

LEGISLATION AND ADMINISTRATION

THE NEW RULES OF THE ILLINOIS SUPREME COURT UNDER THE ILLINOIS CIVIL PRACTICE ACT*

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THE new rules of the Illinois Supreme Court, seventy-one in number, were adopted in response to a general rule-making power granted the Court in the new Illinois Civil Practice Act.¹ The new rules, together with the first ninety-four sections of the Civil Practice Act, now form the basis of pleading and practice in the State.² This system of legislative statute and court rule permits the legislature to control

* The new rules were suggested by a committee representing the Illinois State Bar Association, the Chicago Bar Association, the Illinois State Judicial Advisory Council, and the Cook County Judicial Advisory Council, and consisted of Hon. Floyd E. Thompson, Chairman, Hon. John M. O'Connor, Hon. Denis E. Sullivan, Hon. Harry Fisher, Mr. June Smith, Mr. John D. Black, Mr. Clarence W. Heyl, Mr. Harry N. Gottlieb, Mr. Logan Hay, Mr. Isaac S. Rothschild, Mr. Charles E. Feirich, and Mr. Roy C. Martin. This committee was assisted by Messrs. Walter F. Dodd and Albert E. Jenner, Jr., who drafted the new rules, and by Mr. Robert W. Millar, who drafted the new rules of the Circuit and Superior Courts of Cook County [22 Ill. Bar Jour. 129 (1934)].

The draft submitted by the Committee was given much study by the Justices of the Supreme Court, consisting of the Hon. Warren H. Orr, Chief Justice, and the Hon. Clyde E. Stone, Hon. Frederic R. DeYoung, Hon. Norman L. Jones, Hon. Lott R. Herrick, Hon. Paul Farthing, and the Hon. Elwyn R. Shaw, Justices. On December 22, 1933, the draft of the rules, as revised by the Court, was adopted, to become effective January 1, 1934.

For a full print of the rules with historical introduction and cross reference tables to the Civil Practice Act, see 22 Ill. Bar Jour. pp. 129-182 (1934).

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¹ Ill. Cahill's Rev. Stat. (1933), c. 110, §§ 130-131, 207. For a review of the Civil Practice Act as proposed see Jenner and Schaefer, 1 Univ. Chi. L. Rev. 49 (1933); 19 Am. Bar Assoc. Jour. 538 (1933). For a review of the Civil Practice Act as enacted see McCaskill, Jenner and Schaefer, Illinois Civil Practice Act, Annotated (1933); Edmunds, Civil Practice Act Forms (1933); Magill, The New Illinois Civil Practice Act: Pleading, 1 Univ. Chi. L. Rev. 171 (1933); Sunderland, The Provisions Relating to Trial Practice in the New Illinois Civil Practice Act, 1 Univ. Chi. L. Rev. 188 (1933); Ill. Cahill's Rev. Stat. (1933), 2143; Clark, The New Illinois Civil Practice Act, 1 Univ. Chi. L. Rev. 209 (1933); Millar, Pleading under the Illinois Civil Practice Act, 28 Ill. L. Rev. 460 (1934); Fisher, Effect of the Civil Practice Act upon Instructing Juries in Criminal Cases, 28 Ill. L. Rev. 451 (1934). For a summary of the history of the Act see Hon. Floyd E. Thompson, Introduction to Illinois Civil Practice Act, Annotated (1933).

² A system of practice and pleading regulated in part by statute and in part by court rule, while out of the ordinary in American procedure, does not have its inception in Illinois, having been heretofore employed in the Connecticut act of 1870, the New Jersey act of 1912, and the New York act of 1921. See Sunderland, The Provisions Relating to Trial Practice in the New Illinois Civil Practice Act, 1 Univ. Chi. L. Rev. 188 (1933).

