Chicago-Kent Law Review

Volume 18 | Issue 3 Article 4

June 1940

Civil Practice Act Cases

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APPEAL AND ERROR—PROCEEDINGS FOR PREPARATION—EFFECT OF FAILURE TO FILE PRAECIPE WITHIN TIME ALLOWED BY RULE 36.—In the case of *Harris* v. *Sovereign Camp of Woodmen of the World, Inc.*,[1] the appellant had filed its praecipe for record eleven days after filing its notice of appeal, and the appellee, relying on Subdivision 1(a)[2] of Rule 36 of the Supreme Court requiring the filing of such praecipe within ten days, moved to dismiss the appeal. Held: Motion to dismiss denied.

The present problem was foreshadowed in the case of *Lanquist* v. *Grossman*,[3] in which appellant, having failed to file his praecipe within the ten day period, became apprehensive that this omission might be held fatal to his right of appeal and thereupon filed a second notice of appeal and praecipe thereunder. In dismissing the second appeal, the Appellate Court held that there was no provision for a second notice of appeal and therefore it was a nullity.[4] The court said: "If the appellant had proceeded with his original perfected appeal and filed his record on appeal in this court within apt time, even though his praecipe for record did not comply with the rules as to the time of its filing, a different question would have been presented," but properly left such question unanswered until presented in the instant case.

While it has generally been held in Illinois that the right to appeal is purely statutory[5] and that the statute must be strictly complied with, the Appellate Court pointed out that even under the old practice[6] the purpose of filing a praecipe, and notice thereof on the opposite party, was to give the latter an opportunity to file an additional praecipe for any portions of the record not ordered up by the appellant; and that the giving of such notice, where the entire record was included in the appeal, as it was in the instant case, was not an indispensable prerequisite to the right to have the record reviewed.

Liberal construction of the provisions of the Civil Practice Act and the rules enacted pursuant thereto,[7] especially when coupled with the express language of Section 76 (2)[8] thereof, indicates a clear intention on the part of the legislature that no party should lose his right of appeal merely through failure to comply strictly with procedural steps established by rules of court.[9] R. F. GOODMANSON

1 302 Ill. App. 310, 23 N.E. (2d) 793 (1939).

2 Ill. Rev. Stat. 1939, Ch. 110, § 259.36. 3 282 Ill. App. 181 (1935).

4 Accord: Cullinan v. Cullinan, 285 Ill. App. 272, 1 N.E. (2d) 921 (1936); Corrigan v. Vin Schill College of Chiropody and Pedic Surgery, 277 Ill. App. 350 (1934).

5 Hall v. First National Bank of Pittsfield, 330 Ill. 234, 161 N.E. 311 (1928); Davison v. Heinrich, 340 Ill. 349, 172 N.E. 770 (1930).

6 People v. Union Gas and Electric Co., 258 Ill. 193, 101 N.E. 421 (1913).

7 Ill. Rev. Stat. 1939, Ch. 110, § 128.

8 Ill. Rev. Stat. 1939, Ch. 120, § 200(2). See 162 East Ohio Street Building Corp. v. Lindheimer, 368 Ill. 294, 13 N.E. (2d) 970 (1938); Veach v. Hendricks, 278 Ill. App. 376 (1935).

9 Other instances of liberal construction of provisions affecting appellate procedure appear in the following cases: City of Chicago v. Peterson, 360 Ill. 177,

EQUITY—BILL OF REVIEW—NECESSITY THAT COMPLAINT SET OUT THE PLEADINGS IN THE PROCEEDING SOUGHT TO BE REVIEWED.—A consent decree in a foreclosure proceeding was entered, and no appeal was taken. Thereafter a complaint in the nature of a bill of review was filed to set aside the decree on the grounds that "the court did not have jurisdiction to make any order concerning . . . " certain tracts of land dealt with by the decree. It was held in *Davis* v. *Oliver*,[1] by the Illinois Appellate Court, that the complaint was insufficient in that the answer to the original bill and the answer to the cross-bill, pleadings in the original case, were not set forth in haec verba. The holding follows a long line of cases[2] preceding the Civil Practice Act and affirms the former practice requiring that a bill of review recite all the pleadings and the decree in the proceeding to be reviewed. W. L. SCHLEGEL

