NOTES ON RECENT ILLINOIS LEGISLATION†

CRIMINAL LAW

THE 1937 session of the Illinois assembly was marked, so far as criminal law is concerned, rather by the significant measures which were proposed and which did not become law than by those which did. Notably two measures which were much in the public eye so failed of adoption, the one unfortunately, the other most fortunately, in the writer's opinion. The former was the proposed new criminal code, constituting an entire revision and modernization of the present criminal code, both substantive and procedural. This was prepared by a committee of the Illinois State Bar Association, after several years of work, and was approved by the association. It was introduced in the 1935 Assembly and referred to committee. In the hearings which followed, certain differences of view were disclosed and the bill was not reported out. Prior to this year’s assembly the drafting committee made some changes and modifications to remove or reduce the objections disclosed, with a result that this year it was favorably reported out. Unfortunately it was caught in the legislative jamb at the end of the session and so failed of passage. The chaotic condition of the present code is an unanswerable argument for its passage, even if in a further modified form. It is to be hoped that this desirable and inevitable end will not be delayed beyond the 1939 session.

A bitterly contested measure, finally adopted by both houses, but vetoed by the governor, was a response to the wide-spread dissatisfaction with the administration of parole in Illinois. Commencing in a most promising newspaper criticism of abuses in the administration of the system it rapidly tended to become a criticism of parole itself and of the indeterminate sentence. As a result of the clamor a self-appointed committee of highly regarded citizens drafted a series of measures, one of which was the measure referred to at the beginning of this paragraph. Under its provisions, in any conviction of a crime covered by the indeterminate sentence law (the vast majority of crimes) it would have become the duty of the trial judge to set, within the statutory minimum and maximum, a further minimum and maximum within which alone the parole board would have been authorized to act. This proposal at once awakened strong support and equally strong disagreement. Detailed examination of the arguments

† These articles were prepared by the following members of the University of Chicago Law School faculty: Paul Cleveland, E. W. Puttkammer, Max Rheinstein, and Kenneth C. Sears.
pro and con is out of place here. In brief the proponents of the measure cited the unsatisfactory conditions surrounding parole, which in their opinion rendered a restriction on its scope desirable, and urged the wisdom of vesting in the trial judge some control over the defendant's future, in the light of the knowledge acquired of him at the trial. The opponents denied the ability of the trial judge then to forecast when and when only a prisoner would become fit for release and maintained that in actual operation as shown by experience elsewhere, such a measure would in fact do away with indeterminate sentence in favor of a return to the older system of a judge-fixed punishment. If there were defects in parole administration, it was argued, these should be met by correcting that administration, not by, in effect, abolishing parole. The bill, after extensive hearings, was passed. It was however vetoed by the governor.

The committee which had sponsored the vetoed bill also backed several other bills on parole which did not meet with similar opposition, and were passed and signed by the governor. One of these was a highly desirable measure to tighten the control over employers and sponsors of parolees. The law governing release on parole has long provided that there was to be no such release unless a job was awaiting the parolee, but the reality of such a job and the responsibility of the sponsor offering it had largely to be taken on faith, supplemented by such cursory investigation as the over-loaded field agents were able to make. The new law provides for summoning the prospective employer and examining him under oath. The scope of the new measure is however narrowed by a provision that "no prospective employer shall be required to travel outside of the county in which he resides to be so examined." In view of the extent to which we have outgrown county lines the limitation seems an unfortunate one. The same act also provides that no person shall be accepted as a sponsor, who holds any political or party office.

Two minor measures on parole are directed toward securing publicity for parole decisions. According to one all the sessions of the board are to be open to the public and a public record kept of all persons appearing for or against the application. The other provides for publicity as to decisions reached by the board. These measures probably alter the previous practice only to a very slight degree. Whatever the provision for public admission, over an extended period of time public interest will flag and in all likelihood representatives of the public will be few and far between. Mainly it will in effect provide admission for partisans of the prisoner. The provision that there shall be a public record of all those who favor or oppose the parole seems open to considerable and obvious objection. It remains to be seen to what an extent it will deprive the board of sources
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of information open to them so long as these sources could remain anonymous.

Another act dealing with the handling of convicted offenders reflects the current concern regarding sex offenses. It requires the prison authorities to segregate all such offenders and handle them as a unit. Whether such a measure is desirable is debatable. Either it is a reversion to the old theory of looking to the offense rather than to the offender, or it assumes that such offenders inherently are a separate and homogeneous group, requiring similar handling, which may or may not be true—we do not know. It is true that the proportion of psychopathics is a much higher one than is the case for offenders generally (a fact which has already led to a definite grouping of them at Menard and a light sex-offender population at Pontiac). It is also true that the average age at admission of these offenders is nearly twenty years higher than the general average. It still remains an open question whether or not such segregation is useful. The one thing sure is that the hasty legislation was a result of present popular uneasiness on the subject and popular belief that the danger is growing. Such a belief arises periodically as a result of lurid newspaper fanning. This year it is further fanned by the fact that for 1937 to-date about ten per cent of the admissions to prisons have been sex offenders, against a previous resident average of only about five per cent. But this may indicate, not an increase in these offenses, but in the zeal with which they are prosecuted. And in any event in the past thirty years there have been regular percentage swings back and forth in a much wider range, from as low as four per cent to a maximum of sixteen. It would be unfortunate if action dictated by unnecessary haste were to lure us away from more considered measures.

The inadequate statute governing insane persons is filled in by an act which codifies the results which have already been or would be arrived at by the courts without statutory aid. The previous statute merely provided that if the acquitting jury did not find the defendant restored to sanity he was to be confined until he had so recovered. There was no provision for the event of insanity arising after the act but before trial. The present act covers this by providing for a jury hearing, followed (in the event of a finding of insanity) by commitment until in a similar hearing it should be found that sanity had been regained and the trial on the issue of guilt could be had. While certain decisions had already indicated that such a pro-

1 However loose a term this may be to the psychiatrist, it is here used in the usual popular sense to include rape, incest, crime against nature, taking indecent liberties, and attempts to commit any of these. Exposure and transvestism, not being state offenses, are not included.

2 See, e.g., People v. Geary, 298 Ill. 236, 131 N.E. 652 (1921); People v. Scott, 326 Ill. 327, 157 N.E. 247 (1927); People v. Maynard, 347 Ill. 422, 179 N.E. 833 (1932).
procedure would be followed without statutory aid, it is a gain to have made
the matter definite.3

Rather belatedly the harmful consequences of People v. Lieber4 have
been cured. That case held that in forming a grand jury the clerk of court
was limited to drawing twenty-three names, and that there was no author-
ity to draw more to guard against the contingency of absences, with sub-
sequent determining by lot who was to serve. Where, as in Cook County,
a large number of those drawn would for one reason or another be unavail-
able the inconvenience caused by preventing such forehandedness is ap-
parent. The new act provides for the regular drawing of a supplemental
panel of twenty in addition to the regular panel of twenty-three, with
vacancies in the latter to be filled from the former.

Another is added to the growing list of sections making specific provi-
sions for venue in particular crimes. This time it is libel which is dealt
with. Jurisdiction is laid in the county where the libel was composed, in
cases of newspapers of general circulation. Detailed discussion will be
omitted here as an identical provision for civil suits is dealt with elsewhere
in this article. Attention should, however, be called to the loose drafts-
manship of the concluding clause, which reads “except when . . . . the
article was printed without this State . . . . in which [case] the jurisdiction
shall be in any county in which the libel was . . . . printed.”5

Changes in the substantive law were few, only one of which was of
major importance. This is the provision, so widely publicized as to call for
nothing more than bare mention, that those convicted of certain traffic
offenses (involving dangerous driving) may in addition to other penalties
be prohibited from driving a motor vehicle for any period not exceeding a
year. Violation of the order is made a contempt.

