LEGISLATION AND ADMINISTRATION

THE PROPOSED ILLINOIS CIVIL PRACTICE ACT†

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EXCEPT for a few statutory changes, Illinois remains today one of the few jurisdictions in the United States retaining substantially the common law method of practice, together with most of its unwieldiness and technical limitations induced by blind pleadings and distinctions between forms of common law actions.

The proposed act is intended as a sweeping revision of the civil practice now employed, and will repeal the entire present Practice Act, and, in addition, will replace the bulk of the existing Chancery Act. The proposed act does not apply to criminal proceedings.¹ Nor is it to affect proceedings which are regulated as to practice and procedure by special statutes.²

It has been prepared with the four major fields of practice in mind, and the proper relations each should bear to the other. The four divisions are: (1) the institution of suit, (2) the preparation for trial, (3) the trial, and (4) review.

The reforms suggested may be summarized generally as:

a) the simplification of the present trial practice through the abolition of blind pleadings now in use, such as common law declarations, the common counts, general issues, and general demurrers, and the substitution thereof of

† The proposed civil practice act (Senate Bill 359) now before the legislature is the product of four years of study and research of the Illinois Bar. The original draft was presented by a committee of the Chicago Bar Association. Professor E. R. Sunderland, Director of the Legal Research Bureau, University of Michigan, wrote the original draft, and Professor O. L. McCaskill of the University of Illinois Law School worked with the committee in the criticism and revisions of the several drafts. The original draft was then presented to the Illinois Bar Association, and through its Committee on Judicial Administration, headed by Honorable Floyd E. Thompson, was referred to District Bar Associations throughout the state for study and comment. After a year of such study a re-draft was prepared by the Illinois Bar Committee. The re-draft was in turn submitted to District Associations. A final draft was then prepared late in 1932 by the Illinois Bar Association Committee on the Civil Practice Act, headed by Mr. Harry N. Gottlieb of the Chicago Bar. Professors Sunderland and McCaskill continued to render the same extensive assistance with relation to the re-drafts as they had in connection with the original draft. The effective date of the Act is January 1, 1934.

* Members of the Chicago Bar. Valuable suggestions and advice were received from Mr. Walter F. Dodd, also of the Chicago Bar.

¹ § 1.

² The limitation as to certain civil proceedings will preserve the present special statutory practice in attachment, ejectment, eminent domain, forcible entry and detainer, garnishment, habeas corpus, mandamus, ne exeat, quo warranto, and replevin.

complaints in narrative form such as are now employed in equity actions, specific motions instead of general demurrers, and narrative defense pleadings instead of general issues;

b) increasing the flexibility of pleadings by abolishing the distinctions between the common law forms of action;

c) speeding up the progression of actions by shortening the time for the return of process and increasing the number of return days for process, providing for more liberal rules regarding service, and shortening the length of time within which review may be obtained;

d) reducing the work of the trial court, and expense to litigants through summary judgment proceedings, extensive discovery before trial, reduction of the number of separate cases through liberal rules on the joinder of parties and causes of action, elimination of new trials through the use of special verdicts and a narrative form of jury instructions, the elimination of special fact findings by the trial court in law cases where jury is waived, the abolition of the requirement that equity decrees contain a recital of facts sufficient to support them, and the conferring upon the court of review the power to take additional evidence where no jury question is involved;

e) the removing of uncertainties in legal relations through declaratory judgments; and

f) the simplification of the process of appeal by providing for a single form of review constituting a continuation of the proceedings in the trial court, and eliminating certain technical limitations now found in the present practice.

A more detailed exposition of the means through which the general reforms enumerated have been carried out can best be made by reviewing the changes effected in the four main divisions of practice.

INSTITUTION OF SUIT

VENUE-PROCESS

Several changes have been made in the preliminary proceedings through which suit is filed, and process is issued, served, and returned.

The use of the praecipe as heretofore employed has been eliminated, and the complaint must be filed with the clerk at the time he issues process.³ This is wise. All the praecipe now does is inform the defendant that he is being sued without giving him information as to the nature of the demand. The defendant is entitled to full disclosure of the nature of the action at the earliest possible moment.

In filing a suit the first question to be considered is the venue of the action. The present law with reference to venue has not been appreciably altered, and the general rule that suit must be commenced in the county wherein one or more of the defendants reside⁴ has been retained.⁵ The existing provision that a de-

³ § 101 (Rule 5).

⁴ § 6, c. 110, Cahill Ill. Rev. Stat. 1931.

⁵ § 7 of Proposed Act.

fendant may be served in a county in which he *may* be found is abandoned, and it is provided that the action may be instituted in any county in which the transaction out of which the cause of action arose or some part thereof occurred.

After commencing suit the question of process next arises. Summons is to be issued in the name of the people of the state but is directed to the defendants instead of the sheriff. All plaintiffs and defendants must be named as in the present long form of chancery summons. The summons on its face directs the defendant to file his answer or otherwise make his appearance within a time and place therein stated. If no personal judgment is sought against any of the defendants, that fact and their names must be set forth. In effect, the summons is a general notice that suit has been filed and directs the defendant as to the action he should take. More information is given the defendant than under the present form, especially as to equity actions where no personal judgment is sought.⁶

The form of the summons being determined, and the summons having been issued, the problem of its service then arises. At present the manner of the service of process differs in law and chancery actions. In law cases personal service must be secured by actually serving the defendant with a copy of the summons, and reading it to him.⁷ In chancery, service may be made by delivering a copy to the defendant, or leaving such copy at his usual place of abode, with some person of the family, of the age of ten or upwards, and informing such person of the contents thereof.⁸ Under the proposed act the present chancery practice is extended to all actions whether legal or equitable. However, the added requirement is made that in cases of service by leaving a copy at the place of abode a copy of the summons must also be sent to the defendant by registered mail.⁹

There is no real basis for the distinction now made in the manner of serving chancery and law process. The experience with "place" service as provided in chancery cases has been entirely satisfactory, and has been much more efficacious than the restricted service permitted in law actions. With the requirement for mailing a copy of the summons to the defendant where "place" service is had, adequate notice and protection is afforded the defendant. The proposed rule will do much to solve the growing problem of service evasion in large counties.

The proposed act makes one radical change as to persons who may serve process. Under present law only the sheriff (to whom all writs are directed) may serve the writ issued, and he is limited to service within his county. If service is to be made outside the county the writ must be issued to the sheriff of the foreign county.

There is no reason why a person authorized to serve process in the county of

⁶ § 97 (Rule 1).

⁷ § 2, c. 110, Cahill's Ill. Rev. Stat. 1931; Sherrall v. Huber, 186 Ill. App. 475 (1914).

⁸ § 11, c. 22, Cahill Ill. Rev. Stat. 1931.

⁹ § 13.

his election or appointment should be divested of power to serve a process issued from the local court, and directed to defendants in other counties. Particularly is this true where the counties adjoin. Often great delay is experienced under the present system of sending process to the foreign county for service. The proposed act, while granting the right to send process to another county for service, also provides that an officer of the county from which process issues may serve such process, in his official capacity, outside his county.¹⁰

After service, the summons must be returned to the court issuing it. Return days are fixed in the proposed act as the first and third Mondays in each calendar month. Heretofore return day has been the first day of the term.¹¹ With one exception,¹² in many of the circuits throughout the state only three to four terms a year are held.¹³ A summons issued between terms must wait until the succeeding term before it is returned. In the interim no action is taken as the defendant is under no duty to file his appearance or plead. Much precious time is thus lost. Unless the defendant desires to file a special appearance there is no need to delay the filing of pleadings, and the setting up of the issues until the next term. By providing for intermediate return days the pleadings and issues may be settled in advance of the next succeeding term, and the case placed upon the calendar ready for trial by the time the next term is formally opened.

