LEGISLATION AND ADMINISTRATION

PROPOSED "PARTIES" AND "JOINDER" SECTIONS FOR FEDERAL PLEADING RULES

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THE persistent demand for pleading reform during the last century has indicated that our older systems of pleading have proved unsatisfactory. Yet even the most rabid of the reformers will admit that the new codes and practice acts have fallen short of the success predicted for them. In an article in the April issue of this Review,¹ I placed the blame for this partial failure on two fundamentals: one a fault of common law pleading that had not been directly attacked nor eliminated by the codes; and the other an error of draftsmanship introduced by the codes.

As to the first of these, it was insisted that the most serious objection to common law pleading was the large number of cases decided on a pleading dispute rather than on the merits of the case. Too often a desirable rule of pleading was made obnoxious by the imposition of the penalty of final judgment (or a reversal) for its breach. In attacking these undesirable cases, the reformers have missed the mark; both rules and comments have been aimed at the innocent rule of pleading, with nothing more than a glittering generality hurled at the objectionable penalty. The discussion of this fundamental fault was accompanied by definite proposals for its elimination. In particular, the methods of objecting to the sufficiency of pleadings (before, during, and after the trial) were discussed, and specific rules were proposed that particularized the objections that could be raised by each method and prescribed the penalty that should accompany the ruling in each type of objection.

The second suggestion was not so complete. Of criticism, there was a plenty, directed at the draftsmanship of many of the most important and sweeping sections of the code. In each of these criticized sections, the controlling factor that purports to determine the proper method of pleading is some high-sounding but misleading and unhelpful expression, such as: "real party in interest," "a plain and concise statement," "facts,"

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¹ Two Fundamentals for Federal Pleading Reform, 3 Univ. Chi. L. Rev. 376 (1936).

"interest in the controversy," "transaction," and so on. Such expressions were apparently used to cover up the failure to select a definite solution to a difficult pleading problem, or more often, to save an indefinite (flexible) rule from criticism for its unavoidable vagueness. The criticisms of these rules were accompanied by only general suggestions for their improvement by eliminating the meaningless generalities and substituting well-considered definite rules, or clearly indefinite rules expressed in such patently indefinite terms as "reasonable," "desirable," or "trial convenience." More specific suggestions were omitted with the plea that the task of covering all problems of pleading would require a book, and with the promise that an attempt would here be made to illustrate these general suggestions with specific rules covering two of the fields most in need of improvement, those of "Parties" and "Joinder of Causes of Action." New sections for these two fields are here submitted.

Nature of Discussion Following Each Section.—These two fields embrace more than can be adequately covered in one article, and this will necessitate strict economy in the comments on the sections. When a satisfactory model for a section already exists, it will be included only for the purpose of completeness, and it will be followed merely by a citation stating one place where the same or a similar provision can be found. Where the present rule seems inadequate and in need of complete revision, some additional explanation will be necessary.

Each of these radically revised sections might be the product of a separate law review article. Indeed, several such articles, and in one case a series of two articles, have appeared in this field, each discussing the problems connected with only one of these rules.² The explanatory comment to these rules can contain only a small part of the available material. It will usually be necessary to avoid a discussion of the substance of the rule, as such a discussion would be too long even if it merely restated the rule in different language. If the defects criticized in my former article are eliminated from these rules, each section will clearly indicate the problem it covers and the substance of its solution. Seldom will an attempt be made to justify that substance in the short space available. As I am primarily

² For representative suits, see Wheaton, Representative Suits Involving Numerous Litigants, 19 Cornell L. Q. 399 (1934). For third party practice, several articles have been written: Gregory, Procedural Aspects of Securing Tort Contribution in the Injured Plaintiff's Action, 47 Harv. L. Rev. 209 (1933); Gregory, Tort Contribution Practice in New York, 20 Cornell L. Q. 269 (1935); Bennett, Bringing in Third Parties by the Defendant, 19 Minn. L. Rev. 163 (1935); Cohen, Impleader: Enforcement of Defendants' Rights against Third Parties, 33 Col. L. Rev. 1147 (1933). In the field of federal rules on intervention, the first of two articles has just been published: Moore and Levi, Federal Intervention: I. The Right to Intervene and Reorganization, 45 Yale L. J. 565 (1936).

interested in the draftsmanship of the rules, the comment will ordinarily be limited to a criticism of the wording of existing rules covering the same problems.³

The Classification of the Problems into Articles and Sections.—The classification here proposed is not entirely orthodox. The common division into two parts, "Parties" and "Joinder," is retained, with slight changes made in the headings. However, many problems have received added attention, with a resulting division and rearrangement of the sections. In addition, one important problem has been lifted bodily from its habitual location in a key position in the "Parties" division and set down in the entirely different atmosphere of the "Joinder" division. This change is so fundamental that it requires an explanation and justification.

In the typical code, one section is sufficient to cover all the problems there classified under "Joinder of Causes of Action."⁴ This section merely prescribes the rules under which a plaintiff may join in one action the two or more causes of action which he has against the one defendant. Because of the common law precedents, this section is also sufficient to cover the case where the plaintiff claims to have one cause of action but, because of his uncertainty as to the facts or the law, he wishes to state his case in two or more alternative ways. He does this by using separate counts as though they stated separate (cumulative) causes of action.

These problems become a little more complicated when the two separate causes of action are against different defendants, or when the two alternative statements of the one claim would constitute causes of action against different defendants. These more complicated problems could be classed as cumulative and alternative "Joinder of Causes of Action Involving Different Defendants." Yet the codes uniformly provide for these joinder problems in a section called by some such name as "Joinder of Parties" or "Joinder of Defendants," appearing in the code some several

³ The object of good draftsmanship is to have the rule clearly indicate the method to be used in solving a particular problem. The draftsman must know the substance of the rule he is to draft. But the difficulty in the fields of "Parties" and "Joinder of Causes of Action" has been in the statement of the rule so that it will be intelligible to the lawyer with a new case; there is remarkable agreement as to the general view of the substance by nearly all the modern pleading reformers. Only in one field did the modern tendency seem very doubtful and conflicting: Federal Equity Rule 42 facilitates the recovery on a joint and several note by allowing the holder to sue some but not all the obligors, while third party practice tends to permit the defendant to delay the recovery by allowing him to bring in parties the plaintiff has chosen to omit.

⁴ *E.g.*, Ill. C.P.A. § 44, Ill. State Bar Stats. 1935, c. 110, par. 172. For an exception, see article 3 of the Rules of Civil Procedure, Am. Jud. Soc. Bull. XIV, 17 (1919), which contains four additional short sections.

pages preceding the section covering the related but simpler problem of joinder of causes of action between the same parties. This has resulted in, or perhaps is the result of, the error of considering the complicated joinder problem as a problem of joinder of parties in one cause of action rather than a problem of joinder of separate causes of action. This error is directly traceable to the similar treatment of the problem under the head of "Proper Parties Defendant" in the textbooks on equity pleading. "Proper Parties Plaintiff," "Necessary Parties," and "Indispensable Parties" were likewise erroneously treated as problems of permissible and required joinder of parties to one cause of action rather than problems of joinder of different causes of action in one suit.

This confused and erroneous attitude toward these problems could not result in sound, understandable rules. The original New York Code covered the problems (including representative suits) in three sections⁵ that sound simple but are actually confused and unhelpful. These sections were adopted almost *verbatim* by the early code states. The more recent tendency, illustrated by the Illinois act, is to have sections which are much longer and more complicated. The history of these sections starts with the New York Code sections which were altered before and after their adoption in the English rules, and were further changed when they were brought back to this country in the New Jersey, the New York, and then the Illinois Civil Practice Acts.⁶ These various revisions were accom-

⁵ Secs. 446, 447, 448. One problem of "Necessary Parties" is treated in § 454.

