
The Illinois Code of Civil Procedure and the Task Ahead

Harry G. Fins

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THE ILLINOIS CODE OF CIVIL PROCEDURE AND THE TASK AHEAD

*Harry G. Fins**

In the field of procedural law, the Code of Civil Procedure is the most advanced development in Illinois history. The objective of this article is to show what has been accomplished in this field between 1980 and 1985, and to point out specifically what remains to be done in 1986 and beyond.

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I. ACCOMPLISHMENTS 1980-1985

The movement to enact the Code of Civil Procedure¹ (the Code) began with the publication of an article by this author in January, 1980.² In March, 1980, a bipartisan coalition introduced the Code in the 81st General Assembly as House Bill 3262.³ The sponsors of Bill 3262 did not hasten its passage in order to allow the legislature, the judiciary, and the bar ample opportunity to examine carefully the bill and to offer suggestions.

The Code, as originally drafted, encompassed three categories of improvements: 1) compositional rearrangement of sixty-two acts, 2) phraseological alterations, and 3) desirable substantive changes. A number of legislators completely approved all three categories, but insisted on executing the project in two steps: first, the enactment of compositional rearrangement and phraseological alterations; second, after the enactment of the Code into law, the proposal of amendments to various sections of the Code to achieve the required substantive changes. This process allowed legislators to consider closely each substantive proposal.

To carry out this plan, House Bill 3262 was revised and introduced in the 82d General Assembly, on February 3, 1981, as House Bill 145.⁴ On May 15, 1981, the Illinois House of Representatives passed House Bill 145 by unanimous vote. Similarly, in June, 1981, the Illinois Senate passed House Bill 145 by unanimous vote. The governor approved the bill on August 19, 1981, and the Code thereby became Public Act No. 82-280.⁵ The Code, however, did not take effect until July 1, 1982. Since the Code was approved on August 19, 1981, but did not go into effect until July 1, 1982, the General Assembly had ample opportunity to amend the Code before its effective date.

After the Code's enactment, a multitude of sections remained in the Illinois statutes that referred to the various acts which were repealed by the Code. These sections required amendment so as to refer to the appropriate Code sections. The largest groups within this sphere contained references to the re-

1. ILL. REV. STAT. ch. 110, §§ 1-101 to 19-128 (1983). Because the author has requested that footnotes be kept to a minimum, references to this statute will be made throughout the article without citation.

2. Fins, *Code of Civil Procedure for Illinois*, 68 ILL. B.J. 312 (1980).

3. H.B. 3262, 82d Ill. Gen. Assembly, 1980 Sess. Bill 3262 was sponsored by 4 democrats and 4 republicans.

4. H.B. 145, 82d Ill. Gen. Assembly, 1981 Sess. (introduced on February 3, 1981).

5. Pub. Act. No. 82-280, Article I-XIX-c, 1981 Ill. Laws 1382-1630 (codified at ILL. REV. STAT. ch. 110, §§ 1-101 to 19-128 (1983)).

pealed Civil Practice Act,⁶ Administrative Review Act,⁷ and Eminent Domain Act.⁸ In 1982, the enactment of Public Act No. 82-783, Article XI accomplished these necessary changes.⁹

A number of statutory references contained in the Illinois Supreme Court Rules also required amendment for appropriate coordination with the Code. Hence, the Illinois Supreme Court coordinated all of its rules with the Code, effective July 1, 1982.

The Code was designed to accomplish four objectives: organization, unification, coordination, and modernization. Both the legislature and the legal profession were pleased with the results of the Code. To evidence their satisfaction with the Code and express their appreciation of its draftsmanship, the Illinois 82d General Assembly presented commendations to Harry G. Fins in the form of House Resolution 700 and Senate Resolution 629. Furthermore, on July 1, 1982, the day when the Code went into effect, the Illinois State Bar Association awarded Harry G. Fins the Medal of Merit—the highest honor theretofore bestowed by that professional organization.

The Code was derived from sixty-two preceding acts, which were drafted at various periods in Illinois history by numerous individuals. Because each individual wrote differently, it was necessary to amend many Code sections to achieve complete uniformity in terminology and style. A number of technical errors also needed correction.

The keen interest which the Illinois legislature and the legal profession have shown in the improvement of the Code is evident from the following statistics:

- 1) In 1982, twenty-eight sections of the Code were amended, two new sections were added, and one section was repealed.
- 2) In 1983, 231 sections of the Code were amended, fourteen new sections were added, and thirty-four sections were repealed.
- 3) In 1984, twenty-three sections of the Code were amended, and three new sections were added.

II. THE ROAD AHEAD IN 1986 AND BEYOND

Numerous sections of the Code of Civil Procedure still require prompt attention. This article discusses each section and the reasons attention is needed, and proposes a bill to remedy the deficiency.

6. ILL. REV. STAT. ch. 110, §§ 1-94 (1979).

7. *Id.*, §§ 264-279.

8. ILL. REV. STAT. ch. 47, §§ 1-17 (1979).

9. Pub. Act. No. 82-783, Article XI, 1982 Ill. Laws 220, 852 (codified throughout ILL. REV. STAT. ch. 110 (1983)).

A. Default Judgments

1. Section 2-210(c): Watercraft and Aircraft Long Arm Jurisdiction

Code section 2-210 governs specific long arm jurisdiction. This section is derived from a prior act entitled "An Act in relation to actions against non-resident owners and operators of aircrafts or watercraft."¹² The prior act consisted of three sections that were converted into one section, with each subsection lettered "a," "b," and "c," respectively. The legislature retained the substance of the text and added only one section heading. This section was placed adjacent to the other sections which cover the subject of "long-arm" jurisdiction because the text deals with that subject.

The general "long-arm" provisions are contained in Code sections 2-208 and 2-209 (former sections 16 and 17 of the Civil Practice Act). There are also several specific "long arm" provisions that address foreign corporations,¹³ antitrust violations,¹⁴ insurers,¹⁵ non-resident executors,¹⁶ persons who are subject to Illinois taxation,¹⁷ and the sale or delivery of securities in Illinois.¹⁸

Code section 2-208(c) (former section 16(3) of the Civil Practice Act) provides that a default judgment entered on service outside Illinois may be set aside only by a showing that would be timely and sufficient to set aside a default judgment if personal service was had within Illinois.

None of the aforementioned specific "long arm" provisions address the procedures that apply when the court enters a default judgment based upon "long arm" service of process. This omission occurs because Code section 1-108(b) (derived from section 1 of the Civil Practice Act) provides that article II of the Code "applies to matters of procedure not regulated by such other statutes."

By virtue of Code sections 2-1301(e) and 2-1401(c) (former sections 50(5) and 72(3) of the Civil Practice Act) a default judgment may be set aside within thirty days, and under unusual circumstances, within two years after a court enters the order. Section 2-210(c), however, directly contravenes Sections 2-1301(e) and 2-1401(c). Section 2-210(c) of the Code includes a "long arm" provision involving aircraft and watercraft, which provides that a default judgment may be set aside within either five years or one year, rather than the two year or thirty day limitation of the other two sections. Section 2-210(c) is therefore considered special legislation, which directly violates article IV, section 13 of the Illinois Constitution. Article IV, section 13 provides that: "The General Assembly shall pass no special or local law when a general law is or

12. 1951 Ill. Laws 1619 (codified at ILL. REV. STAT. ch. 110, § 2-210 (1983)).

13. ILL. REV. STAT. ch. 32, §§ 5.25, 163a74 (1983 & Supp. 1984).

14. ILL. REV. STAT. ch. 38, § 60-7.1 (1983).

15. ILL. REV. STAT. ch. 73, §§ 689, 717, 724, 733-6 (1983).

16. ILL. REV. STAT. ch. 110 1/2, § 6-13 (1983).

17. ILL. REV. STAT. ch. 120, § 444i (1983).

18. ILL. REV. STAT. ch. 121 1/2, § 137.10 (1983).

can be made applicable. Whether a general law is or can be made applicable shall be a matter for judicial determination."¹⁹

In *Bridgewater v. Hotz*,²⁰ the Illinois Supreme Court stated that:

The principal change effected by section 13 is that it specifically rejects the rule enunciated in a long line of decisions of this court that whether a general law can be made applicable is for the legislature to determine *Sommers v. Patton* (1948), 399 Ill. 540, *Trustees v. The Commissioners of Lincoln Park* (1918), 282 Ill. 348) and specifically provides that "it shall be a matter for judicial determination."²¹

The Illinois Supreme Court subsequently cited *Bridgewater v. Hotz* in *Grace v. Howlett*²² and *People ex rel. East Side Levee and Sanitary District v. Madison County Levee and Sanitary District*,²³ to support its observation that the deference previously accorded the legislative judgment, as to whether a general law could be made applicable, has been largely eliminated by the addition in section 13 of the provision that "[this] shall be a matter for judicial determination."²⁴ Section 2-210(c) should therefore be amended by replacing "one year" with "30 days" and by replacing "5 years" with "2 years."

2. Section 2-1301(g)

By virtue of Code sections 2-1301(e) and 2-1401(c) (former sections 50(5) and 72(3) of the Civil Practice Act) a default judgment may be set aside within thirty days after its entry, and under unusual circumstances, within two years.

In direct contrast to these provisions is Code section 2-1301(g), which addresses default judgments when the defendant "has been served by publication." Section 2-1301(g) provides for setting aside a default judgment within ninety days rather than thirty days and in unusual circumstances, within one year rather than within two years. The provisions of section 2-1301(g) constitute special legislation, which directly violates article IV, section 13 of the Illinois Constitution.²⁵

In order to eliminate the inconsistency surrounding default judgments, the following bill is herewith submitted:

Proposed Bill

An Act to amend sections 2-210 and 2-1301 of the Code of Civil Procedure, approved August 19, 1981, as amended.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

19. ILL. CONST. art. IV, § 13.

20. 51 Ill. 2d 103, 281 N.E.2d 317 (1972).

21. *Id.* at 110, 281 N.E.2d at 321.

22. 51 Ill. 2d 478, 283 N.E.2d 474 (1972).

23. 54 Ill. 2d 442, 298 N.E.2d 177 (1973).

24. *Id.* at 447, 298 N.E.2d at 179.

25. See *supra* note 19 and accompanying text.

Section 1. Sections 2-210 and 2-1301 of the Code of Civil Procedure, approved August 19, 1981, as amended, are amended to read as follows:

(ch. 110, par. 2-210)

Sec. 2-210. Aircraft and Watercraft. (a) For the purposes of this Section:

“aircraft” means any contrivance now known, or hereafter invented, used or designed for flight in the air;

“watercraft” means any boat, vessel, craft or floating thing designed for navigation in the water; and

“waters of this State” means the Illinois portion of all boundary lakes and rivers, and all lakes, rivers, streams, ponds and canals within the State of Illinois.

(b) The use and operation by any person of an aircraft on the land or in the air over this State or the use and operation by any person of a watercraft in the waters of this State, shall be deemed an appointment by such person of the Secretary of State, to be his or her ~~true and lawful~~ attorney upon whom may be served all legal process in any action or proceeding against him or her, growing out of such use or resulting in damage or loss to person or property, and such use or operation shall be signification of his or her agreement that any such process against him or her which is so served, shall be of the same legal force and validity as though served upon him or her personally if such person is a nonresident of this State or at the time a cause of action arises is a resident of this State but subsequently becomes a nonresident of this State. Service of such process shall be made by serving a copy upon the Secretary of State or by filing such copy in his or her office, together with a fee of \$2.00, and such service shall be sufficient service upon such person; if notice of such service and a copy of the process are, within 10 days thereafter, sent by registered mail by the plaintiff to the defendant, at the last known address of the defendant, and the plaintiff's affidavit of compliance herewith is appended to the summons. The court in which the action is pending may order such continuances as may be necessary to afford the defendant reasonable opportunity to defend the action. The fee of \$2.00 paid by the plaintiff to the Secretary of State at the time of the service shall be taxed in his or her costs, if he or she prevails in the action. The Secretary of State shall keep a record of all such processes, which shall show the day and hour of such services.

(c) When a final judgment is entered against any non-resident defendant who shall not have received notice of service and a copy of the process by registered mail, required to be sent him or her as above provided, and such person, his or her heirs, ~~legatees devisees~~, executor, administrator or other legal representatives, as the case may require, shall within *30 days* ~~one year~~ after the notice in writing given him or her of such judgment, or within 2 1/2 years after such judgment, if no such notice has been given, as above stated, ~~appear in open court and~~ petition *the court* to be heard touching the matter of such judgment, and shall pay such costs as the court may deem reasonable in that behalf, the person so petitioning *the court* may appear and answer the plaintiff's allegations, and thereupon such proceeding shall be had as if the ~~defendant defendants~~ had appeared in due ~~time season~~ and no judgment had

been ~~entered~~ rendered. If it appears upon the hearing that such judgment ought not to have been ~~entered~~ made against such defendant, the same may be set aside, altered, or amended as shall appear just; otherwise, it shall be ordered to stand confirmed against such defendant. The judgment shall after 2 5 years from the ~~entry~~ making thereof, if not set aside in the manner stated above, be deemed and adjudged confirmed against such defendant, and all persons claiming under him or her by virtue of any act done subsequent to the commencement of such action, and at the end of the 2 5 years, the court may ~~enter~~ make such further ~~orders~~ order in the premises as shall be required to carry the same into effect.

(ch. 110, par. 2-1301)

Sec. 2-1301. Judgments—Default—Confession. (a) The court shall determine the rights of the parties and grant to any party any affirmative relief to which the party may be entitled on the pleadings and proofs. Judgment shall be in the form required by the nature of the case and by the recovery or relief awarded. More than one judgment may be ~~entered~~ rendered in the same cause. If relief is granted against a party who upon satisfying the same in whole or in part will be entitled by operation of law to be reimbursed by another party to the action, the court may determine the rights of the parties as between themselves, and may thereafter upon motion and notice in the cause, and upon a showing that satisfaction has been made, ~~enter~~ render a final judgment against the other party accordingly.

(b) A determination in favor of the plaintiff on an issue as to the truth or validity of any defense in abatement shall be that the defendant answer or otherwise plead.

(c) Except as otherwise limited by this subsection (c), any person for a debt bona fide due may confess judgment by himself or herself or attorney duly authorized, without process. The application to confess judgment shall be made in the county in which the note or obligation was executed or in the county in which one or more of the defendants reside or in any county in which is located any property, real or personal, owned by any one or more of the defendants. A judgment entered by any court in any county other than those herein specified has no force or validity, anything in the power to confess to the contrary notwithstanding.

No power to confess judgment shall be required or given after September 24, 1979 in any instrument used in a consumer transaction; any power to confess given in violation hereof is null and void and any judgment entered by a court based on such power shall be unenforceable. "Consumer transaction" as used in this Section means a sale, lease, assignment, loan, or other disposition of an item of goods, a consumer service, or an intangible to an individual for purposes that are primarily personal, family, or household.

(d) Judgment by default may be entered for want of an appearance, or for failure to plead, but the court may in either case, require proof of the allegations of the pleadings upon which relief is sought.

(e) The court may in its discretion, before final order or judgment, set aside any default, and may on motion filed within 30 days after entry thereof set aside any final order or judgment upon any terms and conditions that shall be reasonable.

(f) The fact that any order or judgment is joint does not deprive the court of power to set it aside as to fewer than all the parties, and if so set aside it remains in full force and effect as to the other parties.

(g) If any final judgment is entered against any defendant who has been served by publication with notice of the commencement of the action and who has not been served with a copy of the complaint, or received the notice required to be sent him or her by mail, or otherwise brought into court, and such defendant or his or her heirs, legatees, or personal representatives, as the case may require, shall within ~~30~~ ~~90~~ days after notice in writing given him or her of the judgment, or within ~~2 years~~ ~~1 year~~ after the judgment, if no notice has been given, appear ~~in open court~~ and petition to be heard touching the matter of the judgment, the court shall upon notice being given to the parties to such action who appeared therein and the purchaser at a sale made pursuant to the judgment, or their attorneys, set the petition for hearing and may allow the parties and the purchaser to answer the petition. If upon the hearing it appears that the judgment ought not to have been *entered* ~~made~~ against the defendant, it may be set aside, altered or amended as appears just; otherwise the petition shall be dismissed at petitioner's costs. If, however, a sale has been had under and pursuant to the final judgment, the court, in altering or amending the judgment may, upon terms just and equitable to the defendant, permit the sale to stand. If upon the hearing of the petition it appears that the defendant was entitled under the law to redeem from the sale, the court shall permit redemption to be made ~~at any time~~ within *a reasonable time* ~~90 days thereafter~~, upon terms that are equitable and just.

Section 2. This Act takes effect upon its becoming a law.

B. Section 2-411: Partnership

In 1941, the Illinois Supreme Court declared that "a partnership is not a legal entity apart from the individual members"²⁶ and "[t]he names of its members must be set out in the complaint and summons."²⁷ In 1955, the legislature added Section 27.1 to the Civil Practice Act to allow actions against partnerships in their firm name. This modification alleviated the need to list the names of each individual partner, who were often unknown to the plaintiff. No modification was made, however, regarding actions by partnerships as plaintiffs. Therefore, the earlier common law doctrine remained that when a partnership sued as a plaintiff, the names of all of

26. *Lewis v. West Side Trust and Sav. Bank*, 377 Ill. 384, 385, 36 N.E.2d 573, 574 (1941).

27. *Id.* at 386, 36 N.E.2d at 575.

its members—even if there are a hundred or more—must have been set out in the complaint and summons. Because Code section 2-411 was derived from section 27.1 of the Civil Practice Act without any change in the text, there has been no procedural change in Illinois law.

The plaintiffs' inability to sue in a partnership name has caused great inconvenience to both litigants and courts in cases involving firms with many partners. For example, the accounting firm of Arthur Andersen & Co. is a partnership consisting of over 1500 partners, and the law firm of Baker & McKenzie is a partnership consisting of over 230 partners. When multi-member partnerships sue as plaintiffs, the paper work involved and the space consumed in listing all the names of the partners on the complaint and summons is excessive. Section 2-411, subsection (a) is duplicative and tedious and does not benefit the defendant, the court, or the public. Moreover, if during the pendency of the litigation a partner retires or an employee is elevated to partnership, additional pleadings must be filed under Code section 2-1008(a) (former section 54(1) of the Civil Practice Act), which states:

(a) Change of interest or liability. If by reason of marriage, bankruptcy, assignment, or any other event occurring after the commencement of a cause or proceeding, either before or after judgment, causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after commencement of the action, it becomes necessary or desirable that any person not already a party be before the court, or that any person already a party be made party in another capacity, the action does not abate, but on motion an order may be entered that the proper parties be substituted or added, and that the cause or proceeding be carried on with the remaining parties and new parties, with or without a change in the title of the cause.

If a partner in the plaintiff's firm dies or becomes legally disabled, additional time-consuming legal action is also required under Code section 2-1008(b) and (c) (former section 54(2) and (3) of the Civil Practice Act). Finally, if every partner is an indispensable party plaintiff, the inadvertent omission of a partner's name in the complaint or summons will result in a void judgment, and this defect may be raised not only at the trial court but also for the first time on appeal.²⁸ Therefore, subsection (a) and the subject heading of Code section 2-411 should be amended.

To accomplish this objective, an appropriate bill is herewith submitted:

Proposed Bill

An Act to amend section 2-411 of the Code of Civil Procedure, approved August 19, 1981, as amended.

28. See *Glickhauf v. Moss*, 23 Ill. App. 3d 679, 320 N.E.2d 132 (1st Dist. 1974) (citing and discussing numerous other relevant cases).

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. Section 2-411 of the Code of Civil Procedure, approved August 19, 1981, as amended, is amended as follows:

(ch. 110, par. 2-411)

Sec. 2-411. Action *by and* against partnerships. (a) A partnership may *sue and* be sued in the names of the partners as individuals doing business as the partnership, or in the firm name, or both.

(b) An unsatisfied judgment against a partnership in its firm name does not bar an action to enforce the individual liability of any partner.

Section 2. This Act takes effect upon its becoming a law.

C. Section 2-415: Sequestration

Illinois Supreme Court Rule 307 provides:

(a) Order Appealable; Time. An appeal may be taken to the Appellate Court from an interlocutory order of the court;

.....

(2) appointing or refusing to appoint a receiver or sequestrator;

(3) giving or refusing to give other or further powers or property to a receiver or sequestrator already appointed²⁹

Sequestration is “[a] writ authorizing the taking into the custody of the law of the real and personal estate (or rents, issues and profits) of a defendant who is in contempt, and holding the same until he shall comply.”³⁰ A sequestrator is “[o]ne appointed or chosen to perform a sequestration, or execute a writ of sequestration.”³¹ Thus, a sequestrator and a receiver are very similar.

In *In re Marriage of Hilkovitch*,³² the court stated:

The fact that the trial judge mistakenly labelled Richard Hoffman receiver of JNH Enterprises, Inc., instead of sequestrator does not change the duties imposed upon him; whereas a receiver is appointed to hold and manage property to preserve it from destruction during pending litigation (*Firebaugh v. McGovern* (1949), 404 Ill. 143, 88 N.E.2d 473), a sequestrator is appointed to seize and sell the assets held by the noncomplying party. (*In re Marriage of Rochford* (1980), 91 Ill. App. 3d 769, 414 N.E.2d 1096.) The fact that a sequestrator might have to manage property during the period of time a buyer is being sought does not automatically transform him into a receiver. Richard Hoffman’s directions were to sell each of Dennis’ assets, thereby making the designation “sequestrator” the appropriate one.³³

29. ILL. REV. STAT. ch. 110A, § 307 (1983).

30. BLACK’S LAW DICTIONARY 1225 (5th ed. 1979).

31. *Id.* at 1226.

32. 124 Ill. App. 3d 401, 464 N.E.2d 795 (1st Dist. 1984).

33. *Id.* at 424, 464 N.E.2d at 809-10.

Code section 2-415 provides for the appointment of, and actions against, receivers. No Illinois statute, however, deals with the appointment of or actions against sequestrators in any manner. Therefore, Code section 2-415 should be amended by adding the phrase "or sequestrator" after "receiver" in every place where "receiver" appears in the section. Such an amendment will fill this gap in Illinois procedural law.

It is noteworthy that in addressing the appointment of receivers, the statute does not specify the circumstances which justify such court action. This determination is aptly left to the judiciary. Similarly, in the appointment of a sequestrator, the statute need not specify the circumstances which justify such court action since the subject is amply covered by Illinois case law.³⁴

The following bill to eliminate the discrepancy between receivers and sequestrators is herewith submitted:

Proposed Bill

An Act to amend section 2-415 of the Code of Civil Procedure, approved August 19, 1981, as amended.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. Section 2-415 of the Code of Civil Procedure, approved August 19, 1981, as amended, is amended to read to as follows:

(ch. 110, par. 2-415)

Sec. 2-415. Appointment of and actions against receivers *or sequestrators*

(a) Before any receiver *or sequestrator* shall be appointed the party making the application shall give bond to the adverse party in such penalty as the court may order and with security to be approved by the court conditioned to pay all damages including reasonable attorney's fees sustained by reason of the appointment and acts of such receiver *or sequestrator*, in case the appointment of such receiver *or sequestrator* is revoked or set aside. Bond need not be required, when for good cause shown, and upon notice and full hearing, the court is of the opinion that a receiver *or sequestrator* ought to be appointed without such bond.

(b) On an application for the appointment of a receiver *or sequestrator*, the court may, in lieu of appointing a receiver *or sequestrator*, permit the

34. See *Manning v. Mercantile Securities Co.*, 242 Ill. 584, 90 N.E. 238 (1909); *Wightman v. Wightman*, 45 Ill. 167 (1867); *Hellwig v. Hellwig*, 100 Ill. App. 3d 452, 426 N.E.2d 1087 (1st Dist. 1981); *In re Marriage of Laser*, 91 Ill. App. 3d 769, 414 N.E.2d 1096 (1st Dist. 1980); *Ryan v. Ryan*, 56 Ill. App. 3d 483, 371 N.E.2d 1199 (1st Dist. 1978); *Factor v. Factor*, 27 Ill. App. 3d 594, 327 N.E.2d 396 (1st Dist. 1975); *Victor v. Victor*, 31 Ill. App. 2d 60, 333 N.E.2d 296 (1st Dist. 1961); *Gray v. Gray*, 6 Ill. App. 2d 571, 129 N.E.2d 706 (1st Dist. 1955); *Stewart v. Stewart*, 1 Ill. App. 2d 283, 117 N.E. 579 (4th Dist. 1954); *Mowrey v. Mowrey*, 328 Ill. App. 92, 65 N.E. 234 (1st Dist. 1946); *Williams v. Williams*, 279 Ill. App. 274 (3d Dist. 1935); *Tuttle v. Gunderson*, 254 Ill. App. 552 (1st Dist. 1929); *Schaeffer v. Potzel*, 238 Ill. App. 335 (1st Dist. 1925).

party in possession to retain such possession upon giving bond with such penalty and with such security and upon such condition as the court may order and approve; and the court may remove a receiver *or sequestrator* and restore the property to the possession of the party from whom it was taken upon the giving of a like bond.