JUDGMENT-PROCEEDINGS TO COMPEL SETOFF—MORTGAGOR'S RIGHT IN FORECLOSURE SUIT TO SET UP COUNTERCLAIM FOR DAMAGES ARISING FROM MORTGAGEE'S WRONGFUL INTERFERENCE WITH POSSESSION.—In *State Bank of St. Charles* v. *Burr*,[1] the Supreme Court construed Section 38[2] of the Civil Practice Act as permitting a mortgagor in a foreclosure proceeding to set off against the mortgage debt, by way of counterclaim, a claim for damages resulting from the mortgagee's wrongful interference with his possession of the mortgaged land. The counterclaim was tried by a jury, and after a verdict and judgment for the defendant counterclaimant, a decree of foreclosure was entered for the amount of the mortgage debt less the amount of the judgment on the counterclaim. On appeal, the defendant objected that the lower court was without jurisdiction to decree that the judgment on the counterclaim was a proper setoff against the mortgaged debt; that it amounted to the entry of a personal judgment or

195 N.E. 636 (1935); Conour v. Zimmerly, 290 Ill. App. 546, 9 N.E. (2d) 61 (1937), noted in 15 CHICAGO-KENT REVIEW 341; National Bank of the Republic v. Kasper American State Bank, 369 Ill. 34, 15 N.E. (2d) 721 (1938), noted in 17 CHICAGO-KENT LAW REVIEW 74; Schaefer v. Robillard, 370 Ill. 92, 17 N.E. (2d) 963 (1938), noted in 17 CHICAGO-KENT LAW REVIEW 175; Melsha v. Johns-Manville Sales Corp., 299 Ill. App. 157, 19 N.E. (2d) 753 (1939), noted in 17 CHICAGO-KENT LAW REVIEW 277. By way of contrast, see Francke v. Eadie, 301 Ill. App. 254, 22 N.E. (2d) 720 (2d Dist., 1939) noted in 18 CHICAGO-KENT LAW REVIEW 89. Caution against too flagrant abuse of the court rules, however, is interposed in the instant case by the court's warning that "at the same time we do not feel that the implication should be drawn from this opinion that the filing of the praecipe and the rules [of the Supreme Court] referred to in this opinion can be disregarded with impunity." 303 Ill. App. 310 at 320, 23 N.E. (2d) 793 at 798.

1 25 N.E. (2d) 905 (Ill. App., 1940).

2 "Regarding the bill then as a mere bill of review, it is clearly insufficient. The rule in this State is too well settled to admit of discussion, that it is indispensably necessary to the sufficiency of such a bill that a copy of the bill, answer, replication, and decree in the proceeding sought to be reviewed should be given. A synopsis of those papers, which is all that appears in the bill in this case, is not sufficient." Cox v. Lynn, 138 Ill. 195, 29 N.E. 857 (1891). See also Turner v. Berry, 8 Ill. 541 (1846); Gardner v. Emerson, 40 Ill. 296 (1866); Judson v. Stephens, 75 Ill. 255 (1874); Aholtz v. Durfee, 122 Ill. 286, 13 N.E. 645 (1887).

1 372 Ill. 114, 22 N.E. (2d) 941 (1939).

2 Ill. Rev. Stat. 1939, Ch. 110, § 162.

decree against the mortgage debtor before the property is sold in violation of Section 17[3] of the statute on mortgages. The Supreme Court dismissed this objection as being without merit in view of the fact that there was no unconditional decree issued before sale.

Before the code undoubtedly the defendant's counterclaim would have failed. The defendant might have recouped damages arising out of the same transaction on which the plaintiff's action is based,[4] as where the mortgagor of a purchase money mortgage, in a foreclosure proceeding, sets off damages resulting from mortgagee's fraudulent representations concerning the land,[5] or where the mortgagee fraudulently induces the mortgagor to give the notes and mortgage.[6] But the essential requirement that it "arise out of the same transaction" does not exist in the instant case.

