be offered by the counter-plaintiff, whereupon the latter, claiming surprise from the dismissal of the other causes of action, requested a continuance.<sup>3</sup> This request was denied upon the understanding that the parties

<sup>4</sup> Issues with respect to the validity of the referendum at which the amended statute received popular approval were involved, but have not been here considered. The court, in that regard, held the referendum provision to be directory rather than mandatory.

<sup>5</sup> That court has been hearing tort cases, pursuant to Ill. Rev. Stat. 1953, Vol. 1, Ch. 37, § 177, provided the amount involved does not exceed \$2,000. The net result of the amendment has been to place the Municipal Court of Chicago in a position superior to that of a state court.

<sup>6</sup> The court took judicial notice of the large backlog of cases awaiting trial in the state courts located in Cook County.

<sup>1</sup> Sub nom. *Almazan v. Wilhite and Thomas J. Lipton, Inc. v. Agbayani*, 2 Ill. App. (2d) 29, 118 N. E. (2d) 440 (1954). Leave to appeal has been denied.

<sup>2</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 162, permits the use of a counterclaim for this purpose.

<sup>3</sup> To avoid an adverse ruling on the oral motion for a continuance, the defendant should have complied with Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 259.14(1). See also *In re Adams Estate*, 348 Ill. App. 124, 108 N. E. (2d) 32 (1952).

would then select a jury but postpone the pretrial conference and the hearing until the next day, all of which was done. The following day, the evidence question was reargued and the objection to counter-plaintiff's proof was sustained. Because of this adverse ruling, the counter-plaintiff summarily moved to dismiss his counterclaim without prejudice,<sup>4</sup> which motion, over objection and request for a directed verdict in favor of counter-defendant, was granted. The counter-defendant appealed from the order dismissing the counterclaim without prejudice and the Appellate Court for the Third District then reversed and remanded with a direction to enter judgment in bar on the ground the trial had begun and the counter-plaintiff was not entitled to a nonsuit except upon full compliance with the provisions of Section 52 of the Civil Practice Act.<sup>5</sup>

Inasmuch as there are no prior Illinois cases possessing analogous facts construing the statute in question and the query presented appears to be the first of its kind to be passed upon by a reviewing tribunal in Illinois, the question raised in the instant case generates a problem as to whether or not the court correctly ascertained the legislative intention. Without regard to the state of the law prior to the adoption of the present statute,<sup>6</sup> the law now seems to be well established with regard to the procedural methods which a plaintiff must follow in order to obtain a voluntary dismissal,<sup>7</sup> particularly after a defendant has filed a counterclaim or a trial has begun.<sup>8</sup> The novelty in the instant case lies in the fact that the statute in question has now been declared to be equally applicable to a defendant who has presented a counterclaim. Technically, the statute makes no reference to that situation, but the court, in reaching its conclusion, gave a liberal interpretation to the provision in order to make it apply alike to both parties. When it is remembered that, for other procedural purposes, a counterclaim is to be dealt with as if it were a suit by defendant,

<sup>4</sup> An unsupported written motion, reciting that it was presented before trial was begun, was presented by the counter-plaintiff.

<sup>5</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 176.

<sup>6</sup> *Daube v. Kuppenheimer*, 272 Ill. 350, 112 N. E. 61 (1916), illustrates the view, under Sections 48 and 70 of the Practice Act of 1907, that a plaintiff could take a voluntary nonsuit as a matter right at any time prior to judgment.

<sup>7</sup> The statute has been interpreted and applied, as to plaintiffs, in the related cases of *Gilbert v. Langbein*, 343 Ill. App. 132, 98 N. E. (2d) 140 (1951); *Glick v. Glick*, 338 Ill. App. 637, 88 N. E. (2d) 509 (1949); *Bernick v. Chicago Title & Trust Co.*, 325 Ill. App. 495, 60 N. E. (2d) 442 (1945); *Gunderson v. First National Bank*, 296 Ill. App. 111, 16 N. E. (2d) 306 (1938).

<sup>8</sup> It is not easy to tell when the trial does begin. It has been said that a civil trial commences when a jury has been sworn to try the issues: *Gilbert v. Langbein*, 343 Ill. App. 132, 98 N. E. (2d) 140 (1951). In the absence of a jury, it would probably not commence until the court had entered upon an examination of the facts, as by the swearing of at least one witness and the propounding of at least one question. This, at least, is the rule with regard to criminal cases: 22 C. J. S., Criminal Law, § 241.

acting as a plaintiff, against others<sup>9</sup> there would seem to be every reason why the methods established should be made equally applicable to both plaintiff and defendant.