⁶ The history of these rules is outlined under each section in McCaskill, *Illinois Civil Practice Act Annotated* 41, 47 (1933).

The two major sections in the Illinois Civil Practice Act are:

Sec. 23. "(Joinder of plaintiffs.) Subject to rules, all persons may join in one action as plaintiffs, in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally or in the alternative, where if such persons had brought separate actions any common question of law or fact would arise: *Provided*, that if upon the application of any party it shall appear that such joinder may embarrass or delay the trial of the action, the court may order separate trials or make such order as may be expedient, and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for the relief to which he or they may be entitled.

"If any one who is a necessary plaintiff declines to join, he may be made a defendant, the reason therefor being stated in the complaint."

Sec. 24. "(Joinder of defendants.) (1) Any person may be made a defendant who, either jointly, severally or in the alternative, is alleged to have or claim an interest in the controversy, or in any part thereof, or in the transaction or series of transactions out of which the same arose, or whom it is necessary to make a party for the complete determination or settlement of any question involved therein, or against whom a liability is asserted either jointly, severally or in the alternative arising out of the same transaction or series of transactions, regardless of the number of causes of action joined.

"(2) It shall not be necessary that each defendant shall be interested as to all the relief prayed for, or as to every cause of action included in any proceeding against him; but the court

plished without greatly altering the vague generalities and meaningless phrases of the original sections. Reforms resulted in accretions rather than in alterations or eliminations. It is true that the plaintiffs who may join are now the persons "in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist,"⁷ etc., rather than the "Persons having an interest in the subject of the action, and in obtaining the judgment demanded."⁸ But even that change is probably meaningless, and it is minor compared with the additions made to the section. More typical is the section on joinder of defendants: the early codes provide that a person may be made a defendant only when he has or claims "an interest in the controversy adverse to the plaintiff"⁹; now any person may be joined who is alleged to have or claim "an interest in the controversy, or in any part thereof, or in the transaction or series of transactions out of which the same arose."¹⁰ As added proof that neither the old nor the new provisions have any real meaning, the expression, "either jointly, severally, or in the alternative," is added in three different places¹¹ so as to modify three main provisions, each containing various alternatives so as to constitute fourteen separate and more or less different rules. It would be surprising if it were possible to devise one rule, much less fourteen of them, that would help materially in solving the problems in all three types of cases: (1) where there is one joint cause of action or liability; (2) where there are several separate causes of action in favor of or against different persons; and (3) where there is a cause of action to be stated in the alternative, the different alternative theories of law or fact giving rise to causes of action wherein either the plaintiffs or defendants are different persons.

The remedy clearly is not to be found in the addition of new phrases or in slight changes in the old ones. The rules governing the joint cause of action, the separate causes of action, and the alternative statements of the cause of action, must be separated from one another. Joinder of separate causes of action involving different parties must be moved from the arti-

may make such order as may be just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in which he may have no interest.

"(3) Where the plaintiff is 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 in the same count or plead separate counts in the alternate against different defendants, to the intent that the question which, if any, of the defendants is liable, and to what extent, may be determined as between the parties."

⁷ Ill. C. P. A. § 23, quoted in note 6 *supra*. ⁹ *Id.*, § 447.

⁸ N.Y. Code Civ. Proc. 1849, § 446.

¹⁰ Ill. C. P. A. § 24, quoted in note 6 *supra*.

¹¹ Ill. C. P. A. §§ 23, 24, quoted in note 6, *supra*.

cle on "Parties" to a position following the similar but simpler problem of joinder of causes of action involving the same parties. Alternative joinder involving different parties should likewise be grouped with alternative joinder involving the same parties; it is rather immaterial whether this is considered a problem of alternative parties to one cause of action, or a problem of joinder of alternative causes of action involving different parties, as the historical development dictates that the alternative joinder sections be closely connected with the sections on joinder of separate (cumulative) causes of action. The only problems of joint causes of action that are covered in the existing rules, or that need to be covered here, are problems that might very well be left in the article on "Parties."

Most of the problems just discussed are governed by indefinite principles that apply equally to plaintiffs and defendants.¹² In the proposed rules covering these problems, therefore, there has been some consolidation as well as much division and reorganization.

Some of the other problems in these articles should be grouped together although they have appeared as entirely separate problems in existing codes. For one example, the problem of misnomer of the plaintiff shades off into the problem of the action being brought by the wrong party, and misnomer should therefore be considered in connection with the rule governing the changing of parties by amendment. For another example, in "Necessary Parties," where the defendant can force the plaintiff to bring in a cause of action involving another person, we have some problems very similar to some found in "Third Party Practice," where the defendant has the privilege of bringing in the other person, and also in "Intervention," where the other person has a right to bring himself in. Incidentally, "Third Party Practice" and "Intervention" have recently received such careful attention,¹³ that it will be unnecessary to do more than indicate where the new provisions on these problems should appear in these rules.

PROPOSED RULES

ARTICLE I—PARTIES TO AN ACTION

SECTION 1. (*Designation of Parties.*)—(1) The party commencing a civil action shall be called the plaintiff, and the adverse party shall be called the defendant.

(2) In all appeals, the relative position of the parties and their designation as plaintiffs or defendants shall be the same as in the court whose

¹² Yet existing rules have one section covering joinder of plaintiffs and another covering joinder of defendants. For an illustration, see the Illinois rules in note 6 *supra*.

¹³ For citations, see note 2 *supra*.

action is in question; but they shall be further designated in the title of the case as appellants and appellees.

Comment:

This is Illinois Civil Practice Act § 21, (1) and (2).

SECTION 2. (*Who May Be Plaintiff—Infant and Lunatic—Beneficial Interest.*)—The action shall be brought in the name of the person or persons to whom the substantive law ascribes the right to prosecute and maintain the action. An infant or a lunatic may sue or defend by his guardian or next friend, or if he has none, then by a guardian *ad litem*. If an action is brought by a person having a partial or the entire beneficial interest but not the right to sue, the name of the entitled person may be substituted at any stage of the proceeding, before or after judgment, on the motion of the named plaintiff and the entitled person.

Comment:

The corresponding section of the typical code requires the action to be brought in the name of "the real party in interest."¹⁴ The objects of such provisions seem to be: (1) the abolition of the rule requiring the assignee of a chose in action to sue in the name of the assignor; and (2) the defeat of technical objections that the action was brought in the wrong name. Both objects are desirable, but each can better be reached by a direct rule. Section 3, *infra*, accomplishes the first purpose; sections 7 and 8 are much more effective for the second. Those sections appear to cover the field sufficiently, and it seems that this whole section could be omitted, including the second sentence.¹⁵

The existing rule, with its meaningless "real party in interest" and its misleading "exceptions," has the sound of a radical change in the law of rights to sue, a substantive law problem. True, the courts have interpreted all the sting out of the rule, and there remains only a disagreement over which, if any, dry trusts have been executed. Yet this rule has proved to be a hard one to kill off,¹⁶ and an effort will probably be made to insert it in the new federal rules.¹⁷ About the only arguments in its favor are that it has not wrought the havoc in the substantive law that might have been feared, and that it is now so familiar that its absence would be noticed. These arguments do not justify a useless rule that confuses the substantive law problem and raises an unnecessary question, even though the courts have not been unreasonable in answering that question. To the extent that the cases are in disagreement, the rule is not only passively useless and confusing, but is actively vicious. Furthermore, it might prove more

¹⁴ N.Y. Code Civ. Proc. 1849, § 449.