The statute[7] provides a remedy by way of setoff, but it is definitely limited to claims arising out of a contract[8] and is never available to set off tort claims.[9] While equity follows the law and permits a setoff wherever it would be permitted if the action was at law, no broader relief is given under this remedy.[10]

By a cross-bill in equity, an equitable setoff may be pleaded where the claim is germane to the original bill,[11] but that remedy is available only where some special equity requires such relief.[12] The instant case presents no such special equity as would justify a court of equity in allowing the setoff.

Section 38 of our code clearly authorizes the counterclaim in the instant case. The only limitation mentioned in that section is that the defendant's claim be a cause of action in itself.[13] It need not arise out of the same transaction but may be wholly unrelated.[14] It need not be germane to the plaintiff's action but may be, as suggested by one writer, a setoff of damages for a tort against a suit for specific performance of a contract for the conveyance of land.[15]

In contrast, the New York courts have placed a more restrictive construction on the counterclaim provision[16] of their practice code. While

3 Ill. Rev. Stat. 1939, Ch. 95, § 17.

4 Keegan v. Kinnare, 123 Ill. 280, 14 N.E. 14 (1887); Burns v. Clark, 200 Ill. App. 277 (1916); Smith v. Gray, 316 Ill. 488, 147 N.E. 459 (1925).

5 Northern Trust Co. v. Sanford, 308 Ill. 381, 139 N.E. 603 (1923).

6 Dunlap v. Peirce, 336 Ill. 178, 168 N.E. 277 (1929).

7 Ill. Rev. Stat. 1939, Ch. 110, § 162.

8 Engstrom v. Olson, 248 Ill. App. 480 (1928); Cox v. Jordan, 86 Ill. 560 (1877).

9 Note 8, supra. 10 Smith v. Billings, 62 Ill. App. 77 (1895).

11 Gordon v. Johnson, 186 Ill. 18, 57 N.E. 790 (1900); Rhodes v. Ashurst, 176 Ill. 351, 52 N.E. 118 (1898); Derby v. Gage, 38 Ill. 27 (1865).

12 Citizen's Trust and Savings Bank v. Blair, 259 Ill. App. 294 (1930).

13 Hinton, Illinois Civil Practice Act, p. 138.

14 McCaskill, Illinois Civil Practice Act Annotated (1936), p. 90.

15 Hinton, Illinois Civil Practice Act, p. 141.

16 New York Civil Practice Act, § 266: "A counterclaim may be any cause of action in favor of the defendants or some of them against the plaintiffs or some of them, a person whom a plaintiff represents or a plaintiff and another person or persons alleged to be liable."

their decisions admit that the counterclaim is more than a setoff or recoupment and includes both,[17] and while they suggest that it should be liberally construed to avoid multiplicity of suits,[18] they have limited the right to use the counterclaim to claims arising out of,[19] or relevant to,[20] the same transaction, which, in addition, tend to diminish or defeat plaintiff's recovery.[21] So, as far as foreclosure suits are concerned, the mortgagor's counterclaims are limited to claims such as damages for fraud arising out of the note or mortgage transaction,[22] or damages for breach of covenant in the case of purchase money mortgages[23] and then only when a deficiency decree is sought.[24]

Obviously the conservative construction of the New York code was for the purpose of preventing the joining of such unrelated actions and counterclaims as might arise under our more liberally construed code. The authors of the Illinois Civil Practice Act recognized, however, that the counterbalancing of unrelated claims may at times be highly inconvenient, and sought to prevent any such impractical uses or abuses by providing that its use shall be subject to regulation by Supreme Court rules,[25] and by authorizing the courts, in their discretion, to order separate trials of such actions and counterclaims.[26] W. H. MAYNOR