the more permanent, fundamental and major portions of practice such as pleading, parties, general trial practice, summary judgment, discovery and method of review, leaving to the court the task of supplying the detail of the working machinery, and the administrative features. This division of procedural regulation permits a permanency as to more fundamental matters combined with a flexibility as to mechanics admitting of ready change as experience should dictate. The line of demarcation suggested has not been strictly adhered to by either body, however. But this may well be expected since the line between fundamental matters of practice and pleading and administrative detail is in itself often difficult to point out. The task of the court in this respect was further complicated by the fact that its rules had to cover matters of procedure not regulated by the Civil Practice Act—review of criminal cases, for example. Furthermore, the court found it necessary to supply certain deficiencies appearing in the Act revealed by close study following its passage.³

The new rules may be said to fall into six well defined groups:

(a) Those dealing with the application of the new practice to pending suits, and to statutory proceedings subject to special regulation by the legislature;

(b) Those dealing with matters purely of general trial court practice;

(c) those dealing with pleading;

(d) those dealing with special practice matters such as summary judgments and discovery before trial;

(e) those dealing with review of cases subject to the Civil Practice Act;

(f) and those dealing with review of cases not subject to the Civil Practice Act.

As near as possible the rules will be discussed in the order outlined.⁴

PENDING PROCEEDINGS AND SPECIAL STATUTORY ACTIONS

To the practicing lawyer the most important of the new rules is the first. It deals with the effect of the Civil Practice Act on pending litiga-

³ After the adoption of the Civil Practice Act, committees of the Illinois and Chicago State Bar Association continued their study of the Act with a view to recommending rules to the Supreme Court, and of supplying the bar of the state with a collection of precedents and source materials. 22 Ill. Bar Jour. 129 (1934).

⁴ Some of the rules are not discussed. A good many of them are merely adaptations, with but slight change in a few instances, of rules appearing in the schedule of rules attached to the Civil Practice Act (§§ 95-135). Those rules have already received widespread comment by legal scholars, and the present authors feel that they could add nothing by further elaboration. See citations to a series of learned and instructive articles in this and other reviews by Hon. Harry M. Fisher, and by Professors Charles E. Clark, Edson R. Sunderland, Roswell Magill, and Robert W. Millar, *supra* note 1.

Rules which may be disposed of in this summary manner are: 3-8, 13-15, 18, 20, 23-24, 33-34, 37-47, 49, 51-59.

tion, as to which problem, prior to the adoption of rule, nearly every attorney in the state had a different opinion. For each version advocated there was some basis in the statute, and in the existing case law.⁵

Section 94 of the Act repealed the former Practice Act⁶ and the bulk of the former Chancery Act.⁷ A great mass of litigation in all stages, filed and conducted under the former practice, was pending at the time the Act came into effect.⁸ The only provision in the new Act indicating how this litigation was to be handled was a saving clause in section 94 providing that "Nothing in this provision for repeal shall impair or affect any action or proceeding commenced before this Act shall have taken effect." Practically identical language had been construed in four cases decided by the Supreme Court of Illinois. Two early cases emphatically held that under such language pending cases, regardless of their stage, should proceed under the new law,⁹ and two later cases just as emphatically held that such a saving clause, if it was to be given any meaning, must operate to exclude pending suits from the operation of the new law.¹⁰

The rule adopted by the court uses the various distinct stages through which an action ordinarily passes—service of process, appearance, and settlement of the pleadings as the basis for determining whether the old or new law applies. If the cause has entered one of these stages under the old law all steps necessary to complete that stage of the cause are to be performed under that law, and upon completion of that stage the cause proceeds under the new law.

The first sentence of the rule controls the matter of review. If a judgment, decree, or order was entered by a trial court, prior to January 1, 1934, the review thereof is to proceed under the former practice, and the parties are to employ either the old method of statutory appeal or the common-law writ of error as modified by the Practice Act of 1907.¹¹ Under this plan the accrued right to a writ of error is preserved,¹² and the provision of Section 94 that no action should be impaired or affected is ex-

⁵ For a detailed discussion of the problem prior to the adoption of rule 1 of the Supreme Court, see McCaskill, Jenner & Schaefer, *Illinois Civil Practice Act Annotated* (1933), 344-351.

⁶ Ill. Cahill's Rev. Stat. (1933), c. 110, appendix.

⁷ Ill. Cahill's Rev. Stat. (1933), c. 22, appendix.