The statute governing the obtaining of property by bad checks is am-
plified by a provision that the drawing of a check without having sufficient
funds on deposit at the time shall be prima facie evidence of an intent to
defraud. The prosecution is thereby relieved of some of the difficulties
indicated by such cases as People v. Balalas.6

E. W. P.

3 A minor matter, but deserving of favorable note, is that the act drops all reference to “a
lunatic” and speaks only of insane persons. Unhappily, the completely meaningless “without
lucid intervals” escaped notice and still remains to cumber the statute.
4 357 Ill. 423, 192 N.E. 331 (1934).
5 Cf. the more careful draftsmanship of the New York act. Gilberts' Criminal Code § 133
(1933).
6 334 Ill. 444, 166 N.E. 47 (1929).
In 1935, after the Civil Practice Act became effective in Illinois, a large number of laws were enacted to make the practice in special proceedings conform to the Civil Practice Act. One of the bills included in this group was a bill to make the procedure in quo warranto conform to the practice act and also to modify and modernize quo warranto proceedings. This bill passed both houses but was vetoed by Governor Horner. In his veto message he stated that he was sympathetic with the proposed legislation but objected to the elimination from quo warranto procedure of railroad companies which charged extortionate rates or indulged in unjust discriminations.

In the 1937 General Assembly a similar bill was introduced and is now a law. The provision just mentioned, which was eliminated in 1935, was restored. It is believed that the new law has several desirable features which will tend to make procedure in quo warranto seem modern rather than ancient. For instance, the proceeding is no longer referred to as “an information in the nature of a quo warranto.” This makes it more clear that the proceeding is not merely a writ or a penal proceeding but primarily a civil action, although there is the sanction of a fine in order to make the proceeding one of greater value. The statute provides for a fine as high as $25,000 but in this respect the new law is the same as it was before 1937.

The first section of the new law is essentially the same as the first sec-

1 L. of Ill. 1937, 992.

2 The reference here is to sub-section f of section 1 of the law of 1937. Since the law of quo warranto was overhauled why were not public service companies in general placed under the restriction that now, in terms at least, applies only to a railroad company? It is hoped that no court will be persuaded that such a classification is unconstitutional “class legislation,” i.e., in violation of the guarantee of the equal protection of the laws. See State R.R. Comm. v. People ex rel., 44 Colo. 345, 98 Pac. 7 (1908).

3 Would it not have been more consistent with changes that appear in the new law, if section 6 had used other words for the words “fine” and “offense”?

In procedural aspects the Supreme Court of Illinois seems to have regarded a quo warranto proceeding as a prosecution.

“An information in the nature of quo warranto is a prosecution, and section 33 of article 6 of the constitution provides that all prosecutions shall be carried on ‘in the name and by the authority of the People of the State of Illinois,’ and conclude, ‘against the peace and dignity of the same.’ A prosecution by information in the nature of quo warranto is included in that provision.” People v. Larsen, 265 Ill. 406, 409, 106 N.E. 947 (1914). Will the rule set forth in People v. Larsen be followed any longer in this state under the new statute? It would seem better to abandon the criminal form. Compare People ex rel. v. Blair et al., 339 Ill. 57, 170 N.E. 680 (1930). “This (quo warranto) is a civil case, and pleadings in cases of this kind should be in accordance with the common law”; People ex rel. v. Drainage Com’rs, 282 Ill. 514, 118 N.E. 742 (1918) (criminal in form but not criminal in its nature, but a civil remedy).
tion of the old law which had its beginning in 1833. The change of greatest value that seems certain occurs in the second section. Before the law of 1937 was enacted it was necessary for the Attorney General or a State’s Attorney “of the proper county” to obtain permission from a court of “competent jurisdiction” or a judge thereof “in vacation” in order to “file an information in the nature of a quo warranto.” Under the new statute either official may bring “the proceeding” without permission and may do so “of his own accord or at the instance of any individual relator.” More important is the fact that under the 1937 statute “any citizen having an interest in the question” may bring the proceeding “on his own relation” provided (1) his request of the Attorney General and the State’s Attorney, of the “proper” county, presumably, to bring the proceeding has been refused or ignored, and (2) permission of court has been granted after notice has been given to the Attorney General, State’s Attorney, and the adverse party of the intended application. The court’s permission is to be secured from “any court of competent jurisdiction or any judge thereof.” Observe that the repealed law specified “any judge thereof, in vacation.” Will the new expression make it possible in such a county as Cook for one to “peddle” his application from judge to judge until a willing judge is found? This was possible under the habeas corpus act before reformatory legislation in 1935 restricted the practice. It is hoped that similar procedure in quo warranto will not be possible; that a ruling by one judge or court will be res judicata with relief in an appellate court if the refusal to grant permission is an abuse of discretion. The value of these changes seems to be: (1) a specified public official may institute quo warranto without the trouble and delay of obtaining the permission of a court or judge; (2) an interested citizen may obtain his justice without being compelled in certain instances to bring a mandamus action to compel one of two public officials to proceed in quo warranto. But it must not be assumed that now in Illinois “any citizen” may bring quo warranto, whenever he feels so inclined, without the consent of the Attorney General or State’s Attorney. The new statute specifies that he

5 L. of Ill. 1937, 993, § 2.
6 3 Univ. Chi. L. Rev. 82 (1935).

Observe that the statute of 1937 omits the provision in the previous statute that the court may grant permission to file quo warranto if “satisfied that there is probable ground for the proceeding.” Will a court or a judge be ruled by a different standard in the case of an interested citizen under the new statute?
must have "an interest in the question." What is the meaning of this limitation? It seems likely that it will be interpreted to mean that a citizen must have an interest that is different from that of other citizens and taxpayers as a class. The interest of a relator as a citizen and taxpayer was not sufficient to justify a proceeding by this citizen on his own relation in quo warranto in the District of Columbia. So held the Supreme Court of the United States in Newman v. U.S. ex rel. Frizzell, construing a statute that required a relator acting for himself to be an "interested person." This decision was relied upon by the Supreme Court of Illinois in People ex rel. Miller v.Fullenwider. There it was held that Miller as a citizen and taxpayer could not secure a writ of mandamus to compel Fullenwider, State's Attorney, to institute a proceeding in quo warranto to challenge the right of Len Small to be Governor of Illinois. The controversy was regarded as one of "public" rather than "private" right and Miller had no greater interest than citizens and taxpayers generally. It is believed that the Supreme Court of Illinois will follow these two cases in construing the new statute and that a general interest of the type mentioned will not be sufficient "interest in the question" to justify anybody except the Attorney General or a State's Attorney in bringing a quo warranto proceeding in a matter that will be classified as of "public" rather than "private" interest.

However, it is not believed that a classification of proceedings in quo warranto as "public," or "private" will be easy unless it is done rather blindly. It seems fairly clear that the desire of Raster to oust Brand from the office of treasurer of the Illinois Publishing Company, a private corporation, was a "private" affair. The question involved in the Fullenwider case, supra, was of "public" concern. But is it obvious that the question presented in People ex rel. Post v. Healy was "private" or that the State's Attorney should have been held to have been under a duty to institute a quo warranto proceeding? The relators there were privately interested in retaining their positions as members of the Chicago Board of Education to the extent of their salaries; but the public served by the board was interested in the members of the board and it would seem that this was the more important of the two interests. This possibility was not discussed by the court.

Thus, it would seem that there are cases where courts may conclude

8 238 U.S. 537 (1915).
9 329 Ill. 65, 160 N.E. 175 (1928).
10 People ex rel. Raster v. Healy, 230 Ill. 280, 82 N.E. 599 (1907).
11 231 Ill. 629, 83 N.E. 453 (1908).
that there are both "public" and "private" interests involved. Indeed in *People ex rel. Raster v. Healy* appears the following language:

"It is, of course, true that in many cases where the individual relator has a private and personal interest in the suit which he seeks to set on foot the public also has a substantial interest therein. No injury can result to the public in such instances, however, by requiring the prosecutor to proceed, for the reason that the court, or the judge thereof, when the petition for leave to file the information is presented, is vested with a sound legal discretion to be exercised in determining whether leave to file the information should be granted, and the court or the judge thereof may, in the exercise of that discretion, fully protect the rights of the public, and may under some circumstances, where the public weal demands, refuse leave to file the information although the clear legal right of the relator is established. . . ."