¹⁵ This sentence is taken from Am. Jud. Soc. Bull. XIV, art. 2, § 22 (1919).

¹⁶ The Illinois Civil Practice Act is almost unique in omitting the "real party in interest" provision. See Ill. C. P. A. § 22, Ill. State Bar Stats. 1935, c. 110, par. 150.

¹⁷ Its inclusion is suggested in Clark and Moore, A New Federal Civil Procedure: II. Pleadings and Parties, 44 Yale L. J. 1291, 1311 (1935).

obnoxious as a Federal rule than it has been as a State rule, as it might confuse the problem of jurisdiction based on diversity of citizenship.

The use of the "real party in interest" provision raises the question as to how far the rules should go in including problems that are clearly or possibly substantive law problems. The suggestion has been made that the rules should cover questions of capacity to sue.¹⁸ It may be desirable to attempt this, but the adjective law problems of capacity are so closely connected with some of the problems of substantive law and jurisdiction that it will perhaps be better to omit the entire matter from these rules.

SECTION 3. (*Assignee of a Non-negotiable Chose in Action.*)—The assignee of a non-negotiable chose in action may sue thereon in his own name; but such action shall be subject to any substantive law limitation or restriction imposed upon the assignability of such a chose in action, and to any defense or set-off existing before notice of the assignment.

Comment:

This is in substance the first part of Illinois Civil Practice Act § 22; it may be better to copy the Illinois provision *verbatim*. Further sections may be added dealing with the subrogee, or administrator, guardian or trustee, as in the Illinois statute or the Federal Equity Rules.

SECTION 4. (*Joinder of Parties. Nominal Parties.*)—(1) When two or more persons are jointly entitled to one cause of action or are jointly liable on one cause of action, they shall all be joined as parties unless the complaint justifies the omission of the non-joined person.

(2) The joinder of persons entitled to, or liable on, separate causes of action may be permitted or required under the rules of Article II.

(3) Persons against whom no account, payment, conveyance, or other direct relief is sought may be made parties, subject to the discretion of the court, if it is made to appear that their presence might, without unduly complicating the case, protect the litigants or facilitate the trial of the cause or the enforcement of the judgment or other order of the court. Unless he is an infant, such a nominal party, upon service of the subpoena upon him, need not appear and answer the bill, unless the plaintiff specifically requires him to do so by the prayer; but he may appear and answer at his option; and if he does not appear and answer he shall be bound by all the proceedings in the cause. If the plaintiff shall require him to appear and answer he shall be entitled to the costs of all the proceedings against him, unless the court shall otherwise direct.

Comment:

In the introduction to these rules, the organization of existing rules governing "Parties" was criticized. Even in their most modern form as sections 23 and 24

¹⁸ Clark and Moore, *op. cit. supra* note 10, at 1312.

of the Illinois Civil Practice Act, they are hodgepodes covering joint rights and obligations, joinder of separate distinct causes of action, alternative statements of one cause of action where the different alternatives state cases involving different parties, required joinder ("necessary parties"), and, apparently, nominal parties. In aggravation, such meaningless phrases as "the same transactions or series of transactions" and "interest in the controversy" are there retained to misdirect the litigants and court away from the test of trial convenience.

The first step in correcting this absurd situation is taken here in the statement in paragraph (2) that the problems of permitted and required joinder of separate causes of action involving different parties are classified with other problems of joinder of causes of action. This reference to Article II will practically eliminate the confusion that might result from the adoption of a new classification.

The problem of paragraph (1) is ordinarily not separately or clearly covered by procedural rules; it is here merely mentioned to show that it is classed as a problem of joinder of parties to one cause of action rather than that of joinder of separate causes of action involving different parties. As is apparent from the rules under Article II, this paragraph does not cover the dissimilar problem of joinder of the so-called "joint tortfeasors," or the "several" or the "joint and several" obligors.

Paragraph (3) is a restatement of Federal Equity Rule 40. Perhaps in the revised form it is still misleading by indicating that bystanders and onlookers can be included in an action as "nominal parties." This is far from true. A person without a cause of action should not sue as a plaintiff. Usually a person is not made a defendant unless the plaintiff has a cause of action against him; in fact the rule, even in equity, is often stated that a person *must not* be made a party unless a decree is sought against him.¹⁹ But there seem to be cases warranting the presence of "nominal parties." Thus in a foreclosure suit by the assignee of the mortgage, when the assignment is questioned the mortgagee may be a necessary party; if the assignment is not questioned he is not a necessary party. When the plaintiff does not know whether or not the mortgagor will question the assignment, it would seem proper to make the mortgagee a "nominal party" defendant. At least, paragraph (3) should be considered, since its substance is now found in Federal Equity Rule 40.

SECTION 5. (*Persons Refusing to Join as Plaintiffs.*)—Persons having a united interest must be joined on the same side as plaintiffs or defendants, but when anyone refuses to join, he may for such reason be made a defendant.

Comment:

This is the last sentence of the first paragraph of Federal Equity Rule 37.

SECTION 6. (*Representative Suits.*)—When the number of parties involved on either side of an action is so large as to make it impracticable to

¹⁹ See the note in 3 P. Wm. 311 (1734).

bring them all before the court, or when for any other reason justice to the other parties requires a representative suit, the court may permit or order one or more to sue or defend for the whole, if this is not unfair to the represented parties.

Comment:

This section takes the place of Federal Equity Rule 38, which provides: "When the question is one of common or general interest to many constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole."

The typical statute or rule, such as Federal Equity Rule 38, is subject to four objections: (a) it fails to make clear that often the represented persons are for some purposes parties to the action, and are therefore generally held to be bound by the judgment; (b) the expression, "the question is one of common or general interest to many persons" is misleading: "the question" is a cause of action wherein the represented persons are plaintiffs or defendants; (c) there are many different types of cases wherein representation is permitted; the "many persons constituting a class so numerous" is only one; (d) the typical rule leaves many problems unsolved.

The proposed rule attempts to eliminate the first three objections. The fourth is the subject of a recent article by Professor Carl C. Wheaton, who suggests a new rule.²⁰ The length of Professor Wheaton's rule is a warning that considerable study must precede the drafting of a definite rule covering all the problems. It is submitted that his discussion and rule are handicapped because of his apparent failure to realize that there are several types of representative suits, with some major differences among them. The taxpayer's suit will benefit or foreclose all taxpayers; the creditor's bill may benefit only those who join. All the members of a congregation may be parties to *one* cause of action, as for an injury to the church property; many lower riparian owners or neighbors may have *separate* causes for enjoining the pollution of the stream or the air. Similarly, the plaintiff might have *one* cause of action against all the members of a society; another plaintiff may have separate causes of action for an injunction against each member of a trade union whose picketing cannot be classed as "peaceful." Where there are several causes of action, joinder might be required, or merely permitted. It is doubtful if each of the definite rules developed by Professor Wheaton as applicable to all these cases would work well in all. And there are other types of representative suits perhaps not within the scope of that article: cases where unborn contingent remaindermen may be represented; or known but remote remaindermen. The task of framing a definite rule covering all problems connected with representative suits would indeed be a difficult one.