EXECUTORS AND ADMINISTRATORS—ACTIONS—WHETHER SERVICE OF SUMMONS NAMING EXECUTOR-DEFENDANT AS AN INDIVIDUAL OPERATES TO CONFER JURISDICTION OVER HIM IN HIS REPRESENTATIVE CAPACITY—A liberal interpretation given to certain concepts underlying the Illinois Civil Practice Act would appear to form the basis for the holding in the recent case of *Wessel v. Eilenberger*.<sup>1</sup> The action was one to procure the specific performance of an oral contract allegedly made by the decedent under which he agreed to devise certain property, at his death, to the plaintiff. The complaint was directed against the heirs at law of the decedent, in their individual right, and also described certain of these same parties as occupying varied representative capacities. Notwithstanding this, the summons appears to have been issued only in the names of the several defendants as individuals. Certain of these defendants, answering the complaint as individuals only, set up the fact that while they had been named in the suit as representative parties they had not been so described in the summons nor had they been served in such representative capacities. As individuals, however, they contested the suit on the merits and lost in the trial court. On direct appeal to the Illinois Supreme Court, because a freehold was involved,<sup>2</sup> that court affirmed the decree when it held that the purpose of process was accomplished when the parties had been served, particularly since they had, from an inspection of the complaint, been fully advised as to the capacity, or capacities, in which they had been sued. The error, if any, with respect to the form of the process was there regarded as being cured by the subsequent steps taken in the case.

Discrepancies existing between the summons and the declaration, or other initial pleading, in a case have generally been regarded as forming one or the other of two possible types of defect depending on the point as to whether the error related to the plaintiff or to the defendant. If, for example, under the common law practice, an original writ had been issued in the name of a single plaintiff but the claim, as disclosed in the declaration later placed on file, was stated to be jointly owned by two or more plaintiffs, the defect was regarded as being one of substance sufficient to

<sup>9</sup> See, for example, Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 162(3), which directs that a counterclaim should be pleaded with the same particularity as is required of a complaint, and Ch. 110, § 172(2), permitting the use of a defensive motion to dismiss against a counterclaim as well as against a complaint.

<sup>1</sup> 2 Ill. (2d) 522, 119 N. E. (2d) 207 (1954).

<sup>2</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 199.

require the granting of a motion in arrest of judgment.<sup>3</sup> In much the same way, on a writ issued in behalf of a plaintiff suing as an individual, it was considered to be a fatal error to count on a claim belonging to the plaintiff not as an individual but as executor under a will.<sup>4</sup> In these instances, at a time when the writ preceded the pleading, the allegations of the writ were considered to be controlling for it formed the jurisdictional base for the power to hear and determine. On the other hand, as in a suit in equity, where the bill of complaint was designed to precede the summons, any error with regard to naming,<sup>5</sup> describing, or serving the defendant was considered, at best, to be a ground for abatement only, hence could be waived by pleading over to the merits.<sup>6</sup>

The present Illinois Civil Practice Act apparently contemplates that the filing of the complaint should be the initial step in the action,<sup>7</sup> hence it would now appear to be the controlling jurisdictional factor. A summons directed in favor of, or against, a party not named in the complaint would probably be fatally defective<sup>8</sup> but, in the light of the instant case, defects in the summons, when tested by the allegations of the complaint itself, would appear to be of less fatal character. It would certainly appear to be desirable, especially where representative parties are involved, to have process read, and be served, in conformity with the complaint, so no possible jurisdictional questions could arise.<sup>9</sup> Nevertheless, the instant holding would purport to illustrate the proposition that one on whom summons has been served is charged, by that fact, with notice that jurisdiction has been

<sup>3</sup> *Rogers v. Jenkins*, 1 Bos. & P. 383, 126 Eng. Rep. 966 (1799).

<sup>4</sup> *Hally v. Tipping*, 3 Wils. K. B. 61, 95 Eng. Rep. 933 (1770).

<sup>5</sup> *Stuyvesant v. Weil*, 167 N. Y. 421, 60 N. E. 738, 53 L. R. A. 562 (1901).

<sup>6</sup> *Black v. Thompson*, 120 Ill. App. 424 (1905). The issue therein appears to have been similar to the one in the instant case but the action arose under a former practice act.

<sup>7</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 129. After stating that every civil action, with certain exceptions, "shall be commenced by the filing of a complaint," the statute goes on to state that the clerk "shall issue summons upon request of the plaintiff." The chronological order of these steps would appear to be significant.

<sup>8</sup> But see *Vokovich v. Custer*, 415 Ill. 290, 112 N. E. (2d) 712 (1953), wherein the plaintiff died prior to the institution of suit for personal injuries but, on amended complaint, his legal representative was permitted to have summons issued in the name of the latter although the action had been commenced in the name of the dead person.

<sup>9</sup> Persons suing, or being sued, in an official or representative capacity are, in contemplation of law, distinct persons and strangers with respect to any right or liability as individuals: *Leonard v. Pierce*, 182 N. Y. 431, 75 N. E. 313 (1905). When so sued, the term "as" should appear between the name and the described capacity in order to emphasize the fact that the suit is not intended to bind the individual as such: *Kinsella v. Cahn*, 185 Ill. 208, 56 N. E. 1119 (1900). Naturally, of course, the allegations of the complaint would control and a substantial description therein will be sufficient: *Cooney v. Sweitzer*, 205 Ill. App. 597 (1917).

obtained over him both in the description contained in the summons and also in whatever other capacity he may be declared to possess in the complaint itself.<sup>10</sup> If that is the law, a distinct change has been made in former practice requirements.