Under the new statute of 1937 it would seem that courts will cease to grant writs of *mandamus* to compel the Attorney General or a State's Attorney to file a proceeding in *quo warranto*. In "public" matters the discretion apparently cannot be controlled; apparently such a thing as an abuse of that discretion has not been observed. In a "private" controversy the interested citizen can sue on his own relation provided he takes certain action and secures the consent of a court of competent jurisdiction or a judge thereof. There is no need for *mandamus* against a public official to compel him to sue in such a case even though the officials mentioned may sue at the instance of an individual relator if they wish. From the language quoted above from the *Raster* case it seems a fair guess that a citizen "having an interest" in a question that is also a matter of public interest may sue in *quo warranto* on his own relation, after taking the required action, since he must obtain permission to sue from a court or a judge who presumably will be more reluctant to give consent where the interests are mixed as distinguished from a case of a mere "private" interest.

Section 3 of the new statute provides that the complaint in the proceeding may be expressed in general terms and "need not set forth the basis of the challenge," but the plaintiff may set forth "the grounds for an attack on the defendant's claimed right." This seems to make the proceeding elastic and liberal. The complaint if "filed by a citizen on his own relation" shall allege that his requests of the Attorney General and the State's Attorney have been refused or that they failed to act. It is not expressly stated that this complaint must set forth the interests of the citizen or that notice was given to the adverse party; but one doubts whether such omissions from the complaint will be permitted by the courts.

In section 4 there is new legislation as to the appearance that the defendant must make and apparently it will result in a more prompt disposal of the action in the trial court. Section 5 is a new section that is prompted by the provision in section 2 authorizing a citizen to bring an
action on his own relation. It requires the citizen to file security for costs "to be approved by the clerk...." This seems to mean that the clerk can fix the amount of the security.

Section 6 has a new provision that may constitute a very decided change in the nature of the trial. In Illinois it seems to be the understanding of the profession that a jury trial is an incident of a *quo warranto* proceeding. The first sentence in section 6 reads: "The court shall determine and adjudge the rights of all parties to the proceeding." The word "court" could be interpreted to include trial by jury but it would appear to be a more natural interpretation that trial by jury is abolished in *quo warranto*. If so, the statute in Illinois appears to be similar to the statutes of other states. However, it is a serious question whether under the constitutional guarantee in Illinois, jury trial can be denied in *quo warranto*. It is believed that the issues in *quo warranto* are usually of such a nature that better results can be obtained through trial by a court without the use of a jury. Has it been common in Illinois to use a jury in a *quo warranto* proceeding?

K. C. S.

**ILLINOIS MARRIAGE LAW**

I

Among the statutes enacted by the sixtieth Illinois legislature, none has obtained greater publicity than the so-called Saltiel Act (Eugenic Marriage Law), which has been inserted into the Marriage Law as section 6a, and which provides that:

"all persons desiring to marry shall within fifteen (15) days prior to the issuance of a license to marry, be examined by any duly licensed physician as to the existence or non-existence in such person of any venereal disease...."3

Issuance of a marriage license to a person who fails to present such a health certificate is declared to be unlawful for any county clerk.

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2 People ex rel. v. Lord, 315 Ill. 603, 146 N.E. 506 (1925); People ex rel. v. Barber, 265 Ill. 316, 106 N.E. 798 (1914); People ex rel. v. Drainage Comr's., 282 Ill. 514, 118 N.E. 742 (1918); People ex rel. v. Cooper, 139 Ill. 461, 29 N.E. 872 (1891).

3 See the cases collected in 24 L.R.A. 806 (1894) and 24 L.R.A. (n.s.) 639 (1909).

1 H.B. No. 114 (1937), introduced by Dr. Edward P. Saltiel of Chicago. The Act was approved by the Governor on June 23, 1937, and took effect immediately.

2 Ill. Bar Ass. Rev. Stats. 1937, c. 89.

The passage of this act marks a successful step in the campaign against venereal diseases which has recently been initiated under the leadership of Doctor Parran, Surgeon-General of the United States Army. Whether or not such a drastic measure as compulsory medical examination of all marriage candidates is necessary and sufficient to prevent the communication of syphilis and other venereal diseases from one spouse to the other and to the coming generation is the subject of a debate among public health experts. The main arguments against such legislation are that the desirable end of conquering venereal diseases could be better achieved through education than through compulsion, and that "premarital examination laws are likely to be arbitrary and rigid. They assume—and lead the public to believe—that tests for syphilis (the Wasserman, Kahn and Kline tests) render highly reliable verdicts as to whether or not a certain man or woman is fit to marry. Many a man with a 4-plus Wasserman, and so a proved syphilitic, is perfectly justified in getting married, so far as infectiousness is concerned. The plus-reaction from a serological test usually lasts longer than infectiousness. Experts will tell you that practically half of such plus-reactions are no bar to marriage. That, however, is a point determinable only by a widely experienced syphilologist. Legal requirements of laboratory tests as decisive evidence fail to allow for expert discretion.

"The State of Connecticut has left the decision as to the patient's right to marry to his own doctor, who can exercise his own judgment on what a plus-Wasserman means. But when, in order to avoid injustice, the law does allow such wide discretion to doctors, some members of the medical profession will be sorely tempted to bootleg clean bills of health." It is argued, furthermore, that "some experienced health officers regard these laws as an uneconomical diversion of financial ammunition from the front lines. They say they could give the community a much bigger dollar's worth of syphilis prevention by using the money along more constructive lines," such as education of the public, and serological tests to pregnant women. "Given proper treatment before a pregnancy is five months advanced, a syphilitic mother has a nine-to-one chance of bearing an uninfected, normal child."

The main arguments in favor of compulsory health examination statutes are that the required examination is likely to reveal contagious conditions and to cause postponement of marriage, that such a law is a real factor in inducing marriage candidates to make sure whether they are fit,
even before applying for an official health certificate. Experiences in other states have also shown that such a law has a marked educational value, first through newspaper discussion in the early years of its history, and also through the fact that large numbers of persons receive a warning as to the dangers of venereal infection at the time when they are most likely to heed it.\(^6\)

Under the new statute of Illinois, the physician has to certify that he has made "a thorough examination of" the applicant, that he has "considered the result of a microscopical examination for gonococci and a Wassermann or Kahn test for syphilis which was made at his request," and that he "believes" the applicant "to be free from all venereal diseases." Since no marriage license may be issued to an applicant who does not present to the County Clerk such a health certificate, the final decision as to a person's capacity to marry is thus left to his doctor. Since nothing in the law prevents a person from consulting as many doctors inside and outside of the state as he chooses, until he may finally succeed in obtaining a health certificate, it can hardly be argued that the statute deprives a person of his liberty without due process of law. Indeed, nowhere so far have eugenic marriage laws been held unconstitutional. In a careful decision, the Supreme Court of Wisconsin held:

"The power of the state to control and regulate by reasonable laws the marriage relation, and to prevent the contracting of marriage by persons afflicted with loathsome or hereditary diseases, which are liable either to be transmitted to the spouse or inherited by the offspring, or both, must on principle be regarded as undeniable. To state this proposition is to establish it. Society has a right to protect itself from extinction and its members from a fate worse than death."\(^7\)

The Constitution of the State of Illinois does not contain a provision which would necessitate or justify a different decision in Illinois.