I have taken the easier path; the proposed rule definitely does not state the details of the equity rule, nor does it attempt to point out how far the doctrine can be successfully extended to the law cases. It seems distinctly better to state

²⁰ Note 2 *supra*. The proposed rule appears on p. 441.

the rule in such a way that it clearly does not purport to solve all these problems, than it would be to use the glittering phrases of Federal Equity Rule 38 that purport to solve the problems but do not. If a series of definite rules seems better, let the man who attempts to draft them list all the possible types of cases, in law and in equity, and then check the soundness of each rule as applied to each type of case.

SECTION 7. (*Misnomers.*)—(1) Misnomer of parties plaintiff or defendant shall not constitute a defense in bar or in abatement, but the names of any parties may be corrected at any time, before or after judgment, on motion, upon such terms and proof as the court shall require.

(2) When an action is brought in good faith in the name of some actual or supposed person, persons, corporation or otherwise, individually or in a representative capacity, and it shall appear that the action should have been brought in the name of some other person, persons, corporation or otherwise, or in some other capacity, such error shall be considered only one of misnomer if the action was commenced by, or with the express or implied consent of, the proper person, and the defendant, from all the facts within his knowledge, did know or should reasonably have known what cause of action the plaintiff was relying upon. Similarly in the case of the erroneous recital of the name or capacity of the defendant, the error shall be considered only one of misnomer if the proper defendant, personally or by his attorney, actually defended the case in the name of the named defendant,²¹ or if (as might occur when a relationship existed between the named and proper defendant, such as that of principal and subsidiary corporations, officer or principal stockholder and the corporation, member of partnership and the partnership, or prior and successor businesses where there has been a reorganization) the proper defendant actually did learn or should have learned of the commencement of the action and did know or should have known what cause of action the plaintiff was relying upon, provided the service of summons, or other act relied upon, would have given the court jurisdiction of the proper defendant if he had been properly named in the complaint and summons. In these cases the defendant may suggest the existence of the error by motion, or an interested person may intervene and make such suggestion. The order shall protect the defendant and others from unfair prejudice, and if the error has been suggested in due time, ordinarily both costs and expenses necessarily resulting to the named or the proper defendant or interested person shall be taxed against the person making the error as terms for permitting the amendment.

²¹ Compare art. II, § 8 (4), and comment thereto.

Comment:

Paragraph (1) is Illinois Civil Practice Act § 21 (3), slightly amended. Paragraph (2) is new.²² Its object is to defeat a technical objection as to parties, even to the extent of preventing a new trial on change of parties where the change can come under this section. Its obvious limitations are governed by the constitutional requirement of due process. This limitation will prevent any great extension of the doctrine of misnomer in the case of an error in defendants. This section calls attention to the fact that the distinction between a misnomer and an erroneous party is necessarily not a clear-cut one; for instance, the defense of *nul tiel corporation* is sometimes treated as in bar, and sometimes as in abatement.

This paragraph is supplemented by Section 8 which follows immediately, and by the amendment to the statute of limitations suggested in the comment to that section.

SECTION 8. (*Errors Regarding Parties.*)—No action shall be defeated by non-joinder, misjoinder, or erroneous recital of parties. New parties may be added, parties misjoined may be dropped, and substitutions may be made in parties by order of court, at any stage of the cause, before or after judgment, as the ends of justice may require. Where required by fairness to new parties, the hearing of new evidence, or the recall of former witnesses, or a new trial may be ordered, on such terms as the court may direct.

Comment:

Compare Illinois Civil Practice Act § 26, New York Civil Practice Act § 192, and Federal Equity Rules 19 and 37. This section supplements Section 7 *supra*. The greatest need for liberality arises when the statute of limitations would prevent a new suit. In many cases the statute of limitations would also be available to the new party brought into the old suit. A more effective and supplementary remedy would seem to be an amendment applying to all statutes of limitations, and providing for the tolling of the statute while there is pending not only an action actually setting up the cause of action, but also an action, defense or counterclaim which the possessor of the cause of action actually (and reasonably?) supposes to set up the claim, even though the pleading or parties are not proper. Such a statute might receive much more favorable treatment by the courts than would a liberal rule on changing parties. This proposal will, for most cases, require action by the state legislature.

SECTION 9. (*Death of Party-Revivor.*)—In the event of death of either party the court may, in a proper case, upon motion, order the suit to be revived by the substitution of the proper parties. If the successors or representatives of the deceased party fail to make such application within

²² Compare Am. Jud. Soc. Bull. XIV, art. 2, § 14 (1919).

a reasonable time, then any other party may, on motion, apply for such relief, and the court, upon any such motion, may make the necessary orders for notice to the parties to be substituted and for the filing of such pleadings or amendments as may be necessary.

Comment:

This is Federal Equity Rule 45.

SECTION 10. (*Action against Joint Debtors No Bar.*)—When several joint debtors are sued, and any one or more of them shall not be served with process, the pendency of such suit or the recovery of a judgment against the parties served shall not be a bar to a recovery on the original cause of action against such as are not served, in any action which may be thereafter brought. This section shall not be so construed as to allow more than one satisfaction.

Comment:

This is Illinois Civil Practice Act § 27, and is inserted here as appropriate for a state statute on the subject. *Quaere*, whether it is appropriate for federal Rules of Court, in view of the desirability of applying the law of the forum.

SECTION 11. (*Unknown Parties.*)—If in any action there are persons interested in the same whose names are unknown, it shall be lawful to make such persons parties to such action by the name and description of unknown owners, or unknown heirs or devisees of any deceased person, who may have been interested in the subject matter of the action previous to his or her death; but in all such cases an affidavit shall be filed by the party desiring to make such persons parties stating that the names of such persons are unknown; and process may issue and publication may be had against such persons by the name and description so given, and judgments rendered in respect to such parties shall be of the same effect as though they had been designated by their proper names.

Comment:

This is Illinois Civil Practice Act § 29. See comment to § 10 *supra*.

Additional Comment on Article I:

The rules in this Article seem sufficiently complete in covering the problems of "Parties." Others might be added if desired. The proposed rules of the American Judicature Society contain several additional sections, such as one prescribing the effect on the case of an assignment of the claim during the pendency of the action.²³ Although those sections have been omitted from these proposed rules, they should all be considered by the drafting committee as possibly appropriate for the new federal rules.

²³ Am. Jud. Soc. Bull. XIV, art. 2, § 27 (1919). For other provisions, some covered in substance by these rules, see §§ 2, 4, 5, 6, 7, 10, 18, 19, 20, 21, 23, and 29.

ARTICLE II—JOINDER OF CAUSES OF ACTION, DEFENSES, AND PARTIES

SECTION 1. (*Joinder of Separate and Alternative Causes of Action and Defenses Involving Same Parties.*)—(1) Parties may plead as many causes of action, counterclaims, defenses and matters in reply, rejoinder and so forth as they may have, whether legal or equitable, including equitable counterclaims in the answer or reply, and each separate one shall be separately designated and numbered.

(2) When a party is in doubt as to which of two or more statements of fact is true, he may state them in the cumulative as separate counts, pleas or other separate parts of a pleading (as at common law), or state them in the alternative in one count, plea or other single part of a pleading (as in the equity bill), or state them in the alternative in separate counts, pleas or other separate parts of a pleading. Alternative joinder shall be allowed even though one be legal and the other equitable, and even though the two statements of fact be inconsistent and mutually exclusive. If the alternatives are stated in one count, plea or other single part of a pleading, as in the second method, the court may, on motion, require a separation, if this seems desirable, to prevent complications in subsequent pleadings.

