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THE NEW ILLINOIS CIVIL PRACTICE ACT: PLEADING

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THE new practice act, in its pleading provisions,¹ is the result of an intelligent effort to import into Illinois judicial administration modern procedural machinery which has been found to work satisfactorily elsewhere.² On the other hand, it is a commonplace that not all provisions of the Codes have in practice fulfilled the high expectations of their draftsmen. In many instances, therefore, the Illinois Act either retains the existing practice of the state, or alters the typical code provisions to obviate these known defects. The result is that the act, in its provisions as to joinder of parties and joinder of causes of action for example, is much more "liberal" than the former Illinois practice, and even the typical code. On the other hand, the sections as to the forms of pleading, while they will cause a considerable change in the appearance of a common law declaration, will probably be found in practice not to change very greatly the fundamental allegations heretofore in use.

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¹ The provisions to be discussed in this article are those relating to parties (Art. V, §§ 21-30) and pleading (Art. VI, §§ 31-47). In an article of this length, it is only possible (1) to discuss a few of the sections rather fully, or (2) to summarize all the sections, with very little comment on any of them. I have chosen the former alternative. Longer discussions will no doubt appear in the Illinois Practice Act Annotated, announced for early publication. In addition, the standard treatises on Code Pleading, such as Clark and Pomeroy, contain helpful discussions of similar provisions in the Codes of other states.

For a brief summary of the new act, see Professor Sunderland's notes in Cahill's Illinois Revised Statutes; and Jenner and Schaefer, *The Proposed Illinois Civil Practice Act*, 1 Univ. Chi. L. Rev. 49 (1933).

² As to the history and drafting of the new act, see Jenner and Schaefer, *op. cit.*, *supra*, note 1; Schaefer and Jenner, *The Illinois Civil Practice Act*, 19 Am. Bar Assn. Jour. 538 (1933).

Presumably the Illinois courts will regard at least as persuasive the settled interpretations in other states of provisions copied in this act. See *People v. Griffith*, 245 Ill. 532, 92 N.E. 313 (1910); *People v. Union Trust Co.*, 255 Ill. 168, 99 N.E. 377 (1912). The bar will also find commentaries by some of the draftsmen very helpful; and no doubt the Illinois courts will endorse these individual opinions in many instances.

ARTICLE V. PARTIES

1. *The Real Party in Interest*.—The Act as adopted does not contain the real party in interest provision, which is common in the Codes.³ Instead, the Act retains in Section 22, with slight alterations, the provisions of Section 18 of chapter 110, permitting the assignee and owner of a non-negotiable chose to sue in his own name. The choice was probably a wise one, although it seems that the verbosity of Section 18 might have been improved. The present provision covers the main situation which the real party in interest provision was designed to remedy. Although it is likely that the latter provision was intended only to permit the party, who as a matter of substantive law has the right of action, to sue in his own name,⁴ and not to change the substantive law, the provision has caused a great deal of litigation, because of the vague and sweeping character of its language.⁵ The more specific Illinois section has apparently worked satisfactorily.

2. *Joinder of Parties Plaintiff*.—Professor Hinton⁶ has summarized the common law rules as to joinder, as follows:

The common law rules as to joinder were extremely simple, but inflexible. In order to join as plaintiffs, the declaration must show a joint right.

. . . . The application of the rules might involve difficult problems as to when a promise should be construed to be made jointly or to run to two jointly, or what property rights were joined, or when two persons were jointly liable, as, for example, whether master and servant were jointly liable for the torts of the servant.

But with such problems solved, the application of the rules followed as a matter of course. . . .

If parties were determined to have a joint right, they were compelled to bring their action jointly.⁷ The purpose of these rules was to prevent the confusion of the jury by a multiplicity of distinct issues.

The Codes commonly provide in the first place that persons united in

³ See, e.g., § 210 of the New York Civil Practice Act (1920):

§ 210. Action to be brought in name of real party in interest.

Every action must be prosecuted in the name of the real party in interest, except that an executor or administrator, a trustee of an express trust, a person with whom or in whose name a contract is made for the benefit of another, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted.

⁴ See Clark, Code Pleading (1928), 97.

⁵ See Simes, *The Real Party in Interest*, 10 Ky. L. Jour. 60 (1922), discussing among others the cases involving suits by a partial assignee; an insurance company subrogated to rights of the insured; and by third party beneficiaries.

⁶ *An American Experiment with the English Rules of Court*, 20 Ill. L. Rev. 533, 535 (1926).

⁷ For a discussion of the common law rules in particular cases; and of the method of raising the point, see Jones and Carlin, *Nonjoinder and Misjoinder of Parties in Common Law Actions*, 28 W.Va. L. Quar. 197, 266 (1922); Ames, *Cases on Pleading* (1905), 133-143.

interest must be joined as plaintiffs or defendants, as the case may be.⁸ It is evident that this rule is not far different from the common law requirements. The Codes provide for permissive joinder in these terms:

All persons having an interest in the subject of the action, and in obtaining the relief demanded, may join as plaintiffs, except as otherwise provided.⁹

The theory back of this provision evidently was to adopt the former equity practice and to facilitate the disposition of several related controversies.