**GARNISHMENT—QUASHING, VACATING, DISSOLUTION, OR ABANDONMENT—WHETHER BANKRUPTCY DISCHARGE PROTECTS DEBTOR FROM GARNISHMENT WHEN PRIOR JUDGMENT RESTS ON CLAIM FOR MONEY MISAPPROPRIATED—**A unique issue with respect to garnishment was presented to the Appellate Court for the First District through the medium of the case of *Airo Supply Company v. Page*.<sup>1</sup> The judgment debtor there concerned had served as plaintiff's sole bookkeeper, had misappropriated a large sum of money, had pleaded guilty to a charge of embezzlement, and had served a term in the penitentiary. While the debtor was so imprisoned, plaintiff filed a civil action to recover the amount misappropriated and originally obtained a default judgment which included a finding of malice<sup>2</sup> but, by agreement, this judgment was vacated and replaced by another, for the same amount and based on the same facts, wherein the request for a body execution was specifically denied. Following the debtor's release from the penitentiary, the creditor began garnishment proceedings and succeeded in reaching certain unpaid wages due the debtor. The debtor then moved to abate the proceedings, relying on a subsequent discharge in a bankruptcy proceeding wherein the judgment in question had been scheduled with other debts. The trial court sustained the motion but, on appeal by the judgment creditor, this order was reversed when the Appellate Court reached the conclusion that, despite the absence of a finding of malice, the defendant was not the "honest debtor" entitled to secure relief but rather was to be treated as one who had obtained funds by defalcation while acting in a fiduciary capacity so not entitled to be protected by the discharge in bankruptcy.<sup>3</sup>

<sup>10</sup> It is not clear why, despite participation in the merits of the case as individuals, the several defendants in question were not granted the benefit of their answers in abatement. The old rule, as illustrated by the case of *Pond v. Ennis*, 69 Ill. 341 (1873), which stated that a defense in abatement would be waived by a simultaneous pleading to the merits, has clearly been overruled by Ill. Rev. Stat. 1953, Vol. 2, Ch. 110 § 167(3). Compare this point with the holding in *Procaccianti v. Procaccianti*, 76 R. I. 305, 69 A. (2d) 635 (1949), where the court held that a summons issued to "Giuseppe Procaccianti, alias John Doe, Executor of the Estate of Rudolph Procaccianti," said to be no more than *descriptio personae*, did more than confer jurisdiction over him as an individual, particularly since the defendant had not attacked the writ by a timely special pleading but had relied solely on the general issue.

<sup>1</sup> 2 Ill. App. (2d) 264, 119 N. E. (2d) 400 (1954).

<sup>2</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 77, § 5.

<sup>3</sup> 11 U. S. C. A. § 35(4) provides for release except where the debt was created by "fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

Although an extremely restricted character has been given to the tort judgment based on malice and the like by the decision of the Illinois Supreme Court in the case of *Ingalls v. Raklios*,<sup>4</sup> a case in which the court sharply limited the scope of the Illinois statute with respect to body executions,<sup>5</sup> it does not follow that an inability to enforce a judgment by that method necessarily proves that the claim of the plaintiff is one dischargeable in bankruptcy. While it is clear that the contrary finding would establish without question, that the claim was not one subject to discharge, the presence of the malice finding would appear to be pertinent only with respect to body executions for, as the court there noted, a defendant can be actuated by malice and the like without the same forming the gist of plaintiff's action.<sup>6</sup>

Having passed this hurdle, the court in the instant case was then concerned with the remaining question as to whether or not the defendant had been guilty of a defalcation while acting in a fiduciary capacity within the intent of the bankruptcy statute.<sup>7</sup> In the absence of Illinois decisions, the court relied on cases cited by the plaintiff from other jurisdictions. In one of them, that of *Citizens Mutual Automobile Insurance Company v. Gardner*,<sup>8</sup> the defendant was an insurance agent who had collected but failed to remit premium proceeds to the company. In another, that of *Central Hanover Bank & Trust Company v. Herbst*,<sup>9</sup> a receiver in a foreclosure suit had withdrawn money which had been placed in a suspense account pending determination of an appeal. Even though the courts concerned were willing to assume that the parties involved had acted in good faith, the defaults were said to be defalcations within the meaning of the Bankruptcy Act, hence recovery was not barred by a discharge in bankruptcy.<sup>10</sup> It would appear, then, that anyone occupying a position necessitating an accounting of funds in his control will have to practice extreme honesty, even though malice, fraud, or embezzlement be lacking, for the protection of bankruptcy will not be available to change his status from a debtor to a debt-free individual.

<sup>4</sup> 373 Ill. 404, 26 N. E. (2d) 468 (1940). It was there held to be essential that the judgment should contain an express finding of malice to warrant issuance of a body execution.

<sup>5</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 77, § 5.

<sup>6</sup> 373 Ill. 404 at 408, 26 N. E. (2d) 468 at 470.