(c) Every receiver *or sequestrator* of any property appointed by any court of this State may be sued in respect of any act or transaction of the receiver *or sequestrator* in carrying on the business connected with the property, without the previous leave of the court in which the receiver *or sequestrator* was appointed; but the action shall be subject to the jurisdiction of the court in which the receiver *or sequestrator* was appointed, so far as the same is necessary to the ends of justice.

Section 2. This Act takes effect upon its becoming a law.

D. Sections 2-1001 and 2-1002: Change of Venue

Sections 2-1001 and 2-1002 of the Code were derived from the 1979 Illinois Revised Statutes, chapter 110, paragraphs 501 through 535.

1. Sections 2-1001 and 2-1002 Employ Incorrect Terminology

“AN ACT to revise the law in relation to change of venue” (former paragraphs 501 through 536 of the Illinois Revised Statutes, 1979, chapter 110) uses incorrect terminology by employing the term “change of venue” instead of the terms “substitution of a judge” and “change of place of trial” where the judicial proceeding will commence. In the Code of Criminal Procedure of 1983 these two concepts are appropriately kept separate and distinct.³⁵ The civil statutory provisions for covering the two procedures—each of which is governed by separate and distinct standards—must be corrected to clarify the procedural steps.

2. Section 2-1001(l) Contravenes Settled Case Law

Section 2-1001(l) states as follows: “(l) All questions concerning the regularity of the proceedings in a change of venue, and the right of the court to which the change is made to try the case and enforce the judgment, shall be considered as waived after trial and verdict.” In *Board of Education of Township High School District Number 201 v. Morton Council, West Suburban Teachers Union Local 571*,³⁶ the Illinois Supreme Court reversed a finding of the circuit court, which had denied a petition for a change of venue.³⁷ Settled Illinois case law holds that if a trial court erroneously

35. Compare ILL. REV. STAT. ch. 38, § 114-5 (1983) (entitled “Substitution of judge”) with *id.* § 114-6 (entitled “Change of place of trial”).

36. 50 Ill. 2d 258, 278 N.E.2d 769 (1972).

37. *Id.* at 261-262, 278 N.E.2d at 771.

denies a change of venue and proceeds to trial and judgment, all proceedings subsequent to the denial of the change of venue are void.³⁸ In *Howarth v. Howarth*,³⁹ the court explained that participation at trial "by a party whose application for a change of venue has been denied does not waive error in denying application."⁴⁰

In *Wheaton National Bank v. Aarvold*,⁴¹ the court observed that in Illinois, courts have repeatedly held that a court must grant a timely-filed motion for change of venue in proper form which is based on the alleged prejudice of the judge before whom the matter is pending. Orders entered by that judge after the order denying the change of venue are void. As a result, the legislature should eliminate Code section 2-1001(l).

A bill to clarify the distinction between "change of place of trial" and "substitution of a judge" is herewith submitted:

Proposed Bill

An Act to amend sections 2-1001 and 2-1002 of the Code of Civil Procedure, approved August 19, 1981, as amended.

Be it enacted by the People of the State of Illinois, represented by the General Assembly:

Section 1. Sections 2-1001 and 2-1002 of the Code of Civil Procedure, approved August 19, 1981, as amended, are amended to read as follows: (ch. 110, par. 2-1001)

Sec. 2-1001. *Substitution of judge. (a) Where the judge is a party, or interested in the action, or the testimony of the judge is material to either of the parties to the action, or the judge is related to, or has been related to, or has been attorney for, any party in regard to the matter in controversy, a substitution of judge may be granted with or without the application of either party.*

(b) Where any party or his or her attorney fears that the party will not receive a fair trial or hearing by the judge before whom the action is pending because the judge is prejudiced against the party or the party's

38. See *In re Marriage of Sipich*, 80 Ill. App. 3d 883, 400 N.E.2d 696 (1st Dist. 1980); *City of Peoria v. Peoria Rental, Inc.*, 61 Ill. App. 3d 1, 377 N.E.2d 546 (3d Dist. 1978); *Frede v. McDaniels*, 37 Ill. App. 3d 1053, 347 N.E.2d 259 (1st Dist. 1976); *Johnson v. Johnson*, 34 Ill. App. 3d 356, 340 N.E.2d 68 (1st Dist. 1975); *Anderson v. The City of Wheaton*, 25 Ill. App. 3d 100, 323 N.E.2d 129 (2d Dist. 1975); *Rowlen v. Hermann*, 129 Ill. App. 2d 45, 262 N.E.2d 739 (1st Dist. 1970); *Gates v. Gates*, 38 Ill. App. 2d 446, 187 N.E.2d 460 (2d Dist. 1963).

39. 47 Ill. App. 2d 177, 197 N.E.2d 736 (2d Dist. 1964).

40. *Id.* at 182, 197 N.E.2d at 739.

41. 16 Ill. App. 3d 193, 305 N.E.2d 541 (2d Dist. 1973). Similarly, in *In re Marriage of Cummins*, 106 Ill. App. 3d 44, 435 N.E.2d 506 (2d Dist. 1982), the court stated: "Any order entered after an improper denial of a change of venue is void." *Id.* at 47, 435 N.E.2d at 508. Finally, in *People v. Samples*, 107 Ill. App. 3d 523, 437 N.E.2d 1232 (5th Dist. 1982), the court said that if a motion for the substitution of a judge "is improperly denied, all subsequent action of the trial court is void." *Id.* at 527, 437 N.E.2d at 1235.

attorney, a substitution of judge may be granted by consent of the parties or upon petition presented to the judge before whom the cause is pending. The petition shall state the cause for the application and shall be verified by the affidavit of the applicant, reasonable notice of such application having been given to the adverse party or his or her attorney. A petition for substitution of a judge shall not be granted unless it is presented before trial or hearing begins and before the judge to whom it is presented has ruled on any substantial issue in the case. However, if any ground for substitution of judge occurs thereafter, a petition for substitution of judge may be presented based upon such ground.

(c) When any defendant in a proceeding for contempt arising from an attack occurring otherwise than in open court, upon the character or conduct of a judge, which proceeding is pending before the judge whose character or conduct was impugned, fears that he or she will not receive a fair and impartial trial before such judge, he or she may petition the court for a substitution from such judge, such petition to be verified by the petitioner, and thereupon such substitution of judge shall be granted.

(d) No party shall have more than one substitution of judge.

Change of venue. (a) A change of venue in any civil action may be had in the following situations:

(1) Where the judge is a party or interested in the action, or his or her testimony is material to either of the parties to the action, or he or she is related to, or has been counsel for any party in regard to the matter in controversy. In any such situation a change of venue may be awarded by the court with or without the application of either party.

(2) Where any party or his or her attorney fears that he or she will not receive a fair trial in the court in which the action is pending, because the inhabitants of the county are or the judge is prejudiced against him or her, or his or her attorney, or the adverse party has an undue influence over the minds of the inhabitants. In any such situation the venue shall not be changed except upon application, as provided herein, or by consent of the parties.

(b) When a change of venue is granted it may be to some other judge in the same county or in some other convenient county, to which there is no valid objection.

(c) Every application for a change of venue by a party or his or her attorney shall be by petition, setting forth the cause of the application and praying a change of venue, which petition shall be verified by the affidavit of the applicant. A petition for a change of venue shall not be granted unless it is presented before trial or hearing begins and before the judge to whom it is presented has ruled on any substantial issue in the case, but if any ground for such change of venue occurs thereafter, a petition for change of venue may be presented based upon such ground.

(d) If the cause for the change is the prejudice of the inhabitants of the county or the undue influence of the adverse party over their minds, the petition shall set forth the facts upon which the petitioner bases his

~~or her belief, and must be supported by the affidavits of at least 2 other reputable persons residing in the county. The adverse party may controvert the petition by counter affidavits, and the court may grant or deny the petition as shall appear to be according to the right of the case.~~

~~—(e) The application may be made to the court in which the case is pending, reasonable notice thereof having been given to the adverse party or his or her attorney.~~

~~—(f) The order for a change of venue may be made subject to such equitable terms and conditions as safety to the rights of the parties may seem to require, and the court in its discretion may prescribe.~~

~~—(g) The expenses attending a change of venue shall be taxed by the clerk of the court from which the case is certified according to the rates established by law for like services and shall be paid by the petitioner and not allowed as part of the costs in the action.~~

~~—(h) The order shall be void unless the party obtaining a change of venue shall, within 15 days, or such shorter time as the court may prescribe, pay to the clerk the expenses attending the change.~~

~~—(i) Where the venue is changed without the application of either party, the costs of such change shall abide the event of the action.~~

~~—(j) In all cases of change of venue, the clerk of the court from which the change is granted shall immediately prepare a full transcript of the record and proceedings in the case, and of the petition, affidavits and order for the change of venue, and transmit the same, together with all the papers filed in the case, to the proper court, but when the venue is changed on behalf of a part of the defendants in a condemnation proceeding, it shall not be necessary to transmit the original papers in the case, and it shall be sufficient to transmit certified copies of so much thereof as pertains to the case so changed. Such transcript and papers or copies may be transmitted by mail, or in such other way as the court may direct.~~

~~—(k) The clerk of the court to which the change of venue is granted shall file the transcript and papers transmitted and docket the cause, and such cause shall be proceeded in and determined before and after judgment, as if it had originated in such court.~~

~~—(l) All questions concerning the regularity of the proceedings in a change of venue, and the right of the court to which the change is made to try the cause and enforce the judgment, shall be considered as waived after trial and verdict.~~

~~—(m) When any defendant in a proceeding for contempt arising from an attack occurring otherwise than in open court, upon the character or conduct of a judge, which proceeding is pending before the judge whose character or conduct was impugned, fears that he or she will not receive a fair and impartial trial before such judge, he or she may petition the court for a change of venue from such judge, such petition to be verified by affidavit of the defendant, and thereupon such change shall be granted.~~

~~—(n) The clerk of the court to which the venue is changed shall file the transcript and papers transmitted and docket the case, and such case shall~~

~~be proceeded in and determined before and after judgment, as if it had originated in such court.~~

~~—(e) Upon the entry of judgment of any civil cause in which the venue has been changed, it shall be lawful for the party in whose favor judgment is entered, to file in the office of the clerk of the court where the action was instituted a transcript of such judgment, and the clerk shall file the same of record, and enforcement may be had thereon, and the same shall, from the time of filing such transcript, have the same operation and effect as if originally recovered in such court.~~

~~(ch. 110, par. 2-1002)~~

Sec. 2-1002. Change of place of trial. (a) Where any party or his or her attorney fears that the party will not receive a fair trial in the court in which the action is pending because the inhabitants of the county are prejudiced against the party or the party's attorney or the adverse party has an undue influence over the minds of the inhabitants, a change of place of trial may be granted upon the consent of the parties or upon petition to the court where the action is pending, reasonable notice thereof having been given to the adverse party or his or her attorney. The petition shall state the facts upon which the petitioner founds his or her belief, and must be supported by the affidavits of at least 2 other reputable persons resident of the county. The adverse party may controvert the petition, and the court may grant or deny the petition as shall appear to be according to the right of the case.

(b) No party shall have more than one change of place of trial.

(c) When a change of place of trial is granted, it may be to some other convenient county, to which there is no valid objection.

(d) The order for change of place of trial may be made subject to terms and conditions as safety to the rights of the parties may require and the court in its discretion may prescribe.

(e) The expenses attending a change of place of trial shall be taxed by the clerk of the court from which the case is certified according to the rates established by the law for like services and shall not be charged as part of the costs in the action.

(f) The order shall be void unless the party obtaining a change of place of trial shall, within 15 days, or such shorter time as the court may prescribe, pay to the clerk the expenses attending the change.

(g) In all cases of change of place of trial, the clerk of the court from which the change is granted shall immediately prepare a full transcript of the record and proceedings in the case, and of the petition, affidavits and order for change of place of trial, and transmit the same, together with all the papers filed in the case to the clerk of the proper court. However, when a change of place of trial is granted on behalf of a part of the defendants, in a condemnation proceeding, it shall not be necessary to transmit certified copies of so much thereof as does not pertain to the case so changed. Such transcript and papers and copies may be transmitted by mail or in such other manner as the court may direct.

(h) *The clerk of the court to which the place of trial is changed shall file the transcript and papers transmitted to him or her and shall docket the case, and the case shall be proceeded in and determined in all respects, before and after judgment, as if it has originated in such court.*

(i) *Upon the entry of judgment in any case in which the place of trial was changed, the party in whose favor judgment was entered may file, in the office of the clerk of the court wherein the action had originally been instituted, a transcript of such judgment, and the clerk shall enter the same in the judgment docket, and enforcement thereof may be had, and the judgment shall, from the time of filing such transcript, have the same operation and effect as if originally recovered in such court.*

~~Limitation of change of venue. No party shall have more than one change of venue.~~

Section 2. This Act takes effect upon its becoming a law.

E. Evidentiary Issues

1. Section 2-1103: Affidavits

Section 2-1103 is derived from section 69 of the Civil Practice Act, which consisted of two subsections. The two subsections were copied from sections 85 and 86 of the Practice Act of 1907.⁴²

The modern practice concerning affidavits is to present the affidavit to the court in a pleading, not to read the affidavit to the court. This practice inspired a change in the language of subsection (a).

The last sentence in subsection (b) states that the section "does not apply to applications for change of venue on grounds of prejudice." "Change of venue on grounds of prejudice," applies in two separate and distinct situations: the prejudice of a judge, and the prejudice of county inhabitants. A judge to whom a party applies for a change of venue on the ground of judicial prejudice may not hear any further evidence. However, after an application for change of venue because of local prejudice, the court may hear evidence and permit the adverse party to controvert the petition by counter-affidavits.⁴³ These situations are separate and distinct because the judge may hear evidence to determine whether the county inhabitants have been prejudiced. A judge may not, however, determine his own prejudice. Thus, the foregoing venue passage misstates the statutory rule. The legislature should therefore substitute the phrase "change of venue" with "the substitution of judges."

2. Section 2-1112: Oral Testimony

Section 2-1112 of the Code was originally section 38 of the Evidence Act of 1872.⁴⁴ The text remains the same. Specific modifications to Code

42. ILL. REV. STAT. ch. 110, §§ 85, 86 (1907).

43. ILL. REV. STAT. ch. 110, § 2-1001(d) (1983) (former ILL. REV. STAT. ch. 110, § 504 (1979)).

44. ILL. REV. STAT. ch. 40, §§ 1-48 (1872).

section 2-1112 are currently required to correct two inaccuracies. Section 38 of the Evidence Act of 1872 provided: "On the trial of every action seeking equitable relief, oral testimony shall be taken when desired by either party."⁴⁵ This section conflicts with subsequent sections 48 and 57 of the Civil Practice Act (Code sections 2-619 and 2-1005) and Supreme Court Rule 191, which permit trial by affidavits without oral testimony. Moreover, when a Supreme Court Rule and a statutory provision conflict, the Rule predominates.⁴⁶ Therefore, section 2-1112 should be amended by inserting "except as otherwise provided by law" at the end of the section. This would remove the current conflict.

Additionally, the word "either" should be replaced with "any" since a third-party defendant or intervenor may also request a trial by affidavits or oral testimony.

In order to clarify the procedural aspects regarding affidavits, the following bill is herewith submitted:

Proposed Bill

An Act to amend sections 2-1103 and 2-1112 of the Code of Civil Procedure, approved August 19, 1981, as amended.

Be it enacted by the People of the State of Illinois represented in the General Assembly:

Section 1. Sections 2-1103 and 2-1112 of the Code of Civil Procedure, approved August 19, 1981, as amended, are amended to read as follows:
(ch. 110, par. 2-1103)

Sec. 2-1103. Affidavits. (a) All affidavits presented to the court shall be filed with the clerk.

(b) If evidence is necessary concerning any fact which according to law and the practice of the court may now be supplied by affidavit, the court may, in its discretion, require the evidence to be presented, wholly or in part, by oral examination of the witnesses in open court upon notice to all parties not in default, or their attorneys. If the evidence is presented by oral examination, an adverse party shall have the right to cross-examination. This Section does not apply to applications for *the substitution of judges* ~~change of venue~~ on grounds of prejudice.

Sec. 2-1112. Oral testimony in actions seeking equitable relief. On the trial of every action seeking equitable relief, oral testimony shall be taken when desired by *any* either party, *except as otherwise provided by law*.

Section 2. This Act takes effect upon its becoming a law.

45. *Id.* § 38.

46. *People v. Cox*, 82 Ill. 2d 268, 412 N.E.2d 541 (1980); *People v. Jackson*, 69 Ill. 2d 252, 371 N.E.2d 602 (1977).

*F. Transfer of Existing Acts Into
the Code of Civil Procedure*

The Code of Civil Procedure became effective on July 1, 1982. Subsequent research indicated that five sections of chapter 110 of the 1979 Illinois Revised Statutes, paragraphs 801 through 805, should be incorporated into the Code. This was accomplished in 1983 when the legislature passed Public Act 83-350, whereby section 2-621 (incorporating former paragraphs 801 through 805) was added to the Code without any change in the law.⁴⁷

Similarly, subsequent research indicates that certain Illinois Acts delineated in the following proposed bills, which are now outside the Code, should be transferred into the Code, without any substantive change in their respective areas of Illinois law.

Bills to accomplish these objectives are herewith submitted:

Proposed Bills

An Act relating to trust estates.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. Section 2-1404 is added to the Code of Civil Procedure, approved August 19, 1981, as amended, the added section to read as follows:

(ch. 110, new par. 2-1404)

Sec. 2-1404. Preservation of trust estates. In all cases where a trustee has been or shall be appointed by order of a court having authority to authorize the payment of interest on any mortgage which is a lien upon the trust estate, to authorize the payment of taxes and assessments levied upon or assessed against the trust estate, to authorize the payment of insurance premium on any policy of insurance on the buildings and personal property of the trust estate, and to authorize the making of repairs and the payment therefore, when it appears for the best interest of the estate; and where a trustee has paid any such interest, taxes, assessments, insurance premiums, or for repairs, and it appears that such payments were for the best interests of the estate and the protection and preservation thereof, the court, on application or by report, has authority to approve such payments.

(ch. 110, rep. pars. 403 and 404).

Section 2. "An Act in relation to trust estates," approved July 1, 1931, as amended, is repealed.

Section 3. This Act takes effect upon its becoming a law.

The above Act became law by Pub. Act No. 84-621, effective Sept. 20, 1985.

An Act amending the Code of Civil Procedure, approved August 19, 1981, as amended, and repealing certain other Acts.

47. 1983 Ill. Laws 2810, (consisting of five lettered subdivisions, codified as amended at ILL. REV. STAT. ch. 110, § 2-621 (1983)).

Be it enacted by the People of the State of Illinois represented in the General Assembly:

Section 1. Parts 17 and 18 are added to Article II of the Code of Civil Procedure, approved August 19, 1981, as amended, the added Parts to read as follows:

Part 17. Lis Pendens

(ch. 110, new par. 2-1701)

Sec. 2-1701. Lis Pendens—Operative date of notice. Every condemnation proceeding, proceeding to sell real estate of decedent to pay debts, or other action seeking equitable relief, affecting or involving real property shall, from the time of filing in the office of the recorder in the county where the real estate is located, a notice signed by any party to the action or his or her attorney of record or attorney in fact, on his or her behalf, setting forth the title of the action, the parties to it, the court where it was brought and a description of the real estate, be constructive notice to every person subsequently acquiring an interest in or a lien on the property affected thereby, and every such person and every person acquiring an interest or lien as above stated, not in possession of the property and whose interest or lien is not shown of record at the time of filing such notice, shall, for the purposes of this section, be deemed a subsequent purchaser and shall be bound by the proceedings to the same extent and in the same manner as if he or she were a party thereto. If in any such action plaintiff or petitioner neglects or fails for the period of 6 months after the filing of the complaint or petition to cause notice to be given the defendant or defendants, either by service of summons or publication as required by law, then such notice shall cease to be such constructive notice until service or summons or publication as required by law is had.

This section authorizes a notice of any of these actions concerning real property pending in any United States district court to be recorded and indexed in the same manner and in the same place as herein provided with respect to notices of such actions pending in courts² of this State.

However, no such action or proceeding shall be constructive notice, either before or after service of summons or publication, as to property subject to the provisions of "An Act concerning land titles," approved May 1, 1897, as amended, until compliance with the provisions of Section 84 of that Act has been effected.

At any time during the pendency of an action or proceeding initiated after July 1, 1959, which is constructive notice, the court, upon motion, may for good cause shown, provided a finding of specific performance is not necessary for final judgment in the action or proceeding, and upon such terms and conditions, including the posting of suitable bond, if any, as it may deem equitable, authorize the making of a deed, mortgage, lease or other conveyance of any or all of the real estate affected or involved, in which event the party to whom the deed, mortgage, lease or other conveyance of the real estate is made and those claiming under him or her shall not be bound by such action or proceeding.

(ch. 110, new par. 2-1702)

Sec. 2-1702. Lis Pendens—Bankruptcy. A certified copy of a petition, with schedules omitted, commencing a proceeding under the Bankruptcy Act of the United States or the order of adjudication in such proceeding, or of the order approving the bond of the trustee appointed in the proceedings, may be filed, indexed and recorded in the office of the recorder where conveyances of real estate are recorded in the same manner as deeds. It shall be the duty of the recorder to file, index under the name of the bankrupt, and record such certified copies filed for record in the same manner as deeds, for which services the recorder shall be entitled to the same fees as are provided by law for filing, indexing and recording deeds.

(ch. 110, new par. 2-1703)

Sec. 2-1703. Lis Pendens—Limitation as to Public Officers. In the absence of a permanent or preliminary injunction or temporary restraining order of a court, the bringing or pendency of any action alone, heretofore, or hereafter brought, to defeat or enjoin the disbursement by public officers of public funds to the persons, uses, or purposes for which they are appropriated or set apart, including the payment of the salaries and wages of all officers and employees of the State, or of any county, city, village, town, or other municipality of the State, shall in no way change the liability of any public officer in the disbursement of public funds on account of any notice of matters contained in the pleadings in any action, but such liability shall remain the same, insofar as the bringing or pendency of such action alone is concerned, as if no such action had been brought.

Part 18. Mittimus

(ch. 110, new par. 2-1801)

Sec. 2-1801. Mittimus. (a) In all cases, including criminal, quasi-criminal, and civil, when a person is imprisoned, incarcerated, confined, or committed to the custody of a sheriff, warden, Department of Corrections, or other executive officer by virtue of a judgment or order which is signed by a judge, a copy of such judgment or order shall, in each case, constitute the mittimus, and no separate mittimus need be issued.

(b) Where no written judgment or order was signed by a judge, the practice heretofore prevailing in such cases in the courts of this State shall be followed.

Section 2. The following Acts are repealed:

(ch. 102, rep. par. 18)

“An Act to prevent the mere bringing or pendency of any suit from changing the liability of public officers in the disbursement of the public funds on account of notice of any matter contained in the pleadings.”

Filed June 29, 1917.

(ch. 110, rep. pars. 405 and 406)

“An Act concerning constructive notice of condemnation proceedings, proceedings to sell real property of decedents to pay debts, or other suits seeking equitable relief involving real property, and proceedings in bankruptcy,” approved June 11, 1917, as amended.

(ch. 110, rep. par. 701)

“AN ACT in relation to mittimus.” Approved Aug. 28, 1979.

Section 3. This Act takes effect upon its becoming a law.

The above Act became law by Pub. Act No. 84-622 effective Sept. 20, 1985.

G. Section 3-103: Review of Final Administrative Decisions

Code section 2-201 (derived from section 13 of the Civil Practice Act) provides that an action “shall be commenced by the filing of a complaint. The clerk shall issue summons upon the request of the plaintiff.” Code section 3-103 (derived from section 4 of the former Administrative Review Act)⁴⁸ directly contradicts section 2-201, and provides that “[e]very action to review a final administrative decision shall be commenced by the filing of a complaint and the issuance of summons within 35 days from the date that a copy of the decision sought to be reviewed was served upon the party affected thereby.” Thus, under section 2-201 only the filing of the complaint is required—the initiation of which is within the plaintiff’s power. Under section 3-103, however, the plaintiff must complete two steps: the filing of the complaint, and the issuance of the summons. The issuance of summons can only be performed by the clerk of the circuit court, an officer of the judicial branch of state government⁴⁹ over whom the plaintiff has no control.