Even if the desirability of liberalizing the common law rules for joinder be assumed, the phraseology of the section just quoted is not very happy. In requiring the parties plaintiff each to have an interest in the subject of the action, the section leaves open for litigation the question of what the subject of the action is.¹⁰ Moreover, the section requires each party plaintiff also to be interested in obtaining the relief demanded. So, when three of the signers of a contract sued two others, all having agreed to contribute to the expenses of any one of the signers in hiring substitutes to serve for them in the Civil War, the court held that joinder was improper, since each plaintiff had an interest only in his own individual recovery.¹¹ On the other hand, joinder has been frequently permitted in suits for injunction against a nuisance by separate property owners,¹² following the former equity practice, although the result is not readily justified under the wording of the Code. Courts have generally denied joinder, where the relief sought is damages rather than an injunction.¹³

In an attempt further to liberalize the rules for joinder, and to avoid the troublesome litigation which the old section has caused, New York, following the English rules, has eliminated the requirement that each party be interested in obtaining the relief demanded, and has substituted as a

⁸ See, e.g., the New York Civil Practice Act, § 194. Practically all the Codes contain such a provision; for citations, see Clark, *op. cit.*, *supra*, note 4, 250, note 48.

⁹ See, e.g., the Iowa Code (1927), § 10969. For citations of the corresponding sections in other Codes, see Clark, *op. cit.*, *supra*, note 4, 252, note 60.

¹⁰ See, for a discussion of this phase, with reference to the joinder of causes of action, *McArthur v. Moffet*, 143 Wis. 564, 128 N.W. 445 (1910), in which the court concludes: "We therefore come to this conclusion: that in possessory and proprietary actions, whether involving real or personal property, the subject of action is composed of the plaintiff's primary right together with the specific property itself." The confusion in the Code cases is brought out in Clark, *op. cit.*, *supra*, note 4, 252, 308 *et seq.* See also McCaskill, *Actions and Causes of Action*, 34 Yale L. Jour. 614, 626 (1925).

¹¹ *Goodnight v. Goar*, 30 Ind. 418 (1868).

¹² See *Strobel v. Kerr Salt Co.*, 164 N.Y. 303, 58 N.E. 142 (1900); *Younkin v. Milwaukee Traction Co.*, 112 Wis. 15, 87 N.W. 861 (1901).

¹³ See *Hellams v. Switzer*, 24 S.C. 39 (1885). Cf. *Schiffer v. City of Eau Claire*, 51 Wis. 385, 8 N.W. 253 (1881).

test the requirement of a common question of law or fact.¹⁴ The Illinois section likewise contains the requirement, common to these later Code provisions, that the right to relief shall arise out of the same transaction or series of transactions. In other words, in place of the common law test of a joint right, the new act substitutes two tests: (1) a right to relief arising out of the same transaction or series of transactions; and (2) a common question of law or fact.

The first requirement might conceivably give rise to the same difficulty in interpretation which the somewhat similar language in the Codes respecting joinder of causes of action has caused.¹⁵ In actual practice, however, the courts of the states which have this provision seem to have interpreted it liberally in favor of joinder, emphasizing the presence of common questions as justifying it. Thus, it has been held that the words "transaction or series of transactions" include torts, as well as contracts; and that twelve plaintiffs, suing the defendant railroad company for losses caused by the "Black Tom" explosion in its yards, may join.¹⁶ In *Akely v. Kinnicutt*,¹⁷ 193 plaintiffs, each claiming a separate cause of action for damages caused by defendant's fraudulent representations in a stock prospectus, were permitted to join. The court said, as to the second requirement for joinder: "The common issues are basic, and would seem to be the ones around which must revolve the greatest struggle and to which must be directed the greatest amount of evidence." As to the first, the court said: "The transaction in respect of or out of which the cause of action arises is the purchase by plaintiff of his stock under such circumstances, and such purchases conducted by one plaintiff after another respectively plainly constitute a series of transactions within the meaning of the statute. The purchase by a plaintiff of his stock is not robbed of its character as a 'transaction' because, as appellants seem to suggest, the transaction was not a dual one occurring between the plaintiff and the defendants, and the many purchases by plaintiffs respectively do not lose their character as a series of transactions because they occurred at different places and times extending through many months." In a subsequent

¹⁴ The New York section was taken from the English Order 16, rule 1, after its amendment in 1896. Medina, *Pleading and Practice under the New York Civil Practice Act* (1922), 45. Before the amendment, English courts had held that distinct causes of action in different plaintiffs could not be joined. See particularly *Smurthwaite v. Hannay*, [1894] A. C. 494; *Carter v. Rigby & Co.*, [1896] 2 Q.B. 113. The rule was then changed to the form adopted in New York and in Illinois. Cf. the provisions of the New Jersey act (P. L. 1912, 378, § 4), and California act (Stat. 1927, 631).

¹⁵ For a summary of the diverse holdings see Clark, *op. cit.*, *supra*, note 4, 308 *et seq.*

¹⁶ *Metropolitan Casualty Ins. Co. v. Lehigh Valley R. R. Co.*, 94 N. J. L. 236 (1920).