(3) When a complaint, answer, reply or other pleading includes separate (cumulative) or alternative grounds, each separate or alternative ground may be objected to separately, but a bad ground or alternative ground shall not affect a good one and if there is a verdict or finding of fact for this pleader, judgment shall be given for him without requiring an amendment if there is a good ground or alternative ground which will support the verdict or finding of fact.

Comment:

Paragraph (1) is in substance Illinois Civil Practice Act § 43 (1). Compare Federal Equity Rule 26. As the plaintiff is interested in keeping the case simple enough for him to obtain a judgment, he can be trusted not to confuse the case by joining unconnected and confusing cases.

Paragraphs (2) and (3) restate the substance of Illinois Civil Practice Act § 43 (2). The three methods of stating the alternative claims are here allowed partly because all three methods seem safe, partly because if one alone were prescribed, the error of using one of the other methods might be punished too severely,²⁴ and partly because it seemed desirable to call attention to the three possible ways. The requirement of truthful pleading should prevent the use of the first (common-law) method when the alternative statements are inconsistent. The second (equity) method may prove objectionable in confusing subse-

²⁴ The inclusion of two causes of action in one count (rather than in separate counts) was one of the grounds relied upon for reversal in *Randall Dairy Co. v. Pevely Dairy Co.*, 278 Ill. App. 350 (1935).

quent pleadings, especially when the pleadings are affirmative and involve quite different legal theories, or when one is legal and the other is equitable. The third method seems preferable.

SECTION 2. (*Parties in the Alternative.*)—When, because of uncertainty as to the facts or law, the plaintiff (or plaintiffs) is in doubt as to which plaintiff (or combination of plaintiffs) is entitled to a cause of action or which defendant (or combination of defendants) is liable on a cause of action, the parties may be joined and the complaint framed in the alternative or in the cumulative in the same manner as when the two alternatives involve the same persons, provided the alternatives are so related that a single trial would be more just or procedurally more convenient than separate trials. Alternative joinder shall be allowed even though one be legal and the other equitable, and even though the two statements of fact be inconsistent and mutually exclusive. In tort cases against several defendants, each of whom is alleged to have committed an act which would make him separately liable for the damage caused the plaintiff, it shall not be necessary for the complaint to allege that the defendants acted jointly.

Comment:

The more modern rules indicate an intention to adopt a liberal provision on alternative joinder, by the insertion in the joinder sections of the phrase "whether jointly, severally or in the alternative."²⁵ As suggested in the introduction to these rules, the problems of alternative joinder differs so greatly from the problems of cumulative joinder that the two problems cannot be intelligently covered in the same rule. It is a commentary on the existing rules that, when they were amended by the insertion of the quoted phrase, they were as appropriate (or inappropriate) for alternative joinder as they had been for cumulative joinder, for which they had been drawn. For alternative joinder, a subsection such as Illinois Civil Practice Act § 24 (3) has been added to the rules, but it purports to apply only to alternative defendants.

The joinder of tort claims under the theory of "joint tortfeasors" is so deeply rooted that it seems desirable to permit the same form to be used, even though the separate claims are sometimes inconsistent and are included in one count. Subsequent pleadings might often be simplified if separate counts were used. This should not unduly lengthen the complaint as the later counts may be shortened by incorporating parts of the first count by reference instead of repeating long allegations.

SECTION 3. (*Additional Parties Brought in by Counterclaim or Supplemental Bill.*)—(1) In pleading a counterclaim, the defendant by summons may bring in such additional persons as are proper or necessary parties to the cause of action set up in the counterclaim.

²⁵ See Ill. C. P. A. §§ 23 and 24 (1), quoted in note 6 *supra*.

(2) Likewise the plaintiff, in pleading a counterclaim in the reply, may bring in additional parties.

Comment:

When the plaintiff relies on a deed or contract, the defense may be in the nature of a cross-bill in equity to reform or rescind such instrument, and some other person may be a necessary party to such a counterclaim. Likewise the defendant may rely on some instrument which the plaintiff wishes to avoid by reformation or rescission, and some other person may be a necessary party to such a proceeding.²⁶

SECTION 4. (*Joinder of Separate Causes of Action Involving Different Parties.*)—Separate causes of action involving different plaintiffs or different defendants may be joined in one action (at the election of the plaintiff or plaintiffs) if, because the cases arise out of the same transaction or otherwise, it appears probable that one or more common issues of law or fact will be raised making it convenient to try some or all of the issues of the cases together, or some other sufficient grounds appear for uniting the causes of action in order to promote the convenient administration of justice. If the grounds for such joinder do not appear from the statement of the causes of action, such grounds shall otherwise be set out in the complaint.

Comment:

The rules culminating in Illinois Civil Practice Act §§ 23 and 24 have previously been criticized for treating the main problem as one of joinder of parties rather than one of joinder of causes of action, and also for including, by the use of the phrase "whether jointly, severally or in the alternative," the three problems that require such dissimilar treatment. There remains the question whether these rules are fundamentally sound for covering these problems of cumulative joinder for which they were originally developed. It is submitted that these rules are unsound for this purpose because they conceal the true object and test by setting up a false test. Stating that objection in the language of my former article, the true rule is an indefinite one, but the criticized sections contain definite-sounding but meaningless phrases rather than clearly indefinite terms. As these rules illustrate this objection so well, they should receive a more detailed consideration.

The advocates of these rules agree that the desirable object (and insist that the result) of the rules is to make "the question of joinder depend upon trial convenience."²⁷ If trial convenience is the one and only test, the rule should say so, even though the rule would necessarily be an indefinite rather than a definite

²⁶ For a discussion of reply counterclaims, see 46 Harv. L. Rev. 342 (1932), a note on Procter and Gamble Co. v. J. L. Prescott Co., 59 F. (2d) 773 (D.C. N.J. 1932).

²⁷ McCaskill, Illinois Civil Practice Act Annotated 42 (1933) (black letter type).

one. This indefinite rule might be clarified by mentioning the most common way in which joinder will result in trial convenience; *i.e.*, the two causes of action involve primarily the same issue, and time will be saved if that issue is decided (with evidence presented but once) for all the causes of action at one time. When that is the item of convenience relied on,²⁸ the presence of the common issue makes it possible, in most cases, to state loosely that there was a common transaction, or more loosely, that the two causes of actions arose "out of the same transaction." But the same might be said of an even larger number of other cases in which there would be no convenience in joinder and in which joinder would not be allowed under the equity rules. The expression, "arising out of the same transaction," does not help solve a new case, as it is only a post-decision label. This expression conceals the true test and sets up a false one. While it is understandable why an attempt was made to reduce the likelihood of the discussion in a case centering upon the meaning of this expression, it is submitted that this should have been prevented by frankly stating the indefinite test of trial convenience; an improvement was not produced by permitting the relief to be "in respect of" as well as "arising out of" the transaction, or by permitting it to be a "series of transactions." Four meaningless phrases are not superior to one.²⁹

Federal Equity Rule 37 is just as misleading: "all persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs, and any person may be made a defendant who has or claims an interest adverse to the plaintiff." It would have been much better to have omitted that sentence and to have treated the subject as covered by Rule 26 which, in dealing with "Joinder of Causes of Action," provides: "But when there is more than one plaintiff, the causes of action joined must be joint [meaning it must be a joint cause of action], and if there be more than one defendant, the liability must be one asserted against all the material defendants, *or sufficient grounds must appear for uniting the causes of action in order to promote the convenient administration of justice.*" (Italics added.)