In *Cox v. Board of Fire and Police Commissioners*,⁵⁰ a decision later reversed by the Illinois Supreme Court,⁵¹ the plaintiff filed a complaint for administrative review on the thirty-fifth day after the service of the administrative decision. The circuit court clerk did not issue the summons until the following day. The trial court considered this delay to be fatal, and dismissed the action. The Appellate Court for the Fourth District affirmed the decision with one judge dissenting. Thus, the plaintiff lost because of the circuit clerk’s general incompetence. This result is grossly unfair to the plaintiff and totally unnecessary, as is evident from the fact that in other civil cases an action is “commenced by the filing of a complaint,” as provided in Code section 2-201. The issuance of the summons is a clerical duty of the circuit court clerk and should be left to the clerk’s office management.

In *City National Bank and Trust Co. v. Illinois Property Tax Appeal Board*,⁵² the complaint for administrative review was filed on a Friday, the thirty-fifth day from the service of the administrative decision. The

48. ILL. REV. STAT. ch. 110, §§ 264-279 (1979).

49. See *Drury v. County of McLean*, 89 Ill. 2d 417, 433 N.E.2d 666 (1982).

50. 107 Ill. App. 3d 704, 437 N.E.2d 1277 (4th Dist. 1982).

51. 96 Ill. 2d 399, 451 N.E.2d 842 (1983).

52. 108 Ill. App. 3d 979, 439 N.E.2d 1301 (2d Dist. 1982).

plaintiff's attorney notified the deputy clerk that this was the last day to issue the summons. The deputy clerk advised the plaintiff's attorney that it was the clerk's standard procedure to issue summons effective on the date on which the complaint was filed. Nevertheless, when issued, the summons bore the date of the following Monday, which was beyond the thirty-fifth day required by the statute. The circuit court dismissed the administrative review action. The Appellate Court for the Second District, however, reversed. The court concluded that:

Here, the plaintiff-owner, in good faith, sought issuance of summons in accordance with the mandatory provisions of the statute and advised the clerk of the time limitation. While, as defendant suggests, the Owner's [plaintiff's] counsel could have prepared the summons himself, that would not have assured that the clerk would vary the practice and necessarily have issued it on the day the complaint was filed, the 35th day.⁵³

Therefore Code section 3-103 should be amended by deleting from the first sentence the phrase "and the issuance of summons," and inserting, at the beginning of the second paragraph, "The clerk shall issue summons upon request of the plaintiff." This sentence also appears in Code section 2-201.

The following bill to eliminate the requirement that a party to a review of an administrative decision issue a summons is herewith submitted:

Proposed Bill

An Act to amend section 3-103 of the Code of Civil Procedure, approved August 19, 1981, as amended.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. Section 3-103 of the Code of Civil Procedure, approved August 19, 1981, as amended, is amended to read as follows:

(ch. 110, par. 3-103)

Sec. 3-103. Commencement of action. Every action to review a final administrative decision shall be commenced by the filing of a complaint ~~and the issuance of summons~~ within 35 days from the date that a copy of the decision sought to be reviewed was served upon the party affected thereby. The method of service or the decision shall be as provided in the Act governing the procedure before the administrative agency, but if no method is provided, a decision shall be deemed to have been served either when personally delivered or when deposited in the United States mail, in a sealed envelope or package, with postage prepaid, addressed to the party affected thereby at his or her last known residence or place of business.

The clerk shall issue summons upon request of the plaintiff. The form of the summons and the issuance of alias summons shall be according to rules of the Supreme Court.

53. *Id.* at 983, 439 N.E.2d at 1305.

Section 2. This Act takes effect upon its becoming a law.

H. Section 3-111(a): Scope of the Administrative Review Act

In *Basketfield v. Daniel*,⁵⁴ the appellate court noted that:

the scope of our review does not allow us to grant all the relief appellant requests in his notice of appeal. The Administrative Review Act (Ill. Rev. Stat. 1977, ch. 110, pars. 264-79) provides that the scope of review shall extend to all questions of law and fact presented by the entire record . . . The court has the power to affirm or reverse the decision of the administrative agency in whole or in part or to remand the cause for additional evidence. There is no provision in the Act for the joinder of a mandamus action for the restoration of the position formerly held or an action for back wages. (See *Drezner v. Civil Service Com.* (1947), 398 Ill. 219, 75 N.E.2d 303; *Sgro v. City of Springfield* (1972), 6 Ill. App. 3d 478, 285 N.E.2d 589. See also *Davern v. Civil Service Com.* (1970), 47 Ill. 2d 469, 269 N.E.2d 713, cert. denied, (1971), 403 U.S. 918, 29L. Ed. 2d 695, 91S. Ct. 2229.) Therefore, this court lacks jurisdiction to compel reinstatement or back pay.⁵⁵

Similarly, in *Dorner v. Civil Service Commission*,⁵⁶ the appellate court followed *Basketfield v. Daniel* and explained that the trial court was limited to a determination of whether the decision of the Civil Service Commission was against the manifest weight of the evidence. The court lacked jurisdiction to order the Department of Corrections to offer the plaintiff the next available CAT position. Likewise, it lacked jurisdiction to compel reinstatement or back pay.⁵⁷

The court's approach to procedural law resembles the days when common law forms of action reigned supreme. A litigant who desired to set aside a fraudulent decree more than thirty days after its entry had to file a new action known as a bill of review. A litigant who wanted to enforce a judgment against a judgment debtor who had concealed assets had to file a new action known as a creditor's bill. A judgment creditor whose judgment remained unpaid for more than seven years had to file a new action, then known as scire facias, to revive a judgment. Fortunately, these archaic and ritualistic procedures no longer exist in Illinois.⁵⁸

Public employees who have lost their employment due to dubious accusations by their employers, but who have been exonerated in court have suffered enough. It is unnecessary to frustrate them further by requiring them to file a new action labeled "mandamus", or to compel them to pay the circuit court clerk and the sheriff new fees for filing and for the service of a new summons.

54. 71 Ill. App. 3d 877, 390 N.E.2d 492 (1st Dist. 1979).

55. *Id.* at 880, 390 N.E.2d at 494.

56. 85 Ill. App. 3d 957, 407 N.E.2d 750 (1st Dist. 1980).

57. *Id.* at 963, 407 N.E.2d at 755.

58. See ILL. REV. STAT. ch. 110, §§ 55, 72, 73 (1981).

This judicial circuitry and impracticality is clearly inconsistent with the decisions of *Mills Prairie Community High School v. Miller*,⁵⁹ and *Goodfriend v. Board of Appeals of Cook County*,⁶⁰ which stated that common law certiorari may be joined with an injunction to obtain adequate relief. Since 1967, there has been no difference between common law certiorari and a proceeding under the Administrative Review Act.⁶¹

The availability of relief by partition in an action for dissolution of marriage presents a parallel situation.⁶² In *Hitchcock v. Hitchcock*,⁶³ the Illinois Supreme Court entertained a suit for divorce and a suit for partition of jointly owned property. Both complaints arose out of the same difficulties. The same parties were involved and had asserted various causes in the complaint which could be more conveniently tried in one suit, thereby avoiding multiplicity. The court reasoned that the appellant suffered no unreasonable hardship and it was not error to join the complaint for partition and the complaint for the divorce.⁶⁴

It is especially interesting to observe that the removal or dismissal of teachers under section 24-12 of the School Code⁶⁵ is governed by the Administrative Review Act. Section 24-12 of the School Code provides in part:

If a decision of the hearing officer is adjudicated upon review or appeal in favor of the teacher, then the trial court shall order reinstatement and shall determine the amount for which the board is liable including but not limited to loss of income and costs incurred therein.

Any teacher who is reinstated by any hearing or adjudication brought under this Section shall be assigned by the Board to a position substantially similar to the one which that teacher held prior to that teacher's suspension or dismissal.⁶⁶

A number of courts have ordered reinstatements and back pay on administrative review under the above provision.⁶⁷ Obviously, reinstatement and the recovery of back pay can be adjudicated in an administrative review

59. 15 Ill. App. 3d 87, 303 N.E.2d 603 (5th Dist. 1973).

60. 18 Ill. App. 3d 412, 305 N.E.2d 404 (1st Dist. 1973).

61. See, e.g., *Smith v. Department of Public Aid*, 67 Ill. 2d 529, 367 N.E.2d 1286 (1977); *Batley v. Kendall City Sheriff's Dept., Etc.*, 99 Ill. App. 3d 622, 425 N.E.2d 1201 (2d Dist. 1981); *Maas v. Board of Trustees*, 94 Ill. App. 3d 562, 418 N.E.2d 29 (5th Dist. 1981); *Penrod v. Department of Corrections*, 72 Ill. App. 3d 649, 391 N.E.2d 59 (1st Dist. 1979); *S & F Corp. v. Bilandic*, 62 Ill. App. 3d 193, 378 N.E.2d 1137 (1st Dist. 1978).

62. ILL. REV. STAT. ch. 40, § 514 (1983).

63. 373 Ill. 352, 26 N.E.2d 108 (1940).

64. *Id.* at 355-56, 26 N.E.2d at 109.

65. ILL. REV. STAT. ch. 122, §§ 1-1 to 36-1 (1983).

66. *Id.* § 24-12.

67. See, e.g., *Bessler v. Board of Education*, 69 Ill. 2d 191, 370 N.E.2d 1050 (1977); *Board of Education v. Metskas*, 106 Ill. App. 3d 943, 436 N.E.2d 587 (1st Dist. 1982); *Miller v. Board of Education*, 98 Ill. App. 2d 305, 240 N.E.2d 471 (1st Dist. 1968).

proceeding without the delay and expense of commencing new and successive proceedings.

A bill to accomplish this objective is herewith submitted;

Proposed Bill

An Act to amend Section 3-111 of the Code of Civil Procedure, approved August 19, 1981, as amended.

Be it enacted by the people of the State of Illinois, represented in the General Assembly:

Section 1. Section 3-111 of the Code of Civil Procedure, approved August 19, 1981, as amended, is amended to read as follows:

(ch. 110, par. 3-111)

Sec. 3-111. Powers of circuit court. (a) The Circuit Court has power:

(1) with or without requiring bond (except if otherwise provided in the particular statute under authority of which the administrative decision was entered), and before or after answer filed, upon notice to the agency and good cause shown, to stay the decision of the administrative agency, in whole or in part pending the final disposition of the case;

(2) to make any order that it deems proper for the amendment, completion or filing of the record of proceedings of the administrative agency;

(3) to allow substitution of parties by reason of marriage, death, bankruptcy, assignment or other cause;

(4) to dismiss parties or to realign parties plaintiffs and defendants;

(5) to affirm or reverse the decision in whole or in part;

(6) where a hearing has been held by the agency, to reverse and remand the decision in whole or in part, and in such case, to state the questions requiring further hearing or proceedings and to give such other instructions as may be proper;

(7) where a hearing has been held by the agency, to remand for the purpose of taking additional evidence when from the state of the record of the administrative agency or otherwise it shall appear that such action is just. However, no remandment shall be made on the ground of newly discovered evidence unless it appears to the satisfaction of the court that such evidence has in fact been discovered subsequent to the termination of the proceedings before the administrative agency and that it could not by the exercise of reasonable diligence have been obtained at such proceedings and that such evidence is material to the issues and is not cumulative;

(8) in case of affirmance or partial affirmance of an administrative decision which requires the payment of money, to enter judgment for the amount justified by the record and for costs, which judgment may be enforced as other judgments for the recovery of money;

(9) *the plaintiff may, without filing a separate action for mandamus, or any other separate action, join in the complaint for administrative review, a separate count praying for reinstatement to a position of employment or for the recovery of back pay or other relief which was theretofore*

available by an action for mandamus or by any other separate action;

(10) (9) when the particular statute under authority of which the administrative decision was entered requires the plaintiff to file a satisfactory bond and provides for the dismissal of the action for the plaintiff's failure to comply with this requirement unless the court is authorized by the particular statute to enter, and does enter, an order imposing a lien upon the plaintiff's property, to take such proofs and enter such orders as may be appropriate to carry out the provisions of the particular statute. However, the court shall not approve the bond, nor enter an order for the lien, in any amount which is less than that prescribed by the particular statute under authority of which the administrative decision was entered if the statute provides what the minimum amount of the bond or lien shall be or provides how said minimum amount shall be determined. No such bond shall be approved by the court without notice to, and an opportunity to be heard thereon by, the administrative agency affected. The lien, created by the entry of a court order in lieu of a bond, shall not apply to property exempted from the lien by the particular statute under authority of which the administrative decision was entered. The lien shall not be effective against real property whose title is registered under the provisions of "An Act concerning land titles," approved May 1, 1897, as amended, until the provisions of Section 85 of that Act are complied with.

(b) Technicals errors in the proceedings before the administrative agency or its failure to observe the technical rules of evidence shall not constitute grounds for the reversal of the administrative decision unless it appears to the court that such error or failure materially affected the rights of any party and resulted in substantial injustice to him or her.

(c) On motion of either party, the circuit court shall make findings of fact or state the propositions of law upon which its judgment is based.

Section 2. This Act takes effect upon its becoming a law.

I. Article IV of the Code: Attachment

1. Part 1 of Article IV

Code section 2-602 (former section 32 of the Civil Practice Act) provides: "The first pleading by the plaintiff shall be designated a complaint." Similar provisions, requiring the commencement of an action by the filing of a complaint, also appear in the following sections of the Code:

Section 3-103: Administrative Review.

Section 4-204: Attachment of Watercraft.

Section 6-108: Ejectment.

Section 7-101: Eminent Domain.

Section 9-106: Forcible Entry and Detainer.

Section 10-103: Habeas Corpus.

Section 11-101: Injunction.

Section 14-102: Mandamus.

Section 15-108: Mortgage Foreclosure.

Section 17-101: Partition.

Section 18-103: Quo Warranto.

Section 19-104: Replevin.

Five of these Code sections require the commencement of an action by the filing of a "verified complaint":

Section 4-204: Attachment of Watercraft.

Section 10-103: Habeas Corpus.

Section 11-101: Injunction.

Section 17-101: Partition.

Section 19-104: Replevin.

Part 1 of article IV of the Code, which addresses actions for attachment, is in contrast to all of the above provisions. Hence, Part 1 presents a solitary, anomalous, and wasteful procedure by splitting the filing of a verified complaint into two legal steps:

- (1) the filing of an affidavit (section 4-104 of the Code), and
- (2) the filing of a complaint at a later period in the proceeding (section 4-130 of the Code).

This circuitous method not only duplicates paper work and court filing, but also unnecessarily wastes time and energy, and contradicts the spirit, if not the mandate, of article IV, section 13 of the Illinois Constitution.⁶⁸

The Circuit Court of Cook County has found the attachment statute to be clumsy, unworkable, and anomalous. To solve this dilemma, the Circuit Court has for several decades provided plaintiffs in attachment actions with a printed form that combines the complaint and affidavit into a single document. The plaintiff files this form as the first document in the case to commence the attachment action. In effect, the court simply disregards the specified procedure in the attachment statute. This undesirable situation requires immediate attention. The legislature must act promptly to coordinate the statute with actual practice in the field.⁶⁹

68. See *supra* note 19 and accompanying text.

69. A knowledge of the following historical background is necessary to understand how the currently anomalous attachment statute developed. Prior to January 1, 1934, filing a bill of "complaint" in the chancery commenced a suit in equity. ILL. REV. STAT. ch. 22, § 4 (1931). On the other hand, the issuance of a summons commenced the legal action. ILL. REV. STAT. ch. 110, § 1 (1931). Thereafter, the declaration had to be filed ten days before the return day of the summons. *Id.* § 32. Section 5 of the Civil Practice Act, which went into effect on January 1, 1934, provided that civil actions, both at law and in equity, "shall be commenced by the issuance of a summons," ILL. REV. STAT. ch. 110, § 133 (1935), thus unifying the legal and equitable actions. In 1955 the Civil Practice Act was materially revised, and the amended Act went into effect on January 1, 1956. 1955 Ill. Laws 2238 (codified at ILL. REV. STAT. ch. 110, §§ 1-93 (1957)). Section 13 of the revised Act intentionally changed the previous law by providing that all civil actions, both at law and in equity, "shall be commenced by the filing of a complaint." ILL. REV. STAT. ch. 110, § 13 (1957). In 1981 the Code was enacted and section 2-201 of the Code (derived from section 13 of the Civil Practice Act) provided that actions "shall be commenced by the filing of a complaint."

In the attachment statute, Code section 4-130 (patterned after section 32 of the Practice Act of 1907) provides for the filing of the complaint "10 days before the return day of the order of attachment." This provision is in complete disharmony with modern court practice in Illinois. Therefore, part 1 of article IV of the Code should be amended as follows:

1. In section 4-101, the phrase "when the claim exceeds \$20" should be eliminated. Considering the current purchasing power of \$20, the filing fees which are charged by the clerk of the circuit court, and the fees charged for service of process by the sheriff, the requirement that the plaintiff's claim in an attachment motion must exceed \$20 is totally unrealistic and borders on the ridiculous. The phrase "when the claim exceeds \$20" should therefore be deleted. Additionally, in the numbered paragraphs 6 and 7 of section 4-101 the word "affidavit" should be deleted and the phrase "verified complaint" inserted in its place since the first document to be filed in the case will be the "verified complaint" and not the "affidavit."

2. In section 4-104, provision should be made for the filing of a sworn complaint. Section 4-104 draws an arbitrary distinction between tort and non-tort actions. It is noteworthy that section 4-201 draws no similar distinction regarding the attachments of watercraft.⁷⁰ Section 4-201 covers both tort and contract actions. Therefore, the last two unnumbered paragraphs of section 4-104 should be deleted.

3. Code section 4-105 contains a form of affidavit which the plaintiff is now required to file as the first document in the attachment action. The form is replete with details which normally belong in a complaint. By contrast, it is noteworthy that Attachment of Watercraft (Code sections 4-204) and Replevin (Code section 19-104), both of which are actions for the seizure of property prior to final judgment and are commenced by a "verified complaint," require no redundant affidavit. Therefore, section 4-105 should be repealed. This will effect uniformity in the procedure for seizing property prior to trial.

4. In sections 4-107 and 4-108, reference should be made to the complaint instead of the affidavit.

5. In an ordinary civil case, the defendant must appear within thirty days after service of summons.⁷¹ In an attachment action, however, Code section 4-110 provides that an order for attachment "shall be made returnable on a return day designated by the plaintiff, which day shall not be less than 10 days or more than 60 days after its date." This provision is also anomalous; the injunction and replevin sections permit provisional relief before a trial on the merits and are governed by the usual thirty-day return

70. Article IV, part 2 of the Code deals with watercraft. See ILL. REV. STAT. ch. 110, §§ 4-201 to 4-228 (1983).

71. ILL. SUP. CT. R. 101(d) and 181(a) (codified at ILL. REV. STAT. ch. 110A, §§ 101(d), 181(a) (1983)).

date under Illinois Supreme Court Rules 101(d) and 181(a).⁷² This fact is not problematic for the following reasons:

A. Injunction: If a temporary restraining order is entered without notice to the defendant under Code section 11-101, the defendant "may appear and move its dissolution or modification."

B. Replevin: Code section 19-105 requires that "[t]he defendant shall be given 5 days written notice . . . of a hearing before the court to contest the entry of an order for replevin." However, if the court enters a replevin order without notice to the defendant, Code section 19-106 requires the court to "order a hearing as soon as practical on the entry of an order for replevin."

C. Attachment: Code section 4-137 provides that "[a]t any time after the entry of an order for attachment, upon motion of the defendant, the court shall set a hearing." This section further provides that "[t]he order for attachment shall be vacated unless the plaintiff shows by a preponderance of evidence that a cause for the entry of the order exists, and unless the plaintiff demonstrates to the court the probability that he, she or it will ultimately prevail in the action."

Considering the provision in Code section 4-137, the abnormal ten to sixty day return date, instead of the usual thirty-day return day, is obviously a useless provision which should be eliminated.

6. Section 4-113 fails to recognize that the particular land involved may be registered under "AN ACT concerning land titles" (Torrens),⁷³ in which event recordation with the Recorder of the County, and not with the Registrar of Titles, would be a useless gesture. Furthermore, the recording task should be cast upon the plaintiff in the attachment proceeding, not upon the sheriff.

7. In section 4-114, the fifth sentence should be deleted; it would not apply if the action is commenced by the filing of a sworn complaint, as recommended in section 4-104.

8. Section 4-117 is grossly deficient because it does not provide for emergency action by the court and other officials on Saturdays, holidays, or other days when the courts are closed. This section should be redrafted and patterned after section 11-106 of the Code covering injunctive relief on Saturdays, Sundays, or holidays.

9. In section 4-120, the phrase "within 90 days after such judgment" was corresponded to the ninety day appeal period that prevailed in Illinois from January 1, 1934, to December 31, 1955.⁷⁴ Since 1965, the appeal period has been and remains thirty days.⁷⁵ The "90 days" should therefore be updated with the phrase "30 days."

72. *Id.*

73. ILL. REV. STAT. ch. 30, §§ 45-148 (1983).

74. ILL. REV. STAT. ch. 110, § 200 (1935); *id.* § 200 (1953).

75. *Id.* § 76 (1965); ILL. SUP. CT. R. 303 (codified at ILL. REV. STAT. ch. 110A, § 303(a) (1983)).

10. In the first sentence of section 4-122, the words "except" and "exception" should be corrected to read "object" and "objections," respectively. This correction will coordinate the terminology which is employed in section 4-123. In the second sentence of section 4-122, the phrase "as is now provided by law for bail against their principal where a judgment is paid or satisfied by them" refers to the special statutory proceeding formerly provided in section 21 of "AN ACT concernng bail in civil cases"⁷⁶ which Act was repealed in 1963.⁷⁷ Therefore, the second sentence of section 4-122 should be corrected.

11. Section 4-130 should be repealed. Section 4-104 would then provide for the commencement of the attachment action by the filing of a sworn complaint.

12. Section 4-131 should read: "Pleadings. The defendant may plead in the action as in other civil cases." The remaining text in that section should be eliminated, because a prompt hearing at the option of the defendant regarding the propriety of the entry of an attachment order is provided adequately in section 4-137.

13. In section 4-132, the word "complaint" should be substituted for the word "affidavit" in two places.

14. Section 4-134 is grossly insufficient. This section fails to provide an opportunity to file responsive pleadings to the allegations of the intervenor, and further fails to provide for a bench trial. It directly conflicts with Code section 2-1105 and disregards the Jury Commissioners Act⁷⁸ as well.

15. In section 4-137, the word "complaint" should be substituted for the word "affidavit".

16. In section 4-140, the word "affidavit" should be deleted, and the phrase "sworn complaint" should be inserted instead.

17. Section 4-143 places an enormous burden on the clerks of court and empowers them with judicial authority, raising a serious constitutional question as to the validity of the section.⁷⁹ Furthermore, federal judgment creditors whose judgments were entered in federal courts sitting in Illinois, and whose judgments became liens by recordation as provided in sections 12-501 and 12-502 of the Code, do not share in these proceeds. Thus, section 4-143 discriminates against federal judgment creditors. This discrimination violates equal protection of the law under both the Illinois and the United States Constitutions and requires a practical solution. As the Supreme Court noted in *King v. Order of United Travelers of America*, "[a] federal court adjudicating a matter of state law in a diversity suit is

76. ILL. REV. STAT. ch. 16, § 21 (1961).

77. 1963 Ill. Laws 3240.

78. ILL. REV. STAT. ch. 78, §§ 24-35 (1983).

79. See *Hall v. Marks*, 34 Ill. 358 (1864); see also *Agran v. Checker Taxi Co.*, 412 Ill. 145, 105 N.E.2d 713 (1952) (discussed in H. FINS, GUIDE TO ILLINOIS CODE OF CIVIL PROCEDURE 525 (1981)).

in effect, only another court of that State."⁸⁰ In *Hughes v. Fetter*⁸¹ and *First National Bank of Chicago v. United Air Lines, Inc.*,⁸² the United States Supreme Court found state statutes invalid because they discriminated against causes of actions arising in sister states. Obviously, discrimination by a state against federal judgment creditors presents a situation that violates the supremacy clause of the United States Constitution.⁸³ Therefore, Section 4-143 should be repealed, leaving all judicial authority with the court, as reenforced by section 4-142.

2. Part 2 of Article IV

A three-judge United States district court held that the Illinois Attachment Act was unconstitutional in *Hernandez v. Danaher*.⁸⁴ The district court opinion discussed the Supreme Court cases condemning self-help and cited, *inter alia*, *Sniadach v. Family Financial Corp.*,⁸⁵ and *Fuentes v. Shevin*.⁸⁶ The district court then held that the Illinois Attachment Act patently violated the due process clause of the fourteenth amendment to the United States Constitution on its face.⁸⁷

Public Act 81-738, effective September 16, 1979,⁸⁸ amended the Attachment Act (now article IV part 1 of the Code.) Part 1 of article IV requires a preliminary court hearing before property may be seized, and further provides for an early hearing at the defendant's request.