¹⁷ 238 N.Y. 466, 144 N.E. 682 (1924), noted in 34 Yale L. Jour. 192 (1926).

Appellate Division case,¹⁸ two separate actions for deceit were consolidated by a 3-2 vote of the judges, notwithstanding the fact that the circulars the respective plaintiffs acted upon were not the same, although there were some statements common to both.

Moreover the section has been held not only to permit the joinder of plaintiffs with distinct and independent causes of action, but of plaintiffs with alternative causes of action.¹⁹

Since it will be observed that the new practice act contains no provision for compulsory joinder of parties, the question arises as to the result if the plaintiff fails to join other persons jointly interested in the claim. Section 25 provides for bringing in new parties, where, for example, "a complete determination cannot be had without the presence of other parties." Section 26 provides that "no action shall be defeated by non-joinder or misjoinder of parties." In other words, a plaintiff evidently incurs no penalty by his failure to join necessary parties, except such loss of time as will ensue from ordering them to be brought in.

In conclusion, the new provisions represent an attempt to facilitate the disposition of litigation by permitting plaintiffs to join not only in cases in which they have a joint interest, but even in which their claims are alternative or independent, so long as the claims have common questions of law and fact, and arise out of the same transaction or series of transactions. The serious question is whether this liberality of joinder will result in a considerable confusion of issues in many trials.²⁰ The draftsmen have sought to avoid this danger by giving the court broad powers to order separate trials.²¹ In the hands of intelligent judges, this provision will be a sufficient safeguard.²² If Illinois did not have the benefit of the years of

¹⁸ *Crandall v. A. B. Leach & Co., Inc.*, 222 App. Div. 292, 225 N.Y.S. 649 (1927), noted in 37 Yale L. Jour. 998 (1928).

¹⁹ Thus an injured employee and an insurance company have been permitted to join in an action for negligence, where the question was whether the employee had elected to receive compensation under the Workmen's Compensation Law, in which case the entire cause of action vested in the insurance company. *Roecklein v. Am. Sugar Refining Co., Inc.*, 222 App. Div. 540, 226 N.Y.S. 375 (1928).

²⁰ In his brief before the New York Court of Appeals in *Akely v. Kinnicutt*, *supra*, note 17 (as quoted in) 34 Yale L. Jour. 192 (1924) appellant (defendant) declared that he "will be faced with the uncertainties of a trial before a single jury in an action brought by a horde of plaintiffs all shouting that they have been defrauded and tricked by wealthy and unscrupulous defendants" and that "confronted with all of these causes of action at one trial any jury might readily, though incorrectly, gain the impression that where there is so much smoke there must be some fire."

²¹ In the proviso of § 23.

²² Thus, it has been suggested that, in *Akely v. Kinnicutt*, *supra*, note 17, the issues should be split; the common issue of the honesty of the prospectus tried once; and then, if the finding is adverse to the defendant, the accessory facts as to each of the 193 claims be disposed of one at a time. 34 Yale L. Jour. 192, 194 (1924).

experience of other courts with the Codes, the radical changes from the previous practice might be expected to cause great uncertainty during the period in which its courts would gradually work out a settled interpretation. With that experience, it should be possible to obtain satisfactory results in a relatively short time.

3. *Joinder of Parties Defendant*.—The Illinois provisions here also amplify not only the previous common law rules; but the sections in the New York and New Jersey acts on the subject.²³ The new section permits the joinder of defendants jointly or severally liable, or liable in the alternative; and then, among other things, permits the joinder of a defendant "whom it is necessary to make a party for the complete determination or settlement of any question involved therein . . . regardless of the number of causes of action joined."

The evident purpose of these provisions is to eliminate the restrictions on joinder imposed in the New York case of *Ader v. Blau*²⁴ and the English case of *Thompson v. London County Council*,²⁵ while permitting joinder in the cases now comprehended by the New York act.²⁶ In the former case, the plaintiff administrator brought an action against two defendants to recover damages for the death of the intestate, a young boy. In the first cause of action he alleged that the death was caused solely by the negligence of the defendant Blau in erecting and maintaining an iron picket fence, whereby the intestate was injured and died. In the second cause of action against defendant Emil, he alleged that the intestate, being injured, came to Emil, a physician, for treatment, and that Emil treated him so negligently that solely by reason thereof intestate died. The court concluded that "Section 211 contemplates a case where a fundamental, common set of facts either entitles a plaintiff to relief against all the defendants even though such relief may be predicated upon different relationships or

²³ Paragraph 2 is substantially identical with New York Civil Practice Act (1920), § 212; and paragraph 3 is § 213 of that act, somewhat modified. Paragraph 1 is much broader and more detailed than New York Civil Practice Act, § 211, which reads:

§ 211. Joinder of defendants generally.

All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative; and judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities.

Reference has previously been made to the elimination of the compulsory joinder provision. There is no question that any defendant who *must* be joined under that section *could* be joined under § 24.

²⁴ 241 N.Y. 7, 148 N.E. 771 (1925).

²⁵ [1899] 1 Q.B. 840.