APPEARANCE

Appearance by the defendant, whether general or special, is to be made in writing by filing a pleading or motion in the cause. The present general written appearance is abolished.¹⁴ Since the defendant is given at least 20 days from the date of service to prepare his defense, he should be ready to file defensive pleadings, or a motion attacking service, on the return day.

PARTIES TO THE CAUSE

As a general statement, it may be said that at common law, and under present law practice in Illinois, those persons having a joint interest must join as plaintiffs or be joined as defendants. No one who does not have a joint interest may join as plaintiff, and no one whose liability is not joint may be joined with other defendants.¹⁵ This rule is based upon the supposition at common law that the

¹⁰ § 10.

¹¹ § 1, c. 110, Cahill Ill. Rev. Stat. 1931.

¹² Except Cook County, where Circuit Court terms begin on each third Monday of the month throughout the year, and Superior Court terms begin each first Monday of the month. § 187, c. 37, Cahill Ill. Rev. Stat. 1931.

¹³ §§ 168-182, c. 37, Cahill Ill. Rev. Stat. 1931.

¹⁴ § 20.

¹⁵ *Wisner v. Catherwood*, 225 Ill. App. 471 (1922); c. 76, par. 3, Cahill's Ill. Rev. Stat. 1931; *Martin on Civil Procedure*, § 209. *Chas. H. Thompson Co. v. Burns*, 199 Ill. App. 418 (1917). If claim is joint both joint creditors must join. *Brady v. Koontz*, 145 Ill. App. 582 (1908), the joinder of several parties as plaintiffs is improper if they have no joint interest in the transaction with respect to which action is brought; see also *Moore v. Terhune*, 161 Ill. App. 155 (1911); on a joint and several obligation executed by more than two persons, one may be sued or all, but not an intermediate number. *Scanlon v. People*, 95 Ill. App. 348 (1900); *Phillips v. Pitcher*, 80 Ill. App. 219 (1898).

jury was incapable of determining both group liability and separate liability within the group.¹⁶

However, modern practice acts tend to depart from the concept of joint rights as the test of joinder, and to make the question depend more or less upon administrative convenience, as in chancery. Less emphasis is placed upon the capacity of the jury, and more upon encouraging a reduction in the number of separate suits. In this way the rights of all persons may be determined in one proceeding, eliminating the repetition of evidence, and reducing costs and time.

The elimination of the joint interest or joint liability rule as to the joinder of parties is accomplished by Sections 23 (joinder of plaintiffs) and 24 (joinder of defendants) of the proposed act. Under Section 23 all persons may join in one action as plaintiffs in whom any rights to relief arising out of the same transaction or series of transactions are alleged to exist, whether the rights be joint, several, or in the alternative. The interests must be such that if such persons had brought separate actions a common question of law or fact would arise. Separate judgment or relief may be given separate plaintiffs. If, upon application to the court, it appears that such general joinder may embarrass or delay the trial, separate trials may be ordered.¹⁷

Under Section 24 any person may be joined as a defendant who, either jointly, severally, or in the alternative, is alleged to have or claim an interest in the controversy, or in the transaction or series of transactions out of which the controversy arose, or whom it is necessary to make a party for the complete determination or settlement of any questions involved therein, or against whom a liability, joint, several, or in the alternative, is asserted, all regardless of the number of causes of action joined. Provision is made whereby a defendant will be relieved of the necessity to attend any proceedings in the course of trial in which he has no interest. If the plaintiff be in doubt as to the person from whom he is entitled to redress, he may join two or more defendants and state his claim against them in the alternative so that the question as to which of the defendants is liable, and to what extent, may be determined between the parties.

The above sections are taken from the New York Civil Practice Act,¹⁸ and the New Jersey practice provisions.¹⁹ In operation they have proved to be practical time and expense saving devices,²⁰ and their construction has been liberal.²¹

¹⁶ The rule as to contracts has been modified to some extent by c. 76, § 3, c. 110, §§ 53 and 54.

¹⁷ Similar provisions are in use in New Jersey (1912—c. 231, § 4); New York (Civil Practice Act, § 209).

¹⁸ New York Civil Practice Act, §§ 209, 211, 212.

¹⁹ N.J. Law 1912, §§ 4, 5, 6. See also English Order 16, Rules 1 and 7.

²⁰ *Akeley v. Kennicut, et al.*, 238 N.Y. 466, 144 N.E. 682 (1924) (193 plaintiffs allowed to join); *Young v. Southern Pacific Co.*, 15 F. (2d) 280 (1926) (16 plaintiffs each having separate demands—all of which demands were subject to proof by the same evidence); *Benton v. Deininger*, 21 F. (2d) 657 (1927) (23 plaintiffs as stockholders sued bank for damages for violation of banking act. 57 causes of action were alleged against 21 defendants who were or had been directors. The court held the joinder proper, and within the spirit of the law.).

²¹ *Bossak v. Nat'l. Surety Co.*, 205 App. Div. 707, 200 N.Y.S., 148 (1923); 137 E. 66th St. Inc. v. Lawrence, 118 Misc. Rep. 486, 194 N.Y.S. 762 (1922).

Closely connected with the problem of the joinder of parties plaintiff and defendant is the problem of the misjoinder of parties. In brief, the existing law in Illinois treats non-joinder or misjoinder of parties plaintiff or defendant as a matter of which the defendant may take advantage by appropriate plea, and defeat the action.²² Through the proposed Section 26 the tactical advantage afforded the defendant to abate the cause for misjoinder or nonjoinder of parties is eliminated. Under the provisions of that section no action is to be defeated by non-joinder or misjoinder of parties. The section permits new parties to be added, and misjoined parties to be dropped by order of court at any stage of the cause. In other states where like provisions prevail they are widely employed; parties have been permitted to be added at any stage,²³ and the substitution or joinder has not been limited to the trial court.²⁴ It is intended that the same interpretation be given Section 26.

PLEADINGS

One of the most radical changes in present practice wrought by the proposed bill is contained in the first clause of Section 31 by which "blind pleadings" such as the common counts, general issues and general demurrers, and fictions such as that of losing and finding in trover, are abolished, and the distinctions between the manner of pleading at law and in equity are eliminated. The language of the section is:

Neither the names heretofore used to distinguish the different ordinary actions at law, nor any formal requisites heretofore appertaining to the manner of pleading in such actions respectively, shall hereafter be deemed necessary or appropriate, and there shall be no distinctions respecting the manner of pleading between such actions at law and suits in equity, other than those specified in this Act and the rules adopted pursuant thereto; but this section shall not be deemed to affect in any way the substantial averments of fact necessary to state any cause of action either at law or in equity.

The bill then provides for the following pleadings:

Complaint.—This is the first pleading of the plaintiff.²⁵ It is to be in narrative form as are bills in equity. It replaces both the declaration at law and the bill in equity. It may contain as many causes of action, legal and equitable, as the plaintiff may have, and each cause of action is to be separately designated and numbered, but the court may in its discretion order a separate trial of causes of action which cannot conveniently be disposed of with the other causes, and separate issues may be transferred for trial to the proper side of the court.²⁶ The complaint is to contain specific prayers for relief, but except in case of default

²² *Dement v. Rokker*, 126 Ill. 174 (1888); *Rutter v. McLaughlin*, 257 Ill. 199 (1913); *Gottfried Brewing Co. v. McDonald*, 146 Ill. App. 601 (1909); *Snell v. DeLand*, 43 Ill. 323 (1867).

²³ *Dunlop v. Sweet Bros. Paper Mfg. Co.*, 208 N.Y.S. 54 (1925).

²⁴ *Windoes v. Colwell*, 247 Mich. 372, 225 N.W. 573 (1929).

²⁵ § 32.