<sup>7</sup> In 8 C. J. S., Bankruptcy, § 578c, p. 1541, the statement is made that "defalcation," as used in the provision of the act under discussion, is "of broader meaning than embezzlement or misappropriation. An act need not be shown to be willful or malicious to constitute a defalcation."

<sup>8</sup> 315 Mich. 689, 24 N. W. (2d) 410 (1946).

<sup>9</sup> 93 F. (2d) 510, 114 A. L. R. 769 (1937).

<sup>10</sup> See also *First-Citizens Bank & Trust Co. v. Parker*, 225 N. C. 480, 35 S. E. (2d) 489 (1945), where a former guardian who had failed to account for the minor's funds was denied protection under a discharge in bankruptcy.

JURY—RIGHT TO TRIAL BY JURY—WHETHER STATUTE REQUIRING DEMAND FOR JURY TRIAL AT COMMENCEMENT OF SUIT OR FILING OF APPEARANCE PRECLUDES POSSIBILITY OF JURY TRIAL WHERE DEMAND COMES ON REMAND AFTER APPEAL—A striking change in the Illinois practice with respect to trial by jury may be noted under the holding in the case of *Reese v. Laymon*.<sup>1</sup> In that case, a suit for personal injuries, the original trial of the cause was conducted by the court alone as neither party had demanded a jury trial. Following plaintiff's appeal from an adverse judgment, the reviewing court reversed and remanded the cause for a new trial.<sup>2</sup> Upon reassignment for trial, the defendant then moved for a jury trial but this motion was denied on the ground the request came too late, hence was barred by Section 64 of the Illinois Civil Practice Act.<sup>3</sup> Following a second trial, with judgment there for the plaintiff, the defendant took a direct appeal<sup>4</sup> to the Illinois Supreme Court, claiming the constitutional right to a trial by jury<sup>5</sup> was being infringed by the interpretation given to the statute in question. The Supreme Court, however, affirmed the judgment when it held the statute effective and adequate to make the failure to demand a jury trial at the time of commencement of suit or filing of appearance sufficient to forever preclude the parties from asserting such a demand at any later stage of the case.

There can be no dispute over the fact that, at the time of the adoption of the present Civil Practice Act, the legislature planned a drastic change with regard to the matter of procuring trial by jury for it there substituted, in lieu of the prior concept that jury trial should always be had in proper cases except where the same was expressly waived by the parties,<sup>6</sup> the contrary concept that jury trial was thereafter to be had only provided the same was expressly demanded.<sup>7</sup> The necessity for the prompt making of such a demand, at least with respect to the initial trial of the case, has been reinforced by the theory that, absent a demand, an implied waiver of the constitutional privilege could well be assumed to exist.<sup>8</sup> The statute is silent,<sup>9</sup> however, with respect to the effect to be given to this presumed waiver in case of a remand of the action for new trial following a successful appeal. Under the earlier practice, on the belief that the express waiver

<sup>1</sup> 2 Ill. (2d) 614, 119 N. E. (2d) 271 (1954).

<sup>2</sup> See *Reese v. Laymon*, 346 Ill. App. 465, 105 N. E. (2d) 526 (1952), abst. opinion.

<sup>3</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 188(1).

<sup>4</sup> *Ibid.*, Ch. 110, § 199.

<sup>5</sup> Ill. Const. 1870, Art. II, § 5.

<sup>6</sup> See Ill. Rev. Stat. 1931, Ch. 110, § 60, and explanatory note in Ill. Civ. Prac. Act Annotated, p. 152.

<sup>7</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 188(1).

<sup>8</sup> *Stephens v. Kasten*, 383 Ill. 127, 48 N. E. (2d) 508 (1943).

<sup>9</sup> It does expressly cover certain other possible eventualities, such as the transfer of a cause from the equity side of the court to the law docket.

had become exhausted by the first trial, it had been considered proper for the parties, or either of them, to insist upon jury trial following remandment.<sup>10</sup> The instant decision now indicates that this practice will no longer be permitted to prevail, particularly since, upon remandment, the case stands on the existing record and not as it were an entirely new suit. It can be said, therefore, that unless the litigant is careful to preserve his constitutional right to jury trial from the outset he is likely to find that, once the right is gone, it is gone forever.

LIMITATION OF ACTIONS—STATUTES OF LIMITATION—WHETHER OR NOT ADDITION OF LIMITATION CLAUSE TO ILLINOIS DRAM SHOP ACT OPERATES TO BAR A CAUSE OF ACTION WHICH HAD ACCRUED PRIOR TO DATE OF SUCH AMENDMENT—Recently, the Illinois Appellate Court for the First District, in *Orlicki v. McCarthy*,<sup>1</sup> was confronted with a question as to whether or not a suit under the Illinois Dram Shop Act,<sup>2</sup> based upon a cause of action, which accrued before, but on which action was not started until after, a recent amendment to that statute had been enacted,<sup>3</sup> should be regarded as being barred by the giving of retroactive effect to such statutory amendment. The complaint therein, based upon facts which had occurred prior to the effective date of the amendment in question, had been filed within what might be regarded as ample time but for such amendment.<sup>4</sup> Nevertheless, on motion by the defendant,<sup>5</sup> the trial court dismissed the complaint and the Appellate Court for the First District, on appeal to it, while aware of a possible contrary holding in the Second District,<sup>6</sup> preferred to align itself with the view taken of the problem in the Fourth District.<sup>7</sup> In so doing, and affirming the trial court holding, it too gave retroactive effect to the statutory amendment.