²⁶ See the notes on this section of the new act by Professor McCaskill and his assistants to be published in the Illinois Civil Practice Act Annotated (Foundation Press), which I have had the opportunity of reading in manuscript.

in the alternative against one of two or more defendants," and that joinder of the causes of action was not permissible, since they were not consistent with each other, and did not arise out of the same transaction, or out of transactions connected with the same subject of action.²⁷

In the *Thompson* case, the plaintiffs sued for the negligence of the defendants in excavating the earth of the street adjoining the premises. The defendants denied the negligence, and alleged that the injuries were caused wholly or in part by the negligence of the New River Water Company in leaving their water main insufficiently stopped. The plaintiffs applied for the addition of the Water Company as a defendant. The Court of Appeal held that the causes of action against the defendants and the Water Company being in respect of separate torts, though the resulting damage might be the same, the Water Company could not be joined, following *Sadler v. Great Western Railway*.²⁸

In the *Thompson* case, joinder might have been permitted if the plaintiff had alleged that the negligence of each defendant contributed to the fall of the building.²⁹ But if the plaintiff's theory is that the negligence of the one party *or* of the other caused the injury, the two claims do not appear to arise out of the same transaction, nor do they seem to present common questions of fact, other than the element of damage from the fall of the building.³⁰ Similarly, in *Ader v. Blau*, the claims against the two defendants arose out of independent transactions. In the claim against the physician, the cause of the injuries was immaterial. In the claim against the property-owner, the negligence of the physician was immaterial, provided proper care was used in his selection. If proper care was not used, and the negligence of the physician caused the death, the defendant property owner would not be liable. Hence there is a chance of a common question of fact, and, as Judge Cardozo pointed out in his memorandum dissent, the two causes of action are not necessarily inconsistent.

These two cases have been presented at length, because of the likelihood that similar ones will arise in Illinois, and because the draftsmen evi-

²⁷ This part of the decision, of course, was an interpretation of § 258 of the New York Civil Practice Act, dealing with joinder of causes of action. As is brought out *infra*, the Illinois Act contains no restrictions on the joinder of causes, other than the discretionary power of the court to order separate trials. This difference from other Codes is very likely to lead to greater liberality in permitting joinder of parties.

²⁸ [1896] A.C. 450.

²⁹ See *Colegrove v. New York & New Haven R. R. Co.*, 20 N.Y. 492 (1859); *Simmons v. Everson*, 124 N.Y. 319, 26 N.E. 911 (1891).

³⁰ See the excellent discussion of this case, *Ader v. Blau*, *supra*, note 24, and other decisions involving the English and New York rules by Professor E. W. Hinton, in his article cited *supra*, note 6.

dently intended to obviate their effect. It is not clear that the attempt has been wholly successful. To be sure, there is no common question of law or fact requirement in this section, nor in Section 44 governing joinder of causes of action; although it would seem that, in practice, such a requirement may well be made. It is conceivable, however, that the court may hold that two such claims as those involved in *Ader v. Blau*, for example, do not arise out of the same transaction or even out of the same series of transactions, since the independent negligent acts of two separate defendants did not constitute one transaction or a series of transactions. A strict court may further hold that defendants in a negligence case do not "have or claim an interest in the controversy"; that this language is applicable rather to cases involving land, for example, or to some types of equity cases; and that, even construing "interest in the controversy" in a non-technical fashion, there are here two controversies, not one; with neither defendant necessarily interested in the controversy involving the other.³¹ The plaintiff will then fall back upon the remaining clause "or whom it is necessary to make a party for the complete determination or settlement of any question involved therein." Liberally construed, this provision enables the plaintiff to join defendants who, he claims, caused the injury of which he complains either jointly or severally or in the alternative. But it seems possible also to give this language substantially the meaning which the New York Court of Appeals adopted as to the different wording of Section 211 of the New York Act: that "it contemplates a case where a common set of facts either entitles a plaintiff to relief against all the defendants, even though such relief may be predicated upon different relationships, or in the alternative against one of two or more defendants."³² Since the wording of the first paragraph of the section has no exact counterpart elsewhere, it will take time and litigation to establish its meaning. Meantime, lawyers will do well to proceed cautiously in the joinder of defendants whose liabilities are separate.

The third paragraph of Section 24, permitting the plaintiff to join defendants in the alternative, when he is in doubt as to the person from whom he is entitled to redress, could readily be applied to the situation just discussed. In *Ader v. Blau*, the only reference by the court to the corresponding section in the New York Civil Practice Act (§ 213) was the statement: "It is not claimed that Section 213 covers this action." Prob-

³¹ To be sure, each defendant may want to defend on the basis that it was no negligence of his that caused the injury, but rather the negligence of the other. To this extent, each is interested in the other's controversy. Moreover, as is indicated *infra*, if both defendants can be joined, the burden of proof on the plaintiff may be made much lighter than at common law.