²⁶ § 44.

the prayer is not to limit the relief obtainable.²⁷ The complaint must be filed at the time the summons is issued.²⁸

Answer.—This is the first pleading of the defendant.²⁹ It, too, is to be in narrative form. It will replace general issues. Every allegation in the complaint must be explicitly admitted or denied; every allegation, except allegations of damages, not explicitly denied is to be deemed admitted, unless an affidavit be filed that the party lacks sufficient knowledge to form a belief.³⁰ Defenses to the jurisdiction or in abatement or in bar may be pleaded together, but pleas other than those in bar may be tried first. Affirmative defenses, such as payment, fraud, laches, *et cetera*, must be plainly set forth.³¹

Counterclaim.—Any demand by one or more defendants against one or more plaintiffs, or against one or more co-defendants, in the nature of set off, recoupment or cross-bill, in tort or contract, for liquidated or unliquidated damages, may be pleaded as a cross-demand, as a part of the answer, and shall be designated a counterclaim.³² The counterclaim is in general governed as to form and content by the same rules as the complaint. Separate trials of issues presented by a counterclaim may be ordered if convenient.

Reply.—When new matter is set up by counterclaim in the answer, the plaintiff shall file a reply, the form and substance of which are to be governed by the rules applicable to the answer.³³

Bills of particulars may be demanded when allegations in pleadings are wanting in detail, and the court will determine the propriety of the demand. Untrue allegations and denials, made without reasonable cause, will subject the offending party to the payment of the reasonable expenses incurred by the other party by reason of such untrue pleadings.³⁴

Objections to pleadings now raised by demurrer are, by Section 45, required to be raised by motion which "shall point out specifically the defects complained of, and shall ask for such relief as the nature of the defects may make appropriate." This will eliminate the general demurrers, and will force all objections to be specific as in special demurrers today.

The new narrative form of pleading will permit a more intelligent, understandable, and concise statement of the issues to be propounded. Unnecessary and useless verbiage will be eliminated.

PREPARATION FOR TRIAL

DISCOVERY BEFORE TRIAL

In addition to the reduction of the number of controverted issues in advance of trial by the abolition of blind pleadings, and in addition to the reduction of litigated cases through summary and declaratory judgments, the proposed act provides for the narrowing of trial issues, and their proof in causes actually reaching the trial stage. The device employed is discovery before trial. By this means each party is permitted to call upon the other in advance of trial to ad-

²⁷ § 34. ²⁸ § 101. ²⁹ § 32. ³⁰ § 40. ³¹ § 43. ³² § 38. ³³ § 32. ³⁴ §§ 37, 41.

mit documentary or other facts in issue but not actually in dispute; to require the other party to furnish a sworn list of all documents known to him to be pertinent to the cause which are or have been in his possession or power, whether admissible in evidence or not; and to require the other party or any witness in the cause to answer oral or written interrogatories by deposition, and to submit the person or property to physical examination in actions for injury to such person or property. Appropriate penalties are provided in order to insure full and honest disclosure.³⁵

Under present law no provision is made for discovery before trial except in two very limited instances. The court may require either party to produce for examination in advance of trial any books or writings pertinent to the issues.³⁶ However, the party requesting the books and documents must have such knowledge of the material desired as sufficiently to describe it and point out its relevancy. Also, in equity actions, depositions of witnesses who reside in the state may be taken if a showing of the necessity of such testimony is made.³⁷ This is not applicable to actions at law.

Discovery through trial itself may be had today by bill in chancery. The discovery sought may be incidental to other relief or may be the sole relief prayed. Furthermore, Section 22 of the Chancery Act³⁸ provides that discovery may be had of officers and agents of a corporation where the corporation is made defendant.

The present limited chancery discovery is retained except that discovery now available under a chancery bill for discovery, or by interrogatories in a bill for relief, is to be sought hereafter by motion in the cause.³⁹

The forced admission of uncontroverted facts in advance of trial is accomplished by Rule 10⁴⁰ which provides for admissions of authenticity by one party of documents in possession of the other,⁴¹ the admission of written statements of facts submitted by any party to any other party,⁴² and the admission of written copies, synopses, or abstracts of public records submitted by any party to any other party. In all instances the adverse party is given the right to show why he cannot admit the document or the statement of facts, or he may show that the copy of the public record submitted is inaccurate. On failure to admit documents or statements submitted, without a showing of just cause for failure to admit,

³⁵ Section 59; Rules 9 (§ 105), 10 (§ 106), 11 (§ 107), 12, (§ 108), 13 (§ 109).

³⁶ § 9, c. 51, Cahill Ill. Rev. Stat. 1931; *Carden v. Enswinger*, 329 Ill. 612 (1928).

³⁷ § 24, c. 51, Cahill Ill. Rev. Stat. 1931; *People v. Calumet Nat'l Bank*, 260 Ill. App. 603 (1931).

³⁸ § 22, c. 22, Cahill Ill. Rev. Stat. 1931.

³⁹ § 59 (1).

⁴⁰ § 106.

⁴¹ This provision of Rule 10 is in force in England, and in twenty states. Ragland, *Discovery Before Trial*, 207.

⁴² Similar provisions prevail in England, Mass., Mich., N.Y., N.J., and Wis. Ragland, *Discovery Before Trial*.

the negligent party may be required to stand the expense of proving the document or facts.

Except for the admitting of statements of fact, the provisions of Rule 10 should be helpful, satisfactory, and not subject to abuse. By eliminating the need for formal proof at the trial of documents or public records much time should be gained, and unnecessary questions and objections thereto eliminated. The provision regarding the requirement to admit statements of facts may well be subject to abuse. It will also be difficult of application. Some attorneys will be inclined to include conclusions and other matters not properly to be classed as ultimate facts capable of admission. This attempt to lessen the business of the court may have the opposite effect.⁴³

The disclosure of documents which may or may not be within the knowledge of the person asking discovery but which are in the possession of any other party is attempted through Rule 9.⁴⁴ Under this rule any party may make a motion requiring any other party to prepare a sworn list or schedule of documents which are or have been in his possession or power whether admissible in evidence or not. Subject to reasonable rules, the other party may have access to the documents listed upon reasonable demand. Appropriate penalties to insure full disclosure are provided. This is an extension of the limited rule allowing the examination of documents, as it exists today. By requiring a sworn list, it is expected that full disclosure of all documents will be made. In other states the rule has not operated as broadly as might be expected because, through lack of knowledge, the party seeking discovery often is not able to impeach the list furnished. However, where there is knowledge it will eliminate the expense of subpoenas duces tecum, and force the person listing the documents to make immediate admission of them, and thus simplify their introduction at the trial.⁴⁵ The rule that unlisted documents may not be introduced at the trial by the person who fails to list them will also promote full disclosure.

Oral disclosure, or interrogation in advance of trial, is provided for in Rule 11.⁴⁶ Any party may, by deposition on oral or written questions directed to any other party or person, examine such other party or person in advance of trial as to matters relevant to the issues involved. If the party or person be hostile, such person may be examined as if under cross-examination. A penalty of damages is provided for abuse of the provision by the party seeking the examination.

Similar provisions are in force in eleven other states, and the broad, mutual, advance discovery experienced has been the subject of favorable comment.⁴⁷ The essential factor of the provision is that it permits broad interrogation by

⁴³ For experience in other states, see Ragland, *Discovery Before Trial*, 200.

⁴⁴ § 105.

⁴⁵ For a discussion of the problem, see Ragland, *Discovery Before Trial*, 179, 182.

⁴⁶ § 107.

⁴⁷ Ragland, *Discovery Before Trial*, 123-131.

both plaintiff and defendant of all witnesses whether or not they are parties.⁴⁸ The proposed rule should encourage voluntary statements, and will allow the preservation of testimony. Without doubt it will eliminate unnecessary examination at the trial.

The proposed provision regarding physical examination of person or property before trial is, of course, limited to cases involving injury to such person or property. The terms upon which examination is to be allowed are to be fixed by the court.⁴⁹ The constitutionality of the provision has been upheld both in New York and New Jersey.⁵⁰ The proposed provision should be of assistance in determining the exact nature, extent, and probable duration of the injury,⁵¹ and will strongly tend to reduce the possibility of "trumped-up" cases.