While the Illinois rule is here severely criticized for the misleading way in which the test is expressed, it represents the modern tendency of applying the more liberal equity test to the law cases. It should, however, be noted that the chancellor could often handle the more complicated cases involving several distinct causes of action, while the joinder might result in a trial too complicated for a jury. With the true test of trial convenience applied, this difference would

²⁸ For a recent Illinois case under the new rules where the convenience of joinder was apparent even though there was no common issue, see *Hitchcock v. Reynolds*, 278 Ill. App. 559 (1935).

²⁹ Ill. C. P. A. § 23, quoted in note 6 *supra*, contains the following: ". . . in respect of or arising out of the same transaction or series of transactions. . . ." Statutory construction yields the following combinations: (1) "in respect of the same transaction"; (2) "in respect of the same series of transactions"; (3) "arising out of the same transaction"; (4) "arising out of the same series of transactions."

be taken into consideration. This might not be understood if the rule appeared to depend on the presence of a single "transaction or series of transactions." One rule is adequate to include both joinder of plaintiffs and joinder of defendants, as the same test of trial convenience is applied in both cases.³⁰

SECTION 5. (*Necessary and Indispensable Parties.*)—(1) In an action [in equity] seeking to determine or enforce the legal or equitable rights, or extinguish or change the legal rights, of the plaintiff or the defendant in some interest or subject matter, the judgment shall not be binding on persons not parties to the action, who have or claim rights in the same interest or subject matter unless such persons actually engage in the litigation of the case or are legally represented by one of the parties.

(2) A person whose right, interest, or title will necessarily be directly affected (though not bound) by the judgment is an indispensable party in the proceedings, and the court shall not render a judgment unless such indispensable party has been made a party or is otherwise legally subjected to the judgment.

(3) A person whose right, interest, or title will not be bound or directly affected by the judgment may nevertheless be a necessary party [to an equitable cause of action] if, after a consideration of all arguments of convenience and fairness to such person, the parties and the court, the court determines that it would be undesirable to proceed in the cause without such person.

(4) If [in an equitable cause of action] the judgment may be made ineffective if a person not subject to the judgment is not made a party, the plaintiff shall be required to make such person a party to the action if this can be done without undue prejudice and delay and if the objection to his absence was made in due time during the pleading stage of the case.

(5) If [in an equitable cause of action] the defendant will be unnecessarily prejudiced unless another person, not a party, is made a party so as to bind him on an action which the defendant has or will have against such person for reimbursement, contribution, payment, or otherwise, the plaintiff shall be required to make such person a party to the action if this can be done without undue prejudice and delay and if the objection to his absence was made in due time during the pleading stage of the case. [Alternative: the defendant may, on motion, obtain an order and summons mak-

³⁰ The rule is flexible enough to take into consideration the inherent difference in that, when plaintiffs are joined, the defendant is really benefited to the extent that he defends only one suit, rather than two, while in the cases of joinder of defendants, one defendant is required to be represented throughout the longer combined trial rather than in a trial involving only the one case in which he is interested. This is mentioned in the comment to art. II, § 6, *infra*.

ing such person a party to the action, if the joinder will not result in undue prejudice or delay.]

(6) Nevertheless, in all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court as parties to a suit concerning such demand all the persons liable thereto; but the plaintiff may proceed [on any equity cause of action he may have] against one or more of the persons severally liable.

(7) If a person who would otherwise be deemed a necessary party cannot be made a party by reason of being out of the jurisdiction of the court, or incapable otherwise of being made a party, or because his joinder would oust the jurisdiction of the court as to the parties before the court, the court may proceed in the cause without making such person a party unless the judgment in the case would directly affect such absentee.

Comment:

The first five paragraphs of this section are new. Their object is to indicate, at least in a general way, the rules governing "necessary parties" and "indispensable parties." They are supplemented by the later sections, especially the provisions of section 8 on objections to nonjoinder.

The subject matter of these five paragraphs is apparently covered by the one sentence in Federal Equity Rule 37: "Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause." Perhaps the Illinois Civil Practice Act is as adequate as any present statute or rule: "Section 24 (1). Any person may be made 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." "Section 25. Where a complete determination of the controversy cannot be had without the presence of other parties, the court may direct them to be brought in. When a person, not a party, has an interest or title which the judgment may affect, the court, on application, shall direct him to be made a party. . . ."

It is believed that those federal and Illinois rules, as is true of the proposed rules, merely attempt to state the older equity practice without material change except perhaps to extend it to the law cases. The discussion of the proposed rules will indicate wherein it is believed the existing rules are inadequate.

Paragraph (1) of the proposed rules merely states a constitutional limitation imposed by the requirement of due process. It is inserted here in order to clarify the subsequent paragraphs.

Paragraph (2) may indicate, in indefinite terms, the characteristics of "indispensable parties." The judgment could not legally bind the absentee; yet as a practical problem it might seriously affect him by disposing of property so that it would be difficult or futile for him to trace it and assert his rights, or by

enjoining a party from doing the act which the absentee has a right that the party shall do, so that the absentee would have a cause of action instead of performance. Again our concept of due process protects the absentee, and the defect of omitting him in the suit is considered so much more serious than in the case of the omission of the other persons covered by this section that the persons described in this paragraph have been called "indispensable parties." Past efforts proved unsuccessful in eliminating this term at the time of the adoption of Federal Equity Rule 39,³¹ the predecessor of paragraph (7) of this proposed section; it seems best to retain it by the express provision of paragraph (2).

Paragraph (3) prescribes the indefinite concepts of fairness and trial convenience for the determination of which persons are "necessary parties." It is honestly indefinite, and is inserted partly as an introduction to paragraphs (4) and (5) and partly as a supplement to them in case they fail to cover all cases of necessary parties. The bracketed parts of this and other paragraphs in this section indicate that the drafting committee should determine to what extent those equity rules should be extended to law cases.

Paragraph (4) is somewhat more definite in covering one type of "necessary parties." In a suit to foreclose a mortgage, a second mortgagee or other subsequent lienholder is a "necessary party"; otherwise the judgment would not bind him and he could make the whole proceeding ineffective by foreclosing or taking a release, and redeeming. The major consideration in this case is fairness to the court, protecting it from wasting its time on a trial resulting in a decree that may be upset by a person with an interest that could easily be foreclosed in this first litigation. The tenant in possession of the property being foreclosed may also be a necessary party so the judgment may put the purchaser into possession without an additional action.

Paragraph (5) covers the other major group of "necessary parties." Here the main reason for requiring the plaintiff to join the absentee is an item of fairness to the defendant similar to the item of fairness to the stakeholder that has resulted in the development of the remedy of interpleader. A leading case is *Knight v. Knight*.³² In a proceeding in equity brought by the obligee of a bond against the heir of the obligor, the administrator of the estate of the obligor was held to be a necessary party as the personal property was primarily liable, and it would be unfair to the heir to put him to his separate action against the administrator for reimbursement, and subject him to the expense of two suits and the hazards of losing both because of evidence available to the administrator but not to the heir. A more typical case is the bill in equity brought by the heir of the purchaser against the vendor; the administrator is a necessary party so the decree can order the administrator to pay the purchase price. Or in a suit by the administrator of the vendor for the purchase price, the heir is a necessary party so he can be ordered to convey, thus protecting the defendant. The rule

³¹ Hopkins, *New Federal Equity Rules* 242 (8th ed. 1933).

