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Civil Practice Act Cases - Jury - Right to Trial by Jury - Effect of Plaintiff's Filing Inadequate Counter-Affidavits to Motion to Dismiss under Section 48

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voke a will, and that said section does not apply to the revocation of a will, or a part thereof, arising by implication of law" was discounted on the grounds that the case merely decided that a conveyance of the bequeathed property by the testator to the legatee resulted in an ademption, despite the subsequent reacquisition of the property by the testator.

The Court in the instant case recognized the existence of decisions⁴ in other states opposed to its holding but declined to recognize those cases as authority in this state on the grounds that the statutory provisions of Illinois are materially different from those of the other jurisdictions.

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CIVIL PRACTICE ACT CASES

JURY—RIGHT TO TRIAL BY JURY—EFFECT OF PLAINTIFF'S FILING INADEQUATE COUNTER-AFFIDAVITS TO MOTION TO DISMISS UNDER SECTION 48—

Some light on the interpretation to be given to Subsection 3¹ of Section 48 of the Illinois Civil Practice Act has been shed by the case of *Fitzpatrick v. Pitcairn*.² The plaintiff therein, as administratrix, sued the defendant railway company to recover for the wrongful death of her intestate. More than a year after the accident, the plaintiff amended her complaint by adding the receivers of the defendant railway company as additional parties defendant. The receivers filed a motion to dismiss relying on Subsection (f)³ of Section 48, and in their motion they set forth chronologically the proceedings up to that point. The plaintiff filed counter-affidavits in which she inadequately sought to explain her failure to sue the receivers of the railway company at the outset, and she requested a jury trial on the issues of fact alleged to be created by the defendant's affidavits and her counter-affidavits. The trial court refused to dismiss the defendant's motion and thus force him to file an answer⁴ in order that a jury trial might be had. The court held that, since the plaintiff had not controverted the facts set out in the defendant's motion, the only issue was one of law, and this holding was affirmed on appeal.

The practice as outlined in Section 48 and as now interpreted in the *Fitzpatrick* case thus appears to require that if the plaintiff does

⁴ For a discussion of these cases, see 17 CHICAGO-KENT LAW REVIEW 97.

¹ "If, upon the hearing of such motion, the opposite party shall present affidavits or other proof denying the facts alleged or establishing facts obviating the objection, the court may hear and determine the same and may grant or deny the motion; but if disputed questions of fact are involved the court may deny the motion without prejudice and shall so deny it if the action is one at law and the opposite party demands that the issue be submitted to a jury." Ill. Rev. Stat. 1937, Ch. 110, § 172(3).

² 371 Ill. 203, 20 N.E. (2d) 280 (1939).

³ "That the cause of action did not accrue within the time limited by law for the commencement of an action or suit thereon." Ill. Rev. Stat. 1937, Ch. 110, § 172(f).

⁴ Under the former practice such new matter had to be introduced into the record by an appropriate plea upon which issue could be taken and trial had before the appropriate forum.

not file counter-affidavits or other proof denying or avoiding the effect of the new matter contained in the motion to dismiss, the court must assume the same to be true and give judgment accordingly as a matter of law.⁵ It would further seem that where counter-affidavits or other proof are offered to a motion to dismiss, the court would be compelled to deny such motion if the issue were one of fact, if the action were one at law, and if a request for a jury trial were made.⁶ If either one of the latter two elements were missing, the court would be free to exercise its discretion in the matter.

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⁵ *Stern v. Auerbach*, 197 N.Y.S. 295 (1922), a case decided under an analogous New York statute. The instant case would also lead to this conclusion.

⁶ Ill. Const. of 1870, Art. II, § 5, which provides that "the right of trial by jury as heretofore enjoyed, shall remain inviolate . . .," is thus reinforced by the section under consideration. See M. Weisbrod, "Some Observations on Section 48 of the Illinois Civil Practice Act," 16 CHICAGO-KENT REVIEW 118 at 133, 136, 142, 147. See also Ill. Rev. Stat. 1937, Ch. 110, § 188, for the procedure involved in the request for jury trial.