These constitutional requirements are completely lacking in article IV, part 2 of the Code. This section was formerly the Attachment of Watercraft Act.⁸⁹ To remedy this constitutional deficiency, section 4-205 should be amended by incorporating the substance of sections 4a, 4b, and 4c of the former Replevin Act,⁹⁰ as amended in 1973 by Public Act 78-287,⁹¹ in order to comply with the Supreme Court's decision in *Fuentes v. Shevin*.⁹²

Section 4-206 also needs revision for coordination with the proposed section 4-206 by deleting the phrase "the filing of such complaint and bond"

80. *King v. Order of United Commercial Travelers of America*, 333 U.S. 153, 161 (1948); see also *Guaranty Trust Co. v. York*, 326 U.S. 99, 108 (1945); H. FINS, *supra* note 79, at 525.

81. 341 U.S. 609, 611 (1951).

82. 342 U.S. 396, 398 (1952).

83. U.S. CONST. art. VI, cl. 2.

84. 405 F. Supp. 757 (N.D. Ill. 1975), *aff'd*, 440 U.S. 951 (1978).

85. 395 U.S. 335 (1969).

86. 407 U.S. 67 (1972).

87. 405 F. Supp. at 757, 762.

88. Pub. Act. No. 81-738, § 1, 1979 Ill. Laws 2664 (codified at ILL. REV. STAT. ch. 110, §§ 4-101 to 4-145 (1983)).

89. ILL. REV. STAT. ch. 12, §§ 1-47 (1981).

90. ILL. REV. STAT. ch. 119, §§ 1-28 (1981).

91. Pub. Act. No. 78-287, § 1, 1973 Ill. Laws 986 (codified at ILL. REV. STAT. ch. 110, §§ 19-101 to 19-128 (1983)).

92. See *supra* note 86.

and inserting, instead, the phrase "compliance by the plaintiff with the requirements hereinabove provided."

In light of the above situation, it is obvious that this matter merits prompt attention. A bill to accomplish this objective is herewith submitted:

Proposed Bill

An Act to amend article IV of the Code of Civil Procedure, approved August 19, 1981, as amended, and to repeal sections 4-105, 4-130 and 4-143 thereof.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. Sections 4-101, 4-104, 4-107, 4-108, 4-110, 4-113, 4-114, 4-117, 4-120, 4-122, 4-131, 4-132, 4-134, 4-137, 4-140, 4-205, and 4-206 of the Code of Civil Procedure, approved August 19, 1981, as amended, are amended to read as follows:

(ch. 110, par. 4-101)

Sec. 4-101. Cause. In any court having competent jurisdiction, a creditor having a money claim, whether liquidated or unliquidated, and whether sounding in contract or tort, *is entitled to* ~~may have~~ an *order for* attachment against the property of his or her debtor, or that of any one or more of several debtors, either at the time of commencement of the action or thereafter ~~when the claim exceeds \$20~~, in any one of the following *instances* ~~cases~~:

1. Where the debtor is not a resident of this State.
2. When the debtor conceals himself or herself or stands in defiance of an officer, so that process cannot be served upon him or her.
3. Where the debtor has departed from this State with the intention of having his or her effects removed from this State.
4. Where the debtor is about to depart from this State with the intention of having his or her effects removed from this State.
5. Where the debtor is about to remove his or her property from this State to the injury of such creditor.
6. Where the debtor has within 2 years preceding the filing of the *verified complaint affidavit* required, fraudulently conveyed or assigned his or her effects, or a part thereof, so as to hinder or delay his or her creditors.
7. Where the debtor has, within 2 years prior to the filing of such *verified complaint affidavit*, fraudulently concealed or disposed of his or her property so as to hinder or delay his or her creditors.
8. Where the debtor is *fraudulently* about to ~~fraudulently~~ conceal, assign, or otherwise dispose of his or her property or effects, so as to hinder or delay his or her creditors.
9. Where the debt sued for was fraudulently contracted on the part of the debtor, ~~the~~ ~~The~~ statements of the debtor, his or her agent or attorney, which constitute the fraud, shall have been reduced to writing, and his or her signature attached thereto, by himself or herself, agent or attorney.

(ch. 110, par. 4-104)

Sec. 4-104. ~~Complaint Affidavit.~~ A plaintiff seeking the entry of an order for attachment shall file with the court *a verified complaint* ~~an affidavit based upon the personal knowledge of the affiant and showing:~~

1. the amount of the claim, so far as practicable, after allowing all just credits and set-offs;
2. facts establishing any one or more of the causes set forth in section 4-101 of this Act;
3. the place of residence of the defendant, if known, and if not known, that upon diligent inquiry the affiant has been unable to ascertain the place of residence; and
4. facts establishing the cause of action against the defendant.

~~The plaintiff shall file an additional statement in writing, either embodied in such affidavit or separately, to the effect that the action invoked by such affidavit does or does not sound in tort and a designation of the return day for the summons to be issued in the action; and the court, if it is satisfied that the affidavit has established a prima facie case, shall enter an order for attachment.~~

~~In all actions sounding in tort, before an order for attachment is entered, the plaintiff, his or her agent or attorney, shall apply to the circuit court of the county in which the action is to be brought or is pending and be examined, under oath, by the court concerning the cause of action; and, thereupon, the court shall indorse upon the affidavit the amount of damages for which the order for attachment shall be entered, and no greater amount shall be claimed.~~

~~(ch. 110, par. 4-107)~~

Sec. 4-107. Bond. Before the entry of an order for attachment, as hereinabove stated, the court shall take bond and sufficient security, payable to the People of the State of Illinois, for the use of the person or persons interested in the property attached, in double the sum sworn to be due, conditioned for satisfying all costs which may be awarded to such defendant, or to any others interested in the proceedings, and all damages and costs which shall be recovered against the plaintiff, for wrongfully obtaining the attachment order, which bond, with *the complaint affidavit* of the *plaintiff party complaining*, or his, her or its agent or attorney, shall be filed in the court *wherein entering the order for attachment is to be entered*. Every order for attachment entered without a bond ~~and affidavit~~ taken, is hereby declared illegal and void, and shall be *vacated dismissed*. Nothing herein contained shall be construed to require the State of Illinois, or any Department of Government thereof, or any State officer, to file a bond as plaintiff in any proceeding instituted under Part 1 of Article IV of this Act.

(ch. 110, par. 4-108)

Sec. 4-108. Fixing of Bond. The court, upon *ex parte* motion, without notice, supported by *complaint affidavit* of the plaintiff, his or her agent or attorney, substantially describing the property to be attached, and the value thereof, may, if satisfied of the *bona fides* of the application and sufficiency of the bond under the circumstances of the case, including proposed garnishments, fix the amount of the bond in double the value of the property

to be attached, instead of double the sum sworn to be due, and in such event the order shall direct the officer to attach such specifically described property, but the value of such property to be attached shall not be in excess of an amount sufficient to satisfy the debt claimed and costs. The court may require that such *complaint affidavit* be supplemented by additional showing, by appraisal or otherwise, as to the value of such property, and may, upon motion of any party to the action claiming an interest in such property, either before or after actual attachment, require additional security, or order release of the attachment to the extent not covered by adequate double security.

(ch. 110, par. 4-110)

Sec. 4-110. Order for attachment. The order for attachment required in the preceding section shall be directed to the sheriff ~~(and, for purpose only of service of summons, to any person authorized to serve summons)~~, or in case the sheriff is interested, or otherwise disqualified or prevented from acting, to the coroner of the county in which the action is commenced, and shall be made returnable *within 30 days from the service of the order for attachment on a return day designated by the plaintiff, which day shall not be less than 10 days or more than 60 days after its date*. Such order shall ~~direct~~ order the officer to attach so much of the estate, real or personal, of the defendant, to be found in the county, as shall be of value sufficient to satisfy the debt and costs, according to the *complaint affidavit*, but in case any specific property of the defendant, found in the county, shall be described in the order, then the officer shall attach the described property only, and no other property. Such estate or property shall be so attached in the possession of the officer to secure, or so to provide, that the same may be liable to further proceedings thereupon, according to law. The order shall also direct that the officer summon the defendant to appear and answer the complaint of the plaintiff in court at a specified time or, at defendant's option, to appear at any time prior thereto and move the court to set a hearing on the order for the attachment or *on the complaint affidavit*; and that the officer also summon any specified garnishees, to ~~be and~~ appear in court at a specified time to answer to what may be held by them for the defendant.

(ch. 110, par. 4-113)

Sec. 4-113. *Affidavit Certificate* of levy. When an order for attachment is levied upon any real estate, ~~in any case~~, it shall be the duty of the *plaintiff officer making the levy* to file ~~an affidavit a certificate~~ of such fact with the recorder of the county where such land is situated; *or with the registrar of titles if the real estate levied upon is registered under "An Act concerning land titles"*, and from ~~and after~~ the filing of the *affidavit same*, such levy shall take effect, as to creditors and *bona fide* purchasers, without notice ~~but and~~ not before.

(ch. 110, par. 4-114)

Sec. 4-114. Serving defendant. The officer shall also serve a certified copy of the order upon the defendant therein, if he or she can be found, in like manner as provided for service of summons in other civil cases. Such service upon the defendant shall be made as soon as possible after the entry of the

order for attachment upon the property described in the order, but in no event later than 5 days thereafter. Failure to make such service upon the defendant within the time provided shall in the absence of good cause shown for such delay, be grounds for vacating of the attachment order upon motion of the defendant made at any time. The return of the order shall state the particular manner in which the order was served. ~~If the certified copy of the order is served upon the defendant less than 10 days before the return day thereof, the defendant shall not be compelled to appear or plead until 15 days after the return day designated in the order.~~ The certified copy of the order for attachment may be served as a summons upon defendants wherever they may be found in the State, by any person authorized to serve process in like manner as summons in other civil cases.

(ch. 110, par. 4-117)

Sec. 4-117. *Relief Serving on Saturday, Sunday or legal holiday.* If it shall appear, by the affidavit, that a debtor is actually absconding, or concealed, ~~or stands in defiance of an officer duly authorized to arrest him or her on civil process,~~ or has departed this State with the intention of having his or her effects and personal estate removed out of the State, or intends to depart with such intention, it shall be lawful for *the court to enter an order for attachment*, the clerk to issue, and sheriff or other officer to serve a certified copy of the order for attachment against such debtor, on a *Saturday, Sunday, or legal holiday or on a day when courts are not in session, the same* as on any other day.

(ch. 110, par. 4-120)

Sec. 4-120. Bond or recognizance to pay judgment. Any defendant in attachment, desiring the return of property attached, may, at his or her option, instead of or in substitution for the bond required in the preceding section, give like bond and security, in a sum sufficient to cover the *amount due debt and damages* sworn to in behalf of the plaintiff, with all interest, damages and costs of the action, conditioned that the defendant will pay the plaintiff the amount of the judgment and costs which may be entered against him or her in that action, on a final trial, within ~~30~~ 90 days after such judgment ~~is shall be~~ entered or a recognizance, in substance hereinabove stated, may be taken by the court, and filed of record, in which ~~event~~ *ease* the court shall approve of the security and the recognizance made to the plaintiff, and upon a forfeiture of such recognizance, judgment may be entered and enforced as in other cases of recognizance. In either case, the attachment shall be dissolved, and the property taken restored, and all previous proceedings, either against the sheriff or against the garnishee, set aside, and the cause shall proceed as if the defendant had been seasonably served with a summons.

(ch. 110, par. 4-122)

Sec. 4-122. Neglect to return sufficient bond. The plaintiff may, within 30 days after the return of such bond, ~~object except~~ to the sufficiency thereof, reasonable notice of such ~~objection exception~~ having been given to the sheriff or other officer who took the same, and if, upon hearing, the court shall adjudge such security insufficient, ~~the such~~ sheriff shall be subject to the same

judgment and recovery and have the same liberty of defense as if the sheriff had been made defendant in the attachment *proceedings*, unless good and sufficient security shall be given within such time as may be directed by the court, and enforcement may be had thereupon as in other cases of judgment for the payment of money. Whenever the judgment *in favor* of the plaintiff, or any part thereof shall be paid or satisfied by any such sheriff, he or she *may recover from* ~~shall have the same remedy against~~ the defendant for the amount so paid by him or her ~~as is now provided by law for bail against their principal where a judgment is paid or satisfied by them.~~

(ch. 110, par. 4-128)

Sec. 4-128. Default. ~~Defaults may be taken as in other civil cases. No default or proceeding shall be taken against any defendant not served with summons within the State and not appearing, unless the first publication or personal service outside of the State be at least 30 days prior to the day at which such default or proceeding is proposed to be taken.~~

(ch. 110, par. 4-131)

Sec. 4-131. Pleadings. The defendant may *plead in the action as in other civil cases.* ~~answer, denying the facts stated in the affidavit upon which the order of attachment was entered which answer shall be verified by affidavit, and if, upon the trial thereon, the issue shall be found for the plaintiff, the defendant may answer the complaint or file a motion directed thereto as in other civil cases, but if found for the defendant, the order of attachment shall be set aside, and the costs of the attachment shall be adjudged against the plaintiff, but the action shall proceed to final judgment as in other civil cases.~~

(ch. 110, par. 4-132)

Sec. 4-132. Amendments. Subject to the requirements of section 4-137 of this Act, no order for attachment shall be vacated, nor the property taken thereon restored, nor any garnishee discharged, nor any bond by him or her given cancelled, nor any rule entered against the sheriff discharged, on account of any insufficiency of the original *complaint, affidavit* order for attachment or attachment bond, if the plaintiff, or some *credible* person for him, her or it shall cause a legal and sufficient *complaint affidavit* or attachment bond to be filed, or the order to be amended, in such time and manner as the court shall direct; and in that event the cause shall proceed as if such proceedings had originally been sufficient.

(ch. 110, par. 4-134)

Sec. 4-134. Intervention. In all cases of attachment, any person other than the defendant, claiming the property attached, or garnisheed may intervene, *by sworn* ~~verifying his or her~~ petition ~~by affidavit~~, without giving bond, but such property shall not thereby be *retaken replevied*, and the court shall *promptly immediately* (unless good cause shown by either party for a continuance) direct a jury to be impaneled to inquire into the right of the property. In all cases where the *court or jury* finds for the claimant, and that such claimant is also entitled to the possession of all or any part of such property, the court shall enter judgment for such claimant accordingly and order the property attached or garnished to which such claimant is entitled to be de-

livered to such claimant, and the payment of his or her costs in such action. In cases where the *court or jury finds find* for a claimant but further finds that such claimant is not then entitled to the possession of ~~any~~ such property, ~~the such~~ claimant shall be entitled to his or her costs; and where the *court or jury finds find* for the plaintiff in the attachment *proceeding, the such* plaintiff shall recover his or her costs against ~~the such~~ claimant. If ~~the such~~ claimant is a non-resident of the State he or she shall file security for costs as in *other civil* cases of non-resident plaintiffs.

(ch. 110, par. 4-137)

Sec. 4-137. Prompt hearing. At any time after the entry of an order for attachment, upon motion of the defendant, the court shall set a hearing on the order *and complaint or affidavit*. The hearing shall be held as soon as possible after the motion by the defendant, but shall not be more than 5 days after service of notice on the plaintiff.

At the hearing, either party may introduce affidavits or oral testimony. The order for attachment shall be vacated unless the plaintiff shows by a preponderance of evidence that a cause for the entry of the order exists, and unless the plaintiff demonstrates to the court the probability that he, she or it will ultimately prevail in the action.

(ch. 110, par. 4-140)

Sec. 4-140. Judgment by default. When the defendant is notified as hereinabove stated, but not served with an order for attachment within the State, and does not appear and answer the action, judgment by default may be entered, which may be proceeded upon to final judgment as in other cases of default, but in no case shall judgment be entered against the defendant for a greater sum than appears, by the *sworn complaint affidavit* of the plaintiff, to have been due at the time of obtaining the order for attachment, with interest, damages and costs; and such judgment shall bind, and enforcement had against the property, credits and effects attached, and such judgment shall not be enforced from any other property of the defendant; nor shall such judgment be any evidence of debt against the defendant in any subsequent cases.

(ch. 110, par. 4-205)

Sec. 4-205. *Procedure. (a) The defendant shall be given 5 days written notice in the manner required by rule of the Supreme Court, of a hearing before the court to contest the entry of any order for attachment. No order for attachment may be entered nor may property be seized pursuant to any order for attachment prior to such notice and hearing except as provided in subsection (b) of this Section.*

As to any property, the right to notice and hearing established in this Section may not be waived by any consumer. As used in this Section, a consumer is an individual who obtained possession of the property for personal, family, household, or agricultural purposes.

Any waiver of the right to notice and hearing established in this Section must be in writing and must be given voluntarily, intelligently, and knowingly.

(b) Notice to the defendant is not required if the plaintiff establishes and the court finds as a matter of record and supported by evidence that summary seizure of the property is justified by reason of necessity to:

(1) protect the plaintiff from an immediately impending harm which will result from the imminent destruction or concealment of the property in derogation of the plaintiff's rights in the property;

(2) protect the plaintiff from an immediately impending harm which will result from the imminent removal of the property from the state, taking into consideration the availability of judicial remedies in the event of such removal;

(3) protect the plaintiff from immediately impending harm which will result from the perishable nature of the property under the particular circumstances at the time of the action;

(4) protect the plaintiff from an immediately impending harm which will result from the imminent sale, transfer or assignment of the property to the extent such sale, transfer or assignment is fraudulent or in derogation of the plaintiff's rights in the money or other property;

(5) recover the property from a defendant who has obtained possession by theft.

(c) At the hearing on the entry of an order for attachment which may be a hearing to contest pursuant to notice under subsection (a) of this Section or an ex parte hearing pursuant to a finding under subsection (b) of this Section the court shall review the basis of the plaintiff's claim. If the plaintiff establishes a prima facie case to the lien on property, and if the plaintiff also demonstrates to the court the probability that he or she will ultimately prevail on the underlying claim, the court shall so find as a matter of record and an order for attachment shall be entered by the court.

(d) The plaintiff, or his or her agent or attorney, shall file a bond, payable to the owner of the craft to be attached, or, if unknown, to the unknown owners thereof, in at least double the amount of the claim, with security to be approved by the court, conditioned that the plaintiff shall prosecute his or her action with effect, or, in case of failure therein, will pay all costs and damages which the owner or other person interested in such water craft may sustain, in consequence of the wrongful suing out of such order for attachment, in the same manner as if it had been given to such person by his or her proper name. Only such persons shall be required to join in such action as have a joint interest. Others may allege breaches and have assessment of damages, as in other actions on penal bonds.

~~Bond. The plaintiff, or his or her agent or attorney, shall also file with such complaint a bond, payable to the owner of the craft to be attached, or, if unknown, to the unknown owners thereof, in at least double the amount of the claim, with security to be approved by the clerk, conditioned that the plaintiff shall prosecute his or her action with effect, or, in case of failure therein, will pay all costs and damages which the owner or other person interested in such water craft may sustain, in consequence of the wrongful suing out of such attachment, which bond may be sued by any owner or person interested, in the same manner as if it had been given to such person by his~~

~~or her proper name. Only such persons shall be required to join in such suit as have a joint interest. Others may allege breaches and have assessment of damages, as in other actions on penal bonds.~~

(ch. 110, par. 4-206)

Sec. 4-206. Designation of defendants. Upon *compliance by the plaintiff with the requirements hereinabove provided*, ~~the filing of such complaint and bond~~, the court ~~clerk~~ shall enter an order for attachment against the owners of such water craft, directed to the sheriff of the county, or other officer if the sheriff is disqualified or unavailable to attach such water craft. Such owners may be designated by their reputed names, surnames, and joint defendants by their separate or partnership names, or by such names, styles or titles as they are usually known. If the name of any owner is unknown, he or she may be designated as unknown owner.

Section 2. Sections 4-105, 4-130, and 4-143 of the Code of Civil Procedure, approved August 19, 1981, as amended, are repealed.

Section 3. This Act takes effect upon its becoming a law.

Pub. Act 84-631, effective January 1, 1986, removed the word "clerk" and inserted the word "court" in its place in section 4-205 and 4-206.

J. Section 5-114: Costs in *Scire Facias* and Prohibition

Section 5-114 of the Code addresses costs in *scire facias* and prohibition.

1. *Scire Facias*.

A proceeding by *scire facias* no longer exists in Illinois. In the past there were four statutes that employed *scire facias*:

- 1) Revival of judgment;⁹³
- 2) Escheat;⁹⁴
- 3) Workers' Compensation Act; and⁹⁵
- 4) Workers' Occupational Diseases Act.⁹⁶

None of the above now employ *scire facias*.

2. Prohibition.

Section 13 of article IV of the Illinois Constitution of 1970 provides:

The General Assembly shall pass no special or local law when a general law is or can be made applicable. Whether a general law is or can be made applicable shall be a matter of judicial determinations.⁹⁷

In *Bridgewater v. Hotz*,⁹⁸ the Illinois Supreme Court stated:

93. ILL. REV. STAT. ch. 110, § 2-1601 (1983).

94. ILL. REV. STAT. ch. 49, § 3 (1983).

95. ILL. REV. STAT. ch. 48, § 138.19 (1983).

96. *Id.* § 172.54.

97. *See supra* note 19.

98. 51 Ill. 2d 103, 281 N.E.2d 317 (1972).

The principal change effected by section 13 is that it specifically rejects the role enunciated in a long line of decisions of this court that whether a general law can be made applicable is for the legislature to determine *Somers v. Patton* (1948), 399 Ill. 540; *Trustees v. The Commissioners of Lincoln Park* (1918), 282 Ill. 348) and specifically provides that 'it shall be a matter for judicial determination.'⁹⁹

Because the section applies only to prohibition, it constitutes special legislation that violates the Illinois Constitution.

A bill to make section 5-114 applicable to all cases is herewith submitted:

Proposed Bill

An Act to amend Section 5-114 of the Code Civil Procedure, approved August 19, 1981, as amended.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. Section 5-114 of the Code of Civil Procedure, approved August 19, 1981, as amended, is amended to read as follows:

(ch. 110, par. 5-114)

Sec. 5-114. *Applicable to all cases. Seire facias and prohibition.* In all actions of ~~seire facias, or prohibition,~~ the plaintiff recovering judgment after an answer was filed, or a motion directed to the complaint, shall recover his or her costs of the action. If the action is voluntarily dismissed by the plaintiff or is dismissed for want of prosecution or judgment is entered against the plaintiff, the defendant shall recover his or her costs.

Section 2. This Act takes effect upon its becoming a law.

K. Section 5-123: Forfeiture of Clerk's Fees

The provision for forfeiture of clerk's fees in the event of erroneous taxation by the clerk is a vestige of Illinois law when court clerks were fee officers and retained for themselves whatever fees they collected. Consequently, when clerks were guilty of an overcharge, they were ordered to return that amount. Article VI, section 14 of the Illinois Constitution, however, currently provides that "[t]here shall be no fee officers in the judicial system."¹⁰⁰ Article VI, section 18(c) of the Illinois Constitution also provides that "[t]he salaries of clerks and other non-judicial officers shall be as provided by law."¹⁰¹ All fees collected by circuit court clerks are turned over to the respective county treasurers. All fees collected by the appellate and supreme court clerks are turned over to the State Treasurer. Consequently, the above-quoted provision, which is directed against the personal finances of individual clerks, should be deleted from this section.

99. *Id.* at 110, 281 N.E.2d at 321.

100. ILL. CONST. art. VI, § 14.

101. *Id.* § 18(c).

A bill to eliminate the provision on forfeiture of clerk fees is herewith submitted:

Proposed Bill.

An Act to amend section 5-123 of the Code of Civil Procedure, approved August 19, 1981, as amended.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. Section 5-123 of the Code of Civil Procedure, amended, is amended to read as follows:

(ch. 110, par. 5-123)

Sec. 5-123. Retaxing costs. Any person who is dissatisfied by the taxation of any bill of costs by the clerk may apply to the court in which the action or proceeding was had, to retax the same, according to law. If the court finds any charge allowed for services not performed, or for which the person charged is not liable, or any item charged higher than is allowed by law, then the court shall correct such taxation; and if the dissatisfied party has paid such unlawful charge, the clerk ~~shall forfeit all fees allowed to the clerk for taxation, and shall pay to the dissatisfied party, out of fees in the possession of the clerk, the whole amount which such party has paid by reason of the allowing of such unlawful charge.~~

The above Act became law by Pub. Act No. 84-552, effective Sept. 18, 1985.