It may be said that on the whole the measures outlined will eliminate unnecessary objections to evidence, and shorten trials by eliminating proof through extensive admissions of uncontroverted facts. By the same token the expense of trial will be decreased. Witnesses appearing at the trial may be examined without undue delay. The proposed measures will eliminate the formal introduction of much of the evidence to be considered. They will simplify the trial of most cases, reduce the necessity for new trials, and further stimulate waivers of juries.

THE TRIAL

NON-SUIT

Under the present Practice Act⁵² a plaintiff may take a non-suit at any time before the jury retires from the bar, or, if the case be tried without a jury, before the case is submitted for final decision. Plaintiffs often abuse this privilege by using it to harass defendants with several suits involving the same subject matter; inconvenience and expense are thus thrust upon defendants.

In remedying this situation the new Act⁵³ restricts the plaintiff, in taking a non-suit, to any time before the commencement of the trial or hearing, upon notice to the defendant or his attorney and upon the payment of defendant's costs. After the trial or hearing commences no non-suit may be taken unless the defendant agrees thereto by stipulation, or the court so orders on special motion setting out under affidavit the grounds therefor.

SUMMARY JUDGMENTS

There are many cases in which no valid defense exists, and yet in which the plaintiff is delayed in obtaining judgment because defenses are asserted which must be disposed of by trial, even though there is no possibility of ultimate success on the part of the defendant. These cases should be disposed of without the

⁴⁸ Seven other states follow this practice. Ragland, *Discovery Before Trial*, 50-51.

⁴⁹ § 109 (Rule 13).

⁵⁰ *Lyon v. Railway Co.*, 142 N.Y., 298 (1894); *McGovern v. Hope*, 63 N.J.L. 76 (1899).

⁵¹ For the experience of other states, see Ragland, *Discovery Before Trial*, 191-193.

⁵² Cahill Ill. Rev. Stat. 1931, c. 110, § 70.

⁵³ § 52.

delay incident to trial. "Summary judgment" procedure affords a means of segregating these cases for prompt disposition. By means of affidavits, in a limited class of cases, the court is enabled to determine whether or not a defense worthy of trial exists. If so, the case is tried. If not, judgment is rendered as in case of default.

The summary judgment is not, as the term might indicate, an innovation in Illinois. In 1853 a statute, applicable to Cook County alone, provided that in an action on a contract the plaintiff should be entitled to a default judgment unless the defendant filed, in addition to his plea, an affidavit stating that he believed he had a good defense to the action on the merits.⁵⁴

In the Practice Act of 1872 a like provision made applicable to the whole state was included. By this Act the plaintiff was required to show by affidavit the nature of his claim, but, in a line of cases, of which *Fisher v. National Bank of Commerce*,⁵⁵ is typical, it was held that an affidavit by the defendant which stated merely that he believed that he had a good defense to the suit upon the merits met the requirements of the statute.

In the Fisher case, a rule of the Superior Court of Cook County was involved which anticipated in substance the summary judgment provisions of the proposed act, but this rule was held invalid as providing a system of practice not uniform throughout the state.⁵⁶

Section 55 of the Practice Act of 1907 added the requirement that the defendant specify the nature of his defense.⁵⁷ Under this Act it has been held that the defendant's affidavit must show facts which will constitute a defense under the pleas filed, "with sufficient particularity to apprise the plaintiff of the nature of the defense, but it is not necessary to state the evidence or the facts in detail."⁵⁸

Section 57 of the proposed act enlarges the scope of the procedure to include actions to recover the possession of land, with or without rent or mesne profits, or to recover possession of specific chattels, and actions upon judgments or decrees for the payment of money, as well as actions upon contracts, express or implied. Many jurisdictions have gone as far,⁵⁹ and some have gone further, extending the procedure to claims based upon a statute or a trust, to actions to quiet title to real estate, and to mortgage foreclosures.⁶⁰

However, the striking departure from present practice is found, not in the extension of the procedure, but in the quantity and quality of the facts required

⁵⁴ Laws of 1853, p. 172.

⁵⁶ Article VI, § 29, Constitution of 1870.

⁵⁵ 73 Ill. 34 (1874).

⁵⁷ Cahill Ill. Rev. Stat. (1931), c. 110, § 55.

⁵⁸ *Harrison v. Rosehill Cemetery Co.*, 291 Ill. 416 (1920).

⁵⁹ Connecticut: Rules of Civil Practice, § 14A (1); Delaware: Delaware Rev. Code (1915) c. 128, § 6; Michigan: 3 Mich. Comp. Laws (Cahill 1915) c. 234, §§ 12581, 12582; New Jersey: N.J. Laws 1912, c. 231, Schedule A, § 57; New York: Rules of Civil Practice, Rule 113; England: Annual Practice (1928), Order XIV, Rule 1.

⁶⁰ Notably Connecticut. See Charles E. Clark and Charles U. Samenow, *The Summary Judgment*, 38 Yale L. Jour. 423 (1929).

to be set up in the affidavits. Section 104 requires the affidavits of the parties in summary judgment proceedings to be made on the personal knowledge of the affiants; to set forth in detail the facts upon which the claim or defense is based; to have attached thereto certified or sworn copies of all papers relied upon; to consist of such facts as would be admissible in evidence, and to show affirmatively that the affiant would be a competent witness to the facts set forth.

The different function to be performed by the affidavit under the proposed act is apparent. At present the affidavit serves to apprise the adversary of the nature of the claim or defense; the affidavit required under Section 104 will, in addition, serve to apprise the court of the existence and validity of the defense asserted. Unless the defendant's affidavit shows that he has a sufficiently good defense on the merits to all or a part of the plaintiff's claim to entitle him to defend the action, judgment will be entered for the plaintiff either for the whole or a part of the claim, as the case may be.

The difficulty of prolonging litigation with sham causes of action or sham defenses when evidentiary facts must be sworn to with particularity is obvious. Issues of fact, if they exist, may be promptly discovered; if they do not exist a prompt disposition of the questions of law involved is possible. It is the searching character of the affidavits which renders so effective the summary judgment procedure of other jurisdictions.⁶¹

DECLARATORY JUDGMENTS

Often a party is about to perform an act when his right to do so is challenged by another person or by the state. He may then either desist from the proposed act or undertake it regardless of the challenge. If he selects the latter alternative, he runs the risk of breaking a contract, committing a tort or violating a statute. Declaratory judgment procedure provides a sensible remedy for the solution of this problem. The plaintiff, about to assert his claimed and challenged right, summons the adverse parties into court as defendants, and asks for a declaration of his privilege to undertake the proposed act. The parties thus may make certain of their rights, and may proceed accordingly, having avoided the risks of damages or penalties.⁶²

Under Illinois practice today a limited declaratory judgment procedure is in force. Under Section 50 of the Chancery Act, the Circuit Court is given the power to construe wills.^{62a}

Declaratory judgment procedure is now in effect in England and in twenty-nine states.⁶³

⁶¹ Prof. Sunderland of Michigan states that in 1927 there were 4280 summary judgments rendered in the King's Bench Division, as compared with 1258 judgments rendered after trial of issues.

⁶² Edwin M. Borchard, *Judicial Relief for Peril and Insecurity*, 45 *Harv. L. Rev.* 793, 808 (1932).

^{62a} § 50, c. 22, *Cahill Ill. Rev. Stat.* (1931).

⁶³ Arizona, California, Colorado, Connecticut, Florida, Indiana, Kansas, Kentucky, Massachusetts, Michigan, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Caro-

Because it requires adverse parties, and an actual controversy, and because it is conclusive upon the rights of the parties and may be the basis of further relief, a declaratory judgment is clearly distinguishable from the "advisory opinion" which does not require a litigated issue.

