seems the more practical answer. At least, it avoids the violence that often attends strikes. In recent years the unions have more and more taken their grievances to the courts, rather than resort to the strike as a means of enforcement.

It is the writer's belief that this trend should continue and that it will lead to more peaceful and orderly relations between employers and unions. As a New York Court has said in regard to specific enforcement of collective bargaining agreements: "It is in the interest of good government that labor unions and employers should be afforded this reciprocal protection in their lawful contractual undertakings. It is proper and praiseworthy that a union . . ., having entered into a contract with the employer and feeling aggrieved because of an alleged breach thereof by the employer, should come into a court of equity and there seek the protection of its rights rather than resort to picketing and strikes to redress its wrongs, with the resultant effect upon the orderly conduct of business and inconvenience to the public." [20]

The District Court of Colorado has taken up a trend, which till the present has prevailed in many state courts. This trend appears to be a real advancement in the law. We can hope that other federal courts will follow its lead.

WILLIAM B. DAVENPORT.

PLEADING, PRACTICE AND PROCEDURE—*Effect of Failure to Plead the Statute of Limitations as an Affirmative Defense.* (Illinois)

An action was filed to set aside certain deeds which the plaintiff urged were clouds on his title to a parcel of real estate. After a hearing a decree was entered granting the relief prayed.

On appeal, the defendant urged that it had acquired title to the premises by virtue of continuous possession under the deeds in question and payment of taxes for a period of seven years as provided in Section 6 of the Limitations Act.[1] This defense was not specially pleaded in the court below. On appeal, *held*: Affirmed. Though a defense not made in the trial court will not generally be considered on review, courts take judicial notice of public acts, and therefore defense of the seven-year statute of limitations was available to defendant though the defense was not pleaded. However, the evidence does not prove adverse possession

[20] Ribner v. Rasco Butter & Egg Co., 135 Misc. 616, 238 N.Y.S. 132, at 138 (1929).

[1] ILL. REV. STAT., c. 83, § 6 (1947). In the opinion the court points out that though appellant's claim is based on section 6 of the Limitations Act, it is section 7 of the Act which applies to vacant unoccupied lands and thus to this case.

for seven years. *Anderson v. Village Homebuilders, Inc.* 401 Ill. 60, 81 N.E.2d 430 (1948).

The language of this case raises the question as to just what procedural methods are proper to assert the statute of limitations as a defense in Illinois. Prior to the Civil Practice Act, the defense of laches could be raised in equity by demurrer when the complaint showed on its face that the demand was barred by the passage of time.[2] There usually was no question of notice or surprise in asserting the defense in this manner. Laches was an anticipated defense when the limitation period of the statute had run; and to meet this defense, the plaintiff would plead a justification for the delay. In an action at law, however, a demurrer generally could not be employed to raise the defense of the statute of limitations.[3] At law the plaintiff did not anticipate defenses in his complaint; and consequently, a special plea was needed to put the defense in issue. An exception was made in cases where the limitation was a special statutory one, such as in a wrongful death action, and the courts regarded the bringing of the suit within the period allowed as a condition of liability.[4]

At the present time the Illinois Civil Practice Act [5] provides for the raising of this defense by motion if it appears on the face of the complaint that the action is so barred, or by a motion supported by an affidavit to that effect if it does not so appear. This provides an adequate means for raising the defense at a preliminary stage, if the defendant chooses to do so, and at the same time eliminates the possibility of surprise.

Before the Civil Practice Act, the defense could always be raised by plea, regardless of whether in the particular case it could be raised by demurrer. If raised by plea, the plea was usually required to be special and the general issue would not suffice.[6] However, in cases such as the principal case where the defendant claimed title by adverse possession against the plaintiff, the original owner, the defendant could prove title by adverse possession under a general denial.[7] A general denial would

[2] Henry county v. Winnebago Drainage Co., 52 Ill. 454, 456 (1869); City of Fulton v. Northern Ill. College, 158 Ill. 333, 42 N.E. 138 (1895); Schoknecht v. Prassas, 230 Ill. 423, 151 N.E. 258 (1926). The time period of the statute of limitations is used as evidence of laches.

[3] Heinberger v. Elliot Switch Co., 245 Ill. 448, 450, 92 N.E. 297 (1910); Gunton v. Hughes, 181 Ill. 132, 54 N.E. 895 (1899); comment 20 ILL. L. REV. 391 (1925).

[4] Carlin v. Peerless Gas Light Co., 283 Ill. 142, 119 N.E. 66 (1918); Hartway v. Chicago Rwys., 290 Ill. 85, 124 N.E. 849 (1919); Joseph Schlitz Brewing Co. v. Chicago Rwys., 307 Ill. 323, 138 N.E. 658 (1923).

[5] ILL. REV. STAT., c. 110, § 172 (f) (1948).

[6] Emory v. Keighan, 94 Ill. 543 (1880); Fish v. Farwell, 160 Ill. 236, 43 N.E. 367 (1895); Benes v. Boucher's Life Ins. Co., 282 Ill. 236, 118 N.E. 443 (1918); Kreling v. Northrup, 116 Ill. App. 448 (3rd Dist. 1904).