NEW TRIAL—STATEMENT OF GROUNDS IN GENERAL—EFFECT OF FAILURE TO PRESENT MOTION FOR NEW TRIAL IN WRITING.—In the case of *Doellefield* v. *Travelers Insurance Company*,[1] the Appellate Court of the 2nd District of Illinois was called upon to interpret Section 68 of the Illinois Civil Practice Act[2] for the first time. On appeal by the plaintiff from an adverse judgment, the defendant contended that, as no written motion for a new trial, setting forth the grounds for new trial as provided in Section 68, had been made, any errors made by the trial court were not preserved for review. The Appellate Court held that inasmuch as the language of that section was identical with the provision for moving for a new trial under the former practice[3] it should be interpreted in the same manner as hereto-

17 Keon v. Saxton & Co., 257 N.Y. 412, 178 N.E. 679 (1931).

18 Zysman v. 147 and 149 West 57th Street Corp., 223 N.Y.S. 62 (1927).

19 Merry Realty Co., Inc. v. Shamokin & Hollis R.E. Co., Inc., 174 N.Y.S. 627 (1919); Landes v. Landes, 277 N.Y.S. 886 (1935).

20 Comerford v. Sands, 199 N.Y.S. 2 (1923); Terzi v. Savini, 206 N.Y.S. 967 (1924).

21 Landes v. Landes, 277 N.Y.S. 886 (1935).

22 Hall v. Grays, 238 N.Y.S. 67 (1929).

23 Merritt v. Gouley, 12 N.Y.S. 132 (1890).

24 Citizens Sav. Bk. v. 104 East 113 Street Corp., 285 N.Y.S. 271 (1936); Bogert v. Riordan, 245 N.Y.S. 140 (1930); Fout v. Wolfe, 245 N.Y.S. 505 (1930).

25 Ill. Rev. Stat. 1939, Ch. 110, § 162. 26 Ill. Rev. Stat. 1939, Ch. 110, § 168.

1 24 N.E. (2d) 904 (Ill. App., 1940). 2 Ill. Rev. Stat. 1939, Ch. 110, § 192.

3 Ill. Rev. Stat. 1931, Ch. 110, § 77: "If either party may wish to except to the verdict, or for other causes, to move for a new trial . . . he shall, before final judgment be entered, or during the term it is entered, by himself or counsel, file the points in writing, particularly specifying the grounds of such motion . . . . " Ill. Rev. Stat. 1939, Ch. 110, § 192: "If either party may wish to move for a new trial . . . he shall, before final judgment be entered, or within 10 days thereafter, or within such time as the court may allow on motion made within such 10 days,

fore. In *People* v. *Cohen*,[4] the Supreme Court had held, under the former practice, that the requirement for a written motion was directory and not mandatory.[5]

In view of this decision, it seems clear that the failure to present a written motion for a new trial under the code will not be fatal on review, and the party may avail himself of any cause for a new trial that may appear on the record,[6] whether it be the admission or rejection of evidence, the giving or refusing of instructions, the lack of sufficient evidence or any other error occurring on the trial, if in addition, the requirements of Section 68 are waived by the failure of counsel or the court to present an objection. However, if the motion is presented in writing and certain grounds are specified to justify the request, the party filing such written motion will be deemed to have waived all causes for a new trial not set forth in his written grounds. G. R. KEEN

PLEADING—NECESSITY OF ALLEGING AFFIRMATIVE DEFENSES IN ANSWER—APPLICATION OF SECTION 43(4) OF THE ILLINOIS CIVIL PRACTICE ACT.—In the recent case of *Parker* v. *Dameika*,[1] the Illinois Supreme Court had occasion to interpret Section 43(4) of the Civil Practice Act.[2] The plaintiff sued to secure specific performance of an option contract for the transfer of two specific tracts of land. The defendants filed an answer alleging fraud as a defense but failed to prove the same. The lower court, over objection, permitted introduction by the defendants of evidence that they had entered into the option contract through ignorance and mistake, although there were no specific facts set forth nor reference to that defense in the answer. On appeal from a decree denying such specific performance on the ground that the option contract was not "entered into understandingly," the Supreme Court reversed the decree, holding that the lower court had erred in permitting the defendants to avail themselves of such defense without pleading the same as an affirmative defense as required by section 43(4) of the Illinois Civil Practice Act.