Declaratory judgments, affording as they do neither coercive relief nor indemnification, have been attacked in eighteen states upon the ground that they fail to present a justiciable issue, of which a court might properly take cognizance.⁶⁴ Although the proceeding had been sustained against this and other forms of constitutional attack in the state courts, there was, until recently, speculation as to whether the Supreme Court of the United States would regard an action seeking merely a declaration of rights as a "case" or "controversy" within the meaning of Section 3 of Article II of the Constitution.⁶⁵

This question was answered in the affirmative by the Court in *Nashville C. & St. L. R. Co. v. Wallace*.⁶⁶ The court in this case sustained the constitutionality of the Tennessee declaratory judgment act.

Under declaratory judgment procedure it is possible to ascertain the proper construction of contracts⁶⁷ and leases⁶⁸ without incurring the unfortunate consequences resulting from action based on an incorrect interpretation; to determine the existence of debtor-creditor relationships;⁶⁹ to settle conflicting assertion of rights in lands without the possibility of tort liability resulting from reliance on an unfounded right;⁷⁰ and to determine the validity of a statute, ordinance, or governmental regulation without the risk of penalty for a violation.⁷¹

lina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Wisconsin, Wyoming.

⁶⁴ The only decision holding the declaratory judgment unconstitutional, *Anyway v. Grand Rapids Ry.*, 211 Mich. 592, 179 N.W. 350 (1920), was in effect overruled by *Washington-Detroit Theatre Co. v. Moore*, 249 Mich. 673, 229 N.W. 618 (1930), decided after a new statute was drafted.

⁶⁵ See 45 Harv. L. Rev. 717, 1089 (1932); 14 Am. Bar Ass'n. Jour. 633.

⁶⁶ —U.S.—, 77 L.Ed. 444, 445 (advance sheets). The Court said:

In determining whether this litigation presents a case within the appellate jurisdiction of this Court, we are concerned, not with form, but with substance. . . . Hence, we look not to the label which the legislature has attached to the procedure followed in the state courts, or to the description of the judgment which is brought here for review, in popular parlance, as "declaratory," but to the nature of the proceeding which the statute authorized, and the effect of the judgment rendered upon the rights which the appellant asserts.

The Court distinguished *Muskrat v. United States*, 219 U.S. 361, 55 L.Ed. 251 (1910); *Liberty Warehouse Co. v. Grannis*, 273 U.S. 70, 71 L.Ed. 541 (1926); and *Willing v. Chicago Auditorium Assn.*, 277 U.S. 274, 72 L.Ed. 880 (1928).

⁶⁷ *Guaranty Trust Co. v. Hannay & Co.*, (1915) 2 K.B. 536; *United Order of Foresters v. Miller*, 178 Wis. 299, 190 N.W. 198 (1922).

⁶⁸ *Murray Motor Co. v. Overby*, 217 Ky. 198, 289 S.W. 307 (1926).

⁶⁹ *Cloverdale Union High School District v. Peters*, 88 Cal. App. 731, 264 Pac. 273 (1928).

⁷⁰ *Colorado & Utah Coal Co. v. Walter*, 75 Colo. 489, 222 Pac. 864 (1924).

⁷¹ *Little v. Smith*, 124 Kan. 237, 257 Pac. 959 (1927); *Rosenberg v. Whitefish Bay*, 199 Wis. 214, 225 N.W. 838 (1927); *Nashville C. & St. L. R. Co. v. Wallace*, —U.S.—, 77 L.Ed. 444 (1932).

Illustrative of one unfortunate situation from which relief would be afforded by declaratory judgment procedure is *Shredded Wheat Co. v. City of Elgin*,⁷² where the plaintiff sought to restrain the enforcement of an ordinance requiring a license for the distribution of samples and handbills, although the articles in question came into the city in interstate commerce. Because the plaintiff was unable to show prospective irreparable injury or multiplicity of suits, the court refused to determine the validity of the ordinance until an action was brought to collect the penalty prescribed for its violation.

Section 58 of the proposed act provides that no action shall be open to the objection that a judgment is sought which merely declares the rights of the parties, and which affords neither coercive nor compulsory relief. The procedure is made applicable to actions testing the validity of a statute, ordinance or other governmental regulation. Declarations of rights may be obtained by ordinary proceedings at law or in equity, and the case may be noticed for early hearing. Further relief, based upon the rights of the parties as determined by the judgment may be obtained, if appropriate, after notice and hearing.⁷³

INSTRUCTIONS

Under the proposed act written instructions to the jury are to be prepared by the court in the form of a continuous and connected narrative and not as a series of separate instructions. To assist the court in drafting the instructions, the parties may, at any time before their preparation, make suggestions as to the proposed instructions to be drafted. Before the argument the parties are given an additional opportunity to read the instructions finally prepared by the court, and they may make specific suggestions or objections thereto. All objections and suggestions, whether made before or after the instructions are prepared, are to be made out of the presence of the jury. Suggestions which are not adopted and objections which are overruled may be made a ground of review, but all suggestions or objections not made before the jury retires from the bar will be deemed to have been waived.⁷⁴

In place of a disconnected, rambling, repetitious series of instructions prepared by prejudiced parties, each striving to obtain the maximum possible advantage, there will be substituted by the proposed act an intelligible statement of the law of the case prepared by an impartial court. That the jury will be aided by such a presentation of the law is apparent, while the rights of the parties to make their records will be substantially unaffected. The provision that suggestions and objections not made before the jury retires will be deemed to have been waived will serve to reduce materially the number of new trials.

⁷² 284 Ill. 389 (1918).

⁷³ That the provision of § 11 of the Uniform Declaratory Judgment Act, which requires that the Attorney General be made a party to a declaratory action to test the validity of legislation, is unnecessary is evidenced by the ease with which test cases are "framed" and by the thoroughness with which constitutional issues are discussed in declaratory judgment procedure.

⁷⁴ § 69.

SPECIAL VERDICTS

By special verdict, the jury, instead of finding for either party, may find and state all the facts at issue, and conclude conditionally, that if, upon the whole matter thus found, the court should be of the opinion that the plaintiff has a good cause of action, they then find for the plaintiff, and assess his damages; if otherwise, then for the defendant.

The present provision of Section 79 of the Practice Act which permits the jury to return, in their discretion, either a general or a special verdict, is merely declaratory of the common law.⁷⁵ The special verdict is to be preferred to a general verdict,⁷⁶ because it restricts the jury to its proper province, the determination of facts, and because it permits the jury to find the facts without knowing for which party judgment will be rendered.

Yet special verdicts are almost unknown in Illinois,⁷⁷ because of the rule that a special verdict may be returned only when the jury, in its discretion, sees fit to do so, and because of the requirement that a special verdict must pass upon all the material issues presented by the pleadings, and that it find ultimate facts, and not merely evidence of facts.⁷⁸ Issues which are controverted in the pleadings may be admitted or proved in a perfunctory manner upon the trial. They seem unimportant, and are therefore overlooked in the preparation of the special verdict. A new trial is the result.

Section 66 of the bill, in an effort to make the special verdict a useful device, provides that the court may, in its discretion at any time, and shall when requested by either party before the argument to the jury, direct the jury to find a special verdict; that the verdict shall be prepared by the court in the form of questions relating only to material issues of ultimate fact, to which the jury shall make answer in writing; that whenever there is omitted some controverted matter of fact not brought to the attention of the court by request for submission, such matter of fact shall be deemed determined by the court in conformity with its judgment, and that the omission to request a finding by the jury on such a matter shall be deemed *pro tanto* a waiver of jury trial and a consent to a determination by the court.⁷⁹

⁷⁵ C. & N. W. Ry. Co. v. Dunleavy, 129 Ill. 132, 142 (1889).