<sup>10</sup> *Osgood v. Skinner*, 186 Ill. 491, 57 N. E. 1041 (1900).

<sup>1</sup> 2 Ill. App. (2d) 182, 119 N. E. (2d) 1 (1954).

<sup>2</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 43, § 135.

<sup>3</sup> Laws 1949, p. 816, added a proviso to the effect that every action for damage caused by intoxication should be "commenced within two years next after the cause of action accrued."

<sup>4</sup> The cause of action appears to have arisen on July 10, 1949, and the suit was filed on September 27, 1951. The suit would have been well within the five-year period fixed by Ill. Rev. Stat. 1953, Vol. 2, Ch. 83, § 16, but fell beyond the two-year period presently fixed by Ch. 43, § 135.

<sup>5</sup> Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 172(f), authorizes the use of a motion to dismiss whenever the cause of action does not accrue within the time limited by law for the commencement of suit thereon.

<sup>6</sup> The court referred to the case of *Steiskel v. Straus*, arising in the Second District, wherein rehearing has been granted. No opinion therein has, as yet, been released for publication.

<sup>7</sup> See *Fourt v. DeLazzer*, 348 Ill. App. 191, 108 N. E. (2d) 599 (1952), noted in 31 CHICAGO-KENT LAW REVIEW 273.

Up to this point, there has been a paucity of cases in Illinois wherein courts have considered the applicability of limitation statutes to dram shop matters. In one very early decision,<sup>8</sup> the court held that the two-year statute was inapplicable but, in a later case,<sup>9</sup> treating the action as one to recover a statutory penalty, the court indicated that it was necessary to commence the suit within two years after the cause of action had accrued. The lack of a specific statute on the point has been cured by the adoption of the amendment in question but the legislature failed to specify therein whether the provision should be retroactive, as well as prospective, in operation. If prospective only, it might still be considered possible, supposing the five-year period of limitation applied, to institute suit on old claims. If, on the other hand, as the instant case would suggest, the amended statute is retroactive in character, all pending or future litigation would be measured by the present statute.

Absent a definite expression to make a statute retroactive, Illinois courts have generally decided that statutes should be considered to have prospective operation only,<sup>10</sup> unless the language thereof so clearly indicates an intention that it is to operate retroactively so as to admit of no other construction.<sup>11</sup> This, however, is especially true of statutory enactments or amendments which would operate to destroy vested or substantive rights, but is not necessarily so with respect to those which eliminate or change remedies or procedures.<sup>12</sup> As to the latter, the Illinois Supreme Court, in *Wall v. Chesapeake & Ohio Railway Company*,<sup>13</sup> once said there is "no vested right in public law which is not in the nature of a private grant. However beneficial an act of the legislature may be to a particular person, or however injuriously its repeal may affect him, the legislature would clearly have the right to abrogate it."<sup>14</sup> Once this fact is recognized, and attention is given to the point that the Dram Shop Act is a statute of highly penal character,<sup>15</sup> affording rights of action unknown to the common law, there is every reason to believe that decisions of the type reflected in the instant case should be upheld.

<sup>8</sup> *O'Leary v. Frisby*, 17 Ill. App. 553 (1885).

<sup>9</sup> *Dabney v. Manton*, 155 Ill. App. 238 (1910).

<sup>10</sup> *New York Life Ins. Co. v. Murphy*, 388 Ill. 316, 58 N. E. (2d) 182 (1944); *Friedman v. City of Chicago*, 374 Ill. 545, 30 N. E. (2d) 36 (1940).

<sup>11</sup> *People ex rel. Thompson v. Gage*, 233 Ill. 447, 84 N. E. 616 (1908).

<sup>12</sup> *Lubezny v. Ball*, 322 Ill. App. 78, 53 N. E. (2d) 988 (1944); *Lilly v. Grand Trunk Western Ry. Co.*, 312 Ill. App. 73, 37 N. E. (2d) 888 (1941).

<sup>13</sup> 290 Ill. 227, 125 N. E. 20 (1919).

<sup>14</sup> 290 Ill. 227 at 232, 125 N. E. 20 at 22.

<sup>15</sup> *Cruse v. Aden*, 127 Ill. 231, 20 N. E. 73 (1889). But see the recent case of *Childers v. Modglin*, 2 Ill. App. (2d) 292, 119 N. E. (2d) 519 (1954), as to the proper interpretation to be given to the damage provisions of the statute. The case indicates that each person in whose favor a cause of action arises is entitled to an independent recovery not to exceed \$15,000, and that figure is not a limit on the aggregate recovery by all persons affected.