³² 241 N.Y. 7, 13, 148 N.E. 771, 772 (1925).

ably the unexpressed reason was that the plaintiff had formally stated two separate causes of action, not in the alternative. It should be observed that this section works important changes in the burden of proof in some cases, since the plaintiff has been held not to be required to fix the liability on the particular defendant, but merely to furnish "*prima facie* proof that it suffered loss which may reasonably be charged to one or the other of the defendants. . . . The defendants are called upon then to exhibit their conduct . . . and thus fix the liability as between themselves."³³ It is indeed a startling change, if the statute "enables a plaintiff to succeed against a defendant where on the totality of the evidence submitted at the trial he would fail were another defendant not joined."³⁴

It is not entirely clear what result will be reached in some of the other common situations in which joinder will be attempted. The new act does not contain the provision of many codes expressly permitting joinder of persons severally liable upon the same obligation or instrument. Nevertheless, it would appear that joinder of the various parties to a note, for example, should be permitted, although the wording of paragraph (1) of Section 24 does not explicitly require this result. On the other hand, joinder of a principal debtor and a guarantor might be refused if there were two documents, one containing the principal obligation and one the guaranty, on the ground that there are two causes of action, neither affecting both defendants.³⁵ Another problem is whether a master and his servant may be joined in a case in which the plaintiff sues them as joint tortfeasors for an injury caused by the servant.³⁶ If the plaintiff is in doubt whether the servant was acting within the scope of his employment the case could be brought within paragraph (3). In other cases, where no doubt exists, paragraph (1) seems to permit joinder and this has been the previous Illinois view.

It is impossible in an article of this brief compass to discuss all the difficult problems of joinder of parties. It sufficiently appears (1) that the draftsmen attempted greatly to liberalize the common law rules, and (2)

³³ S. & C. Clothing Co. v. U.S. Trucking Corp., 216 App. Div. 482, 215 N.Y.S. 349 (1926). In this case, plaintiff proved the delivery of twelve cases of woolen goods to the defendant trucking company, to be delivered to the defendant warehouse; that subsequently when the boxes were opened, some of the goods was missing, and their value. The trial court held that a *prima facie* case had not been made out, but on appeal judgment was reversed.

³⁴ See comment in 26 Col. L. Rev. 901 (1926).

³⁵ Cf. Carman v. Plass, 23 N.Y. 286 (1861) with Roehr v. Liebmann, 9 App. Div. 247, 41 N.Y.S. 489 (1896) and Mowery v. Mast, 9 Neb. 447, 4 N.W. 69 (1880).

³⁶ In Skala v. Lehon, 343 Ill. 602, 175 N.E. 832 (1931), joinder was permitted, a decision which will presumably stand under the new practice act.

For a citation of the divergent decisions in other states see Clark, *op. cit.*, *supra*, note 4, 267.

that they left a series of hard questions of interpretation in their train. In the ultimate determination of these questions much will depend upon the court's approach. If it is impressed with the likelihood of the confusion of the jury through the presentation on one occasion of several distinct issues, some quite irrelevant as to some defendants, some affecting all, the section, despite the draftsmen's evident intent, can be given a narrow construction, much like that of *Ader v. Blau*. On the other hand, many students of the subject are convinced that efficient judicial administration will be promoted by permitting joinder in all the cases discussed; and that the danger of confusing the jury has been much over-rated. The provisions will surely require more intelligence in their administration than the simpler rules of the common law, and a period of uncertainty as to their meaning is bound to ensue. Nevertheless, there appears to be a strong probability of a net gain from the new section, if liberally interpreted.

ARTICLE VI. PLEADING

The important sections as to forms of action (§ 31), the forms of pleadings (§ 33), and the prayer for relief (§ 34) have no exact counterparts in the Codes. The draftsmen have made an interesting and in my opinion, a desirable attempt, to modify and improve the stock Code provisions. In order not only to appraise their success, but to discover the basis for the present wording, it is desirable to examine the typical problems raised under the Codes. Of these, two have caused much litigation: (1) the problem of pleading "facts," as distinguished from "conclusions" or "evidence"; and (2) the problem of the theory of the pleading.³⁷ The latter problem has, in turn, two branches: (a) the plaintiff alleges facts appropriate to recovery on one legal theory and, after the proof is in, seeks to recover on a different legal theory; (b) the plaintiff alleges facts appropriate to his demand for equitable relief and, after the proof is in, seeks to obtain legal relief; or *vice versa*.

1. *Pleading "facts."*—The draftsmen of the Code evidently considered that the great defect of common law pleading was the generality of the allegations permitted; and that this defect could be cured by requiring the pleader to state "facts." They further believed that the distinction between facts, law, and evidence could be much more easily drawn than has proved to be the case. That there is no clear distinction between statements of "evidentiary facts," "ultimate facts," and "conclusions of law,"

³⁷ See Whittier, *The Theory of a Pleading*, 8 Col. L. Rev. 523 (1908); Albertsworth, *The Theory of the Pleadings in Code States*, 10 Cal. L. Rev. 202 (1921); 24 Harv. L. Rev. 480 (1911).

is abundantly evident from the decisions.³⁸ By way of example, it is perhaps only necessary to cite, on the one hand, the New York decision³⁹ holding that a statement that a promise was made for "a valuable consideration" is "sufficient as a 'plain and concise statement' of the ultimate, principal and issuable fact of consideration" and on the other, the holding of the Missouri court⁴⁰ that the statement "that the defendant negligently caused said step to be driven and placed in said pole not far enough to make it reasonably safe and secure from breaking under a strain" is "but the statement of a legal conclusion, and did not tender an issue of fact."