⁷⁶ "It was found by experience that the old mode of submitting but one issue to the jury, where there were several issues of fact raised by the pleadings, was not satisfactory. The old mode of one issue, which means to find for the plaintiff or for the defendant, gave rise in many cases to what were called 'vicious verdicts.' If it could be so, the jury ought to find the issues submitted to them without knowing whether their findings were for the plaintiff or the defendant. . . . The trial judge should keep it in mind that the very object of submitting written issues to the jury is that they should find the facts, and then the court would apply the law." *Elizabethton Shoe Co. v. Hughes*, 122 N.C. 296, 29 S.E. 339 (1898).

⁷⁷ "Special verdicts" must be distinguished from "special findings of fact" which may be requested only in conjunction with a general verdict. *C. & N. W. Ry. Co. v. Dunleavy*, 129 Ill. 132 (1889).

⁷⁸ Clementson, *Special Verdicts*, 169 ff.; *C. & N. W. Ry. Co. v. Dunleavy*, 129 Ill. 132 (1889).

⁷⁹ It is submitted that since the verdict is to be prepared by the court, the request for a

These provisions are taken from the Wisconsin statutes, Sections 270.27 and 270.28, which have been so successful in operation that the general verdict is practically obsolete, and new trials because of defects in the form of the special verdict are extremely rare. The practice in Wisconsin has been described as follows:

... The judge calls upon the attorney for an informal conference as to the questions to be put to the jury, and in most cases the form of the special verdict is quickly agreed upon. Then should either attorney desire to make a record under the statute, he may do so by requesting a question covering an omitted point. This seldom happens, however, as the judge will usually put a question which an attorney believes should be put, reserving the determination of its materiality until the motion for judgment on the verdict.⁸⁰

FINDINGS OF FACT

One of the greatest obstacles to the waiver of jury trials in civil cases in Illinois is the provision of Section 61 of the present Practice Act,⁸¹ that either party may, in a law action tried without a jury, demand special findings of fact. The special findings of fact in such cases are subject to the same requirements as special verdicts in that every fact necessary to support the judgment must be set out in the findings, and the accidental omission of any one, even though established by uncontroverted evidence, will be ground for reversal. Today, in order to avoid a reversal of judgment because of faulty findings of fact, cases are allowed to go to the jury, so that advantage may be taken of the jury's general verdict, which needs no findings of fact to support it.

Section 65(2) of the bill provides that no special findings of fact shall be necessary to support the judgment. A case properly established by proof will, under the provision, be free from the hazard of reversal.

Much the same problem exists in equity cases. The Illinois law now requires that equity decrees contain a recital of all the ultimate facts necessary to support the decree.⁸² Section 65(2) eliminates the need for the recital of ultimate facts by providing that no findings of fact shall be necessary in any case in equity in order to support the decree.

REVIEW⁸³

The two main factors in Illinois civil appellate practice are (1) the direct review of the trial court by the Appellate and Supreme Courts, and (2) the re-

special verdict may appropriately be required before testimony is introduced, so that the court may prepare the questions to be presented during the course of the trial.

⁸⁰ John B. Sanborn, 12 Am. Bar Ass'n. Jour. 64 (1926). The English practice is substantially the same. See Edson R. Sunderland, 11 Am. Bar Ass'n. Jour. 773 (1925).

⁸¹ § 61, c. 110, Cahill Ill. Rev. Stat. 1931.

⁸² Van Meter v. Malchef, 276 Ill. 451 (1917); French v. French, 302 Ill. 152, (1922); Tomasiewicz v. Tomasiewicz, 229 Ill. App. 385 (1923); Rybakowicz v. Rybakowicz, 290 Ill. 550 (1920); Puterbaugh, Chancery Pleading and Practice, § 262.

⁸³ Senate Bill 359. Article VIII, §§ 76-94; §§ 113-136 (known as Rules 17-40).

view of the Appellate Court by the Supreme Court. As to the latter, no substantial change in present procedure is suggested in the proposed act. Certificate of Importance, wherein the Appellate Court, of its own volition, certifies questions of importance to the Supreme Court for review is retained with no change; and certiorari, wherein the Supreme Court orders the Appellate Court to send a cause to it for review, also remains intact except that the title "certiorari" has been changed to "leave to appeal."⁸⁴

The major efforts of the committee which drafted the suggested changes were directed toward the mechanics of direct review of the trial court. In dealing with this phase of the problem an attempt was made to provide a system of such simple character as materially to reduce the possibility of mechanical error on the part of counsel; to overcome certain technical limitations of the present Practice Act which place a premium upon form instead of substance; and to speed up present practice. The draftsmen of the Act apparently have had in mind that statutory machinery dealing with direct appellate review should have as its primary object the establishment of a simple mechanism for the transfer of a cause from the lower to the upper court for hearing on the merits.

Because the proposed reforms are in purpose and effect closely related and often overlap each other, no attempt will be made to consider them precisely as outlined. They will be considered in the order in which they might ordinarily be expected to arise in the course of an "appeal."

The first question in securing review of a cause is that of the form of appeal to be employed. Today review by the Appellate and Supreme Courts may be had either by writ of error issuing from the reviewing court directed to the trial court commanding it to send up the trial court record, or by appeal to the reviewing court, asking it to examine the portions of the record tendered it. A writ of error differs from an appeal in that it is not a continuation of the proceedings below but is identified with a separate action instituted in the court of review. It may be sought within two years of judgment. Appeal must be prayed within the term at which judgment is entered, but not later than 20 days thereafter. In the case of a writ of error a review may be sought by persons not parties of record somewhat more readily than in appeal. The severance of parties not seeking review is accomplished much more easily with appeal than with a writ of error. On the other hand, unless a stay of the proceedings below is desired, no bond is needed in the case of a writ of error. Moreover, a writ of error brings up the entire record while appeal does not necessarily do so.⁸⁵

The best features of the two present methods have been fused into one form of review by providing that all direct reviews are to be had by "notice of appeal" to be filed within 90 days. No bond is required except where a stay of the

⁸⁴ § 77; § 113 (Rule 17). § 77 is an express reenactment of the present Practice Act provisions of § 121 dealing with certiorari and certificate of importance.

⁸⁵ Dodd & Edmunds, Illinois Appellate Procedure, § 180.

proceedings below is desired. The "notice of appeal" is to constitute a continuation of the proceedings below. The rights of persons not party to the record to seek a review as under writ of error are preserved and parties not joining in the appeal are automatically severed.⁸⁶

There is no real reason or advantage for the employment of the present separate and distinct methods of review. It is not merely confusing; it pays premiums to the dilatory attorney who may wait two years before asking review.⁸⁷ Furthermore, the distinctions between the two forms of review are purely historical and the two are logically fusible into one form of appeal.⁸⁸ The establishment of a single method of review entirely meets present necessities, especially

⁸⁶ § 76 (1), 78, 84, 83.

⁸⁷ Writ of error may now be taken within two years, *Borah Drain. Dist. v. Ankenbrand*, 277 Ill. 132 (1917); and mere delay is no bar, *Chatterton v. Chatterton*, 231 Ill. 449 (1907); also, in limited cases a writ of error lies in spite of the fact that an appeal has been prosecuted. That the matter was settled by appeal will not bar a writ of error where the court on appeal declined to pass upon certain errors raised on appeal, *Smith v. Brittenham*, 98 Ill. 188 (1881); the fact that an appeal has been dismissed on a short record is no bar to the subsequent employment of writ of error, *Reed v. Kinzie*, 98 Ill. App. 364 (1901); a leading author on Illinois Appellate Procedure also states that if the court refuses to consider cross-errors on appeal, the party assigning such cross-errors should not be barred from subsequently suing out a writ of error, *Dodd & Edmunds, Ill. Appellate Prac.*, § 120.

Although the fusing of writ of error and appeal into one form of review (notice of appeal) has its advantages, there may be said to be some doubt as to its constitutionality. Under the constitution of 1870, in criminal cases, and cases in which a franchise or freehold, or the validity of a statute is involved, and in such other cases as may be provided by law, the writ of error is made a constitutional writ of right. (For a full discussion of the cases involving the question of the constitutional right to a writ of error in the four classes outlined, see *Smith-Hurd pamphlet, "Illinois Annotated Constitution"* written by Walter F. Dodd of the Chicago Bar, pp. 237-238.)