The problem of the manner of pleading ignorance, mistake, and matters closely related thereto has had a gradual and two-fold development

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by himself or counsel, file the points in writing, particularly specifying the grounds of such motion . . . ."

4 352 Ill. 380, 185 N.E. 608, 88 A.L.R. 481 (1933). See also Yarber v. Chicago & Alton Railway Co., 235 Ill. 589, 85 N.E. 928 (1908); Anderson v. Karstens, 297 Ill. 76, 130 N.E. 338 (1921); Bromley v. People, 150 Ill. 297, 37 N.E. 209 (1894).

5 People v. Cohen, 352 Ill. 380, 185 N.E. 608, 88 A.L.R. 481 (1933): "This court has held that that section [Ill. Rev. Stat. 1931, Ch. 110, § 77] is directory and not mandatory, and that, if the party moving for a new trial makes either a written or verbal motion for a new trial without stating in writing the grounds therefor, and without objection, the requirement of the statute is waived."

6 Anderson v. Karstens, 297 Ill. 76, 130 N.E. 338 (1921).

1 372 Ill. 235, 23 N.E. (2d) 52 (1939).

2 "The facts constituting any affirmative defense, such as . . . that an instrument or transaction is either void or voidable in point of law, as . . . any ground or defense, whether affirmative or not, which if not expressly stated in the pleading, would be likely to take the opposite party by surprise, must be plainly set forth in the answer or reply." Ill. Rev. Stat. 1939, Ch. 110, § 167.

now apparently culminating in the present view requiring the specific pleading of such matters, so as to give adequate notice thereof to the opposite party, whether the form of action be legal or equitable. The former practice in equity cases may be separated into two divisions: (1) where the matter was used purely defensively so as to defeat the cause of action brought,[3] and (2) where it was used both defensively and as a basis for securing affirmative relief for the defendant. In the former, the matter was properly incorporated in the answer of the defendant, though the facts relied on had to clearly appear therein.[4] In the latter, it was soon determined that a mere defensive answer was insufficient,[5] and hence the use of both the answer and cross-bill became necessary to secure such affirmative relief.[6] To prevent unnecessary pleading, there was also developed the subordinate rule that a cross-bill was improper and superfluous when the rights of the defendant could be adequately protected by the court on the hearing of the original bill.[7] These standards of the old equity practice, with the insistence on informative pleadings, have been definitely carried over into the present practice in Illinois today by the instant case.

Some difficulty is presented when the problem arises in an action as at law. In ancient common law days the defensive practice involved the use of the specific traverse, which required the pleader to single out and deny but one of the facts alleged in the declaration, from which practice developed the idea that the purpose of pleading was that of issue-formulation. Thus, in assumpsit it was usual to traverse in particular the existence of the contract itself, the consideration for the contract, or the plaintiff's performance of any conditions precedent or the breach thereof.[8] Consid-

[3] Gronowski v. Jozefowicz, 291 Ill. 266, 126 N.E. 108 (1920).

[4] Even in the early chancery practice the pleadings had to be informative in nature, rather than issue-formulating, as was the common law theory. As a consequence before a party could take advantage of any defense, such defense had to be specifically and clearly pleaded. See Jewett v. Sweet, 178 Ill. 96, 52 N.E. 962 (1899); Dorn v. Geuder, 171 Ill. 362, 49 N.E. 492 (1898); Linder v. Barnett, 318 Ill. 259, 149 N.E. 239 (1925); Mitchell v. Clem, 295 Ill. 150, 128 N.E. 815 (1920).

[5] Tarleton v. Vietes, 1 Gilm. (Ill.) 470 (1844); Edwards v. Helm, 4 Scam. (Ill.) 143 (1842).

[6] Thus it was necessary that a cross-bill be filed to establish an agreement or conveyance which the original bill seeks to set aside, Carnochan & Mitchel v. Christie, 11 Wheat. (U. S.) 446, 6 L. Ed. 516 (1826); or to compel the cancellation or surrender of a contract which the original bill seeks to specifically enforce, Jones v. Smith, 14 Ill. 229 (1852); Hurd v. Case, 32 Ill. 45 (1863); or on a bill to foreclose a mortgage, to compel the complainant to litigate an adverse title, Parlin & Orendorff Co. v. Galloway, 95 Ill. App. 60 (1901). For a further discussion of the function and requirements of the equitable cross-bill, see Puterbaugh, Chancery Pleading and Practice (7th ed., 1930), I, p. 549 et seq.