NEGLIGENCE—ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE—WHETHER OR NOT A PILE OF LUMBER PLACED AT A CONSTRUCTION SITE CONSTITUTES AN ATTRACTIVE NUISANCE—A decision of significance to builders and contractors may be noted in the holding in the recent case of *Kahn v. James Burton Company*.<sup>1</sup> The action was brought on behalf of a minor plaintiff to recover damages for personal injury sustained because of alleged negligence on the part of the defendants. One of the defendants, a general contractor, had ordered delivery of certain lumber to a private lot on which it was engaged in erecting a home. The other defendant, a lumber dealer, supplied the material and piled the same, without bracing, at the construction site. The plaintiff, an eleven-year old boy, while riding his bicycle in the vicinity, noticed the pile of lumber, imagined it represented a ship, entered on the unguarded premises, climbed upon the lumber pile and, while playing, was injured when the pile collapsed. After verdict in favor of plaintiff, motions for directed verdict on behalf of both defendants were overruled and judgment was entered for plaintiff. The Appellate Court for the First District, however, on appeal to it, reversed the judgment and remanded the case with direction to enter judgment for the defendants when it concluded, as a matter of law, that the piling of lumber on private property for use in construction did not constitute an attractive nuisance nor amount to the creation of a dangerous instrumentality.

Plaintiff had advanced, as a theory to support recovery, that the defendants maintained an attractive nuisance<sup>2</sup> which drew the plaintiff, a youth of tender years, onto the premises and exposed him to injury from the dangerous condition. The court, following prior Illinois cases,<sup>3</sup> pointed out that the doctrine of attractive nuisance was one to be applied strictly and did not require that every interesting or alluring object should be considered to be an attractive nuisance. In line with earlier holdings, the court listed certain prerequisites which would have to exist before the doctrine could be applied, such as (1) the person against whom the doctrine was asserted had to have possession or control over both the premises and the instrumentality which caused the injury, (2) the object or instrumentality had to be dangerous in itself and likely to cause injury to those coming in contact with it, (3) the object or instrumentality had to be attractive and alluring to young children who were incapable, because of youth, to comprehend the danger, (4) the object or instrumentality had to be exposed and readily accessible, and (5) the person in control or pos-

<sup>1</sup> 11 Ill. App. (2d) 370, 117 N. E. (2d) 670 (1954). Leave to appeal has been allowed.

<sup>2</sup> See notes in 29 CHICAGO-KENT LAW REVIEW 172-6 and in 14 CHICAGO-KENT REVIEW 76-9 for a general discussion of the doctrine of attractive nuisance.

<sup>3</sup> *Burns v. City of Chicago*, 338 Ill. 89, 169 N. E. 81 (1930); *Rogers v. Sins*, 349 Ill. App. 353, 110 N. E. (2d) 643 (1953).

session had to be able to foresee that children would come in contact with the object or instrumentality.

The instant case becomes particularly important inasmuch as research discloses only one other Illinois case dealing with a somewhat similar factual situation. In *True & Company v. Woda*,<sup>4</sup> the injured child had played on a pile of lumber which had been placed on a public sidewalk in violation of a city ordinance. The piling of the lumber in that place was held to be an attractive nuisance, particularly since children had a right to be on the public street or sidewalk,<sup>5</sup> hence their presence should have been anticipated and proper precautions should have been taken. Independently of this distinction, most other jurisdictions where the issue has arisen have held that a pile of lumber does not *per se* constitute an attractive nuisance, whether the pile consists of poles,<sup>6</sup> lumber planks,<sup>7</sup> railroad cross-ties,<sup>8</sup> boards,<sup>9</sup> or bridge ties,<sup>10</sup> on the theory such piles of material are not alluring or tempting objects. The instant case reaches a similar decision but the reasoning is different in that the court treated the piling of lumber as other than an attractive nuisance because it was not considered, under the facts, to be a dangerous instrumentality. A different result might have been achieved had it been shown that children were known to congregate about the building site, for then the pile, without bracing, would have represented a foreseeably dangerous condition.

WITNESSES—COMPETENCY—WHETHER OR NOT WITNESS DISCOVERED BY ILLEGAL SEARCH IS COMPETENT TO TESTIFY IN CRIMINAL PROSECUTION—According to the facts in the recent case of *People v. Albee*,<sup>1</sup> certain police officers, without a warrant, went to the apartment of the defendant under a belief that narcotic drugs were there being possessed and dispensed and, on gaining admission, found both the defendant and a drug addict present, apparently engaged in transacting an illegal sale. Following the defendant's indictment on charges of unlawful sale and dispensation of narcotics,<sup>2</sup> defendant seasonably moved to suppress certain physical evidence seized on the premises and also sought to exclude all testimony from the other person

<sup>4</sup> 201 Ill. 315, 66 N. E. 369 (1903).

<sup>5</sup> See also *Holmberg v. City of Chicago*, 244 Ill. App. 505 (1927), with respect to liability for piling sand and other excavated material in a public street.

<sup>6</sup> *Holland v. Wisconsin Michigan Power Co.*, 296 Mich. 668, 296 N. W. 833 (1941).