The draftsmen of the new Illinois Act have provided, in Section 33: "(1) All pleadings shall contain a plain and concise statement of the pleader's cause of action, counterclaim, defense, or reply." This wording in itself is not far different from that of the various Codes.⁴¹ It should doubtless be read in conjunction with the first paragraph of Section 31:

(Forms of action.) (1) 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.

This section contrasts with the stock provision of the Codes as to the one form of action. Thus, Section 8 of the New York Civil Practice Act reads:

There is only one form of civil action. The distinction between actions at law and suits in equity, and the forms of those actions and suits, have been abolished.

It seems clear that the Illinois draftsmen did not purport to go as far as this. How far did they go? The Illinois Supreme Court has held, for example, that an averment that the defendant's servants made repairs to a water main in such a negligent, unskillful, and unworkmanlike manner that in consequence a break occurred, causing damage, is a sufficient allegation of negligence as against a general demurrer,⁴² or after verdict.⁴³

³⁸ See Cook, *Statements of Fact in Pleading Under the Codes*, 21 Col. L. Rev. 416 (1921).

³⁹ *California Packing Corp. v. Kelly S. & D. Co.*, 228 N.Y. 49, 126 N.E. 269 (1920).

⁴⁰ *Kramer v. K. C. P. & L. Co.*, 311 Mo. 369, 279 S.W. 43 (1925).

⁴¹ The usual provision is: "The complaint shall contain: . . . (2) a plain and concise statement of facts constituting a cause of action, without unnecessary repetition. . . ." See Clark, *op. cit.*, *supra*, note 4, 138.

⁴² *Chicago City Ry. Co. v. Jennings*, 157 Ill. 274, 41 N.E. 629 (1895).

⁴³ *City of Chicago v. Selz, Schwab & Co.*, 202 Ill. 545, 67 N.E. 386 (1903).

Will this be sufficient under the new act? It is submitted that it should be, since the defendant is supplied with adequate information to enable him to prepare a defense. Under Section 42, the court may require a fuller statement, and the defendant may well ask for it, in order to pin the plaintiff down if possible to a statement of a specific default. But the desirability of keeping the pleading within reasonable limits should, in cases where the defendant has adequate notice therefrom to enable the preparation of his defense, move the court to hold the complaint sufficient as against a motion to dismiss or even against a motion to make more specific.⁴⁴ In other words, the court should seek to avoid the morass of decisions futilely attempting to distinguish "facts" from "evidence" and from "conclusions of law" by holding that the substantial averments heretofore used in the various forms of action may still be used, provided that they give the defendant reasonable notice of the nature of the claim.

Cases in which the common counts have heretofore been used will raise similar questions. On the one hand, it can readily be urged that such a count offends against the requirements of Section 33. On the other hand, it is more significant that

Complaints so framed have been attacked by every available method known to the law; uncompromising criticism has been heaped upon them by distinguished writers; the courts have expressed their inability to reconcile them with the code system of pleading; and yet they have been held good as against the defendant's answer, his general demurrer, and his special demurrer.⁴⁵

Consequently, notwithstanding informed opinion to the contrary, it is likely that in this particular also the essence of the common law declarations will be preserved.

Although it cannot be said that the common law declarations always gave the defendant detailed or specific information regarding the claim he was called upon to answer, they did supply one trained in their art and mystery with a fair notice of its chief facts and characteristics. If the essential common law allegations are still available and proper, a defendant need not be caught unaware particularly with the weapon which Section 42⁴⁶ gives him. It would seem much more desirable for the Illinois courts

⁴⁴ See Clark, *Pleading Negligence*, 32 *Yale L. Jour.* 483 (1923).

⁴⁵ 4 *Cal. L. Rev.* 352 (1916).

⁴⁶ § 42. (Insufficient pleadings.) (1) If any pleading is insufficient in substance or form the court may order a fuller or more particular statement; and if the pleadings do not sufficiently define the issues the court may order other pleadings prepared.

(2) No pleading shall be deemed bad in substance which shall contain such information as shall reasonably inform the opposite party of the nature of the claim or defense which he is called upon to meet.

(3) All defects in pleadings, either in form or substance, not objected to in the trial court, shall be deemed to be waived.

to proceed along these lines, as indeed Code courts generally have, rather than to embark upon the lengthy and expensive process of distinguishing anew in each type of action what are "ultimate facts," what "evidentiary facts" and what "conclusions of law."

2. *Distinctions between Actions at Law.*—Reference has already been made to the fact that Section 31 of the new Act is worded quite differently from the typical code provisions, which purport to abolish the distinction between actions at law and suits in equity, and the forms of such actions and suits. In this connection, Section 34 must also be considered,⁴⁷ since the character of the prayer for relief is frequently a distinguishing feature between different kinds of actions. It is evident that the latter section is intended to require the plaintiff to select the specific type of relief he wishes; and that the defendant may choose to default with the assurance that no other relief will be given.