*L. Code Sections 6-143 through 6-148 are
Obsolete and Unconstitutional*

At common law, a person who filed an ejectment action and was successful in obtaining a judgment of eviction was entitled to file a second action against the same defendant to recover mesne profits. "Mesne profits" is the "value of use or occupation of land during the time it was held by one in wrongful possession and is commonly measured in terms of rents and profits."¹⁰²

In 1818, the State of Illinois enacted a statute designed to avoid the necessity of filing two separate actions to obtain full relief against a defendant who wrongfully withheld realty from the plaintiff. The legislation permitted a successful plaintiff to forego filing an action to recover mesne profits, and allowed the plaintiff to file a "Suggestion of Damages" in the ejectment action.¹⁰³ In *Ringhouse v. Keener*,¹⁰⁴ and *Nichols v. Bradley*,¹⁰⁵ both the Illinois

102. BLACK'S LAW DICTIONARY 893 (5th ed. 1979).

103. AN ACT as to proceedings in ejectment, distress for rent, and tenants at will holding over. 1819 Ill. Laws 53-59.

104. 63 Ill. 230 (1872).

105. 223 Ill. App. 377 (3d Dist. 1921).

Supreme Court and the respective appellate courts held that the Suggestion of Damages under the Ejectment Act¹⁰⁶ was a new action in assumpsit and not a continuation of the ejectment action.¹⁰⁷

The Ejectment Act was incorporated into the Code and now appears as Article VI. In order to effect uniformity in terminology throughout the Code, however, the "Suggestion" was renamed "Petition." Thus, this aspect of the law remained unchanged.

Code section 6-133 is entitled "Petition for Damages." Section 6-134 is entitled "Petition Stands as Complaint." Section 6-135 is entitled "Service of copy of petition." Section 6-136 is entitled "Pleadings" and provides that "[t]he pleadings following the filing of the petition and the proceedings thereon shall be the same as in ordinary civil actions" Section 6-137 is entitled "Issue of Fact on Petition" and provides as follows:

If any issue of fact is presented on such petition, it shall be tried as in other civil cases; and if such issue is found for the plaintiff, [or] if demand for trial by jury has been made in accordance with law, a jury may assess damages in the amount of the mesne profits received by the defendant since he or she entered into possession of the premises, subject to the restrictions contained in Article VI of this Act.

After the filing of the petition (formally called "suggestion"), Code sections 6-143 through 6-148 (derived from Ill. Rev. Stat., ch. 45 section 56 through 61 (1979)) allow the court to appoint a commission of seven persons. Section 6-146 provides that the commission has the "power and authority to call witnesses, and administer the necessary oaths, and to examine them for the ascertainment of any fact material to the inquiry and assessment" The Illinois legislature must now determine whether the commission should be continued in view of the following developments.

1. The Illinois Constitution Prohibits Fee Officers

Article VI, section 14 of the Illinois Constitution contains the following prohibition: "There shall be no fee officers in the judicial system." Section 6-147 of the Code, however, provides: "The commissioners, in making every estimate of value, by virtue of Article VI of this Act, shall state, separately, the result of each; and the court has power to make such allowance to the commissioners as is just—which allowance shall be taxed and collected as costs." It is questionable whether this fee system is constitutionally valid. Obviously, the commissioners will not render any services without compensation.

2. The Ejectment Act Infinges on the Right to Jury Trial and the Separation of Powers

The statutory provision for the commission system has existed since Illinois' inception in 1818. In the Illinois Acts of 1819, this provision appeared

106. ILL. REV. STAT. ch. 45 (Cahill 1921).

107. 63 Ill. at 234; 223 Ill. App. at 379.

under the title "An Act concerning occupying claimants of Lands."¹⁰⁸ Provisions for commissions appeared under the same title in the Illinois Acts of 1829¹⁰⁹ and in the Revised Laws of Illinois of 1833.¹¹⁰ The provision was incorporated as sections 55 through 61 of the Ejectment Act¹¹¹ in the Illinois Revised Statutes of 1845, and continued in that form in the Illinois Revised Statutes in 1874.¹¹² Thereafter, the commission system continued as part of the Ejectment Act until 1982, when the Ejectment Act was converted into Article VI of the Code.¹¹³

In *Ross v. Irving*,¹¹⁴ the Illinois Supreme Court held that the Ejectment Act was constitutional. However, in *Wright v. Central DuPage Hospital Association*,¹¹⁵ the Illinois Supreme Court held that a similar quasi-judicial body was unconstitutional. The court determined that the Ejectment Act infringed upon the constitutional right to trial by jury, and violated the constitutional mandate of separation of powers because it vested judicial authority in non-judicial personnel.¹¹⁶

3. *The Judicial Article of 1962 Effectively Abolished the Commission*

Although the commission for determining "mesne profits" has existed since Illinois became a state, the commission has been involved in only a few reported cases.

In 1852, the Illinois Supreme Court found the Ejectment Act and the commission to be constitutional in *Ross v. Irving*.¹¹⁷ In this connection, it is interesting to observe the United States Supreme Court's decision in *Bank of Hamilton v. Dudley's Lessee*,¹¹⁸ which arose in an Ohio federal court. *Dudley's Lessee* involved an occupation law. Chief Justice Marshall delivered the opinion for the Court, and held that the provision for assessing the value of improvements by commissioners was repugnant to the seventh amendment of the United States Constitution.¹¹⁹

108. AN ACT concerning occupying claimants of Land. 1819 Ill. Laws 40-43.

109. AN ACT concerning occupying claimants of Land. 1829 Ill. Laws 98-102.

110. REVISED LAWS OF ILLINOIS 416-19 (1833).

111. ILL. REV. STAT. ch. 36, §§ 55-61 (1845).

112. ILL. REV. STAT. ch. 45, §§ 58-60 (1874).

113. Pub. Act No. 82-280, article VI, 1981 Ill. Laws 1382, 1458-1467 (codified at ILL. REV. STAT. ch. 110, §§ 6-101 to 6-150 (1983)).

114. 14 Ill. 171 (1852).

115. 63 Ill. 2d 313, 347 N.E.2d 736 (1976).

116. *Id.* at 321, 347 N.E.2d at 741.

117. *See supra* note 114 and accompanying text.

118. 27 U.S. (2 Pet.) 492 (1829).

119. U.S. CONST. amend. VII provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States than according to the rules of the common law."

In 1860, in *Montag v. Lynn*,¹²⁰ a litigant moved to appoint commissioners to assess the value of certain improvements. The trial court refused to appoint the commissioners. On appeal, the Illinois Supreme Court stated:

We think that the defendant in ejectment was in time to make the application for the appointment of commissioners at the time he made his motion. This is the part of the section of the law presenting the question: "The court who shall pronounce and give judgment of eviction, either in law or equity, shall at the time nominate seven fit persons, any five of whom shall have power, and it shall be their duty to go on the premises, and after viewing the same, on oath or affirmation, to assess the value of all such lasting and valuable improvements, which shall have been made thereon prior to the receipt of such notice as aforesaid," etc. The question is, whether the time here specified for the appointment of commissioners is directory or imperative. We think from the nature of the case it was only designed to be directory, at least where the judgment is appealed to this court, as was the case here. The appeal suspended the operation of the judgment until the case should be decided by this court.¹²¹

In 1862, in *Montag v. Linn*,¹²² the litigant again moved to appoint commissioners, and the trial court denied the motion. The Illinois Supreme Court reversed and ordered the appointment of commissioners.

In the 1887 decision of *Haslett v. Crain*,¹²³ certain commissioners were appointed and filed their report with the court. The plaintiffs moved to quash the report on several grounds.¹²⁴ The court denied the motion and the plaintiffs appealed. The Illinois Supreme Court said:

It is claimed that the report of the commissioners, as respects the finding upon the evidence, is final, as the statute has not pointed out any mode of taking objection thereto. The proceeding is a judicial one, an incident to a legal suit within the ordinary jurisdiction of the court, the commissioners being appointed by the court at the time of giving judgment of eviction, and being required to lodge their report with the clerk of the court, and the judgment of the court is afterward to be entered thereon. We are of opinion that it is to be held subject to the supervision of the court, and liable to be expected to in the mode done here.

We think the court below erred in refusing the motion to quash the report, and the judgment is reversed and the cause remanded.¹²⁵

Apparently the commissioners occupied a position almost identical with that of a master in chancery. In the Judicial Article of 1962, which took effect on January 1, 1964, section 8 provided: "There shall be no masters in chan-

120. 25 Ill. 154 (1861).

121. *Id.* at 155.

122. 27 Ill. 328 (1862).

123. 85 Ill. 129 (1877).

124. *Id.* at 130.

125. *Id.* at 132-33.

cery or other fee officers in the judicial system."¹²⁶ In 1965, the Illinois legislature repealed the statutes dealing with masters in chancery and referees.¹²⁷ Masters in chancery were extinct in Illinois by the time the Illinois Constitution of 1970 was drafted, and Article VI, section 14 of the Illinois Constitution stated this prohibition in the following form: "There shall be no fee officers in the judicial system."¹²⁸

Also, in 1939, a quarter of a century before the Judicial Article of 1962 took effect, a litigant in *Maynard v. Stevens*,¹²⁹ moved during the trial to appoint commissioners. The trial court struck the motion and the Illinois Supreme Court affirmed.

There have not been any reported cases in Illinois involving commissioners under the Ejectment Act since January 1, 1964, the date when the Judicial Article of 1962 took effect. Therefore, the commission system for determining "mesne profits" is long dead and is merely waiting for a respectable burial by repeal in the Illinois legislature.

A bill to accomplish this objective is herewith submitted:

Proposed Bill

An Act to repeal sections 6-143, 6-144, 6-145, 6-146, 6-147 and 6-148 of the Code of Civil Procedure, approved August 19, 1981, as amended.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

(ch. 110, rep. pars. 6-143 through 6-148)

Section 1. Sections 6-143, 6-144, 6-145, 6-146, 6-147 and 6-148 of the Code of Civil Procedure, approved August 19, 1981, as amended, are repealed.

Section 2. This Act takes effect upon its becoming a law.

The above sections were repealed by Pub. Act No. 84-623, effective Sept. 20, 1985. No new legislation will be needed to fill the gap of the above repealed six sections, because Code section 6-137 provides that when an issue of fact is involved in a proceeding under a petition to recover "mesne profits," the case shall be tried by the court or by a jury "as in other civil cases." Code section 6-137 reads as follows:

Issue of fact on petition. If any issue of fact is presented on such petition, it shall be tried as in other civil cases; and if such issue is found for the plaintiff, or if demand for trial by jury has been made in accordance with law, a jury may assess damages in the amount of the mesne profits received by the defendant since he or she entered into possession of the premises, subject to the restrictions contained in Article VI of this Act.

In *Guide to Illinois Code of Civil Procedure*, the author commented that:

126. Judicial Article of 1962, ILL. CONST. art. VI, § 8.

127. 1965 Ill. Laws 3594-95.

128. ILL. CONST. art. IV, § 14.

129. 370 Ill. 594, 19 N.E.2d 575 (1939).

This section is derived from Ill. Rev. Stat. 1979, Ch. 45, Par. 48, without change in the substance of the text. The term "suggestion" was substituted by "petition" in order to specify the precise pleading which is to be filed. This coordinates the practice under this section with the practice under Section 12 of the Injunction Act (Ill. Rev. Stat. 1979, Ch. 69, Par. 12) as amended in 1979 (Public Act 81-232).¹³⁰

No reported Illinois case has cited the above section 6-137 or its predecessor.

M. Section 7-102: Procedure in Condemnation

It has been the practice in Illinois for a condemnee, who contests an eminent domain proceeding on the ground that the condemnation is not for a necessary public use or is otherwise unauthorized by law, to file two documents: a motion to dismiss, and a traverse. Thus in *City of Carbondale v. Yehling*,¹³¹ the Illinois Supreme Court said:

On March 18, 1982, the city of Carbondale filed several petitions for condemnation in the circuit court of Jackson County. Defendants Mary Lou Atwood and Atwood Drugs, Inc., filed a motion to dismiss and traverse asserting that the city of Carbondale lacked legislative authority to acquire the premises sought to be taken under sections 11-74.3-4 and 11-74.4-3 of the Illinois Muniipal Code (Ill. Rev. Stat. 1979, ch. 24 pars. 11-74.3-4, 11-74.4-3), and alleged that ordinances 81-105 and 82-06 were void since they constituted an improper use of home rule authority, were not authorized by State law, and were unconstitutional under both the United States and Illinois constitutions.

The judgment of the circuit court of Jackson County granting the defendants' motion to dismiss is affirmed.¹³²

Black's Law Dictionary¹³³ says:

In common law pleading, a traverse signifies a denial. Thus, where a defendant denies any material allegation of fact in the plaintiff's declaration, he is said to traverse it and the plea itself is thence frequently termed a "traverse."¹³⁴

In *Eminent Domain in Illinois*,¹³⁵ Righeimer states:

Questions as to the necessity of the taking, whether the taking is for public use, whether a bona fide attempt to agree has been made, and any and all other questions affecting the right of the petitioner to maintain the particular proceeding should be raised by traverse or motion to dismiss. A traverse denies the allegations of the petition to condemn and places upon the petitioner the burden of sustaining them. The motion to dismiss generally points out certain specific objections that the property owner has to the proceeding. Either is a proper method of raising the question of the right of the condemnor to proceed.¹³⁶

130. H. FINS, *supra* note 79, at 223.

131. 96 Ill. 2d 495, 451 N.E.2d 837 (1983).

132. *Id.* at 496, 451 N.E.2d at 838 (emphasis added).

133. BLACK'S LAW DICTIONARY, *supra* note 102.

134. *Id.* at 1345.

135. F. RIGHEIMER, *EMINENT DOMAIN IN ILLINOIS* (2d ed. 1972).

136. *Id.* at 34.

It is, therefore, proposed that Section 7-102 be amended to read as shown in the following proposed bill.

The issue presented by a condemnee's motion to dismiss resembles a defendant's motion to dismiss under Code section 2-615 (former section 45 of the Civil Practice Act) or under Code section 2-619 (former section 48 of the Civil Practice Act). The traverse is an obvious vestige of common law pleading, which has been abolished in Illinois. There is no valid reason why two documents are required when only one document amply accomplishes the same objective.

Proposed Bill

An Act to amend section 7-102 of the Code of Civil Procedure, approved August 19, 1981, as amended.

Be it enacted by the People of the State of Illinois represented in the General Assembly:

Section 1. Section 7-102 of the Code of Civil Procedure, approved August 19, 1981, as amended, is amended to read as follows:

(ch. 110, par. 7-102)

Sec. 7-102. Parties. Where the right to take private property for public use, without the owner's consent or the right to construct or maintain any public road, railroad, plankroad, turnpike road, canal or other public work or improvement, or which may damage property not actually taken has been heretofore or shall hereafter be conferred by general law or special charter upon any corporate or municipal authority, public body, officer or agent, person, commissioner or corporation and the compensation to be paid for or in respect of the property sought to be appropriated or damaged for the purposes mentioned cannot be agreed upon by the parties interested, or in case the owner of the property is incapable of consenting, or the owner's name or residence is unknown, or the owner is a nonresident of the state, the party authorized to take or damage the property so required, or to construct, operate and maintain any public road, railroad, plankroad, turnpike road, canal or other public work or improvement, may apply to the circuit court of the county where the property or any part thereof is situated, by filing with the clerk a complaint, setting forth, by reference, his, her or their authority in the premises, the purpose for which the property is sought to be taken or damaged, a description of the property, the names of all persons interested therein as owners or otherwise as appearing of record, if known, or if not known stating that fact and praying such court to cause the compensation to be paid to the owner to be assessed. If it appears that any person not in being, upon coming into being, is, or may become or may claim to be, entitled to any interest in the property sought to be appropriated or damaged the court shall appoint some competent and disinterested person as guardian ad litem, to appear for and represent such interest in the proceeding and to defend the proceeding on behalf of the person not in being, and any judgment entered in the proceeding shall be as effectual for all purposes as though the person was in being and was a party to the proceeding. If the proceeding seeks to

affect the property of persons under guardianship, the guardians shall be made parties defendant. Persons interested, whose names are unknown, may be made parties defendant by the same descriptions and in the same manner as provided in other civil cases. Where the property is sought to be taken or damaged by the state for the purposes of establishing, operating or maintaining any state house or state charitable or other institutions or improvements, the complaint shall be signed by the governor or such other person as he or she shall direct, or as is provided by law. No property belonging to a railroad or other public utility subject to the jurisdiction of the Illinois Commerce Commission may be taken or damaged, pursuant to the provisions of Article VII of this Act, without the prior approval of the Illinois Commerce Commission.

A condemnee who desires to contest the proceeding on the ground that the condemnation is not for a necessary public use or is otherwise unauthorized by law, shall raise the issue by a motion to dismiss the action. No traverse is required, and the court shall adjudicate all issues of law or fact raised by such motion.

Section 2. This Act takes effect upon its becoming a law.

N. Section 8-402: Production of Books and Writings

Section 8-402 of the Code is derived from Ill. Rev. Stat. ch. 51, par. 9, without change in text, although a previously omitted section heading was supplied.

Section 9 of the Evidence Act of 1872¹³⁷ required the litigant to produce books and writings upon notice, motion showing good and sufficient cause, and a court order. This procedural subject is covered by Illinois Supreme Court Rules 204, 214 and 237,¹³⁸ which require neither motion nor court order for the production of books and writings. Consequently, a procedural conflict exists between section 9 of the Evidence Act and the Supreme Court Rules. When such a conflict exists, the rule predominates and the statute is invalid.¹³⁹ Therefore, section 8-402 requires amendment.

First, the phrase "upon motion and good and sufficient cause shown, and reasonable notice thereof given," should be deleted. Second, the word "either" should be changed to "any." Third, the phrase "or power" should correctly read "or control." Fourth, the word "the" should be changed to "any." Lastly, the phrase "as provided by Supreme Court Rules" should be added at the end of the section.

These suggested amendments to section 8-402 are supported by legislative precedent. The Illinois Supreme Court's decision in *People v. Jackson*¹⁴⁰ held invalid section 115-4(f) of the Code of Criminal Procedure of 1963 because

137. Section 9 of the Evidence Act of 1872 is codified at ILL. REV. STAT. ch. 51, § 9 (1979).

138. ILL. SUP. CT. R. 204, 214, 237 (codified at ILL. REV. STAT. ch. 110A, §§ 204, 214, 237 (1983)).

139. *People v. Jackson*, 69 Ill. 2d 252, 371 N.E.2d 602 (1977). See also *People v. Cox*, 82 Ill. 2d 268, 412 N.E.2d 541 (1980).

140. 69 Ill. 2d 252, 371 N.E.2d 602 (1977).

the statutory provision was in conflict with a Supreme Court rule.¹⁴¹ The legislature thereafter amended subsection (f) as follows: "After examination by the court the jurors may be examined, passed upon, accepted and tendered by opposing counsel *as provided by Supreme Court Rules.*"¹⁴²

A bill to coordinate section 8-402 with the Illinois Supreme Court Rules on the production of books and writings is herewith submitted:

Proposed Bill

An Act to amend section 8-402 of the Code of Civil Procedure, approved August 19, 1981, as amended, is amended as follows:

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. Sec. 8-402 of the Code of Civil Procedure, approved August 19, 1981, as amended, is amended as follows:

(ch. 110, par. 8-402)

Sec. 8-402. Production of books and writings. The circuit courts shall have power, in any action pending before them ~~upon motion, and good and sufficient cause shown, and reasonable notice thereof given,~~ to require the parties, or *any* either of them, to produce books or writings in their possession ~~or control of power~~ which contain evidence pertinent to ~~any~~ the issue *as provided by the Supreme Court Rules.*

Section 2. This Act takes effect upon its becoming a law.

O. Section 9-108: Premises Used for Residential Purposes

In *Twin-City Inn, Inc. v. Hahn E. Enterprises*,¹⁴³ the Illinois Supreme Court held section 9-108 of the Code to be applicable to commercial as well as residential real estate. Consequently, the reference to "premises used for residence purposes" is misleading and should be eliminated. Additionally, if the statutory provision involved was limited to residential real estate and excluded commercial real estate, the provision would constitute special legislation in violation of article IV, section 13 of the Illinois Constitution.

In order to make section 9-108 applicable to any case brought under Article IX, the following bill is herewith submitted:

Proposed Bill

An Act to amend section 9-108 of the Code of Civil Procedure, approved August 19, 1981, as amended.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. Section 9-108 of the Code of Civil Procedure, approved August 19, 1981, as amended, is amended to read as follows:

141. *Id.* at 671, 371 N.E.2d at 606 (citing ILL. REV. STAT. ch. 38, § 115-4(f) (1963)).

142. Pub. Act No. 81-263, § 1, 1979 Ill. Laws § 1369 (codified at ILL. REV. STAT. ch. 38, § 115-4(f) (1983)).

143. 37 Ill. 2d 133, 225 N.E.2d 630 (1967); *see also* Pernell v. Southall Realty, 416 U.S. 363 (1974).

(ch. 110, par. 9-108)

Sec. 9-108. Jury trial. In any case *brought under Article IX of this Act, a relating to premises used for residence purposes*, either party may demand trial by jury, notwithstanding any waiver of jury trial contained in any lease or contract.

Section 2. This Act takes effect upon its becoming a law.

P. Sections 10-106 and 10-125: Liability of Judges

The second sentence of Section 10-106 of the Code reads as follows:

Any judge empowered to grant relief by habeas corpus who shall corruptly refuse to grant the relief when legally applied for in a case where it may lawfully be granted, or who shall for the purpose of oppression unreasonably delay the granting of such relief shall, for every offense, forfeit to the prisoner or party affected a sum not exceeding \$1,000.

The United States Supreme Court has repeatedly and consistently held that a state court judge may not be held liable in damages for the duties performed while acting in the capacity as a judicial officer, even if the judge acted maliciously.¹⁴⁴ In view of these decisions, the above quoted sentence should be removed.

If an Illinois judge wilfully fails or refuses to perform his or her duty, the most effective remedial means is to present the matter to the Courts Commission. The Commission has the authority, by virtue of article VI, section 15(e) of the Illinois Constitution, "to remove from office, suspend without pay, censure or reprimand a judge or associate judge for wilful misconduct in office, persistent failure to perform his duties, or other conduct that is prejudicial to the administration of justice or that brings the judicial office into disrepute."¹⁴⁵

Similarly, the last sentence of Code section 10-125 states as follows: "If any judge shall neglect or refuse to bind any such prisoner or witness by recognizance, or to return a recognizance when taken as hereinabove stated, he or she shall be guilty of a Class A misdemeanor in office, and be proceeded against accordingly." This sentence should also be deleted for the above stated reasons.

To eliminate the unlawful sanctions imposed against judges by section 10-106 and 10-125 of the Code, the following bill is herewith submitted:

Proposed Bill

An Act to amend sections 10-106 and 10-125 of the Code of Civil Procedure, approved August 18, 1981, as amended.

144. *Dennis v. Sparks*, 449 U.S. 24 (1980); *Supreme Court of Virginia v. Consumers Union of U.S.*, 446 U.S. 719 (1980); *Stump v. Sparkman*, 435 U.S. 349 (1978); *Pierson v. Ray*, 386 U.S. 547 (1967); *Bradley v. Fisher*, 80 U.S. (1 Wall.) 335 (1872).

145. ILL. CONST. art. VI, § 15(e).

Be it enacted by the People of the State of Illinois represented in the General Assembly:

Section 1. Sections 10-106 and 10-125 of the Code of Civil Procedure, approved August 18, 1981, as amended, are amended to read as follows:

(ch. 110, par. 10-106)

Sec. 10-106. Grant of relief ~~Penalty~~. Unless it shall appear from the complaint itself, or from the documents thereto annexed, that the party can neither be discharged, admitted to bail nor otherwise relieved, the court or judge shall forthwith award relief by habeas corpus. ~~Any judge empowered to grant relief by habeas corpus who shall corruptly refuse to grant the relief when legally applied for in a case where it may lawfully be granted, or who shall for the purpose of oppression unreasonably delay the granting of such relief shall, for every such offense, forfeit to the prisoner or party affected a sum not exceeding \$1,000.~~

(ch. 110, par. 10-125)

Sec. 10-125. New commitment. In all cases where the imprisonment is for a criminal, or supposed criminal matter, if it appears to the court that there is sufficient legal cause for the commitment of the prisoner, although such commitment may have been informally made, or without due authority, or the process may have been executed by a person not duly authorized, the court shall make a new commitment in proper form, and direct it to the proper officer, or admit the party to bail if the case is bailable. The court shall also, when necessary, take the recognizance of all material witnesses against the prisoner, as in other cases. The recognizances shall be in the form provided by law, and returned as other recognizances. ~~If any judge shall neglect or refuse to bind any such prisoner or witness by recognizance, or to return a recognizance when taken as hereinabove stated, he or she shall be guilty of a Class A misdemeanor in office, and be proceeded against accordingly.~~

Section 2. This Act takes effect upon its becoming a law.