[7] Akin v. Cassiday, 105 Ill. 22 (1882), wherein it was held that a decree of the court declaring a mortgage void would accomplish the same result as that asked in the cross-bill, declaring to have the mortgage and notes cancelled.

[8] Chitty, Pleading, I, p. 473 et seq. At this stage, the defendant who had placed his agreement in writing could scarcely deny its existence, even though mistakenly made; hence he was obligated to file a separate suit in equity to secure its cancellation before having any defense to the suit at law.

erations of convenience however prompted a modification of the pristine stringency of this rule, with the result that the defendant was at first permitted, and afterwards required, to plead, not to any single averment of the declaration but to the plaintiff's case as a whole, using a plea known as the general issue for this purpose.[9] As a direct result, the issues formed in any given case included every element of the plaintiff's cause of action, and he was therefore poorly informed as to the defenses he might have had to meet.[10]

Becoming increasingly aware of the hardships which had arisen by such unwarranted extension of the general issue, the courts of England promulgated the Hilary Rules,[11] the principal purpose of which was to limit the scope of the general issue and to compel the defendant either to deny particular parts of the declaration or to plead specially every matter of defense not actually involved in a traverse. Thus Chitty says, "In every species of assumpsit, all matters in confession and avoidance, . . . including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law, on the ground of fraud . . . or otherwise, shall be specially pleaded."[12] This step not only restored the original nature of the specific traverse but also tended to make common law pleading informative as well as issue-forming. Such was the state of the law at the time of the adoption of the code procedure in the various states.

The code ideal was, of course, to make pleading into a device to inform the parties and the court as to the cause of action relied on and the defenses thereto, rather than to simplify and isolate the issues. As a consequence, the enacted codes usually provided that the defendant's answer should contain a statement of any new matter in ordinary and concise language, the answer by way of denial usually being limited to cases where a specific traverse would have been proper in the later common

[9] Chitty, Pleading, I, p. 476 et seq; Puterbaugh, Common Law Pleading and Practice (10th Ed., Jones, 1926), I, p. 238 et seq.

[10] As the use of the general issue became more prevalent, the courts permitted anomalous extensions of this peculiar form of traverse. It became the established practice to admit under the general issue defenses which were not, as in the original usage, merely negative of the plaintiff's case, but matters properly pleaded by way of confession and avoidance, such as infancy, release, accord and satisfaction, and former recovery. Among the very few exceptions to this rule was the defense of the statute of limitations and discharge in bankruptcy, both of which required special pleading and were not provable under the general issue. See Benes v. Bankers' Life Insurance Co., 282 Ill. 236, 118 N.E. 443 (1918).

[11] Chitty, Pleading, I, p. 733 and p. 738 et seq. For a discussion of the general effect and application of the rules, see W. S. Holdsworth, "The New Rules of the Hilary Term," 1 Cambridge Law Journal 261.

[12] Chitty, Pleading, I, p. 517. Some examples included by the author which required special pleading are as follows: Infancy, coverture, release, payment, performance, want of consideration, illegality of consideration, drawing, endorsing, and accepting bills and notes by way of accommodation, mutual credit, unseaworthiness, misrepresentation, concealment and deviation. An example showing the application of the rule may be found in Hayselden v. Staff, 5 Ad. & E. 153, 111 Eng. Rep. 1124 (1836).