It is practically impossible to generalize with respect to the many situations in which the defendant has answered; and, after the trial, the plaintiff seeks to recover on some legal theory different from that expressed in his complaint. Moreover, since this is a field in which Code courts have reached very divergent results, any attempt at prophecy is hazardous. However, the problem can at least be presented by means of a typical case. Suppose the plaintiff sues the defendant restaurant keeper for personal injuries alleged to have been sustained by reason of defendant's negligence in serving to the plaintiff a piece of blueberry pie in which a tack was concealed. The defendant denies any negligence. At the trial, it appears that plaintiff ordered blueberry pie in defendant's restaurant, and was injured by a tack therein, which lodged in his throat. Defendant's testimony shows a high degree of care in preparing the pie. Defendant moves for a directed verdict.⁴⁸ Plaintiff contends that he is entitled to recover on the basis of an implied warranty that the pie was fit to eat, and that the allegation of negligence can be disregarded. Under the common

⁴⁷ § 34. (Prayer for relief.) Every complaint and counterclaim shall contain specific prayers for the relief to which the pleader deems himself entitled. Such relief, whether based on one or more counts, may be asked in the alternative. Demand for relief which the allegations of the pleading do not sustain may be objected to on motion or in the answering pleading. Except in case of default, the prayer for relief shall not be deemed to limit the relief obtainable but where other relief is sought the court shall, by proper orders, and upon such terms as may be just, protect the adverse party against prejudice by reason of surprise.

⁴⁸ For such a case, see *Ash v. Childs Dining Hall Co.*, 231 Mass. 86, 120 N.E. 396 (1918), in which the action was "tort" for personal injuries under the Massachusetts practice act which divides all actions into three kinds: tort, contract, and replevin (Mass. Gen. Laws (1921), c. 231, § 1). The court held that a verdict for the defendant should have been directed. In *Friend v. Childs Dining Hall Co.*, 231 Mass. 65, 120 N.E. 407 (1918), the plaintiff was permitted to recover on a count in contract on similar facts.

law system of pleading, it is clear that the plaintiff cannot prevail, since his proof of a liability in contract does not support his declaration for a tort. The same view has been taken in various Code cases.⁴⁹ Among the arguments in its favor is the fact that this rule compels the plaintiff's attorney to analyze his case, and to draft his pleadings with care; looseness is penalized. On the other hand, this rule requires a new suit to be brought, although the defendants may in fact have been fully prepared for the claim the plaintiff proved, as well as that which he alleged. If the defendant is in fact taken by surprise, he should, of course, be given adequate time and opportunity to present his defense to the charge actually relied upon, which may involve a continuance, or even a new trial. Ordinarily, the plaintiff should be required to amend his declaration instantaneously,⁵⁰ in order to state the claim he is actually relying upon; and to pay any costs caused by his failure to state the case proved. With these safeguards, it seems reasonable for the courts to hold that the complaint should not be dismissed in cases like that used as an example.

3. *Distinctions between Law and Equity Suits.*—The constitutional requirement of trial by jury in law cases necessitates a distinction between legal and equitable proceedings. If the case stated and the relief asked are essentially equitable in character, then the parties, by merely proceeding to trial without a jury, can hardly be deemed to have waived a jury.⁵¹ Consequently, if it is determined that the plaintiff has no grounds for equitable relief, although he may have for legal relief, the case will ordinarily have to be retried on the law side.⁵² This result may be altered in those exceptional cases, in which courts of equity, even before the Codes, were accustomed to give damages in lieu of equitable relief.⁵³

Again, if the plaintiff has asked for rescission of a contract, for example, and has proved that he is entitled to it the court is not justified in giving him instead damages for fraud.⁵⁴

⁴⁹ See *Ross v. Mather*, 51 N.Y. 108 (1872); *Barnes v. Quigley*, 59 N.Y. 265 (1874); *Anderson v. Case*, 28 Wis. 505 (1871).

For discussions of these cases and others, see the articles cited in note 37, *supra*.

⁵⁰ § 46 (3) provides: "A pleading may be amended at any time, before or after judgment, to conform the pleadings to the proofs, upon such terms as to costs and continuance as may be just."

⁵¹ See, however, Dean Clark's article on *The Union of Law and Equity*, 25 Col. L. Rev. 1 (1925), criticizing the decision of the New York Court of Appeals in *Jackson v. Strong*, 222 N.Y. 149, 118 N.E. 512 (1917).

⁵² See *Jackson v. Strong*, cited *supra*, note 51.

⁵³ See *Saperstein v. Mechanics & Farmers Sav. Bank*, 228 N.Y. 257, 126 N.E. 708 (1920).

⁵⁴ *Merry Realty Co. v. Shamokin & Hollis Real Estate Co.*, 230 N.Y. 316, 130 N.E. 306 (1921).

On the other hand, to reverse *Jackson v. Strong*⁵⁵ if the plaintiff sued for the reasonable value of his services, and the proof was that he performed the work under an agreement to take a share of the profits therefor, there seems to be no very good reason why the court should not award him the proven share of the profits. No jury trial question is involved, and the defense itself indicates that the defendant was fully advised of the facts regarding the claims.