<sup>7</sup> *Kelly v. Benas*, 217 Mo. 1, 116 S. W. 577, 20 L. R. A. (N.S.) 903 (1909).

<sup>8</sup> *Carr v. Oregon-Washington R. & Nav. Co.*, 123 Ore. 259, 261 P. 899, 60 A. L. R. 1434 (1927); *Anderson v. Peters*, 22 Tenn. App. 563, 124 S. W. (2d) 717 (1939).

<sup>9</sup> *Branan v. Wimsatt*, 298 F. 833 (1924).

<sup>10</sup> *Missouri, K. & T. Ry. Co. v. Edwards*, 90 Tex. 65, 36 S. W. 430, 32 L. R. A. 825 (1896).

<sup>1</sup> 2 Ill. (2d) 317, 118 N. E. (2d) 277 (1954).

<sup>2</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 38, § 192.2.

found present. This petition was sustained but, at the ensuing bench trial, the person present was permitted to testify as to events which had occurred prior to the arrival of the police. On the strength of such testimony, the defendant was sentenced to a term in the penitentiary. Following issuance of a writ of error to reverse such conviction,<sup>3</sup> the Illinois Supreme Court ruled that the fortuitous discovery of the existence of a human witness by means of an illegal search was to be deemed no different than would have been the case of an illegal search and seizure of documents, records, or other property,<sup>4</sup> hence it reversed the conviction without remanding and ordered the entire testimony of the witness suppressed.

While the Illinois view with respect to the suppression of evidence obtained as the result of an illegal search may be the minority one,<sup>5</sup> Illinois courts, following the attitude expressed in *Weeks v. United States*,<sup>6</sup> have consistently adhered to the theory that such evidence must be excluded at the instance of the defendant, provided suitable action to that end has been promptly taken,<sup>7</sup> to avoid a violation of constitutional rights against illegal search and seizure. If the evidence has been obtained in conjunction with a subsequent search made after a lawful arrest,<sup>8</sup> or with the defendant's permission,<sup>9</sup> no valid reason would exist for the exclusion thereof. When, however, as in the instant case, the search precedes the arrest, provided no search warrant has been issued,<sup>10</sup> the evidence so gathered becomes tainted with illegality attendant upon its acquisition and should be excluded. Heretofore, the rule has generally been invoked where the evidence obtained was of inanimate character, such as contraband firearms<sup>11</sup> or stolen goods,<sup>12</sup> but the rule has been applied to the seizure of records from which the prosecution has learned of the existence of human witnesses to the crime charged so as to require the exclusion of the testimony of such witnesses.<sup>13</sup> The instant case now logically extends the doctrine to include

<sup>3</sup> *Ibid.*, Ch. 38, § 780½.

<sup>4</sup> In general, see U. S. Const., Amend. V, and Ill. Const. 1870, Art. II, § 6.

<sup>5</sup> Wigmore, *Evidence*, 3d Ed., § 2183-4. The majority view is illustrated in *People v. Defore*, 242 N. Y. 13, 150 N. E. 585 (1926).

<sup>6</sup> 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914).

<sup>7</sup> Compare *People v. Castree*, 311 Ill. 392, 143 N. E. 112 (1924), with *People v. Bocamp*, 307 Ill. 448, 138 N. E. 728 (1923).

<sup>8</sup> *People v. Tillman*, 1 Ill. (2d) 525, 116 N. E. (2d) 344 (1954).

<sup>9</sup> But see *People v. Schmoll*, 383 Ill. 280, 48 N. E. (2d) 933 (1943), to the effect that the taking of records other than those referred to in the defendant's consent would amount to an illegal search.

<sup>10</sup> The procedure for obtaining a search warrant is described in Ill. Rev. Stat. 1953, Vol. 1, Ch. 38, § 691, et seq.

<sup>11</sup> *People v. Scaramuzzo*, 352 Ill. 248, 185 N. E. 578 (1933).

<sup>12</sup> *People v. Dalpe*, 371 Ill. 607, 21 N. E. (2d) 756 (1939); *People v. Poncher*, 358 Ill. 73, 192 N. E. 732 (1934).

<sup>13</sup> *People v. Martin*, 382 Ill. 192, 46 N. E. (2d) 997 (1948).

the actual discovery of the human witness himself. To hold otherwise than was done in that case would encourage, rather than deter, illegal searches by law enforcement officers.