The difficulties presented to the enforcement of eugenic marriage laws are not of a constitutional but of a practical order. Such legislation cannot succeed without the understanding co-operation of the medical profession which, in turn, presupposes that the law pays a proper regard to the interests of the medical profession. The attack on the first Eugenic Marriage Law of Wisconsin, a pioneer state in this field of legislation, was based on the insufficiency of the maximum fee of $3.00 which was provided in that statute for the necessary medical examination.\(^8\) The Su-

\(^6\) Hall, Medical Certification for Marriage 15-77 (1925).


\(^8\) Wis. L. 1913, c. 738.
preme Court of Wisconsin, in order to uphold the constitutionality of that law, found itself compelled to interpret it as not prescribing laboratory tests to be made. Since no reliable diagnosis of a venereal disease can be made without such a test, the legislature of Wisconsin had to enact an amendment which provided for free laboratory service by the state. The new statute of Illinois omits to fix a maximum fee for the "thorough physical examination" which it prescribes to be made, but it provides for free laboratory service. The physician, before issuing the health certificate, is obliged in every case, if he does not himself make a microscopical examination for the gonococci for gonorrhea and the blood Wasserman test or Kahn test for syphilis, to have such examination and test made by a health department laboratory, and to consider the result in his certificate.

A physician "who shall knowingly and wilfully make any false statement in the certificate, shall be punished by a fine of not less than $100.00 nor more than $500.00 for each and every offence." Under the careful wording of these provisions, which are taken over literally from the Wisconsin Act, a physician is punishable if he falsely certifies that he made a thorough examination. Abuses of the knowledge obtained through the examination or the certificate are sought to be prevented by the provision that "any party or parties having knowledge of any matter relating or pertaining to the examination of any applicant for license to marry, who shall disclose the same, or any portion thereof, except as may be required by law, shall equally be punished with a fine of not less than $100.00 and not more than $500.00."

Obtaining a license to marry without a health certificate would seem to

\[9\] Peterson v. Widule, 157 Wis. 641, 147 N.W. 966 (1914).

\[10\] Wis. L. 1915, c. 525.

\[11\] Both the Kahn test and the Wasserman test are tests for syphilis on specimens of blood. The Wasserman test depends on the fixation of complements. The Kahn test is a precipitation test. The Wasserman test to be properly interpreted must be made by an expert serologist. The Kahn test demands fairly expensive and elaborate equipment, but its result can be determined by the ordinary laboratory technician more easily. The Kahn test is the more accurate and generally preferred. For a description read J. Am. Med. Ass'n 2070 (1936). See also books on the subject, Ruicey, Dermatology and Syphilology (1936); Stokes, Modern Clinical Syphilology (1936); Lees, Practical Method in the Diagnosis and Treatment of Venereal Diseases (3d ed. 1937); Palm, Death Rides with Venus (1937); Warren, On Your Guard (1937); Snow, Venereal Diseases (1937).

\[12\] The following text is prescribed by the statute for the certificate: "I, (Name of Physician) . . . . being a physician legally licensed to practice in the State of . . . . (my credentials being filed in the office of . . . . in the City of . . . . , County of . . . . , State of . . . . ) do certify that I did on the . . . . day of . . . . , make a thorough examination of . . . . and considered the result of a microscopical examination for gonococci and a Wasserman or Kahn test for syphilis, which was made at my request, (strike out the test or tests which were not made) and believe . . . . to be free from all venereal diseases."
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be less serious an offence than that of an unscrupulous doctor who makes it his regular practice to issue untruthful certificates. Nevertheless, the marriage candidate who succeeds in obtaining a license without a health certificate is punished more severely. He can be sentenced to pay a fine of an unlimited amount and, in addition, can be sent to the county jail for not less than three months! Since the statute says that he shall be liable to such punishment when he "shall obtain any license to marry contrary to the provisions of this section," it might be assumed that he is punishable even if he is ignorant of the requirement of a health certificate and obtains a marriage license from an equally ignorant or undutiful county clerk. The county clerk, himself, who issues a marriage license to a person who fails to present a health certificate, incurs no greater punishment than a fine of not less than $100.00 and not more than $500.00. These incongruities, which result from an insufficient integration of the provisions of the Wisconsin law into the existing legislation of Illinois, should be eliminated by an early amendment.

While older eugenic marriage laws required a health certificate for the male partner only, the Illinois statute, following the amendment act of Wisconsin of July 1, 1937,\(^\text{13}\) and a recent Michigan statute\(^\text{14}\) makes the medical examination obligatory for the female partner as well. Twenty-four years ago such an extension was held not only to be morally shocking but also unnecessary, because "the great majority of women who marry are pure."\(^\text{15}\) As far as this author can see, the Illinois statute's extension to the female partner of the duty to undergo a delicate medical examination has not met with serious criticism.

It also seems, that a majority of candidates to marry find no difficulties in complying with the law. It has been contended, however, that since the law went into effect on July 1, 1937, "thousands of couples crossed the state line into Indiana to be married; and Crown Point, being close to Chicago, got the lion's share of the business....... It has been charged and never denied that the combined income (of the county clerk and the four justices of the peace at Crown Point) approximates $15,000.00 a month.\(^\text{16}\) The question of the validity of these out-of-state marriages has already occupied the Superior Court of Cook County, and Judge John J. Lupe's decision is reported as follows:\(^\text{17}\)

"You and others like you are here in a court of equity with unclean hands. You flaunt our laws and then come here for annulments when you find you have made a mistake. The law is a good law, designed to protect the children of future generations.

\(^{15}\)Peterson v. Widule, 157 Wis. 641, 147 N.W. 966 (1914).
\(^{16}\)Chicago Daily News, Oct. 16, 1937, front page. \(^{17}\)Id., second page.
I'm not going to open the courts to this practice and establish a precedent of this type. You can file another bill if you have grounds for divorce, but as far as Crown Point marriages are concerned, they are not adequate grounds for annulment."

The application of the clean hands doctrine to a problem of public concern seems hardly appropriate, but the decision is nevertheless correct under the rule generally recognized in American conflict of laws\(^8\) and in Illinois in particular,\(^9\) that a marriage which is good at the place of its celebration is good everywhere. The wisdom of this rule is open to doubt but it is the law insofar as it is not modified by the Uniform Marriage Evasion Act, which forms part of the law of Illinois and which provides\(^20\)

"That if any person residing and intending to continue to reside in this state and who is disabled or prohibited from contracting marriage under the laws of this state shall go into another state or country and there contract a marriage prohibited and declared void by the laws of this state,\(^21\) such marriage shall be null and void for all purposes in this state with the same effect as though such prohibited marriage had been entered into in this state."

Under the words of the statute it is clear that it does not justify holding an out-of-state marriage void, unless such marriage would be void if celebrated in Illinois.\(^22\) A marriage celebrated in Illinois without a health certificate would certainly not be void. It is well established that non-compliance with statutory requirements does not render a marriage void unless such effect is indicated in the statute expressly or by necessary implication. Statutory marriage formalities have generally been held not to be mandatory but directory only.\(^23\) A marriage celebrated in proper form but without a license is held valid unless its nullity is clearly expressed by the statute.\(^24\) The same decision was reached in Wisconsin with respect to a marriage celebrated without a health certificate.\(^25\) In Illinois the statutory grounds of nullity of a marriage are enumerated in Sections 1, 2, 3, and 4 of the Marriage Act.\(^26\) To perform a marriage ceremony with-

\(^8\) Restatement of Conflict of Laws § 121 (1934).
\(^21\) Italics by the author. \(^22\) See Lyannes v. Lyannes, 171 Wis. 381, 177 N.W. 683 (1920).
\(^23\) See Meister v. Moore, 96 U.S. 76 (1877); People v. Hann, 206 Ill. App. 543 (1918); Schwartz v. Schwartz, 236 Ill. App. 336 (1925); Madden, Persons and Domestic Relations 53-56 (1931); Vernier, American Family Laws 98 ff. (1931).
\(^24\) In Feehley v. Feehley, 129 Md. 565, 99 Atl. 663 (1916), the court upheld the marriage even though the statute provided that "no person shall be joined in marriage until a license shall have been obtained." See also Wooley v. Bruton, 184 N.C. 438, 114 S.E. 628 (1922).
\(^25\) Lyannes v. Lyannes, 171 Wis. 381, 177 N.W. 683 (1920).
out a license is a punishable offence, but such a marriage is nowhere in the statute declared to be void. To enter upon a marriage without a health certificate exposes to punishment not only the license issuer but also the parties to such marriage, but again the statute fails to declare such a marriage to be void. Absence of a health certificate is an impediment to marriage in the sense that no county clerk is allowed to issue a license and that, consequently, no minister, judge or justice of the peace is allowed to perform a marriage ceremony, without which no marriage can be validly concluded in Illinois. If, however, a marriage ceremony has been performed in contravention to such prohibition, the marriage is good and valid. Absence of a health certificate is not an impedimentum matrimonii dirimens, but only an impedimentum matrimonii impediens.