Similar principles are applicable in cases where a count setting up a distinctively "legal" and a count setting up a distinctively equitable cause of action are joined.⁵⁶ In the absence of a waiver of a jury by the defendant, the "legal" cause of action will have to be tried before a jury.

4. *Joinder of Causes of Action*.—Section 44 is very much broader than either the common law or the usual code practice, since it imposes no restraint upon such joinder in the first instance. The matter of joinder is rather left to the court's discretion at the trial.

Both common law and Code permit joinder only in specified cases, the common law rules being very specific, the Code less so in practice. The rules in both cases were evidently intended to allow joinder of similar controversies, or of controversies which were subject to proof by evidence to some extent common.⁵⁷ Of course, the purpose of these restrictions is to facilitate judicial administration by narrowing the issues sufficiently to enable a jury reasonably to comprehend them. Although one can hardly quarrel with this purpose, in practice, both sets of rules have prevented joinder in some cases where it would have saved time and caused no confusion;⁵⁸ and in addition the Code rules have led to much fruitless litigation as to the meaning of the terms used, notably "transaction" and "subject of the action."⁵⁹

If the Illinois section did not contain the provision authorizing the court to order separate trials, it would clearly be open to severe criticism. On the other hand, if courts exercise this discretion intelligently, the effect will be to eliminate the litigation which has grown up around the interpretation of the Code provisions, while at the same time permitting joinder in proper cases. Although a period of uncertainty may be anticipated, during which courts will have to work out some doctrines for their own guid-

⁵⁵ Cited *supra*, note 51.

⁵⁶ The new act permits such joinder in §§ 43 and 44.

⁵⁷ Nevertheless, as Professor Sunderland has pointed out, the requirements are frequently arbitrary. Sunderland, *Joinder of Actions*, 18 Mich. L. Rev. 571 (1920).

⁵⁸ For example, at common law a count for breach of a sealed contract, with a count for breach of a simple contract having similar terms.

⁵⁹ See Clark, *op. cit.*, *supra*, note 4, 308 *et seq.* collecting and summarizing the cases.

ance in the exercise of their discretion, the new section seems desirable. Good results are more likely to be obtained from a court's working out its own methods of procedure in the particular cases of this sort, than from a legislature's general enactment.

5. *Other Pleading Changes*.—Since this article has already reached its allotted length, only brief mention can be made of some of the remaining pleading innovations. So-called equitable defenses or counter claims are permitted, and may be pleaded along with legal defenses (§ 44). Courts in other states are not in agreement on the method of trying such defenses.⁶⁰ The New York doctrine seems to be satisfactory; if the defendant's answer merely goes to defeat the legal cause of action, it should be tried before a jury; if affirmative equitable relief is required, it should be tried by the court alone.⁶¹

The count system is retained and in addition a party may plead causes of action or defenses in the alternative in the same count or defense (§ 43 (2)). General issues are not to be employed (§ 40); and there is a requirement that many specified affirmative defenses be set forth as such (§ 43 (4)). Pleas in abatement and pleas in bar may be pleaded together if desired, but the court may order the former to be tried first (§ 43(3)). Motions are substituted for demurrers (§ 45).⁶² As has already been stated, bills of particulars may be required (§ 37), where allegations are wanting in detail. A liberal section on amendment permits the introduction of new parties, new causes of action, or new defenses; amendment to conform pleadings to proof; and abrogates the rule of such cases as *Walters v. City of Ottawa*⁶³ to the effect that an amendment after the statute of limitations has run, to supply a missing essential allegation, will not eliminate that defense.

CONCLUSION

Although some years will be required for the courts and the bar to work out interpretations of the new practice act in particular cases, the legal profession will have available at once a mass of judicial decisions in other states, as well as scores of articles and texts by able scholars. Hence the cost of the new act in litigation arising from uncertainty need not be as

⁶⁰ See Hinton, *Equitable Defenses Under Modern Codes*, 18 Mich. L. Rev. 717 (1920); Clark, *Trial of Actions Under the Code*, 11 Corn. L. Quar. 482 (1926); Cook, *Equitable Defenses*, 32 Yale L. Jour. 645 (1923).

⁶¹ See *Susquehanna S. S. Co. Inc. v. Andersen & Co.*, 239 N.Y. 285, 146 N.E. 381 (1925), and the criticism of the decision in Clark, *op. cit.*, *supra*, note 4, 430.

⁶² See also § 48, setting forth various grounds for demurrer. These are similar to Rules 106-110 of the New York Civil Practice Act (1920).

⁶³ 240 Ill. 259, 88 N.E. 651 (1909), discussed in 4 Ill. L. Rev. 344 (1909).

great as the predecessor code states have paid. Moreover, that cost will be further reduced by the care of the draftsmen in eliminating or modifying many troublesome provisions of the Code.

Illinois has secured at one stroke the best modern practice act in the United States. The courts of the state thus have been given a great opportunity to increase the efficiency of its judicial administration, by interpreting the act with the same liberality and intelligence which its draftsmen have displayed.