Q. Section 11-101: Signed Orders

1. Use of "Entry" is Ambiguous

Judgments at law could be rendered orally prior to the constitutional merger of law and equity in Illinois on January 1, 1964. Decrees in equity, however, had to be in writing and signed by the chancellor¹⁴⁶ because the application for a temporary restraining order¹⁴⁷ was a chancery proceeding. The use of signed documents for temporary restraining orders remains the prevailing practice to date in Illinois. Careful attention must be focused on the precise time when a written order signed by the court becomes effective.

146. *Freeport Motor Casualty Co. v. Tharp*, 406 Ill. 295, 94 N.E.2d 139 (1950).

147. Prior to 1967, a temporary injunction included what is now a temporary restraining order and a preliminary injunction.

Illinois Supreme Court Rule 272 provides: "If at the time of announcing final judgment the judge requires the submission of a form of written judgment to be signed by him, the clerk shall make a notation to that effect and the judgment becomes final only when the signed judgment is filed."¹⁴⁸

It should be apparent that as to final judgments, "entry of record" means "filing of the judge's signed document by the clerk of court." There is no valid reason why a signed interlocutory order should require greater formality than a final judgment which must also be signed by the judge.

Unfortunately, the term "entered of record" is ambiguous. *Corpus Juris Secundum* comments that in this context "enter" means to place anything before a court, or upon or among the records, in a formal and regular manner, and usually in writing, as to "enter an appearance," to "enter a judgment," and so to make a record of, and not merely to announce.¹⁴⁹ In this sense, the word is nearly equivalent to setting down formally in writing, in either a full or abridged form. It may, however, be used as meaning simply to file or duly deposit or render.¹⁵⁰

It is necessary to avoid any ambiguity as to when the ten day period expires in the event the court grants an emergency restraining order in the clerk's absence. Thus, the word "entry" should be substituted with the phrase "the signing of the order."

Accordingly, the second sentence of section 11-101 should be amended as follows:

Every temporary restraining order granted without notice shall be *signed by the court and* endorsed with the date and hour of *signing issuance*; shall be filed forthwith in the clerk's office ~~and entered of record~~; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after *the signing of the order entry*, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period.

2. *Reasons for Extensions should be in Orders*

The third sentence of Code section 11-101 provides that if an extension of the injunctive period is granted, the reasons for the extension shall be "entered of record." The court must determine whether the grounds for extending the injunction are sufficient, whereas the "entering of record" is the clerk's function.¹⁵¹ Obviously the sentence that states "[t]he reasons for the extension shall be entered of record" constitutes a misjoinder of functions

148. ILL. SUP. CT. R. 272 (codified at ILL. REV. STAT. ch. 110A § 272 (1983)).

149. 30 C.J.S. *Enter*, at 713 (1965). The above text is quoted with approval in *Neiman v. City of Chicago*, 37 Ill. App. 2d 309, 323 185 N.E.2d 358, 365 (1st Dist. 1962).

150. *Id.*

151. ILL. REV. STAT. ch. 25, § 14 (1983).

which are performed by two separate persons. Therefore, this sentence should require that "The reasons for the granting of the extension shall be stated in the written order of the court."

3. *Removal of Colloquialisms*

In the fourth sentence of Code section 11-101 the phrase "the motion for a preliminary injunction shall be set down for hearing at the earliest possible time" appears. The word "down" in this setting is colloquial and should be deleted.

4. *Use of "Issuance" is Ambiguous*

Code section 2-1501 provides for the availability of "a temporary restraining order" by a copy "certified by the clerk of the court." Thus, the court enters the temporary restraining order, and the clerk certifies the order and issues it to the person by whom it is requested. Therefore, the word "issuance," which appears in the last paragraph of Code section 11-101, should be substituted with the word "entry."

The word "issuance" in section 11-101 is inconsistent with the injunctive provision of section 11-103, which provides that the court "may before *entering a restraining order* . . . require the applicant to give bond . . ." ¹⁵²

A bill to clarify and correct section 11-101 of the Code is herewith submitted:

Proposed Bill

An Act to amend section 11-101 of the Code of Civil Procedure, approved August 19, 1982, as amended.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. Section 11-101 of the Code of Civil Procedure, approved August 19, 1981, as amended, is amended to read as follows:

(ch. 110, par. 11-101)

Sec. 11-101. Temporary restraining order. No temporary restraining order shall be granted without notice to the adverse party unless it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss or damage will result to the applicant before notice can be served and a hearing had thereon. Every temporary restraining order granted without notice shall be *signed by the court and* indorsed with the date and hour of *signing issuance*; shall be filed forthwith in the clerk's office ~~and entered of record~~, shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after *the signing of the order entry*, not

152. ILL. REV. STAT. ch. 110, § 11-103 (1983) (emphasis added).

to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the *granting of the extension* shall be *stated in the written order of the court entered of record*. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set ~~down~~ for hearing at the earliest possible time and takes precedence over all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he or she does not do so, the court shall dissolve the temporary restraining order.

On two days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

Every order granting an injunction and every restraining order shall set forth the reasons for its *entry issuance*, shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

Section 2. This Act takes effect upon its becoming a law.

The above Act became law by Pub. Act No. 84-554, effective Sept. 18, 1985.

R. Section 11-102: Temporary Restraining Orders and Preliminary Injunctions

Prior to 1967, Illinois provided only one form of injunctive relief before a decision on the merits—"preliminary injunction." This injunction remained in effect indefinitely "until the further order of the court." In 1967, the legislature substantially amended the Illinois Injunction Act¹⁵³ and patterned the amendment after the prevailing practice in the United States District Courts. This amendment provided Illinois with two possible forms of injunctive relief prior to a decision on the merits: a temporary restraining order, which remains in effect for ten days only unless expressly extended by the court for another ten days, and a preliminary injunction, which remains in effect indefinitely "until the further order of the court."

In *Kaplan v. Kaplan*,¹⁵⁴ the appellate court stated:

153. ILL. REV. STAT. ch. 69, §§ 1-27 (1967) (repealed by Pub. Act 82-280, Article XIX-b, 1981 Ill. Laws 1382, 1625, 1628. Now codified at ILL. REV. STAT. ch. 110, § 11-101 to 11-110 (1983)).

154. 98 Ill. App. 3d 136, 423 N.E.2d 1253 (1st Dist. 1980).

Since the amendment to the Injunction Act in 1967, only two types of injunctive relief may be entered prior to the resolution of the controversy on its merits; such injunctions are a temporary restraining order (Ill. Rev. Stat. 1979, ch. 69, par. 3-1), and a preliminary injunction (Ill. Rev. Stat. 1979, ch. 69, par. 3). (See also *Paddington Corp. v. Foremost Sales Promotions, Inc.* (1973), 13 Ill. App. 3d 170, 300 N.E.2d 484.) In this instance, while the injunctive relief granted has been labeled a preliminary injunction, it is more in the nature of a temporary restraining order, as we should look to substance rather than form. (*Bohn Aluminum & Brass Co. v. Barker* (1973), 55 Ill. 2d 177, 303 N.E.2d 1.) The practical effect, however, of a temporary restraining order issued with notice is the same as a preliminary injunction issued with notice. A temporary restraining order issued with notice and a preliminary injunction issued with notice, neither of limited duration, are the same type of relief and both require the showing of the likelihood of ultimate success on the merits. The statutorily imposed 10-day duration on temporary restraining orders is not needed where there has been notice to opposing parties. (*Kable Printing Co. v. Mount Morris Bookbinder Union Local No. 65-B* (1976), 63 Ill. 2d 514, 524, 349 N.E.2d 36.) The temporary restraining order and the preliminary injunction both serve the purpose of maintaining the status quo until the trial court can consider the case on the merits. See *S & F Corp. v. American Express Co.* (1978), 60 Ill. App. 3d 824, 377 N.E.2d 73; *Board of Education v. Springfield Education Association* (1977), 47 Ill. App. 3d 193, 361 N.E.2d 697.¹⁵⁵

Due to an oversight in the drafting of the 1967 amendment, the previous statutory provision for obtaining a preliminary injunction without notice was left in the Injunction Act. This oversight in the Injunction Act permitted a party to obtain a temporary restraining order or a preliminary injunction without notice. This situation is illogical and disharmonious.

In *Seagrams Distillers Co. v. Foremost Sales Promotions, Inc.*,¹⁵⁶ and *Paddington Corp. v. Foremost Sales Promotions, Inc.*,¹⁵⁷ the appellate court held that the provision for obtaining injunctive relief without notice applied only to temporary restraining orders, and not to preliminary injunctions. In *Kable Printing Co. v. Mount Morris Bookbinders Union*,¹⁵⁸ the Illinois Supreme Court explained that:

A preliminary injunction under section 3 may be granted with or without notice, and if the latter, with a showing of 'immediate and irreparable injury.' Additionally, the movant must establish the likelihood of ultimate success on the merits of the case. (*Frenchik v. Dean*, 62 Ill. 2d 231, 241; *Wessel Co. v. Busa*, 28 Ill. App. 3d 686, 690.) Under section 3-1 a temporary restraining order may also be granted with or without notice, and if the latter, with a showing of 'immediate and irreparable injury.' Moreover, a temporary restraining order issued without notice, unlike a corresponding preliminary injunction, is limited in duration unless specifically extended for 10 days upon showing a good cause or for a longer period

155. *Id.* at 140, 423 N.E.2d at 1256.

156. 13 Ill. App. 3d 166, 300 N.E.2d 490 (1st Dist. 1973).

157. 13 Ill. App. 3d 170, 300 N.E.2d 484 (1st Dist. 1973).

158. 63 Ill. 2d 514, 349 N.E.2d 36 (1976).

upon the consent of the adverse party. It is apparent from a consideration of these two sections that a temporary restraining order issued with notice is, in its practical results, no different than a preliminary injunction issued with notice. The only difference between the two is that the latter requires the movant to show a probability of success on the merits. To permit such a distinction is incongruous and obviously contrary to the legislature's intention in creating a system of injunctive relief. Accordingly, we hold that a temporary restraining order issued with notice and a preliminary injunction issued with notice, neither of limited duration, are the same type of relief, and whether referred to under either term require a showing of the likelihood of ultimate success on the merits of the case. The order provided it would 'remain in full force and effect pending further order of this court,' and defendants cannot ignore what was clearly stated.¹⁵⁹

In *Webb v. Rock*,¹⁶⁰ the court said:

In *Kable Printing Co. v. Mt. Morris Bookbinders Union Local*, (1976), 63 Ill. 2d 514, 349 N.E.2d 36, the supreme court held that the 10-day limitation periods of section 3-1 were not applicable to TRO's issued after proper notice and that such orders could be ordered to continue until a decision on the merits of the case was reached. The court noted the confusion resulting from the retention of section 3 after the enactment of section 3-1¹⁶¹

In *Jurco v. Stuart*,¹⁶² the court said:

We believe the structure contemplated by sections 3 and 3-1 of the Injunction Act (Ill. Rev. Stat. 1981, ch. 69, pars. 3, 3-1) is the three-tiered system of injunctive relief similar to that practiced in the Federal court which consists of temporary restraining orders, preliminary injunctions and permanent injunctions. *Kable Printing Co. v. Mount Morris Bookbinders Union Local 65-B* (1976), 63 Ill. 2d 514, 520, 349 N.E.2d 36, 38; *People ex rel. Pollution Control Board v. Lloyd A. Fry Roofing Co.* (1972), 4 Ill. App. 3d 675, 281 N.E.2d 757; *Paddington Corp. v. Foremost Sales Promotions, Inc.* (1973), 13 Ill. App. 3d 170, 300 N.E.2d 484; see *Bohn Aluminum & Brass Co. v. Barker* (1973), 55 Ill. 2d 177, 186 (Ryan, J., dissenting).

The first proceeding is the temporary restraining order. A temporary restraining order is a drastic, emergency remedy which may issue only in exceptional circumstances and for a brief duration. (*City of Chicago v. Airline Canteen Service, Inc.* (1978), 64 Ill. App. 3d 417, 380 N.E.2d 1106; *Board of Trustees v. Cook County College Teachers Union Local 1600* (1976), 42 Ill. App. 3d 1056, 356 N.E.2d 1089; *Paddington Corp. v. Foremost Sales Promotions, Inc.* (1973), 13 Ill. App. 3d 170, 300 N.E.2d 484; see Hechinger, *Requisites for the Issuance of a TRO and an Injunction in the Chancery Division*, 63 Chi. Bar Rec. 184 (1982).) The purpose of a temporary restraining order is to maintain the status quo until a hearing can be had on an application for a preliminary injunction. (*People ex rel. Pollution Control Board v. Lloyd A. Fry Roofing Co.* (1972), 4 Ill. App. 3d 675, 281

159. *Id.* at 523, 524, 349 N.E.2d at 40.

160. 80 Ill. App. 3d 891, 400 N.E.2d 959 (4th Dist. 1980).

161. *Id.* at 895, 400 N.E.2d at 963.

162. 110 Ill. App. 3d 405, 442 N.E.2d 633 (1st Dist. 1982).

N.E.2d 757.) Whether the temporary restraining order is with or without notice it is upon a summary showing of the necessity of the order to prevent immediate and irreparable injury. (See Moore, Federal Practice par. 65.05 (2d ed.)) If the temporary restraining order is without notice, it is limited to a period of 10 days with a possible exception as stated in the statute of another 10 days under certain circumstances. (Ill. Rev. Stat. 1981, ch. 69, par. 3-1; *Kable Printing Co. v. Mount Morris Bookbinders Union Local 65-B* (1976), 63 Ill. 2d 514, 349 N.E.2d 36.) If the temporary restraining order is issued with notice the 10-day time limit does not apply. 63 Ill. 2d 514, 521, 349 N.E.2d 36, 39; *Lawter International, Inc. v. Carroll* (1982), 107 Ill. App. 3d 938, 438 N.E.2d 590.

The problem arises in cases such as the one at bar where there has been a summary proceeding with notice and a temporary restraining order is issued but no hearing date is set. The effect then is to have an order with significant consequences extant with only a limited opportunity on the part of a party to resist such an order. To allow a temporary restraining order of unlimited duration is to have a preliminary injunction (*Kable Printing Co. v. Mount Morris Bookbinders Union Local 65-B* (1976), 63 Ill. 2d 514, 349 N.E.2d 36) without giving the one party a fair opportunity to oppose the application and to show if he can why an injunction should not issue. (See Moore, Federal Practice par. 65.04[3] (2d ed.)) A preliminary injunction then maintains the status quo during the pendency of a trial on the merits. *People ex rel. Pollution Control Board v. Lloyd A. Fry Roofing Co.* (1972), 4 Ill. App. 3d 675, 281 N.E.2d 757.

A defendant should be allowed to present evidence and legal argument. (*Paddington Corp. v. Foremost Sales Promotions, Inc.* (1973), 13 Ill. App. 3d 170, 300 N.E.2d 484.) Oral argument is not proper evidence. *People ex rel. Scott v. Aluminum Coil Anodizing Corp.* (1971), 132 Ill. App. 2d 168, 268 N.E.2d 53.

Because of the evidentiary hearing requirement for a preliminary injunction, we do not believe that the instant order emanating from a summary proceeding, albeit with notice, for an unspecified duration is within the statutory scheme envisioned by the legislature. Although a temporary restraining order with notice may exist beyond 10 days, the hearing must be set within a short time thereafter so as to prevent the potential significant consequences of only a summary proceeding to exist more than a short period of time. We have held that a temporary restraining order with notice which is to exist beyond the 10-day period is a proper order where the hearing on the preliminary injunction is scheduled immediately following the expiration of a 10-day order. (*Lawter International, Inc. v. Carroll* (1982), 107 Ill. App. 3d 938, 438 N.E.2d 590.) This holding comports with the rationale that a temporary restraining order is an emergency proceeding to maintain the status quo until a hearing can be held on the preliminary injunction. (*People ex rel. Pollution Control Board v. Lloyd A. Fry Roofing Co.* (1972), 4 Ill. App. 3d 675, 281 N.E.2d 757.) A hearing on a preliminary injunction that is delayed for more than a short period of time, or as in this case, a hearing at an unspecified date in the not immediately foreseeable future, does not comport with the statutory scheme.¹⁶³

163. *Id.* at 408, 442 N.E.2d at 636.

Article VI, section 17 of the Illinois Constitution requires that: "The Supreme Court shall provide by rule for an annual judicial conference to consider the work of the courts and to suggest improvements in the administration of justice and shall report thereon annually in writing to the General Assembly not later than January 31."¹⁶⁴ On January 31, 1984, the Illinois Supreme Court sent the following message to the Illinois Legislature:

THE STATUTE WHICH CONTINUES TO ALLOW A COURT TO
GRANT A PRELIMINARY INJUNCTION WITHOUT PREVIOUS
NOTICE TO ALL PARTIES SHOULD BE RE-EXAMINED

Prior to 1967 "An Act to revise the law in relation to injunction" (Injunction Act) provided for injunctive relief with prior notice to the defendant, and without prior notice where the plaintiff's rights would be "unduly prejudiced" if the injunction were not "issued immediately." (Ill. Rev. Stat. 1965, ch. 69, par. 3.) In 1967 the Injunction Act was amended by the addition of a new section providing for temporary restraining orders (TRO) without notice (Ill. Rev. Stat. 1967, ch. 69, par. 3-1) and by some language modifications in section 3, including denomination of the relief therein as a preliminary injunction (Ill. Rev. Stat. 1967, ch. 69, par. 3). However, section 3 retained the verbiage concerning the granting of injunctive relief both with and without notice. The amended sections were subsequently incorporated into the Code of Civil Procedure, former section 3-1 of the Injunction Act (TROs) being designated as section 11-101 of the Code and former section 3 (preliminary injunctions) being designated as section 11-102. (Ill. Rev. Stat. 1982 Supp., ch. 110, pars. 11-101, 11-102.) Accordingly, under the present statutory scheme, upon a showing that "immediate and irreparable injury, loss or damage will result to the applicant," either a TRO without notice or a preliminary injunction without notice may issue. Ill. Rev. Stat. 1982 Supp., ch. 110, pars. 11-101, 11-102.

This dual system of allowing injunctive relief in essentially the same circumstances has caused some confusion among the bench and bar. The Illinois Appellate Court has recently stated, in an effort to clarify the statutory scheme for the injunctive relief, that:

We believe the structure contemplated by [sections 11-101 and 11-102] is the three-tiered system of injunctive relief similar to that practiced in the Federal court which consists of [TROs], preliminary injunctions and permanent injunctions. [Citations.] The first proceeding is the [TRO]. A [TRO] is a drastic, emergency remedy which may issue only in exceptional circumstances and for a brief duration. [Citations.] The purpose of a [TRO] is to maintain the status quo until a hearing can be had on an application for a preliminary injunction. . . . (*Jurco v. Stuart* (1982), 110 Ill. App. 3d 405, 408.)

Too, one commentator has expressed the view, which is shared by many, that "in the drafting of the 1967 [TRO] amendment, the previous statutory provision for obtaining a preliminary injunction without notice was not

164. ILL. CONST. art. VI, § 17.

removed from the Injunction Act. This resulted in the Injunction Act providing for the obtaining of a [TRO] or a preliminary injunction without notice—an illogical and inharmonious situation. * * * [Section 11-102] is in need of correction to bring harmony out of chaos and to make the distinction between a [TRO] and a preliminary injunction meaningful." Fins, *Guide to Illinois Code of Civil Procedure* (1981), pp. 320, 321.

The Supreme Court suggests that the General Assembly consider clarifying the preliminary injunction statute (Ill. Rev. Stat. 1982 Supp., ch. 110, par. 11-102) by eliminating that part of it which allows a court to grant a preliminary injunction without notice so that there will be a clearer understanding between the bench and bar of those meaningful distinctions between TROs and preliminary injunctions as intended by the General Assembly.¹⁶⁵

To accomplish this objective, section 11-102 should be amended to read as follows:

Proposed Bill

An Act to amend section 11-102 of the Code of Civil Procedure, approved August 19, 1981, as amended.

Be it enacted by the People of the State of Illinois represented in the General Assembly:

Section 1. Section 11-102 of the Code of Civil Procedure, approved August 19, 1981, as amended, is amended to read as follows:

(ch. 110, par. 11-102)

Sec. 11-102. Preliminary injunction. No court or judge shall grant a preliminary injunction without previous notice of the time and place of the application having been given the adverse party ~~unless it clearly appears, from specific facts shown by the verified complaint or by affidavit accompanying the same that immediate and irreparable injury, loss or damage will result to the applicant before notice can be served and a hearing had thereon.~~

Section 2. This Act takes effect upon its becoming a law.

The above Act became law by Pub. Act No. 84-682, effective Jan. 1, 1986.

S. Need for Repeal of Section 12-107

Section 12-107 of the Code reads as follows:

Section 12-107. Incarceration of judgment debtor. No order shall be entered for the incarceration of a judgment debtor except when the judgment is entered for a tort committed by such judgment debtor, and it appears from a special finding of the jury, or from a special finding by the court, if the case is tried by the court without a jury, that malice is the gist of the action, and except when the judgment debtor refuses to deliver up his or her estate for the benefit of his or her creditors.

165. The Illinois Supreme Court's message to the General Assembly in 1985 repeated the request and again cited H. FINS, GUIDE TO ILLINOIS CODE OF CIVIL PROCEDURE 320, 321 (1981).

The Illinois Supreme Court in *Lawyers Title of Phoenix v. Gerber*¹⁶⁶ interpreted this section and held that two conditions must be present:

- (1) a tort with a finding that malice is the gist of the action, *and also*
- (2) a judgment debtor who refuses to deliver up his or her estate for the benefit of creditors.¹⁶⁷

Section 12-301 of the Code reads as follows:

Section 12-301. Contempt for concealing property. Any person who hides or conceals any property so that it cannot be taken by virtue of an order or judgment, or, on the officer's request therefor, refuses to deliver property to the officer having an order or judgment for the taking of the property is guilty of contempt of court and subject to punishment therefor.

If the incarceration provision in section 12-107 is intended as punishment for a crime, it is invalid because it fails to provide for a time-period of incarceration.

Twenty-one American Jurisprudence 2d, says:

To constitute a crime, the act in question must ordinarily be one to which is annexed, upon conviction, a certain specified punishment. And it has been held that a statute declaring an act unlawful, but prescribing no penalty, does not create a crime.

“Provision for imprisonment in a statute does not make an act or proceeding criminal in nature when applied, not as punishment, but to compel immediate obedience to the law, as, for example, contempt proceedings.”¹⁶⁸

However, if the provision is intended as punishment for civil contempt, it is already covered by section 12-301 and is redundant. In either event, Section 12-107 should be repealed.

In this connection, it should be noted that section 12-107 is practically dead because its foundation, The Insolvent Debtors Act, has been repealed. In 1872, Illinois enacted “an Act concerning insolvent debtors.” This Act was incorporated into the Code of Civil Procedure as Part 13 of Article XII and (with other related sections) was repealed in 1983 by the passage of Public Act 83-352. The legislature's failure to include section 12-107 in the repeal of 1983 was the result of a clerical omission which should be corrected immediately.

Furthermore, if a judgment debtor's refusal to deliver property to satisfy an order or judgment in favor of a creditor would subject him to punishment for contempt under Section 12-301, the requirement of section 12-107 that the judgment be, in addition, in tort with a finding of malice as the basis for

166. 44 Ill. 2d 145, 254 N.E.2d 461 (1969).

167. *Id.* at 149, 150, 254 N.E.2d at 463 (emphasis added).

168. 21 AM. JUR. 2D *Criminal Law* § 5 (1981).

the action is superfluous, nonsensical, and extremely confusing. Therefore section 12-107 should be repealed.

A bill to correct this situation is herewith submitted:

Proposed Bill

An Act to repeal Section 12-107 of the Code of Civil Procedure, approved August 19, 1981, as amended.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

(ch. 110, rep. par. 12-107)

Section 1. Section 12-107 of the Code of Civil Procedure, approved August 19, 1981, as amended, is repealed.

Section 2. This Act takes effect upon its becoming a law.