³² 3 P. Wm. 331 (1734).

of course was applied only in equity. Two tendencies have been noted: (a) One is to extend it to law cases, modified by putting the burden of bringing in the third party on the defendant; this is the so-called "third party practice." (b) The other tendency is in directly the opposite direction, to limit the doctrine. In England it was once held that when one of several joint and several obligors was sued in equity, he could insist on the joinder of the other obligors in order to protect his right to contribution. This was changed in 1841 by Order XXXII of the High Court of Chancery, which was adopted as Federal Equity Rule 42, and which is in substance paragraph (6) above. Paragraph (6) may be enlarged.³³

The framing of the rule governing this whole field should await the determination of the policy to be followed. When it is decided how far this doctrine is to be applied, a clear statement of the rule should be possible. The statutes adopting the third party practice have not been satisfactorily drawn to cover the entire problem. Where this step has not been definitely attempted, the statutes and rules are usually very indefinite on the subject. Such a treatment is inexcusable. Indecision as to the policy to be adopted does not justify the use of a rule that is so meaningless that it will not require, nor conflict with, any of the possible theories. This is a matter, not of trial convenience, but of fairness to the parties: Is it desirable to protect the defendant from the hazards and expenses of two suits, or is it more important that the plaintiff's recovery should not be hindered or delayed by bringing in the question of the third person's liability over to the defendant? Paragraph (5) is not intended to be final; it merely indicates the presence of the problem, and suggests an indefinite (flexible) rule (with alternative suggestions) approving the requirement for joinder unless it seems probable that joinder will result in undue prejudice or delay. That leaves much discretion to the trial court; perhaps that is the best policy, but it should, it seems, be limited to equity cases.

Paragraph (7) is a restatement of Federal Equity Rule 39. Its object and effect can be appreciated only after a review of paragraphs (3), (4), and (5). Paragraph (3) expressly provides that items of fairness to the plaintiff, as well as items of fairness to the defendant, should be considered in determining whether or not the absentee is a necessary party. Paragraphs (4) and (5) mention the two most common items of fairness (to the court and to the defendant) that often lead the court to require the plaintiff to join the absentee. Each of those rules recognizes that unusual items of fairness to the plaintiff may excuse joinder. Paragraph (6) was developed as a limitation on paragraph (5), apparently because there seemed to be a real danger that several obligors would nourish a disagreement among themselves in order to delay the recovery of the obligee. A clearer case is the one where one of the obligors has died insolvent; the obligee should not be put to the trouble and expense of having an adminis-

³³ See *Sunderland, The Michigan Judicature Act of 1915, III. Parties to Actions*, 14 Mich. L. Rev. 441, 450 (1916).

trator appointed. Such an administrator has been held not to be a necessary party to the suit against the other joint and several obligors. Such considerations are made material by the clauses in paragraphs (4) and (5): "if this can be done without undue prejudice and delay."

Federal Equity Rule 39 expressly covers a few of such items of fairness to the plaintiff, and similar provisions in force since 1839 have controlled so much of the discussion of the problem that it seems desirable to incorporate this provision into the new rules, even though it is unnecessary and covers only a few of the items of fairness that may cause the court to hold the absentee not to be a necessary party. Paragraph (7) deviates from Rule 39 in three respects: (a) the first part of the sentence was slightly shortened; (b) "necessary" is substituted for "proper," reversing the amendment made in 1912 which made the rule literally useless, as a "proper," as distinguished from a "necessary" party need not be joined even if he were in the jurisdiction; (c) the last clause expressly excepts the "indispensable party." This last change is in agreement both with paragraph (2) and with the cases which have recognized that Rule 39, and its predecessors, are limited by our concept of due process when the decree will directly affect the absentee.

Paragraphs (2) and (7) will both tend to perpetuate the use of the term "indispensable party." It is true that this term is objectionable in that it emphasizes a few of the items of fairness and thus indicates that in the absence of paragraph (7), such items of fairness would not be considered. However, the term "indispensable party" seems to simplify the problem for some people, so it was felt desirable to provide definitely for its continued use rather than to repeat the abortive attempt of 1912 to eliminate it from our vocabulary.

SECTION 6. (*Trials of Actions Involving More Than One Cause of Action.*)

—(1) If, in an action involving more than one cause of action (including counterclaims), it shall appear that joinder may embarrass or delay the trial, or may work an unnecessary hardship on one of the parties, the court may order the cases separated, with or without separate dockets, or may order separate trials of some or all of the issues, or may make such other order as may be expedient.

(2) Legal and equitable causes of action (including counterclaims) may be tried together, provided that the right to trial by jury shall exist as heretofore.

(3) It shall not be necessary that each party to the action shall be interested as to all the relief prayed for, or as to every cause of action included in the action; but the court may make such order as may be just to prevent any defendant from being embarrassed or put to unreasonable expense by being required to attend any proceedings in which he may have no interest.

Comment:

Paragraph (1), in substance, is mentioned in various parts of various rules on parties.³⁴

Paragraph (2) is somewhat different from the last sentence of Illinois Civil Practice Act § 44 (1), "Legal and equitable issues may be tried together where no jury is employed." This Illinois rule confuses "issues" with "causes of action" (so-called "equitable defenses" or "crossbills in equity" are pleaded as counterclaims, under this section), and the practice in most code states is (usually in the absence of rules on the subject) more in accord with paragraph (2) above, and not as narrow as this Illinois rule would indicate.

Paragraph (3) is Illinois Civil Practice Act § 24 (2). The first part of the sentence is inserted out of an abundance of caution. The latter part might be applied where the court permitted the plaintiff to join his two causes of action, each against a different defendant. Joinder would be allowed because it would save the plaintiff the expense of litigating an issue twice, but if this joinder threw additional costs on a defendant, the plaintiff should stand these additional costs. This recalls one practical difference between "proper parties plaintiff" and "proper parties defendant." The defendant can hardly be heard to object that one plaintiff will be put to expense by attending the hearing involving issues in which only the other plaintiff and the defendant are interested. The added expense is imposed only on the one plaintiff who elected joinder. But when defendants are joined, one defendant may have a valid objection if he has to pay an attorney for listening to testimony involving only the cause of action between the other defendant and the plaintiff. This rule protects such a defendant.

SECTION 7. (*Judgments and Costs*).—(1) Separate judgments, with a division of the costs in the discretion of the court, may be awarded for each one or for a combination of the various causes of action involved in the action.

(2) In all cases where joinder of causes of action has made desirable a separation in the pleading (with or without separate dockets), or in the trial (or in the appeal), each part shall be treated, for the purpose of *lis pendens* and otherwise, as a continuance of the original cause. However, the party or parties seeking the joinder shall be required to pay an additional filing fee for each case that is separated for trial.

Comment:

Paragraph (1) was suggested by the last part of the first sentence of Illinois Civil Practice Act § 23. Paragraph (2) needs no comment, except perhaps the second sentence. These rules, adopting the present tendency, are very liberal in their joinder provisions, the feeling being that a plaintiff who wishes to recover

³⁴ See Ill. C. P. A. §§ 23, 44, Ill. State Bar Stats. 1935, c. 110, par. 151, 172.

on several causes of action will not join them if confusion would result, as he is not interested in causing confusion. But it is possible that he might join causes of action to save filing fees and costs of service. He should not escape fees by joining the cases that must thereafter be separated. At least this provision is suggested.