The proposed act, in Section 76 (1), says that

Every order, determination, decision, judgment, or decree, rendered in any civil proceeding, if reviewable by the supreme or appellate court of this state by writ of error, appeal or otherwise, shall hereafter be subject to review by notice of appeal, and . . . shall constitute a continuation of the proceeding in the court below. Such appeal shall be deemed to present to the court all issues which heretofore have been presented by appeal and writ of error.

Section 83, the section on multiple parties entitled to "notice of appeal," provides that "The right heretofore possessed by any person not a party to the record to review . . . by writ of error shall be preserved by notice of appeal."

In favor of constitutionality, it may be said that all the essential characteristics of the writ of error have been preserved in notice of appeal, and that the only changes are in name, and in that there is a shortening of time for "writ of error" from two years to 90 days, and in that the writ may no more issue direct from the Supreme Court to the trial court. Section 83 does not help a great deal except to show the intention to preserve in "notice of appeal" an additional characteristic of writ of error (right of persons not a party to the record to review). It appears that the proposed act does not prohibit writ of error from the Supreme Court to the Appellate Court in the four classes of cases outlined. (See *Freitag v. U. S. Y. Co.*, 262 Ill. 551, 104 N.E. 901 (1914); *Smith v. People*, 98 Ill. 407 (1881); *Gallagher v. People*, 207 Ill. 247, 69 N.E. 962 (1904).

⁸⁸ *Dodd and Edmunds*, § 180.

since the proposed act provides for securing an appeal after the time allowed for "notice of appeal" where delay is unavoidable.⁸⁹

The present scope of review, and the present rules dealing with the jurisdiction of the Appellate and Supreme Court are retained.⁹⁰ Except for very slight changes, the present rules on briefs and abstracts, and the manner of presenting oral argument, have been incorporated in the proposed measure as rules of court.⁹¹

After the perfection of the appeal by filing "notice of appeal," the Act then provides for the progression of the appeal by successive stages, and except for changes in time limitations the present rules for preparing and filing the "record" are retained.⁹²

Bond has been eliminated except where supersedeas (stay of proceedings below) is desired.⁹³ The application for supersedeas and the filing of the bond may be made in the trial court or in the reviewing court depending upon the time at which the record is transmitted. In order to prevent vexation by the appellant, the right to a supersedeas in the reviewing court has been made dependent upon good faith and prompt action in the trial court.⁹⁴ The provisions regarding bond in the court of review are in a measure an adaptation of the rule heretofore applicable to writ of error.⁹⁵

Under existing law the distinctions between the record proper, or "common law record" as it is more often called, and the bill of exceptions or stenographic report of the actual proceedings and evidence presented at the trial, are highly technical and must be closely observed. Matters technically belonging in the "common law record," which are found in the bill of exceptions (or vice versa), will not be considered by the court of review even though the misfiled document or evidence is in fact before the court.⁹⁶ Both bench and bar have long advocated

⁸⁹ § 78 (1). On good cause shown for delay an appeal may be secured within one year of the entry of judgment.

⁹⁰ The jurisdictional portions of the present Practice Act, §§ 118 and 120, Cahill Ill. Rev. Stat. 1931, have been incorporated into § 77 of the proposed act.

⁹¹ § 119 (Rule 14, Ill. Sup. Ct.—Appellant's Abst. and Brief); § 120 (Rule 15, Ill. Sup. Ct.—Appellee's Counter Abst. and Brief); § 121 (Rule 16, Ill. Sup. Ct.—Printing and Service of Abstracts and Briefs); § 122 (Rule 17, Ill. Sup. Ct.—Time of Filing and Service of Briefs and Abstracts); § 123 (Rules 10-18-20-22, and 28 of Ill. Sup. Ct.—Appeal Dockets); § 125 (Rule 23, Ill. Sup. Ct.—Oral Argument).

⁹² § 116 (Rule 20).

⁹³ § 84; § 117 (Rule 21). The perfection of an appeal now depends upon two jurisdictional factors—having both bond and record filed and approved in apt time.

⁹⁴ § 84.

⁹⁵ The provisions covering bond and supersedeas are contained in Sections 84 and 117 (Rule 21); § 78 (2); Dodd and Edmunds, § 140, *et seq.*

⁹⁶ *People v. Harrington*, 291 Ill. 206 (1920); *City v. Pub. Serv. Co.*, 215 Ill. App. 606 (1920) (testimony of witnesses copied into "Common Law Record"); *Weber & Co. v. Hot Point Heating Co.*, 209 Ill. App. 437 (1918), (affidavit on wrong side of "record"); *Bates v. Ball*, 72 Ill. 108 (1874); *Frank v. City*, 216 Ill. 587 (1905) ("It has been repeatedly held by this court that

the abolition of this practice. The proposed act does away with it by providing that all distinctions between the common law record, the bill of exceptions, and the certificate of evidence, for the purpose of determining what is properly before the reviewing court, are abolished, and that all matters in the trial court record actually before the court on appeal may be considered by the court for all purposes.⁹⁷

The law respecting the certification of the proceedings at the trial has heretofore been somewhat unsettled, particularly with reference to the authentication of the report where the trial court judge is absent from the jurisdiction.⁹⁸ The proposed bill clarifies the problem by providing that the trial judge, or his successor in office, shall certify the report, except that if the trial judge or his successor in office be absent from the district, ill, or otherwise disabled, then any other judge of the trial court may certify the report.⁹⁹ The same rule will apply to the approval of bonds.¹⁰⁰

Under present law no formal exception need be taken to any ruling or action of the trial court judge made in the course of the trial.¹⁰¹ The proposed act extends this useful rule to proceedings other than those occurring in the course of the trial.¹⁰²

Today many appeals are partially perfected by the appellant, and then for some reason or other nothing more is done. Because of partial completion a good many of them are suspended with no power in the trial court to dismiss. Under present practice it is often necessary, in order to clear title to property, to take "short records" to the court of review for an order of dismissal. The proposed act attempts to meet this problem by conferring power upon the trial court to dismiss the appeal upon an application and showing by the appellee that the appellant has failed to file a report of the proceedings or agreed statement of facts within the time originally allowed or extended.¹⁰³

An important change in the law with reference to the finality of fact-findings

a document cannot be made a part of the bill of exceptions by reference, and this is the rule even though the document be found in some other place in the record"); *Burke v. City*, 185 Ill. App. 228 (1914) (Reference in bill of exceptions to affidavit introduced before the lower court will not incorporate it).

⁹⁷ § 76 (2).

⁹⁸ *People v. Rosenwald*, 266 Ill. 548 (1915); *Supreme Lodge v. Relig.* 116 Ill. App. 59 (1904); *Koscal v. Wolfson*, 215 Ill. App. 1 (1920); *Thomlinson Riley Co. v. Feinberg & Kahn*, 220 Ill. App. 442 (1921).

⁹⁹ § 116 (Rule 20).

¹⁰⁰ § 84.

¹⁰¹ *Cahill* Ill. Rev. Stat. 1931, c. 110, § 81; (the rule now in force has been held not to include matters not occurring during the trial), *Village of Bradley v. N. Y. C. R. R. Co.*, 296 Ill. 383 (1921).

¹⁰² § 82.