*T. Addition of Code Section 14-110
Will Avoid Multiplicity of Actions*

To avoid the possibility that a levy against the property of a municipal or quasi-municipal corporation as a judgment debtor may result in the inability of the municipal or quasi-municipal corporation to perform its public duties, the cases and statutes have developed a rule that no writ of execution can issue against such judgment debtor.¹⁶⁹ Thus, the judgment creditor must file an independent action for mandamus to enforce the judgment. This procedure requires payment by the judgment creditor of a new filing fee to the clerk of the court. The payment of new sheriff's fees for service of summons also results in new delays. This circuity of action is totally unnecessary. Code section 2-1402, entitled "Supplementary proceedings," fully protects the judgment debtor by the express provision in proposed new Code section 14-110. Specifically, whatever property was previously exempt from the enforcement of a judgment under an action for mandamus still remains exempt.

Subsection (h) of Code section 2-1402 provides that:

(h) This Section does not grant the power to any court to order installment or other payments from, or compel the sale, delivery, surrender, assignment or conveyance of any property exempt by statute from the enforcement of a judgment thereon, a deduction order, garnishment, attachment, sequestration, process or other levy or seizure.

To avoid the multiplicity of actions that occurs when judgments against debtors are enforced, the following bill is herewith submitted:

169. See *Moore v. Town of Browning*, 373 Ill. 583, 27 N.E.2d 469 (1940); *City of Olney v. Harvey & Boyd*, 50 Ill. 453 (1869); *National Bank of Decatur v. City of Gibson*, 261 Ill. App. 190 (3d Dist. 1931).

Proposed Bill

An Act to add section 14-110 to the Code of Civil Procedure, approved August 19, 1981, as amended.

Be it enacted by the People of the State of Illinois represented in the General Assembly:

Section 1. Section 14-110 is added to the Code of Civil Procedure, approved August 19, 1981. The added section is to read as follows:

(ch. 110, new par. 14-110)

Sec. 14-110. When mandamus not required. No action for mandamus is necessary to enforce a judgment against a municipal or quasi-municipal corporation and the relief heretofore available by an action for mandamus shall hereafter be obtainable by the judgment creditor proceeding under Section 2-1402 of this Act in the case wherein the judgment was entered against the municipal or quasi-municipal corporation. However, property of the judgment debtor which was heretofore exempt from the enforcement of a judgment therefrom shall remain so exempt.

Section 2. This Act takes effect upon its becoming a law.

U. Need to Repeal Ne Exeat

The writ of *ne exeat* was originally a high prerogative writ used at common law either to prevent citizens in debt from leaving the country, or to aid the sovereign in compelling citizens to pay taxes.¹⁷⁰ In modern times, relief by *ne exeat*, while rarely used, has acted to forbid persons to whom it is addressed to leave the country, the state, or the jurisdiction of the court.¹⁷¹

Fifty-seven American Jurisprudence 2d, states:

In many of the American states the writ of *ne exeat*, seeming to be repugnant to American institutions, has been abolished by statute, either expressly or by implication, although in a few jurisdictions it is still in force and recognized by statutory enactment.¹⁷²

During the last three decades, the Illinois reviewing courts have heard only two *ne exeat* cases: *Earles v. Earles*¹⁷³ and *Executive Commercial Services v. Daskalakis*.¹⁷⁴ In both cases the courts rejected the plaintiffs' requests for this harsh remedy. The Court of Appeals for the Seventh Circuit also reached the

170. See *Brophy v. Sheppard*, 124 Ill. App. 512, 516-17 (1st Dist. 1906).

171. BLACK'S LAW DICTIONARY, *supra*, note 102, at 929-30.

172. 57 AM. JUR. 2D *Ne Exeat* § 1 (1971).

173. 343 Ill. App. 447, 99 N.E.2d 359 (1st Dist. 1951).

174. 74 Ill. App. 3d 760, 393 N.E.2d 1365 (2d Dist. 1979).

same result in *United States v. Shaheen*,¹⁷⁵ While reviewing an Illinois case, the Seventh Circuit explained that:

When issued, the writ restrains the right possessed by "every man [to] go out of the realm for whatever cause he pleaseth." This right to travel is "a constitutional liberty closely related to rights of free speech and association. . . ." *Aptheker v. Secretary of State*, 378 U.S. 500, 517, 84 S.Ct. 1659, 1669, 12 L.Ed. 2d 992.¹⁷⁶

Similarly, in *Dunn v. Blumstein*,¹⁷⁷ the United States Supreme Court said that "freedom to travel throughout the United States has long been recognized as a basic right under the Constitution."¹⁷⁸

1. *Parallel Between Capias Ad Respondendum and Ne Exeat*

Prior to 1963, in an action at law a plaintiff could cause the arrest of the defendant merely by filing an affidavit stating "facts showing that the defendant fraudulently contracted the debt, or incurred the obligation, respecting which the suit is about to be brought, or that he has concealed, assigned, removed or disposed of his property with intent to defraud such plaintiff."¹⁷⁹ If the affidavit satisfied the court, the judge would issue a *capias ad respondendum*, a warrant to arrest the defendant. This statute was repealed in 1963¹⁸⁰ and the pernicious *capias ad respondendum* has now vanished from Illinois law. *Ne exeat*, however, also results in a restraint upon the defendant's freedom of movement while providing creditors with a pressure tactic for use against debtors. To date, *ne exeat* has not been repealed in Illinois. Consistency in the treatment of judicial remedies dictates that *ne exeat* meet the same fate as the former *capias ad respondendum*.

It should be noted that *capias ad satisfaciendum*, which is a warrant for the imprisonment of a judgment debtor designed to force the debtor to satisfy the judgment, was provided for in 1872 by the enactment of "AN ACT concerning insolvent debtors."¹⁸¹ This Act was incorporated into the Code of

175. 445 F.2d 6 (7th Cir. 1971).

176. *Id.* at 10.

177. 405 U.S. 330 (1972).

178. *Id.* at 338 (citing *United States v. Guest*, 383 U.S. 745, 758 (1966)). The Court also cited the following cases in support of the right to travel: *Passenger Cases*, 48 U.S. (7 How.) 283 (1849); *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1868); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869); *Edwards v. California*, 314 U.S. 160 (1941); *Kent v. Dulles*, 357 U.S. 116 (1958); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Oregon v. Mitchell*, 400 U.S. 112, 285-86 (1970).

179. ILL. REV. STAT. ch. 16, § 1 (1961).

180. 1963 Ill. Laws 3240.

181. ILL. REV. STAT. ch. 52, §§ 34-73 (1872) (later codified at ILL. REV. STAT. ch. 72, § 1 - 34 (1979)).

Civil Procedure as Part 13 of Article XII but (together with other related sections) was repealed in 1983 by Public Act 83-352.¹⁸² Thus, the ancient "twin sisters" of *capias ad respondendum* and *capias ad satisfaciendum* were banished from Illinois. *Ne exeat* deserves the same treatment.

2. Adequate Remedy Available in Code of Civil Procedure

If a creditor fears that a debtor will take property out of the state to avoid satisfaction of a debt, the creditor's remedy is attachment. This remedy appears in Code section 4-101 and is available in the following situations:

4. Where the debtor is about to depart from this State with the intention of having his or her effects removed from this State.

5. Where the debtor is about to remove his or her property from this State to the injury of such creditor.

A plaintiff's bond is required in attachment¹⁸³ as well as in *ne exeat*.¹⁸⁴ A plaintiff who chooses *ne exeat* instead of attachment does so to annoy the debtor by interfering with the debtor's personal liberty.

In this connection, it should be noted that Code section 2-1402 entitled "Supplementary proceedings" provides a creditor with multiple remedies to enforce a judgment. Illinois citizens who possess a sense of decency in their conduct as members of society should not object to the disappearance of *ne exeat* from the Illinois legal scene.

Code section 16-101 should therefore be amended to state: "Relief by *ne exeat* republica is abolished", and the remaining 10 sections of Article XVI of the Code should be repealed. A bill to accomplish this objective is herewith submitted:

Proposed Bill

An Act to amend Section 16-101 and to repeal Sections 16-102 through 16-111 of the Code of Civil Procedure, approved August 19, 1981, as amended.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. Section 16-101 of the Code of Civil Procedure, approved August 19, 1981, as amended, is amended to read as follows:

(ch. 110, par. 16-101)

Sec. 16-101. *Ne exeat abolished.* ~~Availability of remedy.~~ Relief by *ne exeat*

182. Pub. Act. No. 83-352, § 2, 1983 Ill. Laws 2813, 2814.

183. ILL. REV. STAT. ch. 110, § 4-107 (1983).

184. *Id.* at §§ 16-104, 16-107 (1983).

~~republica may be granted, in cases where the debt or claim is not actually due, but exists fairly and bona fide in expectancy at the time of making application, and in cases where the claim is due, and it is not necessary, to authorize the granting of such relief by ne exeat, that the applicant show that his or her debt or claim is purely of an equitable character is abolished.~~

(ch. 110, rep. pars. 16-102 through 16-111)

Section 2. Sections 16-102, 16-103, 16-104, 16-105, 16-106, 16-107, 16-108, 16-109, 16-110, and 16-111 of the Code of Civil Procedure, approved August 19, 1981, as amended, are repealed.

Section 3. This Act takes effect upon its becoming a law.

V. Service of Process in Attachment and Replevin Must be Coordinated by Statute

Section 26 of "AN ACT relating to the circuit courts"¹⁸⁵ provides:

The respective courts and the several judges thereof shall have the power to award *throughout the state*, and returnable in the proper county, relief by injunction, ne exeat, habeas corpus, quo warranto, and all other processes that may be necessary to the due execution of the powers with which they are or may be vested.¹⁸⁶

Code section 2-202(b) (former section 13.1(2) of the Civil Practice Act) provides that: "Summons may be served upon the defendants, wherever they may be found in the State, by any person authorized to serve process."

1. Attachment

Code section 4-112 provides:

Sec. 4-112. Serving of order. Such officer shall without delay serve the order for attachment upon the property described in the order, or in the absence of such description, upon the lands, tenements, goods, chattels, rights, credits, moneys and effects of the debtor, or upon any lands and tenements in and to which such debtor has or may claim any equitable interest or title, of sufficient value to satisfy the claim sworn to, with costs of the action.

Except as provided in section 4-116 of this Act, the order for attachment may be levied only in the county in which the order is entered, and by a proper officer of that county.

Code section 4-118 provides:

Sec. 4-118. Certified copies of order to other county. The creditor may, at the same time, or at any time before judgment, cause a certified copy of an order for attachment to be issued to any other county in the State where the debtor may have property liable to be attached, which shall be levied as other certified copies of orders for attachment.

The second paragraph of section 4-112 renders section 4-118 meaningless. The second paragraph of section 4-112 should therefore be deleted.

185. ILL. REV. STAT. ch. 37, § 72.26 (1983).

186. *Id.* (emphasis added).

2. *Replevin*

Section 19-109 of the Code (former section 7 of the Replevin Act)¹⁸⁷ provides that: "The order for replevin may be served as a summons . . . by any person authorized to serve summons." Code section 19-110 (former section 8 of the Replevin Act) provides: "Additional certified copies of the order for replevin may be issued by the clerk of court, upon the request of the plaintiff, to be used in several counties."

Code section 19-116 (former section 14 of the Replevin Act) is in apparent conflict with the above provisions. In the second paragraph, the section provides that:

The order for replevin issued as provided in Section 19-108 of this Act, may be served as a summons upon defendants wherever they may be found in the State by any person authorized to serve summons in other civil cases; *but property may be taken from the possession of a defendant under a replevin order only in the county in which the order is entered and by a proper officer of the county.*¹⁸⁸

Thus, section 19-110 which expressly provides that orders for replevin may be used in several counties, and section 19-116 which limits the use of a replevin order *only to the county in which the order is entered* are hopelessly irreconcilable.

A bill to amend sections 4-112 and 19-116 of the Code is herewith submitted:

Proposed Bill

An Act to amend sections 4-112 and 19-116 of the Code of Civil Procedure, approved August 19, 1981, as amended, is amended as follows:

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. Section 4-112 of the Code of Civil Procedure, approved August 19, 1981, as amended, is amended to read as follows:

(ch. 110, par. 4-112)

Sec. 4-112. Serving of order. Such officer shall without delay serve the order for attachment upon the property described in the order, or in the absence of such description, upon the lands, tenements, goods, chattels, rights, credits, moneys and effects of the debtor, or upon any lands and tenements in and to which such debtor has or may claim any equitable interest or title, of sufficient value to satisfy the claim sworn to, with costs of the action.

~~Except as provided in Section 4-116 of this Act, the order for attachment may be levied only in the county in which the order is entered, and by a proper officer of that county.~~

Section 2. Section 19-116 of the Code of Civil Procedure, approved August 19, 1981, as amended, is amended to read as follows:

(ch. 110, par. 19-116)

187. ILL. REV. STAT. ch. 119, §§ 1-28 (1979).

188. ILL. REV. STAT. ch. 110, § 19-116 (1983) (emphasis added).

Sec. 19-116. Service of order. Upon the bond being given the sheriff or other proper officer shall forthwith serve the certified copy of the order by seizing the property therein mentioned and by serving such order upon the defendant as summons is served in other civil cases.

The order for replevin issued as provided in Section 19-108 of this Act, may be served as a summons upon the defendants wherever they may be found in the State by any person authorized to serve summons in other civil cases; *and but* property may be taken from the possession of a defendant under a replevin order *only in any the county where it is found in which the order is entered* and by a proper officer of the county.

The officer serving such certified order having taken the property or any part thereof shall forthwith deliver such property to the plaintiff unless the defendant executes a bond and security approved by such officer, before such property is actually delivered to the plaintiff. Such bond shall be given in an amount double the value of such property and conditioned that the defendant will appear in and defend the action, and will deliver such property in accordance with the order of the court, in as good condition as it was when the action was commenced, and that the defendant will pay only those costs and damages that may be incurred during the time the property is out of the possession of the officer and back in his or her possession and adjudged against the defendant in such action.

Such bond shall, *on the day such order is returnable*, be returned to the court by the officer serving the order. ~~on the day such order is returnable~~

Section 3. This Act takes effect upon its becoming a law.

*W. Need to Coordinate Terminology in Code
of Civil Procedure with Terminology of
Illinois Constitution of 1970 and a
Number of Illinois Modernized Statutes*

At common law, the phrase "lands, tenements or hereditaments" was frequently employed to designate "real property" or "real estate." However, since the latter part of the nineteenth century, the use of the common law phrase has been gradually abandoned in Illinois.¹⁸⁹

189. For example:

1. "AN ACT concerning land titles," enacted in 1897 (ILL. REV. STAT. ch. 30, §§ 45-148 (1983)), does not employ "lands, tenements or hereditaments".
2. The Mechanic's Liens Act (which deals with liens upon real estate), enacted in 1903 (ILL. REV. STAT. ch. 82, §§ 1-39 (1983)), does not employ "lands, tenements or hereditaments".
3. The Revenue Act of 1939 (ILL. REV. STAT. ch. 120, §§ 482-811 (1983)), does not employ "lands, tenements or hereditaments".
4. The Condominium Property Act, enacted in 1963 (ILL. REV. STAT. CH. 30, §§ 301-331 (1983)), does not employ "lands, tenements or hereditaments".
5. The Land Sales Act, enacted in 1969 (ILL. REV. STAT. CH. 30, §§ 371-389 (1983)), does not employ "lands, tenements or hereditaments".
6. The Illinois Income Tax Act, enacted in 1969, which provides for foreclosures of tax liens on real property (ILL. REV. STAT. ch. 120, §§ 1-101 to 17-1701 (1983)) does not employ

Due to an oversight in the process of codification, however, the phrase "lands, tenements or hereditaments," which was present in old statutes that were transferred into the Code, has remained in a number of sections of the Code of Civil Procedure. This oversight needs correction.

A bill to delete the common law terminology for real property from various Code sections is herewith submitted:

Proposed Bill

An Act to amend sections 4-112, 5-125, 6-102, 6-103, 9-101, 9-102, 9-104.1, 9-202, 9-215, 12-106, 12-112, 13-107, 13-109, 13-111 and 17-101 of the Code of Civil Procedure in order to coordinate terminology with the Illinois Constitution of 1970 and a number of other Illinois Statutes.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. Sections 4-112, 5-125, 6-102, 6-103, 9-101, 9-102, 9-104.1, 9-202, 9-215, 12-106, 12-112, 13-107, 13-109, 13-111 and 17-101 of the Code of Civil Procedure, approved August 19, 1981, as amended, are amended to read as follows:

(Ch. 110, par. 4-112)

Sec. 4-112. Serving of order. Such officer shall without delay serve the order for attachment upon the property described in the order, or in the absence of such description, upon the *real property* ~~lands, tenements~~, goods, chattels, rights, credits, moneys and effects of the debtor, or upon any *real property* ~~lands, tenements~~, in and to which such debtor has or may claim any equitable

7. Section 4 of Article IX of the Illinois Constitution of 1970, provides:

§ 4. Real Property Taxation

(a) Except as otherwise provided in this Section, taxes upon *real property* shall be levied uniformly by valuation ascertained as the General Assembly shall provide by law.

(b) Subject to such limitations as the General Assembly may hereafter prescribe by law, counties with a population of more than 200,000 may classify or to continue to classify *real property* for purposes of taxation. Any such classification shall be reasonable and assessments shall be uniform within each class. The level of assessment or rate of tax of the highest class in a county shall not exceed two and one-half times the level of assessment or rate of tax of the lowest class in that county. *Real property* used in farming in a county shall not be assessed at a higher level of assessment than single family residential *real property* in that county.

(c) Any depreciation in the value of *real estate* occasioned by a public easement may be deducted in assessing such property.

ILL. CONST. art. IX, § 4 (emphasis added). The phrase "lands, tenements or hereditaments" was omitted.

8. The Probate Act of 1975 (ILL. REV. STAT. ch 110-1/2, §§ 1-1 to 27-1 (1983)), does not employ "lands, tenements or hereditaments".

9. The Conservation Rights in Real Property Act, enacted in 1975 (ILL. REV. STAT. ch. 30, §§ 401-406 (1983)), does not employ "lands, tenements or hereditaments".

10. Article XV of the Code of Civil Procedure, entitled "Mortgage Foreclosure", enacted in 1981 (ILL. REV. STAT. ch. 110, §§ 15-101 to 15-311 (1983)) does not employ "lands, tenements or hereditaments".

interests or title, of sufficient value to satisfy the claim sworn to, with costs of the action.

Except as provided in Section 4-116 of this Act, the order for attachment may be levied only in the county in which the order is entered, and by a proper officer of that county.

(ch. 110, par. 5-125)

Sec. 5-125. Enforcement of fee bill. In all cases where either party is adjudged to pay costs before final judgment, by reason of setting aside a voluntary dismissal, a dismissal for want of prosecution or a default, or the granting of a continuance or new trial, or otherwise, and in all cases where there is security for costs, or attorney liable for costs, or an action brought ~~for to~~ the use of another, and the plaintiff is adjudged to pay the costs, either before or upon final judgment, it shall be lawful for the clerk to prepare and tax a bill of costs so adjudged to be paid, against the party adjudged to pay the same, and against his or her security for costs, or other person liable for the payment thereof, or either of them, and certify the same under the seal of the court, which being delivered to the sheriff of the proper county, the sheriff shall demand payment from the person therein charged; if payment is not made accordingly, within 30 days after such demand, the sheriff shall levy the same on the *personal and real property goods and chattels, lands and tenements* of the person so chargeable, and proceed therein in the same manner as judgments for the payment of money are enforced.

(ch. 110, par. 6-102)

Sec. 6-102. Interest in land. It may also be brought to recover *real property lands, tenements or hereditaments*, and by any person claiming an estate therein, in fee for life or for years, whether as heir, legatee or purchaser.

(ch. 110, par. 6-103)

Sec. 6-103. Lessee of United States or of this State. In all cases in which any person has heretofore entered upon and occupied or shall hereafter enter upon and occupy, any *real property lands, tenements or hereditaments* within this State, by virtue of any lease or permit from the United States or this State, such person, his, her or their legatees, executors, administrators, heirs or assigns, may have and maintain an action of ejectment against any person who has or may enter upon such *real property lands, tenements or hereditaments* without the consent of such lessee, his, her or their legatees, executors, administrators, heirs or assigns, and proof of the right of possession shall be sufficient to authorize a recovery.

(ch. 110, par. 9-101)

Sec. 9-101. Forcible entry prohibited. No person shall *enter upon real property* ~~make an entry into lands or tenements~~ except in cases where entry is allowed by law, and in such cases he or she shall not enter with force, but in a peaceable manner.

(ch. 110, par. 9-102)

Sec. 9-102. (a) when action may be maintained. The person entitled to the possession of *real property lands or tenements* may be restored thereto in the manner hereafter provided:

1. When a forcible entry is made thereon.
2. When a peaceable entry is made and the possession unlawfully withheld.
3. When entry is made into vacant or unoccupied *real property lands* or *tenements* without right or title.
4. When any lessee of the *real property lands* or *tenements*, or any person holding under such lessee, *retains* holds possession without right after the termination of the lease or tenancy by its own limitation, condition or terms, or by notice to quit or otherwise.
5. When a vendee having obtained possession under a written or verbal agreement to purchase *real property lands* or *tenements*, and having failed to comply with the agreement, withholds possession thereof, after demand in writing by the person entitled to such possession.
6. When *real property has lands* or *tenements* have been conveyed by a *any* grantor in possession, or sold under the order or judgment of any court in this State, or by virtue of any sale in any mortgage or deed of trust contained and the grantor in possession or party to such order or judgment or to such mortgage or deed of trust, after the expiration of the time of redemption, when redemption is allowed by law, refuses or neglects to surrender possession thereof, after demand in writing by the person entitled thereto, or his or her agent.
7. When any property is subject to the provisions of the "Condominium Property Act", approved June 20, 1963, as amended, the owner of a unit fails or refuses to pay when due his or her proportionate share of the common expenses of such property, or of any other expenses lawfully agreed upon or any unpaid fine, the Board of Managers or its agents have served the demand set forth in Section 9-104.1 of this *Act Article* in the manner provided for in that Section and the unit owner has failed to pay the amount claimed within the time prescribed in the demand.
8. When any property is subject to the provisions of a declaration establishing a common interest community and requiring the unit owner to pay regular or special assessments for the maintenance or repair of common areas owned in common by all of the owners of the common interest community or by the community association and maintained for the use of the unit owners or of any other expenses of the association lawfully agreed upon, and the unit owner fails or refuses to pay when due his or her proportionate share of such assessments or expenses and the board or its agents have served the demand set forth in Section 9-104.1 of this *Act Article* in the manner provided for in that Section and the unit owner has failed to pay the amount claimed within the time prescribed in the demand.
 - (b) The provisions of paragraph (8) of subsection (a) of Section 9-102 and Section 9-104.3 of this Act shall not apply to any common interest community unless (1) the association is a not-for-profit corporation, (2) unit owners are authorized to attend meetings of the board of directors or board of managers of the association in the same manner as provided for condominiums under the Condominium Property Act, and (3) the board of managers or board of directors of the common interest community association has, subsequent to

the effective date of this amendatory Act of 1984 voted to have the provisions of this Article apply to such association and has delivered or mailed notice of such action to the unit owners.

(c) For purposes of this *Act Article*, (1) "Common Interest Community" means real estate other than a condominium or cooperative with respect to which any person by virtue of his or her ownership of a partial interest or unit therein is obligated to pay for maintenance, improvement, insurance premiums, or real estate taxes of other real estate described in a declaration which is administered by an association; (2) "Declaration" means any duly recorded instruments, however designated, that have created a common interest community and any duly recorded amendments to those instruments; (3) "Unit" means a physical portion of the common interest community designated by separate ownership or occupancy by boundaries which are described in a declaration; and, (4) "Unit Owners' Association" or "Association" means the association of all owners of units in the common interest community acting pursuant to the declaration.

(ch. 110, par. 9-104.1)

Sec. 9-104.1. Demand—Notice—Return—Condominium and Contract Purchasers. (a) In case there is a contract for the purchase of such *real property lands or tenements* or in case of condominium property, the demand shall give the purchaser under such contract, or to the condominium unit owner, as the case may be, at least 30 days to satisfy the terms of the demand before an action is filed. In case of a condominium unit, the demand shall set forth the amount claimed which must be paid within the time prescribed in the demand and the time period or periods when the amounts were originally due. The demand shall be signed by the person claiming such possession, his or her agent, or attorney.

(b) The demand set forth in subsection (a) of this Section shall be served either personally upon such purchaser or condominium unit owner by sending the demand thereof by registered or certified mail with return receipt requested to the last known address of such purchaser or condominium unit owner or in case no one is in the actual possession of the premises, then by posting the same on the premises. When such demand is made by an officer authorized to serve process, his or her return is prima facie evidence of the facts therein stated and if such demand is made by any person not an officer, the return may be sworn to by the person serving the same, and is then prima facie evidence of the facts therein stated. No other demand shall be required as a prerequisite to filing an action under paragraph (7) of Section 9-102 of this *Act Code*.