The grave sanction of nullity is not only not provided for by the new statute, it could also hardly be held necessary on grounds of policy. What the statute tends to prevent is not so much the existence of the legal relation of a valid marriage as the physical act of the consummation of a marriage which could not be undone by an annulment. Nor should the possibility of evading the law through an out-of-state-marriage be taken too seriously. When parties decide to avoid a statute which is designed for their own protection, it can be assumed either that they have made sure that neither of them is suffering from a venereal disease, or that they are so irresponsible that the impossibility of being legally married would not restrain them from engaging in physical intercourse. It is also fortunate that in two of the sister states located in the neighborhood of Chicago, viz. in Wisconsin and Michigan, no marriages will be performed without a health certificate; and in Indiana the states attorney of Lake County, where the marriage mill of Crown Point is located, has dug up an old statute which provides that before any persons may be married they must produce a license issued by the clerk of the county in which the woman resides. The county clerk of Lake County, who refused to comply with this statute, has just been arrested. The result of the litigation ensuing from this controversy will finally settle the possibility of evading in Indiana the Illinois Eugenic Marriage Law.

Another weakness of the law, which, however, can hardly be avoided by legislation, is presented in the fact that a party may lawfully obtain a license upon the certificate of a physician who resides in another state and over whom the State of Illinois has no control. If such a physician should issue an untrue health certificate, he could not be punished under the statute of Illinois. Whether a health certificate can be issued by physicians in the United States only, or also by a physician licensed to practice in a

foreign country, for instance in a Canadian province, is doubtful under the text of the statute. The point should be clarified through an amendment.

II

The same legislature which established the requirement of a compulsory health certificate as a preliminary to marriage, also enacted a statute for the better prevention of hasty or illegal marriages. Getting married is easier in the United States than in probably any other country of Western civilization. Even in those jurisdictions which have abolished common law marriage, the preliminaries to the celebration of a marriage are extremely easy and short. Under the system still prevailing in most states one of the parties to the prospective marriage "buys" a license at the office of the county clerk of the place where he wishes the marriage to be performed. All he has to do besides paying a fee is to sign an affidavit stating the names, ages, and places of residence of the parties, and the applicants' belief that there exists no statutory impediment to the intended marriage. Inquiries into the truth of the statements are rarely prescribed. The whole procedure takes a few minutes, and the marriage may be celebrated immediately by a minister or a justice of the peace.

This system is cheap and convenient but its consequence is that more illegal, especially bigamous, marriages exist in the United States than in probably any other country. Practically all European countries, including England, require public advance notice to be given of an intended marriage, in order to enable members of the public to inform the authorities of eventual impediments to the intended marriage, and also to give the license issuer an opportunity to make inquiries of his own in special cases.29 This system, which originated in the Church's policy not only to prohibit but also to prevent certain socially undesirable marriages, makes, of course, for delay. It is for this very reason that the adoption of a similar scheme has been advocated in recent times in the United States. The ordinary American system favors not only illegal but also hasty and ill-considered unions.30 As a preventive measure several states require a waiting period of a few days, either between application for and issuance of the

29 For a survey of the formalities required in various countries as preliminaries to the celebration of a marriage, see Bergmann, Eheschliessung, 2 Rechtsvergleichendes Handwoerterbuch 727 (1929); the texts of the marriage laws of all European countries and their colonies (in German translation) are collected in 4 Leske-Loewenfeld: Die Rechtsverfolgung im internationalen Verkehr (2d ed. 1932-33). See also Wolff in 4 Enneecerus-Kipp-Wolff, Lehrbuch des buergerlichen Rechts 57 ff. (7th ed. 1937).

30 See Richmond and Hall, Marriage and the State 106 ff, 147 ff (1929); 4 Univ. Chi. L. Rev. 122, 126 (1936).
license, or between the issuance of the license and the celebration of the marriage. A waiting period between application for and issuance of a marriage license has now also been introduced in Illinois by an act for the amendment of Section 6 of the Marriage Act. It was approved by the Governor on July 9, 1937, and has been in effect since that date. The minimum period is short enough, three days, but it is sufficiently long to prevent "gin-marriages," which have become so frequent since the repeal of Prohibition that they have provoked angry remarks from the bench of the Superior Court of Cook County. Government regulation of essential problems of society seems to be taken so much for granted now that these judicial remarks and the newspaper publicity attained by several cases were sufficient to create the public sentiment necessary to assure the quick passage of repressive legislation.

The occasion was also used for an attempt to improve the safeguards against illegal marriages. Still the law does not incommode the parties to the extent of requiring in all cases both of them to appear in person before the county clerk before entering upon the most important transaction of their lives; but the party who does not sign the application before the county clerk is at least required now to sign it before some other officer authorized by law to administer oaths; and such officer is required to acknowledge such signature without charge. It is even a bolder step when the statute enables the county clerk, "if he deems proper," to require both parties to the marriage to sign the application before him.

The license, as already mentioned, may not be issued before the expiration of three days after receipt of the application. The county clerk may wait, however, as long as thirty days. The purpose of this long period seems to be to enable the county clerk to make inquiries into the legality

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31 Length of waiting period between application for and issuance of license: Maine, 1858 (year of adoption of law) 5 days; New Jersey, 1897, 2 days (and an additional day between issuance of license and marriage); Wisconsin, 1899, 5 days; New Hampshire, 1903, 5 days; Massachusetts, 1911, 5 days; Connecticut, 1913, 5 days; Michigan, 1925, 5 days; Colorado, 1931, 5 days; Idaho, 1931, 5 days; Ohio, 1931, 5 days; California, 1927, 3 days; Georgia, 1924, 5 days (only for candidates under 21).

Length of waiting period between issuance of license and marriage: Rhode Island, 1909, 5 days (only for women who are non-residents of the state); Delaware, 1913, 4 days (when both candidates are non-residents of the state, one day in all other cases); Vermont, 1917, 5 days.

The system of the waiting period between issuance of the license and the celebration has not proved itself as effective because it can be evaded by an accommodating minister's or justice's of the peace antedating the marriage certificate. See Richmond and Hall, Marriage and the State 111 (1929).

32 Ill. L. 1937, 999 ff, S. B. No. 178 (1937) introduced by Mr. Graham; Smith-Hurd's Ill Rev. Stats. 1935, c. 89, § 6; Jones' Ill. Stats. 1936, 73.06.

33 See page 101 supra.
of the intended marriage. The statute provides that for this purpose he may, "if he deems proper," require the affidavit not only of both parties to the contemplated marriage but also of any other person or persons.34

Any person "who shall wilfully and knowingly swear falsely as to any material matter in any such affidavit, if the county clerk is thereby induced to issue a marriage license permitting persons to be joined in marriage who are legally incapable or who have not the right to be joined in marriage, shall be punished by a fine of not less than One Hundred Dollars nor more than One Thousand Dollars, or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment."