¹⁰³ § 116 (1-E) (Rule 20).

by the Appellate Court in non-jury cases is proposed.¹⁰⁴ The change will permit the Appellate Court to make its findings of fact either in its opinion or in its "final order, judgment or decree." The revision also specifies that if, upon review by the Supreme Court, the facts found "sufficiently appear in the opinion, or in the final order, judgment or decree, or from an examination of the two, no such final order, judgment or decree shall be reversed for failure to recite such facts." Facts so found are to be final and conclusive. This change was made to overcome the present rule of law under which the decision of the Appellate Court may be reversed by the Supreme Court because a distinct recital of facts found by the Appellate Court does not sufficiently appear in the "final order, judgment or decree," even though a discussion of facts sufficient to support the decision appears in the opinion of the Appellate Court.¹⁰⁵

One extension of power in the Appellate and Supreme Courts intended to reduce new trials has been made. Section 94 (d) of the proposed bill extends to the reviewing courts the power to take further testimony where evidence has been erroneously excluded, or where there has been an omission of proof at the trial, provided, that the taking of such evidence and the proof of the fact or facts to be established does not involve a question for the jury.

Such procedure has long been successfully employed in England.¹⁰⁶ It has also been in use in this country for many years in Massachusetts,¹⁰⁷ California, and some other states.¹⁰⁸

The proposed appellate reforms on the whole show an intelligent and thorough consideration of the problem of appellate review in Illinois. The changes are not as extensive as might first be thought by a casual reading of the proposed act. The use of a single form of review is perhaps the only really basic change in the present procedural structure. Our present framework of review is in great part retained with no change other than one of simplification of statement.

¹⁰⁴ § 91 requires findings of fact to be made by the Appellate Court where the final determination of the cause before it is based upon findings different from those made in the trial court.

¹⁰⁵ In *Chicago Title & Trust Co. v. Ward*, 319 Ill. 201 (1925) the court said:

The circuit court having found against claimant and entered its judgment in accordance with its findings, and the Appellate Court having rendered judgment in favor of the claimant, from the nature of the controverted questions it is evident that the Appellate Court must have found some of the ultimate controverted questions of fact differently from the findings of the trial court. The Appellate Court did not make a finding of the facts so found and recite the same in its judgment. Whenever the Appellate Court reverses a judgment without remanding the cause for a new trial and enters final judgment, if the judgment is the result, wholly or in part, of finding the facts concerning the matter in controversy differently from the finding of the trial court, the Appellate Court must recite in its finding, order, judgment or decree the facts as found. To sustain a judgment of the Appellate Court under such circumstances the finding of facts must be upon every material issue upon which the rights of the parties depend. (*Laughlin v. Norton*, 267 Ill. 476 (1915)). There is a discussion of the evidence in the opinion where the Appellate Court gives reasons for reversing the judgment, but that is not a compliance with the statute. The statement of facts contained in the opinion is not the recital of facts required by the statute. *Martin v. Martin*, 202 Ill. 382 (1903); *Coalfield Co. v. Peck*, 98 Id. 139 (1881); *Dandyline Co. v. Linsk*, 295 Id. 69 (1920); *Laughlin v. Norton*, *supra*.

¹⁰⁶ Order 58, Rule 4.

¹⁰⁷ C. 716, § 3.

¹⁰⁸ 16 Calif. L. Rev. 500 (1928).

Other than the provision giving the courts of review the power to take evidence, the reforms are not particularly designed to change present methods employed in the reviewing courts themselves, but are to abolish the technical limitations existing under the present Practice Act. In this category fall the sections relating to the common law record and bill of exceptions; finality of fact-finders in the Appellate Court; approval of bond and certification of the bill of exceptions by the trial judge; the extension of the rule eliminating the necessity of making formal exceptions; and the power given the trial court to dismiss an appeal without the necessity of taking up a "short record." In these changes, the element of substance has been made to prevail over form.

STRUCTURE OF THE PROPOSED ACT

The proposed civil practice act is divided into two main parts. The first part (Sections 1 to 96) contains a series of affirmative provisions directing and authorizing extensive changes of basic law now employed in the present practice. The second division (Sections 97 to 138) contains a series of sections, entitled Rules of Court, which set out the administrative court machinery and the forms of process and pleading through which the changes of practice outlined in the first division are carried into effect. The second division also contains most of the present Supreme Court rules on appellate practice. However, the lines of cleavage suggested above between the two divisions are not strictly adhered to throughout the proposed act, and there is some measure of confusion as to which provisions should properly appear in the body of the act, and which should appear in the Rules.

All Rules of Court are made subject to suspension and amendment by the Supreme Court. In this manner an attempt is made to extend the rule-making power of the court.¹⁰⁹ No harm should result as the court already has much of the power conferred, and much good may come of it as the proposed profert of

¹⁰⁹ § 3. By Section 2 an attempt is made to confer upon the Supreme Court a broad rule-making power over rules of pleading, practice, and procedure in the city, county, circuit, superior and appellate courts. The courts listed are to retain power to make rules regulating dockets, calendars, and the conduct of business in such courts.

Since a wide regulatory power as to the exercise of its own jurisdiction through rules of court now rests in the Supreme Court, that court already largely has the power attempted to be conferred upon it by the proposed act. The act of the legislature will not result in an unconstitutional delegation of legislative power to the court. The function of the regulation of procedure has not, in this country, been regarded as being exclusively in the judiciary, but delegation to the courts of complete rule-making power has generally been upheld. For a complete review of this problem see: In re Constitutionality of Section 251: 18 Wisconsin Statutes, 204 Wis. 501, 236 N.W. 717 (1931); *Hanna v. Mitchell*, 202 App. Div. 504, 196 N.Y.S. 43 (1922); *State v. Superior Court for King County*, 148 Wash. 1, 267 Pac. 770 (1928); *Sunderland, The Exercise of the Rule Making Power*, 12 Am. Bar Ass'n. Jour. 548-552 (1926); *Pound, The Rule Making Power of the Courts*, 12 Am. Bar Ass'n. Jour. 599-603 (1926); *Rosenbaum, Rule Making Power in the English Supreme Court* (1917); and *The Rule Making Power of the Courts in the Several States*, issued by the Committee on the Conference of Bar Association Delegates of the American Bar Association (1927).

a complete set of Rules—so designated—may prompt the court to act in the future. If the court does act, a more flexible procedure should result.

CONCLUSIONS

Despite the efforts of the draftsmen to construct a bill that will state the law precisely and simply, yet, if the bill be enacted, a period of substantial confusion of the law will follow. Since most of the sections are adaptations of existing law in this or other states, and since those provisions have already been construed by the courts, the period of confusion will, perhaps, not be as protracted nor as intense as might be expected.

It is reasonable to suppose that following the period of construction there will be a simplification of many of the problems now encountered in our procedure in civil cases. The proposed act is wholesome and far-reaching, and indicates a thorough consideration of the problems of practice from a practical as well as a theoretical standpoint.

It is also quite likely that the proposed act will produce an improvement in judicial administration, particularly in the field of trial practice. Undoubtedly, pleading problems will be greatly simplified. The enactment of the proposed bill will produce, in form at least, an extension, to the common law field, of simplified forms of equity pleading now generally employed in Illinois.

REORGANIZATION OF RAILROADS UNDER THE BANKRUPTCY ACT

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BY THE Act of March 3, 1933¹ three new forms of procedure for the relief of debtors were added to the Bankruptcy Act.² The most important of these (Section 77) relates to the reorganization of railroads engaged in interstate commerce.³ In every respect this section is unique in the history of our legislation.

It brings railroads, for the first time, within the scope of the Bankruptcy Act. It represents the first attempt in this country⁴ to provide a statutory method for

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¹ Public—no. 420—72d Congress [H.R. 14359].

² The Act of July 1, 1898, as amended [11 U.S.C.].

³ The statute excludes (§ 77r) any "street, suburban, or interurban electric railway which is not operated as a part of a general railroad system of transportation or which does not derive more than 50 per centum of its operating revenues from the transportation of freight in standard steam railroad freight equipment."

⁴ Since 1870 England has had a reorganization statute. In its original form it provided that a plan affecting a given class of creditors could be made binding upon the consent of a majority in number representing three-fourths in value of the creditors of such class. In 1900 the statute was enlarged by the adoption of a similar provision relating to stockholders. For