[7] Coward v. Coward, 148 Ill. 268, 35 N.E. 759 (1893); Stubbelfield v. Borders, 92 Ill. 279 (1879); Fyffe v. Fyffe, 350 Ill. 620, 183 N.E. 641 (1932).

also put the defense in issue where the limitation was a special one incorporated in the statute upon which the action was based.[8] The reasons for the exceptions to the general rule which required a special plea may be difficult to justify logically,[9] but logical or not these exceptions were part of the law.

The tendency in modern practice has been to prevent the employment of the defense of time limitations under a general denial. Most statutes and rules expressly provide that the defense should be by special plea as in Michigan,[10] New York,[11] and the federal courts.[12] The Illinois Civil Practice Act expressly mentions laches but not the statute of limitations. However, Section 43 (4) provides that "the facts constituting any affirmative defense such as payment . . . laches . . . that an instrument or transaction is either void or voidable in point of law, or *cannot be recovered upon by reason of any statute, . . . or would be likely to take the opposite party by surprise* must be plainly set forth in the answer or reply." This language seems to cover the defense of the statute of limitations either expressly, by referring to "any statute," or in general terms, by referring to "surprise." The proper construction of this section of the statute, however, is not as clear as would appear on first reading: The statute of limitations may not be fully encompassed. In jurisdictions having the statute of limitations expressly set out as requiring an express allegation, some courts have nevertheless adhered to their old exceptions of "title by adverse possession" and "special statutory limitation" and read these into the statutes.[13] Consequently the effect of the Practice Act upon the old rules concerning the statute of limitations in Illinois must be determined by judicial construction.

The court in the principal case uses language apparently broad enough to allow the defense of the statute of limitations to be used without being expressly pleaded in any type of case by applying the doctrine of judicial notice. But, the material question involved here is not whether the statute of limitations is law as such, but whether it is necessary to plead it expressly. The problem is one of notice. Consequently, it would seem that a more reasonable interpretation of the language used is that

[8] Hartway v. Chicago Rwys., *supra* note 4; Lipcowitz v. Warren Printing Co., 249 Ill. App. 368 (1st Dist. 1928). No formal pleading was required in probate courts and the defense could be asserted there without being pleaded: Bramwell v. Schubert, 139 Ill. 424, 28 N.E. 1057 (1891).

[9] The special statutory actions were said to create new rights conditioned upon the time period; the "title" exception based its justification on the fact that this type of limitation statute resulted in the party acquiring an offensive weapon as well as defensive. For an analysis and criticism of these two exceptions see Atkinson, *Pleading the Statute of Limitations*, 36 YALE L. J. 914 at page 937 (1927).

[10] Michigan Supreme Court Rule 18.

[11] New York Rules of Civil Practice, Rule 107.

[12] Rule 8 (c).

[13] For a good discussion of this tendency and compilation of cases see 36 YALE L. J. 914 at page 938 (1927).

it is not an expansion of the issues under a general denial; but if anything, an affirmance of the old exception of "title by adverse possession." Therefore the defense of the statute of limitations in this type of case may still be proper under a general denial or what amounts to the same thing under Illinois practice today.

The better rule would be to require the statute of limitations in all cases to be pleaded expressly. A rule which allows the statute of limitations to be used when not expressly pleaded is weaker on notice than any other defense would be if so allowed. The facts necessary to be proved in order to assert the statute of limitations are usually proved whether the issue is being tried or not. Dates come into proof as a matter of course. To employ a rule which would allow a defendant to spring this defense without specially pleading it could work such a surprise as to cause injustice upon an unsuspecting party. A plaintiff in order to protect himself would have to negate the defense whether the other party is asserting it or not; this is an unnecessary procedure. Another objection to allowing the defense to be used without expressly pleading it is that usually the main disputes between the parties in relation to this defense are not questions of fact for the jury, but are disputes over rules of substantive or procedural law.[14] A procedure eliminating unnecessary trials should be encouraged.

The principal case offers no serious obstacle to holding that the statute of limitations must be specially pleaded in all cases. The language used in relation to the statute of limitations was broad, but was merely dicta and not necessary for the decision of the case. It is hoped that if a proper case arises the court will allow the dicta to remain dicta and propound the view that the statute of limitations must be pleaded expressly in all cases or be deemed waived.

ARTHUR BRANTMAN.

TRUSTS—*Attempted Partial Revocation of Testamentary Trust by Family Settlement Agreement.* (Illinois)

The testator left the bulk of his estate in trust to accumulate the income for the life of the survivor of his wife and two children plus twenty-one years. During the term of the trust, certain annuities were to be paid to the testator's children for life. Upon the death of each child, his or her respective children were to have certain annual payments applied to their support. At the end of the term, the accumulated income

[14] Browning v. De Frees, 196 Calif. 534, 238 Pac. 714 (1925); Brazell v. Hearn, 33 Ga. App. 606, 127 S.E. 479 (1925); Citizen's First Nat'l. Bank v. Whiting, 112 Okla. 221, 240 Pac. 641 (1925); Selles v. Pagan, 8 F.2d 39 (C.C.A. 1st 1925); Murphy v. Murphy, 71 Calif. 389, 235 Pac. 653 (1925).