Inquiries may be especially appropriate where there are circumstances indicating that one of the parties to an intended marriage may be an imbecile or insane. Since a marriage contracted by an insane person or an idiot was invalid under section 2 of the Marriage Act even before the new statute, it could be argued that the county clerk to whom an application was made for a marriage license was not only entitled but also under an obligation to make appropriate inquiries. The new statute, by providing expressly that "no license may be granted when either of the parties, applicants therefore, is an imbecile or insane," seems to make such inquiries the duty of the county clerk in all suspicious cases.

No license may, furthermore, be granted, "when either of the parties . . . is at the time of making the application . . . under the influence of any intoxicating liquor, or narcotic drug." This provision, apparently intended as an additional safeguard against "gin marriages," should be supplemented by a provision making it illegal for a minister or justice of the peace to perform a marriage ceremony where either of the parties is under such an intoxicating or narcotic influence. It seems almost as if the legislature had overlooked that it established by the same statute the requirement of a waiting period of at least three days between the application for the license and the celebration of the marriage.

A third case, where the county clerk is now expressly prohibited from issuing a license is that of an intended marriage where either the male part is over the age of eighteen and under the age of twenty-one years, or the female part is over the age of sixteen and under the age of eighteen years. "unless the consent in writing of the parents of the person under age, or one of such parents, or of his or her guardian, is presented to him, duly verified by such parents, or parent, or guardian, and such consent must be filed by the clerk, and he must state such facts in the license." The Amend-

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34 This new provision renders superfluous section 8 of the Marriage Act, Smith-Hurd's Ill. Stats. 1935, c. 89, § 8, which provides: "for the purpose of ascertaining the ages of the parties, the county clerk may examine either of them, or any other witness, under oath." This section ought to be repealed by an amendment act.
ment Act has not modified section 3 of the Marriage Act which provides that "... a male person of eighteen years of age and upwards or a female person sixteen years of age and upwards may contract a legal marriage if the parent or guardian of such person shall appear before the county clerk in the county where such minor person resides, and shall make an affidavit that he or she is the parent or guardian of said minor and give consent to the marriage. Such parent or guardian shall, when giving consent to such marriage, make an affidavit as to the date and place of birth, and place of residence of such minor and shall submit such proof of such minor's age as the county clerk may deem necessary to comply with the purposes of this Act."

Thus, if one of the parties to the intended marriage is beyond the age of consent, but under the age of majority, no license may be issued by the clerk of the county where the intended marriage is to take place, unless the necessary parental consent is shown to him by an affidavit sworn to by the parent or guardian of the minor before the county clerk of the minor's place of residence. This, at least, seems to be the relation between old section 3 and new section 6.

Nothing has been changed by the Amendment Act with respect to the validity of a marriage contracted without parental consent by a male person between the ages of eighteen and twenty-one, or a female person between the ages of sixteen and eighteen. Such a marriage ought not to be celebrated, but if it is celebrated in contravention of the statutory prohibition, it is nevertheless valid. The statute of Illinois, like those of other states, was careful to avoid mentioning lack of parental consent as a ground of nullity if the parties to the marriage are beyond the so-called marriageable age though below the age of majority. With respect to such a marriage, lack of parental consent was and still is not an impedimentum matrimonii dirimens but only an impedimentum matrimoni impediens.

M. R.

PRACTICE AND PROCEDURE

CHANGES IN THE CIVIL PRACTICE ACT IN 1937

The most important procedural changes effected by the legislature in 1937 are those contained in the bills amending sections 5, 6, 10, 14, 21, 67, 68, 75 (2), of the Civil Practice Act and adding sections 7a and 86½ thereto.¹

Section 5 of the Civil Practice Act prior to amendment provided that

² Italics by the author.
³ This is apparently the county clerk at the minor's place of residence.
civil actions should be commenced by issuance of a summons. As amended the section provides that "Every civil action . . . . shall be commenced by the filing of a complaint." This is an adoption of the chancery practice which existed prior to the Civil Practice Act. It is approved by the Secretary of the Chicago Bar Association on the theory that the amendment simplifies both the problem of tolling the statute of limitations and the problem of *lis pendens*.

While section 5 as amended may simplify the plaintiff's problems, there should be an immediate change in the Supreme Court Rules if the defendant is to be adequately protected. Suppose, for instance, a complaint is filed a few days before the statute of limitations has run and plaintiff then waits a year or two to serve the summons. He has thereby obtained an unconscionable extension of the statutory time limit. Suppose that after filing a complaint in an ejectment proceeding plaintiff similarly fails to serve over a long period. The defendant may never hear of the suit until after negotiations for sale have been perfected. He finds out at the last moment that there is a cloud upon his title. Under the former practice the defendant was somewhat protected by Rules 4 and 5 of the Supreme Court Rules. Under the amended provision he has no protection. It is therefore suggested that there should be added to the Supreme Court Rules some such rule as the following:

"An action shall abate as to any defendant upon whom summons is not served within sixty days after the filing of the complaint, unless within that period the Court for good cause shown extends the time for service."

The changes in Sections 6, 14, and 67 of the Civil Practice Act in no way affect the substance of those provisions but are the result of a desire to avoid possible controversy and to clarify the language previously used.

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3 Albert E. Jenner, Jr., A Summary of Practice, Pleading and Procedure Legislation (adopted at the regular session of the General Assembly in 1937, and now in effect) (1937). The writer wishes to express his indebtedness to the author of this pamphlet which aided materially in the composition of this report on procedural legislation.
4 By rule 4 of the Supreme Court Rules summons must be returned by the sheriff within 60 days as either served or not served. Rule 5, permitting the issuance of *alias* writs where summons is returned "not served" provides that "where the plaintiff fails to show reasonable diligence to obtain service through the issuance of *alias* writs, the action may be dismissed on the application of any defendant or on the court's own motion."
5 Since the above was written, the writer has been informed by the Secretary of the Chicago Bar Association that the Supreme Court has changed Rule 3 to require immediate issuance of summons at the time the complaint is filed. Thus by the combination of Rules 3, 4 and 5 of the Supreme Court Rules defendants have the same protection as before Section 5 of the Civil Practice Act was amended. The writer still believes, however, that the suggested provision for automatic abatement would be a more effective check on the dilatory plaintiff.
Thus some members of the Bar asserted that under the former wording of section 6 (i), a private person could not be authorized to serve summons unless it appeared that both the sheriff and coroner were unavailable or were disqualified by direct interest in the outcome of the proceeding. This view was hardly consistent with the language of the former provision, making the Court order for prior service an optional rather than a conditional alternative. In any event, the new section can by no interpretation be construed to prevent the Court, in its discretion, from authorizing service by an individual.

That part of section 14 which deals with the affidavit upon which service by publication is based was amended by adding the words "or is concealed within this state," to the situations in which service by publication is proper. These words appeared in the old Chancery Act; but were not included in the Civil Practice Act. The provision authorizing service by publication as to a defendant who "on due inquiry cannot be found," in the state undoubtedly covered the defendant who was concealing himself. Since the concealment provision was expressly included in the old Chancery Act and still appears in some of the special acts, the assembly doubtless thought its inclusion was to avoid any possible misconstruction of the omission. Similarly the change in the first sentence of section 67 (i), the jury instruction section of the Civil Practice Act, improves the language but in no way changes the substance of that section.

Under the "transaction clause" of sections 7 and 8 of the Civil Practice Act the venue of libel suits against Chicago newspapers and their editors could be laid in any county of the state where a copy of the newspaper was sold. This was an undoubted hardship in a state which does not have a provision for change of venue for the convenience of parties and witnesses. New Section 7a limits the venue of civil libel proceedings brought against "any owner, publisher, editor, author or printer of any newspaper or magazine of general circulation" to the county in which the defendant resides or has "his or its principal office or in which the article was composed or printed." If the defendant is a nonresident or the arti-

6 Section 6 (i) so far as here material reads: "Writs shall be served by a sheriff, or if he be disqualified, by a coroner of some county of the state. (unless) The court (may) (shall) in its discretion upon motion, order service to be made by (some other person) a private person." The italicized words were added by the amendment; the bracketed words were deleted. The same system will be followed in quoting other amended sections.