**WORKMEN'S COMPENSATION—EFFECT OF ACT ON OTHER STATUTORY OR COMMON LAW RIGHTS OF ACTION AND DEFENSES—WHETHER ILLINOIS STATUTE ABOLISHES POSSIBILITY OF COMMON LAW ACTION BY COVERED EMPLOYEE AGAINST CO-EMPLOYEE**—According to the facts in the recent case of *Hayes v. Marshall Field & Company*,<sup>1</sup> a department store employee became bothered with a particle of dust in her eye so she went to the company doctor, made an individual defendant to the suit, and he, in the course of probing for the particle, punctured the eyeball and caused the loss of sight therein. The employee then sued both her employer and the doctor in a common law action, charging them with having negligently caused the blindness. The corporate and the individual defendants each moved to dismiss the complaint on the ground the action was barred by the provisions of the Illinois Workmen's Compensation Act.<sup>2</sup> The trial court, on the basis of the pleadings, held that the employee had sustained a compensable injury in the course of her employment and was, for that reason, barred from suit against the employer.<sup>3</sup> The claim against the doctor was also stricken, but this was done on the basis that he was a fellow employee of the plaintiff. On appeal, the Appellate Court for the First District affirmed the decision on substantially the same grounds, the court remarking that the statute "treats both employer and employee upon common grounds insofar as any liability exists to answer for damages in an action by a fellow employee."<sup>4</sup>

Accepting, for the purpose of this discussion, that the holding as to the employer was correctly achieved,<sup>5</sup> there is still reason to doubt whether the holding that the doctor was similarly protected by the statute represents sound law. Leaving aside all question as to whether or not the company doctor was a fellow servant,<sup>6</sup> there seems to be little or no basis for the

<sup>1</sup> 351 Ill. App. 329, 115 N. E. (2d) 99 (1953).

<sup>2</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 48, § 138.1 et seq.

<sup>3</sup> See the case of *General Electric Co. v. Industrial Commission*, 411 Ill. 401, 104 N. E. (2d) 257 (1952), on the point of whether or not a compensable injury occurred.

<sup>4</sup> 351 Ill. App. 329 at 336, 115 N. E. (2d) 99 at 102.

<sup>5</sup> The decision in the case appears to have become final from the fact that the plaintiff-appellant died while the appeal was pending and no personal representative appears to have been appointed to prosecute the matter. It is doubtful whether, after affidavits to this effect had been filed, the Appellate Court was empowered to decide the case. See *Fortune v. Gilbert*, 210 Ill. 354, 71 N. E. 442 (1904), as to the effect to be given to the death of a co-appellant, and *Wedig v. Kroger Grocery & Baking Co.*, 278 Ill. App. 378 (1935), as to the effect to be given to the death of the appellee. In the last-mentioned case, however, the legal representative was permitted to substitute and continue with the appeal.

<sup>6</sup> See *Thompson v. Northern Hotel Co.*, 256 Ill. 77, 99 N. E. 878 (1912).

view that the statute relied upon supports the conclusion reached. It purportedly forbids resort to common law or statutory rights to recover damages for injury or death sustained by the covered employee while engaged in the line of duty as such employee, other than a right to the compensation there provided,<sup>7</sup> but this prohibition is far from a total one and judicial language would indicate that these provisions apply "only to the right of the employee against his employer, and have no reference to the liability of third persons causing injury to the employee."<sup>8</sup>

Whether or not an injured employee may sue a co-employee, where the common employer is bound by the provisions of the Workmen's Compensation Act, has seldom been made the subject of inquiry in Illinois. In two cases where the question arose,<sup>9</sup> a finding that the complaining employee had been injured in the course of his employment resulted in the application of the first paragraph of then Section 29, which abolished the cause of action against one also bound by the provisions of the act,<sup>10</sup> leading to dismissal of the suits. Shortly thereafter, in *Botthof v. Fenske*,<sup>11</sup> the court reviewed these holdings and decided that the result achieved was erroneous for the reason that a fellow employee was not one "bound by the Act" inasmuch as he was not one liable to pay compensation, hence the then prohibition of Section 29 did not apply. With this elimination of the statute, it was then possible for the court to state that a plaintiff employee would retain "unaltered and unaffected by any provision of the Compensation Act his common-law right to sue his co-employee for his injuries."<sup>12</sup>

If any doubt may have been cast by dicta in any later case,<sup>13</sup> the decision in *Grasse v. Dealer's Transport Company*,<sup>14</sup> which held unconstitutional the attempted restraint upon suit by the injured employee against a third person bound by the act, should have operated to resolve that doubt. Without the restrictive clause of Section 29, there is nothing to support the ruling in the instant case, hence the opinion therein represents a direct conflict with the conclusion achieved in the *Botthof* case.

<sup>7</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 48, § 138.5.

<sup>8</sup> *O'Brien v. Chicago City Railway Co.*, 305 Ill. 244 at 249, 137 N. E. 214 at 217 (1922).

<sup>9</sup> *Bentley v. Lipper*, 277 Ill. App. 615 (1934); *Cunningham v. Netzger*, 258 Ill. App. 150 (1930).

<sup>10</sup> Ill. Rev. Stat. 1949, Vol. 1, Ch. 48, § 166.

<sup>11</sup> 280 Ill. App. 362 (1935).

<sup>12</sup> 280 Ill. App. 362 at 377.

<sup>13</sup> See *Thornton v. Herman*, 380 Ill. 341, 43 N. E. (2d) 934 (1942), but note that the action was not one between co-employees.

<sup>14</sup> 412 Ill. 179, 106 N. E. (2d) 124 (1952), noted in 30 CHICAGO-KENT LAW REVIEW 375.