SECTION 8. (*Objections to Nonjoinder and Misjoinder of Parties.*)—(1) Objection to the joinder of causes of action involving different parties shall be deemed waived unless made within a reasonable time after misjoinder is apparent, and if made late in the proceedings, even though the delay was unavoidable, the court shall consider the undesirability of scrapping work already completed in determining whether or not it is desirable to sustain the objection. Objection to the failure to join a necessary party shall likewise be deemed waived unless made at such an early stage of the proceedings that the absentee can be brought in without undue inconvenience or delay to the action.

(2) On appeal, objections to the ruling on objections regarding proper and necessary parties shall be considered only if the ruling resulted in substantial injustice which could not have been prevented by diligently pressing a motion for separating the causes of action for trial or a motion to permit the defendant to bring in the necessary party; and then an order of reversal shall be given only if the injustice cannot be substantially removed by some other order.

(3) Subject to paragraphs (4) and (5) hereof, whenever it shall appear that the judgment in a case will necessarily affect an interest or title of an absentee, the court shall refuse to proceed with the case until such indispensable party is brought in, regardless of the stage of the proceedings.

(4) Whenever a person, not a party of record, will be bound by the judgment because he has actually prosecuted or defended the action (though his counsel has formally represented some other person who is a party), such person, if he is a necessary or an indispensable party, may be made a party of record on motion at any stage of the proceedings, before or after judgment.

(5) No action shall be defeated by nonjoinder or misjoinder of parties. New parties may be added and parties misjoined may be dropped by order of the court, at any stage of the cause, before or after judgment, as the ends of justice may require. The order shall protect such persons from prejudice, and shall be made upon such terms as will protect the parties not in error from such expenses and losses as occurred before such parties should reasonably have discovered the defect.

Comment:

The first two sentences of paragraph (5) constitute section 26 of the Illinois Civil Practice Act and are found in the New York, New Jersey, and Michigan statutes. They represent a laudable "spirit," but they are quite inadequate. Due process would prevent their literal application; not indicating how far the "spirit" shall apply, they are apt to be ineffective as the courts have tended to fall back on the common law when confronted with such spiritfult but substanceless rules. The less indefinite paragraphs, (1), (2), (3), and (4), should be more effective in attaining the liberal practice sought by paragraph (5); the latter is included to indicate that there is no intention to curtail the spirit of the most liberal codes.

Paragraph (4) would seem to be a sound statement of the law, though often overlooked. The party really interested in defeating the plaintiff's claim, though not made a party, will employ counsel to defend in the name of the defendant who turns the defense over to him. It has been held that the person really litigating the case is bound by the decree.³⁵ The objection raised by his counsel that he has not been made a party is at best merely a technical defense, and should neither defeat nor delay the cause. This paragraph is supplemented by provisions in Art. I, § 7(2), and in Art. II, § 5(1).

The "indispensable party" who would necessarily be affected by the decree but who is not present to protect his rights presents an entirely different question from that of the "proper" or the "necessary" party. Due process requires that he be protected; the law regarding *res adjudicata* cannot protect him as he will be affected even though the judgment will not be legally binding on him. It has not been uncommon for the highest court, on its own motion, to reverse a case in order to grant this protection. Paragraph (3) restates this rule, tempered by paragraph (5) which should discourage delay on the part of the defendant in raising this objection. The penalty of dismissal is too severe; the defendant and new party can be adequately protected in some other way, even if a new trial is necessary. A dismissal could not protect the defendant more unless the statute of limitations has run, and the defendant, and in some cases the new party, should not have the benefit of that statute. Of course in some cases a dismissal will actually follow, as when the joinder of the new party will "oust the jurisdiction of the court"; the first sentence of paragraph (5) is certainly limited by such cases, and perhaps should be amended to recognize that. The common wording has been retained to indicate its source, and it should cause no uncertainty or confusion. It might be argued that it is literally a correct statement of the law; the dismissal follows not because of the error of omitting the indispensable parties, but by the lack of diversity of citizenship after they are joined.

The theory or "spirit" of the modern pleading rules has been that pleading is not a game to raise objections that immediately or on appeal will gain an ad-

³⁵ See 23 Ill. L. Rev. 812, 817, notes 24, 25 (1929).

vantage if not a judgment for the objector; pleading is a tool for preparing the case for as simple and intelligent a trial as possible. In most cases the trial court should be the judge of what cases can most conveniently be tried together. After the trial there should not be a reversal just to see if some other way would have been a little better. Joinder is often allowed to save the expense of two trials; a reversal for a new trial will not be a saving. So also in the cases of necessary parties when joinder is required because the time spent by the court on the trial might be wasted because the absentee (as subsequent mortgagee in the foreclosure suit) might be able to avoid judgment; after the trial a possibly effective judgment is better than none at all. The defendant's objection should be taken seriously after the trial only when fairness to the defendant makes the absentee a necessary party, and in those cases the equities are so well balanced that there has been much disagreement as to the best policy even on a motion raising the objection before trial. After trial, the added argument that a requirement of joinder would usually be a requirement for a new trial should usually defeat the objection even in these cases. The rules of paragraphs (1) and (2) merely state what was probably intended by the more sweeping but less specific provisions similar to the first two sentences of paragraph (5).

It is hoped that paragraph (2) will have another wholesome effect. Perhaps a lower court has used poor judgment in ruling on a joinder objection, yet the appellate court thinks a reversal would not better the situation. The natural, or at least the common, result has been a decision explaining the affirmance on the ground that the ruling of the lower court was sound *from the point of view of the lower court*. Such a decision adds confusion when applied by lower courts in other cases. Particularly in states where only the decisions of the highest court are reported, the reported decisions often give a false and confused impression of the rules actually applied in the trial courts. Is it being too optimistic to hope that these rules will result in decisions stating sounder grounds for affirming rulings on joinder?

SECTION 9. (*Bringing in New Parties—Intervention.*)—(1) A new party shall be brought in by the service of a summons, which shall be drawn in the usual form with the addition of the statement, in the *teste* thereof, that this summons is issued pursuant to an order of the said court made on a date named.

(2) A person having a right to intervene in any action may be made a party on his petition.

Comment:

Paragraph (1) is the last sentence of Illinois Civil Practice Act § 25. It seems unnecessary; its only effect may be to raise the question of the effect of an error in the date of the order. It is inserted here mainly to indicate where it belongs if it is insisted on.

Paragraph (2) is in substance the second paragraph of Federal Equity Rule 37, amended to remove the false impression that the rule will help determine when intervention is permitted by the clause, "Anyone claiming an interest in the litigation."³⁶ Perhaps a careful study of the intervention problem would lead to a definite rule stating just when intervention is to be permitted; or perhaps it is safe to state it in the form of a rule clearly flexible (indefinite), based on trial convenience and fairness to the original parties and the intervener. The last part of the present rule placing the intervening party in a subordinate position is eliminated as it is a generality that applies to only part of the cases of intervening parties.³⁷

SECTION 10. (*Saving Clause As to Change of Parties.*)—No change in parties made by order of the court shall impair any previous attachment of the estate or body of any person remaining a defendant in the action; nor impair bonds or recognizances of any person remaining a party, either as against himself or his sureties; nor impair receipts to an officer for property attached; and, when parties are changed, the court may order new bonds if such new bonds are deemed necessary. Orders of court concerning changes in parties may be made upon terms, at the discretion of the court.

Comment:

This is Illinois Civil Practice Act § 28.

³⁶ The second paragraph of Rule 37, dealing with intervention, provides: "Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceedings."

³⁷ The problems of intervention are left to the able authors of Moore and Levi, *Federal Intervention: I. The Right to Intervene and Reorganization*, 45 Yale L. J. 565 (1936).