8 Added to the Civil Practice Act by S.B. 343 (1937).

9 The inclusion of the word "its" makes it clear that the new section applies to corporations as well as to individuals.
cle was printed outside of Illinois the action may be commenced in any
county in which the libel was circulated or published. The new venue
provision appears just and a similar statute has been enacted with regard
to criminal libel.

Section 10 of the Civil Practice Act has been amended in three impor-
tant particulars. (1) Literal interpretation of the language of sub-section
10 of section 10 as it existed prior to the amendment rendered service in-
valid as to defendants served outside the county of venue if the venue were
laid in an improper county. The omission of the word "proper" in the
sub-section as amended makes it clear that defendants served in any
county are subject to jurisdiction whether or not the plaintiff in the first
instance selects the proper venue. If the proper venue is not selected the
sole remedy open to defendants will be to transfer the proceedings to the
proper county pursuant to the provisions of the Venue Act. (2) Under
the peculiar wording of the sub-section it was also contended by some
members of the Bar that defendants not residing in the county of venue
could not be served outside that county unless as a condition precedent
there had been a return of process as to such defendants reciting that they
were not found in the county of venue. The new wording establishes that
no such return of "not found" is necessary as a condition precedent to
service outside the county of venue. (3) The use of duplicate summons
was authorized under sub-section 2 of section 10 only as to defendants not
residents in the county of venue. This limitation was troublesome in
cases where there were large numbers of defendants residing in the county
of venue. The sub-section as amended permits the use of multiple sum-
mons within as well as outside of the county of venue and permits more
rapid service where there are large numbers of defendants.

New sub-section 4 added to section 21 provides that there shall be set
forth in the body of the complaint or counterclaim the names of all parties,
plaintiffs and defendants and all parties, cross-plaintiffs and cross-defend-
ants. Under the former practice only the summons needed to contain the

10 This discrimination seems reasonable and should not be open to constitutional objection.
11 S.B. 342 (1937) which adds Section 8a to Division X of the Criminal Code.
12 Section 10 as amended reads: "(1) When a civil action is (properly) commenced in any
county, summons may be served upon the defendants (not found in that county) wherever they
may be found in the State, by any person authorized to serve writs. (2) One or more duplicate
original summonses may be issued, marked First Duplicate, Second Duplicate, etc., as the
case may be, whenever, it will facilitate the service of summons in any one or more (several)
counties, including the county of venue."
13 McCaskill, Ill. C. P. A. Ann. 18, 29 (1936).
names of all parties. If the summons were lost there were grave difficulties of res judicata since it could not be determined what parties were bound by the proceedings. Including the names of all parties in the complaint should tend to alleviate this difficulty.

Section 68 of the Civil Practice Act dealing with motions for new trials, directed verdicts and judgments notwithstanding the verdict has been amended in two particulars. In section 1 it is made clear that where a motion for a new trial is made the time for appeal does not begin to run until the motion has been disposed of. The provisions of sub-section 3a have been amended to permit the Court to render final judgment on a reserved motion to direct a verdict not only in the case where the jury has returned a verdict, but also where it has failed to return one. The former provision was anomalous in permitting the Court to render judgment notwithstanding the verdict where it thought the jury had decided a case unreasonably and yet refusing it power to grant a similar judgment where the jury disagreed and twelve reasonable men could not conscientiously differ.16

There has been one notable change27 in the appeal provisions of the Civil Practice Act, the adding of section 86 1/2 by House Bill 326.18 Pleas in bar in courts of review are of several kinds: limitations, prior adjudication, estoppel and release of error.19 The most frequent of these is, of course, release of error where the plaintiff in error has taken some benefit under the judgment below and hence is disqualified to maintain his appeal. At common law matters in bar could not be raised by motion but only by way of plea.20 Moreover, the plea in bar constituted a confession of error as to the merits. Consequently upon the overruling of a plea in bar the court of review had no alternative but to reverse the judgment below and

16 It would seem that any changes in this section of the Civil Practice Act are of doubtful value. The Supreme Court apparently intends to emasculate the reserved motion to direct and the motion for judgment n.o.v. in the Appellate Courts by treating them as demurrers to the evidence. See Blumb v. Getz, 366 Ill. 273, 8 N.E. (2d) 620 (1937).

17 H.B. 775 (1937) amends Section 75 (2) of the Civil Practice Act so as to change the time for filing a petition for leave to appeal from the Appellate Courts to the Supreme Court.

18 This section reads: “Section 86 1/2. (Pleas in Reviewing Courts Abolished.) Pleas of release of errors and all other pleas in the Supreme and Appellate Courts are hereby abolished and all relief which heretofore may have been had by employing such pleas may be had by way of motion, supported in such manner as the Supreme Court may by rule provide. Where the motion is adjudged bad or not sustained, the appeal shall proceed as though the motion had not been made.”

19 Quindry's Appellate Practice 269-80 (1929).

20 Donahoe v. Owens, 277 Ill. 318, 115 N.E. 552 (1917); Peterson v. Manhattan Life Ins. Co., 244 Ill. 329, 91 N.E. 466 (1910).
remand the case for a new trial.\textsuperscript{21} This result followed even though the court, had it considered the case on the merits, would have affirmed the judgment or decree below. Recently, in \textit{Kerner vs. Thompson},\textsuperscript{22} the Illinois Supreme Court said that the common law rules with respect to pleas in bar in reviewing courts were in full force and effect; that matters in bar could be raised in reviewing courts only by plea not by motion, and further that if a plea in bar were adjudged bad the court was required to remand the case for a new trial regardless of the merits of the appeal.

New section 86\frac{1}{2} is more realistic as to pleas in bar in the Supreme and Appellate Courts. It substitutes the motion for the plea in bar, a change in line with the general policy of the Civil Practice Act. It further provides that should a motion in the nature of a plea be adjudged bad the court of review is not to remand the case, but the appeal should proceed as though the motion had not been made. It is to be noted that this governs not only the plea of release of error as did section 109 of the Practice Act of 1907,\textsuperscript{23} but covers the defenses of prior adjudication and limitations as well.

\textbf{PROCEDURAL AMENDMENTS IN SPECIAL ACTS}

A number of practice bills were enacted by the last session of the General Assembly with the primary purpose of conforming practice and procedure in certain special acts to that of the Civil Practice Act. This is the culmination of the program begun at the 1935 session of the legislature and so ably carried on by the committee on the Civil Practice Act of the Illinois State Bar Association and by the Chicago Bar Association.

Thus House Bill 332 conforms the wording of the Municipal Court of Chicago Act to that of the Civil Practice Act. The Bill also repeals section 38 of the Municipal Court Act which provided for bills of exception or certificates of evidence to be presented to the trial judge within sixty days after entry of the order or judgment appealed from. Under the Civil Practice Act reports of proceedings are not required to be filed or presented to the trial judge before sixty days from the date that the notice of appeal is filed,\textsuperscript{24} and the notice of appeal need not be filed earlier than ninety days from the date judgment is entered.\textsuperscript{25} Since the appeal provisions

\textsuperscript{21} Great Northern Refining Co. v. Jeffris Lum. Co., 308 Ill. 342, 139 N.E. 594 (1923); George v. George, 250 Ill. 251, 95 N.E. 167 (1911); Peterson v. Manhattan Life Ins. Co., 244 Ill. 329, 91 N.E. 466 (1910).

\textsuperscript{22} 365 Ill. 149, 6 N.E. (2d) 131 (1937).

\textsuperscript{23} This section was repealed by the enactment of the Civil Practice Act.