law system.[13] The problem became a little complicated, however, by the other code provisions which purported to abolish the distinctions between actions of law and also between law and equity.[14] In some states, the courts have construed such provisions as producing an actual consolidation, while others have treated the blending as not complete, retaining basically the older rules in the various forms of actions. New York, typical of the first group, has adopted the view that the change has given the defendant the right to interpose his defense in any case, whether originally legal or equitable, even though formerly resort to a court of equity would have been necessary. Thus the New York Court early held that the defendant was allowed to show mistake in a deed given by the plaintiff's grantors to defendant's landlord as a defense without the use of a counterclaim.[15] This practice was contrary to the older chancery practice which has required the prayer for reformation or rescission of the contract to be set up in a cross-bill or made the basis of a separate suit in equity. In contrast is the view of the other group of states, illustrated by *Lombard* v. *Cowham*,[16] in which a Wisconsin court held that an equitable right to establish and enforce a constructive trust would be denied efficacy as a defense to a legal action until the existence of the trust had been established in a separate equitable action or had been introduced by a counter-claim fashioned along the lines of an old cross-bill in equity. Similarly, in *Gunn* v. *Madigan*[17] mistake such as would give an equitable right to reformation was treated as still being an equitable cross-action and therefore pleadable and triable as such. Illinois seems to be aligned with this latter group.[18]

What the status of the law in Illinois today would be in regard to pleading mistake as a legal or equitable defense is a matter of some conjecture. The modern thought is that the purpose of pleading is informational as well as issue formulating, as is evidenced by Section 40 of the Illinois Civil Practice Act,[19] especially clause 1 which abolishes the use of the general issue and replaces it with specific admissions or denials, and clause 3 which states that a denial must not be evasive. This trend is further evidenced by section 43 of the Civil Practice Act,[20] particularly

[13] New York Code of Procedure of 1849, § 149, Clause 2. See also McKyring v. Bull, 16 N. Y. 297 (1857).

[14] N. Y. Laws 1848, Ch. 379, § 62, amplified in Illinois by Ill. Rev. Stat. 1939, Ch. 110, § 155.

[15] Crary v. Goodman, 12 N. Y. 266 (1855). See also Susquehanna Steamship Co. v. A. O. Andersen Co., 239 N. Y. 285, 146 N.E. 381 (1925), in which case it was held that facts entitling a defendant to reformation of an instrument could be pleaded as a defense to an action at law and no counterclaim for reformation was needed. In each case, however, the facts regarding the mistake affirmatively appeared in the defendant's answer.

[16] 34 Wis. 486 (1874).

[17] 28 Wis. 158 (1871). For a comprehensive discussion of the problem see Hinton, "Equitable Defenses Under Modern Codes," 18 Mich. L. Rev. 717; Cook, "Equitable Defenses," 32 Yale L. J. 645.

[18] See Hinton, "Pleading Under the Illinois Civil Practice Act," 1 U. of Chi. L. Rev. 591; note, 11 Corn. L. Q. 396.

[19] Ill. Rev. Stat. 1939, Ch. 110, § 164.

[20] Ill. Rev. Stat. 1939, Ch. 110, § 167.

clause 4, which in essence requires that every affirmative defense be specifically pleaded and set forth in the answer or reply. The phraseology of the section is broad and even requires the special pleading of defenses which were technically not affirmative defenses under the earlier systems. If there is any doubt as to the right of a defendant to offer a "surprise" defense which could have been properly raised under a denial before the code, it has been removed by the "catch all" part of clause 4 requiring specific pleading of any defense, whether affirmative or not, which, if not expressly stated in the pleading, would be likely to surprise the opposite party. It can be seen, therefore, that the procedure to be followed in Illinois, regarding the pleading of such defenses as mistake, can be predicted with comparative certainty. Firstly, in all actions intrinsically legal in nature, it is necessary that affirmative pleading rather than the general denial be used in the answer, as the defense would tend to surprise the opposite party. If affirmative relief is also sought in such action, an equitable counter-claim is necessary. If the action is brought as an equitable one, then the defendant should proceed as before by using an affirmative answer whenever the matter relied on is purely defensive in nature, pleading each such defense with certainty and clarity, whether affirmative or not, so as not to surprise. If, on the other hand, affirmative relief is required such as the cancellation of a note or the declaration of a trust, the pleader should again use a counter-claim, the code equivalent of the former cross-bill in equity. I. BIRNBAUM