(ch. 110, par. 9-202)

Sec. 9-202. Wilfully holding over. If any tenant or any person who is in or comes into possession of any *real property lands, tenements or hereditaments*, by, from or under, or by collision with the tenant, wilfully holds over any *real property lands, tenements or hereditaments*, after the expiration of his or her term or terms, and after demand made in writing, for the possession thereof, by his or her landlord, or the person to whom the remainder

or reversion of such *real property lands, tenements or hereditaments* belongs, the person so holding over, shall, for the time the landlord or rightful owner is so kept out of possession, pay to the person so kept out of possession, or his or her legal representatives, at the rate of double the yearly value of the *real property lands, tenements or hereditaments* so detained to be recovered by a civil action.

(ch. 110, par. 9-215)

Sec. 9-215. Remedies available to grantee. The grantees of any leased *real property lands, tenements, rents or other hereditaments*, or of the reversion thereof, the assignees of the lessor of any lease, and the heirs, legatees and personal representatives of the lessor, grantee or assignee, shall have the same remedies by action or otherwise, for the non-performance of any agreement in the lease, or for the recovery of any rent, or for the doing of any waste or other cause of forfeiture, as their grantor or lessor might have had if such reversion had remained in such lessor or grantor.

(ch. 110, par. 12-106)

Sec. 12-106. Enforcement in other counties. The person in whose favor any judgment is entered, may have the judgment enforced by the proper officer of any county, in this State, against the *real and personal property lands and tenements, goods and chattels* of the person against whom the judgment is entered, ~~or against his or her body, when the same is authorized by law.~~ Upon the filing in the office of the clerk of any circuit court in any county in this State of a transcript of a judgment entered in any other county of this State, enforcement may be had thereon in that county, in like manner as in the county where originally entered.

(ch. 110, par. 12-112)

Sec. 12-112. What liable to enforcement. All the *real and personal property lands, tenements, real estate, goods and chattels* (except such as is by law declared to be exempt) of every person against whom any judgment has been or shall be hereafter entered in any court, for any debt, damages, costs, or other sum of money, shall be liable to be sold *to satisfy upon* such judgment.

(ch. 110, par. 13-107)

Sec. 13-107. Seven years with possession and record title. Actions brought for the recovery of any *real property lands, tenements or hereditaments* of which any person may be possessed by actual residence thereon for 7 successive years, having a connected title, *deducible deductible* of record, from this State or the United States, or from any public officer or other person authorized by the laws of this State to sell such *real property land* for the non-payment of taxes, or from any sheriff, marshal, or other person authorized to sell such land for the enforcement of a judgment or under any order or judgment of any court shall be brought within 7 years next after possession is taken, but when the possessor acquires such title after taking such possession, the limitation shall begin to run from the time of acquiring title.

(ch. 110, par. 13-109)

Sec. 13-109. Payment of taxes with color of title. Every person in the actual possession of *real property lands* ~~or tenements~~, under claim and color of title, made in good faith, and who for 7 successive years, continue in such possession, and also, during such time, pays all taxes legally assessed on such *real property lands* ~~or tenements~~, shall be held and adjudged to be the legal owner of such *real property lands* ~~or tenements~~, to the extent and according to the purport of his or her paper title. All persons holding under such possession, by purchase, legacy or descent, before such 7 years have expired, and who shall continue such possession, and continue to pay the taxes as above set forth so as to complete the possession and payment of taxes for the term above set forth is entitled to the benefit of this Section.

(ch. 110, par. 13-111)

Sec. 13-111. State and United States. Sections 13-109 and 13-110 of this Act shall not extend to *real property lands* ~~or tenements~~ owned by the United States or of this State, nor to school and seminary lands, nor to lands held for the use of religious societies, nor to lands held for any public purpose. Nor shall they extend to *real property lands* ~~or tenements~~ when there is an adverse title to such *real property lands* ~~or tenements~~, and the holder of such adverse title is a minor, person under legal disability, imprisoned, out of the limits of the United States, *or and* in the employment of the United States or of this State. Such person shall commence an action to recover such *real property lands* ~~or tenements~~ so possessed, as above set out, within 3 years after the several disabilities herein enumerated cease to exist, and shall prosecute such action to judgment, or in case of vacant and unoccupied land, shall, within the time last set out, pay to the person or persons who have paid the same, all the taxes, with interest thereon, at the rate of 12% per annum, that have been paid on such vacant and unimproved land.

The exceptions provided in this Section shall not apply to the provisions of Sections 13-118 through 13-121 of this Act.

(ch. 110, par. 17-101)

Sec. 17-101. Compelling partition. When *real property is* ~~lands, tenements, or hereditaments~~ are held in joint tenancy or tenancy in common, whether such right or title is derived by purchase, legacy or descent, or whether any or all of the claimants are minors or adults, any one or more of the persons interested therein may compel a partition thereof by a verified complaint in the circuit court of the county where the premises or part of the premises are situated. If *real property lands, tenements, or hereditaments* held in joint tenancy or tenancy in common are situated in 2 or more counties, the venue may be in any one of such counties, and circuit court of any such county first acquiring jurisdiction shall retain sole and exclusive jurisdiction.

Section 2. This Act takes effect upon its becoming a law.

*X. Fourteen Code Sections
Require Stylistic Uniformity*

1. Lack of Section Headings

The Code of Civil Procedure was approved on August 19, 1981. Each of the more than 800 Code sections was provided with a legislative section heading.

The Illinois 83d General Assembly added seventeen new sections to the Code. Eleven of these sections have legislative section headings, and seven do not have headings. The following seven sections should be amended to correct this lack of uniformity: 2-209.1, 2-416, 9-104.1, 9-104.3, 9-316.1, 12-819, and 15-102.1.

2. Numbering of Sections

Two of the new 1983 sections need stylistic coordination of section numbers. Throughout the Code, additional sections are indicated by the use of the previous section number followed by a decimal and a digit.¹⁹⁰ For stylistic uniformity throughout the Code, section "13-203a" should be corrected to read "13-203.1," and section "13-214a" should be corrected to read "13-214.1." Correcting these two sections will set a pattern and encourage stylistic uniformity in the future.

3. Lettering of Subsections

Unlike all other sections of the Code, the five subsections of section 9-316.1 are numbered instead of lettered. Uniformity requires correction.

4. Gender references

Two of the 1983 sections need stylistic coordination with the rest of the Code to make the Code gender-neutral. Therefore, in sections 9-213.1 and 13-214a, the phrase "or her" should be inserted after the word "his."

5. References to Act

Two new sections, 9-106.1 and 9-104.1, added in 1983 refer to "paragraph (7) of Section 9-102 of this Article." For complete stylistic uniformity throughout the Code, the word "Article" should be substituted with "Act".

6. Incorrect terminology

Section 2-1402 (derived from former section 73 of the Civil Practice Act) complements Supreme Court Rule 277. Both the section and the rule are en-

190. See ILL. REV. STAT. ch. 110, §§ 2-205.1, 2-1105.1, 8-802.1, 9-104.1, 9-104.2, 9-106.1, 9-213.1, 15-102.1 (1983).

titled "Supplementary Proceedings." This term appears in both section 2-1402 and in rule 277 many times. In the third sentence of subsection (a) of Section 2-1402, however, the term "supplemental proceedings" appears. This is a result of a typographical error made in 1955 when section 73 of the Civil Practice Act was substantially amended.¹⁹¹ This error has not yet been corrected. Therefore, the term "supplemental" should be substituted with "supplementary".

7. *Omission of Words*

The word "or" should be inserted in section 6-137. Section 6-137 was derived from Ill. Rev. Stat. ch. 45, § 48 (1979) and the error in omitting the word "or" occurred in 1977.¹⁹² The corrected section should read as follows:

Sec. 6-137. Issue of fact on petition. If any issue of fact is presented on such petition, it shall be tried as in other civil cases; and if such issue is found for the plaintiff, *or* if demand for trial by jury has been made in accordance with law, a jury may assess damages in the amount of the mesne profits received by the defendant since he or she entered into possession of the premises, subject to the restrictions contained in Article VI of this Act.

8. *Correction of a Word*

Section 2-621(b)(3) contains the word "amendable" but should read "amenable."

A bill to create stylistic uniformity among the foregoing sections is herewith submitted:

Proposed Bill

An Act to amend the Code of Civil Procedure approved August 19, 1981, as amended.

Be it enacted by the People of the State of Illinois represented in the General Assembly:

Section 1. Sections 2-209.1, 2-416, 2-621, 2-1402, 6-137, 9-104.1, 9-104.3, 9-106.1, 9-213.1, 9-316.1, 12-819, 13-203a, 13-214a, and 15-102.1 of the "Code of Civil Procedure" approved August 19, 1981, as amended, are amended to read as follows:

(ch. 110, par. 2-209.1)

Sec. 2-209.1. *Actions by and against voluntary associations.* A voluntary unincorporated association may sue and be sued in its own name, and may complain and defend in all actions. For the purposes of this Code, "voluntary unincorporated association" means any organization of 2 or more individuals formed for a common purpose, excluding a partnership or corporation.

191. *Id.* § 73 (1955).

192. *Id.* § 48 (1977).

(ch. 110, par. 2-416).

Sec. 2-416. *Representation of corporations in small claims.* A corporation may prosecute as plaintiff or defend as defendant any small claims proceeding in any court of this State through any officer, director, manager, department manager or supervisor of the corporation, as though such corporation were appearing in its proper person.

No corporation may appear as assignee or subrogee in a small claims proceeding.

For the purposes of this Section, the term "officer" means the president, vice-president, registered agent or other person vested with the responsibility of managing the affairs of the corporation, and "small claims proceeding" means a civil action based on either tort or contract for money not in excess of \$2,500, exclusive of interests and costs, or for collection of taxes not in excess of that amount.

(ch. 110, par. 2-621)

Sec. 2-621. *Product liability actions.* (a) In any product liability action based in whole or in part on the doctrine of strict liability in tort commenced or maintained against a defendant or defendants other than the manufacturer, that party shall upon answering or otherwise pleading file an affidavit certifying the correct identity of the manufacturer of the product allegedly causing injury, death or damage. The commencement of a product liability action based in whole or in part on the doctrine of strict liability in tort against such defendant or defendants shall toll the applicable statute of limitation and statute of repose relative to the defendant or defendant for purposes of asserting a strict liability in tort cause of action.

(b) Once the plaintiff has filed a complaint against the manufacturer or manufacturers and the manufacturer or manufacturers have or are required to have answered or otherwise pleaded, the court shall order the dismissal of a strict liability in tort claim against the certifying defendant or defendants, provided the certifying defendant or defendants are not within the categories set forth in subsection (c) of this Section. Due diligence shall be exercised by the certifying defendant or defendants in providing the plaintiff with the correct identity of the manufacturer or manufacturers, and due diligence shall be exercised by the plaintiff in filing an action and obtaining jurisdiction over the manufacturer or manufacturers.

The plaintiff may at any time subsequent to the dismissal move to vacate the order of dismissal and reinstate the certifying defendant or defendants, provided plaintiff can show one or more of the following:

(1) That the applicable period of statute of limitation or statute of repose bars the assertion of a strict liability in tort cause of action against the manufacturer or manufacturers of the product allegedly causing the injury, death or damage; or

(2) That the identity of the manufacturer given to the plaintiff by the certifying defendant or defendants was incorrect. Once the correct identity of the manufacturer has been given by the certifying defendant or defendants; the court shall again dismiss the certifying defendant or defendants; or

(3) That the manufacturer no longer exists, cannot be subject to the jurisdiction of the courts of this State, or despite due diligence, the manufacturer is not *amenable* ~~amendable~~ to service of process; or

(4) That the manufacturer is unable to satisfy any judgment as determined by the court; or

(5) That the court determines that the manufacturer would be unable to satisfy a reasonable settlement or other agreement with plaintiff.

(c) A court shall not enter a dismissal order relative to any certifying defendant or defendants other than the manufacturer even though full compliance with subsection (a) of this Section has been made where the plaintiff can show one or more of the following:

(1) That the defendant has exercised some significant control over the design or manufacture of the product, or has provided instruction or warning to the manufacturer relative to the alleged defect in the product which caused the injury, death or damage; or

(2) That the defendant had actual knowledge of the defect in the product which caused the injury, death or damage; or

(3) That the defendant created the defect in the product which caused the injury, death or damage.

(d) Nothing contained in this Section shall be construed to grant a cause of action in strict liability in tort or any other legal theory, or to affect the right of any person to seek and obtain indemnity or contribution.

(e) This Section applies to all causes of action accruing on or after September 24, 1979.

(ch. 110, par. 2-1402)

Sec. 2-1402. Supplementary proceedings. (a) A judgment creditor, or his or her successor in interest when that interest is made to appear of record, is entitled to prosecute supplementary proceedings for the purposes of examining the judgment debtor or any other person to discover assets or income of the debtor not exempt from the enforcement of the judgment therefrom, a deduction order or garnishment, and of compelling the application of non-exempt assets or income discovered toward the payment of the amount due under the judgment. A supplementary proceeding shall be commenced by the service of a citation issued by the clerk. The procedure for conducting *supplementary* ~~supplemental~~ proceedings shall be prescribed by rules. It is not a prerequisite to the commencement of a supplemental proceeding that a certified copy of the judgment has been returned wholly or partly unsatisfied.

(b) When assets or income of the judgment debtor not exempt from the satisfaction of a judgment, a deduction order or garnishment are discovered, the court may, by appropriate order or judgment:

(1) Compel the judgment debtor to deliver up, to be applied in satisfaction of the judgment, in whole or in part, money, choses in action, property or effects in his or her possession or control, so discovered, capable of delivery and to which his or her title or right of possession is not substantially disputed.

(2) Compel the judgment debtor to pay to the judgment creditor or apply on the judgment, in installments, a portion of his or her income, however or whenever earned or acquired, as the court may deem proper, having due regard for the reasonable requirements of the judgment debtor and his or her family, if dependent upon him or her, as well as any payments required to be made by prior order of court or under wage assignments outstanding. The court may modify an order for installment payments, from time to time, upon application of either party upon notice to the other.

(3) Compel any person cited, other than the judgment debtor, to deliver up any assets so discovered, to be applied in satisfaction of the judgment, in whole or in part, when those assets are held under such circumstances that in an action by the judgment debtor he or she could recover them in specie or obtain a judgment for the proceeds or value thereof as for conversion or embezzlement.

(4) Enter any order upon or judgment against the person cited that could be entered in any garnishment proceeding.

(5) Compel any person cited to execute an assignment of any chose in action or a conveyance of title to real or personal property, in the same manner and to the same extent as a court could do in any proceeding by a judgment creditor to enforce payment of a judgment or in aid of the enforcement of a judgment.

(6) Authorize the judgment creditor to maintain an action against any person or corporation that, it appears upon proof satisfactory to the court, is indebted to the judgment debtor, for the recovery of the debt, forbid the transfer or other disposition of the debt until an action can be commenced and prosecuted to judgment, direct that the papers or proof in the possession or control of the debtor and necessary in the prosecution of the action be delivered to the creditor or impounded in court, and provide for the disposition of any moneys in excess of the sum required to pay the judgment creditor's judgment and costs allowed by the court.

(c) All property ordered to be delivered up shall, except as otherwise provided in this section, be delivered to the sheriff to be collected by the sheriff or sold at public sale and the proceeds thereof applied towards the payment of costs and the satisfaction of the judgment.

(d) (1) The citation may prohibit the party to whom it is directed from making or allowing any transfer or other disposition of, or interfering with, any property not exempt from the enforcement of a judgment therefrom, a deduction order or garnishment, belonging to the judgment debtor or to which he or she may be entitled or which may thereafter be acquired by or become due to him or her, and from paying over or otherwise disposing of any moneys not so exempt which are due or to become due to the judgment debtor, until the further order of the court of the termination of the proceeding, whichever occurs first. The third party may not be obliged to withhold the payment of any moneys beyond double the amount of the judgment sought to be enforced by the judgment creditor. The court may punish any party who violates the restraining provision of a citation as and for a contempt, or if the

party is a third party may enter judgment against him or her in the amount of the unpaid portion of the judgment, and costs allowable under this section, or in the amount of the value of the property transferred, whichever is lesser.

(2) The court may enjoin any person, whether or not a party to the supplementary proceeding, from making or allowing any transfer or other disposition of, or interference with, the property of the judgment debtor, or the property or debt concerning which any person is required to attend and be examined until further direction in the premises. The injunction order shall remain in effect until vacated by the court or until the proceeding is terminated, whichever first occurs.

(e) If it appears that any property, chose in action, credit or effect discovered, or any interest therein, is claimed by any person other than the judgment debtor, the court shall, as in garnishment proceedings, permit or require the claimant to appear and maintain his or her right. The rights of the person cited (other than the judgment debtor) and the rights of any adverse claimant shall be asserted and determined pursuant to the law relating to garnishment proceedings.

(f) Costs in proceedings authorized by this Section shall be allowed, assessed and paid in accordance with rules.

(g) This Section is in addition to and does not affect enforcement of judgments or proceedings supplementary thereto, by any other methods now or hereafter provided by law.

(h) This Section does not grant the power to any court to order installment or order payments from, or compel the sale, delivery, surrender, assignment or conveyance of any property exempt by statute from the enforcement of a judgment thereon, a deduction order, garnishment, attachment, sequestration, process or other levy or seizure.

(i) An order, judgment, citation or injunction under this Section that relates to a security which is transferable as provided in Section 8-320 of the Uniform Commercial Code may be entered only against the judgment debtor, against a person who carries on his, her or its books an account in the name of the judgment debtor in which an interest in that security is reflected or against the person to whom the judgment debtor has pledged that security.

(ch. 110, par. 6-137)

Sec. 6-137. Issue of fact on petition. If any issue of fact is presented on such petition, it shall be tried as in other civil cases; and if such issue is found for the plaintiff, *or* if demand for trial by jury has been made in accordance with law, a jury may assess damages in the amount of the mesne profits received by the defendant since he or she entered into possession of the premises, subject to the restrictions contained in Article VI of this Act.

(ch. 110, par. 9-104.1)

Sec. 9-104.1. Demand—Notice—Return—Condominium and Contract Purchasers. (a) In case there is a contract for the purchase of such lands or tenements or in case of condominium property, the demand shall give the purchaser under such contract, or to the condominium unit owner, as the case may be, at least 30 days to satisfy the terms of the demand before an action

is filed. In case of a condominium unit, the demand shall set forth the amounts claimed which must be paid within the time prescribed in the demand and the time period or periods when the amounts were originally due. The demand shall be signed by the person claiming such possession, his or her agent, or attorney.

(b) The demand set forth in subsection (a) of this Section shall be served either personally upon such purchaser or condominium unit owner by sending the demand thereof by registered or certified mail with return receipt requested to the last known address of such purchaser or condominium unit owner or in case no one is in the actual possession of the premises, then by posting the same on the premises. When such demand is made by an officer authorized to serve process, his or her return is prima facie evidence of the facts therein stated and if such demand is made by any person not an officer, the return may be sworn to by the person serving the same, and is then prima facie evidence of the facts therein stated. No other demand shall be required as a prerequisite to filing an action under paragraph (7) of Section 9-102 of this *Act Code*.

(ch. 110, par. 9-104.3)

Sec. 9-104.3. *Applicability of Article*. All common interest community associations electing pursuant to paragraph (8) of subsection (a) Section 9-102 to have this Article made applicable to such association shall follow the same procedures and have the same rights and responsibilities as condominium associations under this Article.

(ch. 110, par. 9-106.1)

Sec. 9-106.1. Action for condominium assessments not barred or waived by acceptance of assessments for time periods not covered by demand. An action brought under paragraph (7) of Section 9-102 of this *Act Article* is neither barred nor waived by the action of a Board of Managers in accepting payments from a unit owner for his or her proportionate share of the common expenses or of any other expenses lawfully agreed upon for any time period other than that covered by the demand.

(ch. 110, par. 9-213.1)

Sec. 9-213.1. *Duty of landlord to mitigate damages*. After January 1, 1984 ~~the effective date of this amendatory Act of 1983~~, a landlord or his or her agent shall take reasonable measures to mitigate the damages recoverable against a defaulting lessee.

(ch. 110, par. 9-316.1)

Sec. 9-316.1. *Tenant's duty to disclose to landlord identity of vendee of crops*. (a) (1) Where, pursuant to Section 9-316, a landlord has required that, before the tenant sells crops grown on the demised premises, the tenant disclose to the landlord the persons to whom the tenant intends to sell such crops, it is unlawful for the tenant to sell the crops to a person other than a person so disclosed to the landlord.

(b) (2) An individual who knowingly violates this Section is ~~shall be~~ guilty of a Class A misdemeanor.

(c) ~~(3)~~ A corporation convicted of a violation of this Section ~~is shall be~~ guilty of a business offense and shall be fined not less than \$2000 nor more than \$10,000.

(d) ~~(4)~~ In the event the tenant is a corporation or a partnership, any officer, director, manager or managerial agent of the tenant who violates this Section or causes the tenant to violate this Section ~~is shall be~~ guilty of a Class A misdemeanor.

(e) ~~(5)~~ It is an affirmative defense to a prosecution for the violation of this Section that the tenant has paid to the landlord the proceeds from the sale of the crops within 10 days after such sale.

(ch. 110, par. 12-819)

Sec. 12-819. *Limitations on part 8 of Article XII.* The provisions of this Part 8 of Article XII of this Act do not apply to orders for withholding of income entered by the court under provisions of The Illinois Public Aid Code, the Illinois Marriage and Dissolution of Marriage Act, the Non-Support of Spouse and Children Act, the Revised Uniform Reciprocal Enforcement of Support Act and the Paternity Act for support of a child or maintenance of a spouse.

(ch. 110, par. 13-203a)

Sec. 13-203.1 ~~13-203a~~. Loss of means of support or parental relationships. Actions for damages for loss of means of support or loss of parental or in loco parentis relationships sustained by a minor resulting from an injury described in Section 13-214.1 ~~13-214a~~ may be commenced no later than 10 years after the person who inflicted such injury has completed his sentence therefor.

(ch. 110, par. 13-214a)

Sec. 13-214.1 ~~13-214a~~. *Action for damages involving criminal acts.* Actions for damages for an injury described in Section 13-202 or Section 13-203 arising out of murder or the commission of a Class X felony by the person against whom the action is brought may be commenced no later than 10 years after the person who inflicted such injury has completed his *or her* sentence therefor.

(ch. 110, par. 15-102.1)

Sec. 15-102.1. *Extent of Applicability.* Mortgages securing "revolving credit" loans as authorized by Section 5c of the "Illinois Banking Act", approved May 11, 1955, as amended; by Section 1-6b of the "Illinois Savings and Loan Act", approved July 5, 1955, as amended; or by Section 46 of the "Illinois Credit Union Act", approved August 30, 1979, as amended; shall be subject to this Act except where this Act is inconsistent with those Sections.

Section 2. This Act takes effect upon its becoming a law.

This Act became law by Pub. Act No. 84-1043, effective Nov. 26, 1985.

Y. Availability of Additional Source Material

In late 1981, the West Publishing Company published the *Guide to Illinois Code of Civil Procedure*.¹⁹³ In this *Guide*, the author highlighted numerous

193. See *supra* note 79.

code sections that required amendment. Many of the sections that needed alteration have already been addressed and need no further attention. A number of sections, however, have only been corrected in part, and some sections remain as they were at the time that the *Guide* was published. Other needed corrections that were previously overlooked or were discovered subsequent to the publication of the *Guide* have been carefully treated in the previous pages of this article.¹⁹⁴

III. PROGRESS IN 1985 AND THE TASK AHEAD

In 1985, this author urged a member of the Illinois House of Representatives to introduce in the House a number of bills contained in this law review article. This approach resulted in favorable action in both the House and Senate, so that by the time this article was ready to go to press a number of bills contained therein were passed and became law.

The citizens of Illinois are profoundly indebted to those devoted legislators who gave prompt attention to the solution of these legislative problems, and we sincerely hope for prompt attention by all legislators to the remainder of the needed legislation urged in this article.

This article will assist all persons—legislators, lawyers, judges, and citizens—who wish to participate in creating a Code of Civil Procedure for Illinois which may be used as a model for other states to follow.

194. To conserve space in this article and avoid repetition, the following 13 listed items, which are still in need of correction, are incorporated herein by reference to the Guide:

<i>Section of Code</i>	<i>Pages of Guide</i>
1-104	48-49
2-611	85-88
2-1206(a)	121-122
2-1305	127-135
2-1402(d)	137-143
3-102	147-151
12-183(h)	370-373
12-201	373-376
12-202	376-377
12-813	403-405
12-910	410-411
19-125	516-517