\textsuperscript{24} Rule 36 (c) of the Supreme Court Rules.

\textsuperscript{25} Ill. C. P. A., Sec. 76 (1) Smith-Hurd Ill. Stats. 1935 c. 110 § 200 (1).
of the Civil Practice Act are in all other respects applicable to appeals from the Municipal Court of Chicago\textsuperscript{26} the existing provisions of section 38 serve merely to trap the unwary. Under section 38, as amended, appellate practice will be entirely uniform in all courts. It should be noted, however, that this act is not yet in force; it must be submitted to a referendum of the qualified voters of the city of Chicago at the next election.\textsuperscript{27}

The Partition Act has been amended\textsuperscript{28} so as to require all proceedings for partition to be brought in equity.\textsuperscript{29} The amendment provides that the provisions of the Civil Practice Act shall apply to partition proceedings.\textsuperscript{30} A further practical change has been made by the amendment permitting the parties after a decree of partition has been entered and before division or sale is had, to discontinue the proceedings provided they have adjusted their respective rights among themselves.\textsuperscript{31} The decree of partition, however, remains in full force and effect. The result of this amendment is to permit the parties to obtain a binding determination of their rights in the nature of a declaratory judgment while avoiding the necessity of judicial division or actual sale of the property.

Several other practice bills were enacted conforming practice and procedure of particular acts to the Civil Practice Act. Thus the Administration Act has been amended\textsuperscript{32} so as to conform its language to that of the Civil Practice Act; while section 103 of that Act specifically provides that the provisions of the Civil Practice Act, its amendments and the rules of the Supreme Court should apply to all proceedings except as otherwise expressly provided. Section 7 of the new Quo Warranto Act makes the provisions of the Civil Practice Act including the provisions for appeal, all amendments and the rules applicable to "Quo Warranto" proceedings.\textsuperscript{33} Other phases of this act are discussed elsewhere. Also in line with the Civil Practice Act the County Court Act has been amended to provide for automatic continuance of all causes and proceedings pending and undisposed of at any adjournment.\textsuperscript{34} It has already been pointed out that section 8a of the Criminal Code has been amended to conform to the venue provision with regard to criminal libel proceedings to new section 7a of the Civil Practice Act.\textsuperscript{35}

\textsuperscript{26} Rules 294 and 295 of the Revised Civil Practice Rules of the Municipal Court of Chicago (1935).
\textsuperscript{27} H.B. 332 (1937).
\textsuperscript{28} H.B. 330 (1937).
\textsuperscript{29} Section 43.
\textsuperscript{30} Section 44.
\textsuperscript{31} H.B. 333 (1937).
\textsuperscript{32} S.B. 64 (1937), H.B. 90 (1937) so amend sec. 6 of the County Court Act, Smith-Hurd Ill. Stats. 1935 c. 37 § 176.
\textsuperscript{33} S.B. 342 (1937).
An important change in evidential procedure was effected by the last session of the legislature is the amendment to section 6 of article 13 of the Criminal Code. That section as amended modifies the marital witness incompetency previously existing in criminal cases. The Illinois rule in criminal cases that husband or wife could not testify for or against each other except as at common law was an archaic survival. It arose in the days when husband and wife were regarded as a single person. Under the new paragraph added to section 6 the general marital disqualification of husband or wife to testify for or against each other is abolished. However, the usual disqualification of a spouse to testify as to confidential communications made during coverture has been retained except in the cases, (1) where either is charged with an offense against the person or property of another, (2) in cases of wife abandonment, (3) where the interest of their child or children is directly involved, or (4) as to matters in which either has acted as agent of the other. The statute treats this disqualification as an incompetency rather than a privilege.

There can be no question but that the removal of the incompetency of one spouse to testify for the other is a step forward. It represents the best "modern common law" and the great weight of authority. The sole objection under our modern ideas of the marital relation is that the witness is possibly or probably biased in favor of the accused. Such bias, however, should operate solely to impeach the witness not to render him incompetents.

The new provision added to section 6 by H.B. 608 (1937) reads: "In all criminal cases, husband and wife may testify for or against each other; provided, that neither may testify as to any communication or admission made by either of them to the other or as to any conversation between them during coverture, except in cases where either is charged with an offense against the person or property of the other, or in case of wife abandonment, or where the interests of their child or where children are directly involved, or as to matters in which either has acted as agent of the other."

Marital incompetency, except for the disqualification with respect to confidential communications, has long been abolished in civil cases in Illinois with the removal of the interest disqualification. See Ill. L. 1871-1872, 405, § 1, § 5; Smith-Hurd Ill. Stats. 1935 c. 51, §§ 1, 5. Similar statutes have been enacted in all states. See 1 Wigmore § 488 (2d ed. 1923).

In 1628, Sir Edward Coke in his commentary upon Littleton 6b, stated: "Note, it hath been resolved by the justices that a wife cannot be produced either against or for her husband, 'qua sunt duae animae in carna una.'" Professor Wigmore points out that the marital disqualification of one spouse to testify for the other was a strict incompetency predicated on marital identity and later justified on the same theory as the interest disqualification, whereas the disqualification of one spouse to testify against the other is in reality a privilege predicated on the danger of causing dissension within the home. See 1 Wigmore 601-603 (2d ed. 1923); 4 Wigmore § 2227-2229 (2d ed. 1923).

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incompetent.\textsuperscript{40} The public interest is amply protected by argument by the prosecuting attorney and by natural tendency of a jury to disbelieve the weeping wife.

Similarly the common law marital disqualification of one spouse to testify against the other has no very strong argument in its favor. To be sure “a happy home may be imperiled” but (i) the incompetency did not exist even at common law where one spouse was the aggressor and the other the victim and the prosecuting witness:\textsuperscript{42} (2) “the happy home” is too often non-existent, (3) nor even where it exists is it likely to be ruptured by the testimony of the unwilling spouse coerced by the state, it is then most likely to be favorable to the defense. On the other hand the desire for truth, or at least the examination of all sources from which the truth may be gathered, is to be desired equally in criminal as in civil cases.\textsuperscript{42}

The provision with regard to confidential communication is another story. It may give considerable difficulty. It is drafted in the form of an incompetency rather than a privilege. Suppose a wife is offered by the defense to testify as to a conversation with the defendant to refute the inference that his story is a recent fabrication.\textsuperscript{44} Other states permit this testimony. The husband may waive his privilege.\textsuperscript{44} Under the new section as drafted the prosecutor could object to this on the grounds that it was not the husband’s privilege but the wife’s incompetency. The broad provision excluding testimony “as to any conversation between them during coverture” may likewise lead to difficulty. Are only confidential communications meant, or will incidental statements, become important for purposes of this trial, be likewise excluded? Another clause difficult of interpretation is that excepting communications “as to matters in which either has acted as agent of the other.” It is unfortunate that the present statute, though a step in the right direction, has failed to keep clearly in mind the different bases for the marital incompetency of one spouse to testify for the other, the privilege of one spouse to refuse to testify against the other and the privilege as to confidential communications.\textsuperscript{45}

P. C.

\textsuperscript{40} Such is the effect of “interest” in civil cases. Smith-Hurd Ill. Stats. 1935 c. 51, § 1, and under the first paragraph of section 6 of the Criminal Code.


\textsuperscript{44} See 4 Wigmore § 2227 (2d ed. 1923) for a criticism of the theories advanced in favor of the privilege.

\textsuperscript{43} Compare the erroneous decisions in Commonwealth v. Cronin, 185 Mass. 96, 69 N.E. 1065 (1904) and Dick v. Hyer, 94 Ohio St. 351, 114 N.E. 251 (1916).

\textsuperscript{45} 5 Wigmore § 2340 (2d ed. 1923).

\textsuperscript{45} A similar situation exists in civil cases in Illinois. Marks v. Madsen, 261 Ill. 51, 103 N.E. 625 (1913).