⁸ January 1, 1934. This is also the effective date of the Supreme Court Rules.

⁹ *Farmer v. People*, 77 Ill. 322, 324 (1875); *Hyslop v. Finch*, 99 Ill. 171, 181 (1881).

¹⁰ *Dobbins v. First National Bank*, 112 Ill. 553 (1884); *Ryan v. Allen*, 312 Ill. 250, 143 N.E. 852 (1924); *George v. George*, 250 Ill. 251, 95 N.E. 167 (1911).

¹¹ Ill. Cahill's Rev. Stat. (1933), c. 110, appendix.

¹² *George v. George*, 250 Ill. 251, 95 N.E. 167 (1911); *Robinson v. Kraft*, 154 Ill. App. 213 (1910); *Ryan v. Supreme Council*, 146 Ill. App. 384 (1909); *Mason v. Hooper*, 166 Ill. App. 537 (1911).

pressly carried into effect. Furthermore, a mere checking of a calendar with reference to the time the judgment, order or decree is entered settles definitely the procedure to be followed.

In its new Rule 28 the court took a further step to make the hazards of transition with reference to review less burdensome or hazardous. In certain special statutory proceedings not controlled by the Civil Practice Act the language employed in such statutes with reference to the method of review is somewhat uncertain.¹³ As to actions clearly within the Civil Practice Act there is no question since the new single form of review by "notice of appeal" is to be employed to the exclusion of the former appeal and old writ of error.¹⁴ The new rule covers all cases, however, and provides that if a writ of error is employed where appeal would have been the proper method, or vice versa, the error will not be ground for dismissal if the issues of the case sufficiently appear upon the record before the court of review. This is an adaptation of a similar rule in the Supreme Court of the United States, and is an extension of a practice already enforced by the Illinois Court prior to the adoption of the Civil Practice Act.¹⁵ The rule will not, however, permit parties indiscriminately to disregard the affirmative provisions of the Civil Practice Act with respect to review nor does it supersede the provision of Section 74 of the Act which combines writ of error and appeal into a single form of review to be employed in all cases coming under the Act. Furthermore, it does not relieve the appellant and appellee of the necessity of meeting the time limitations with respect to review contained in the new Act,¹⁶ and in the various statutory proceedings.¹⁷

Rule 28 also settles the problem of the practice to be followed in the Supreme and Appellate Courts with reference to criminal cases and the few civil cases not covered by the new Act,¹⁸ by providing that the Act

¹³ For a detailed analysis of these statutes and the method of review to be employed see: McCaskill, Jenner & Schaefer, *Illinois Civil Practice Act Annotated* (1933), 217-253.

¹⁴ For a general analysis of the new form of review, see *Illinois Civil Practice Act, Annotated* (1933), 173-192; and Jenner and Schaefer, *op. cit. supra* note 1.

¹⁵ Under the former practice if a writ of error was erroneously employed, and if the defendant joined in error, the court would consider the proceeding as though it had been properly brought by appeal, provided it had jurisdiction of the subject-matter. *Mason v. Browner*, 303 Ill. 511, 135 N.E. 735 (1922). The same was true where an appeal was incorrectly employed and the appellee did not move to dismiss but joined in the appeal. *Sullivan v. People*, 224 Ill. 468, 79 N.E. 695 (1906).

¹⁶ If writ of error be improvidently sought where notice of appeal under the Civil Practice Act would be the proper procedure—it must appear that the writ was sued out within the 90 day period prescribed in § 76.

¹⁷ *Illinois Civil Practice Act, Annotated* (1933), 277-290.

¹⁸ *Illinois Civil Practice Act, Annotated* (1933), 237-254.

and the new rules referring to "notice of appeal," "appellant" and "appellee" should, to the extent applicable, include "writ of error," "plaintiff in error" and "defendant in error" in criminal cases and in civil cases where writ of error is preserved as a method of review. This provision will make certain that the rules dealing with briefs, docketing, motions, leave to appeal to the Supreme Court, and other general matters of review will apply to all cases.

The second sentence of Rule 1 deals with the matter of settling pleadings and provides that in an action in which summons has issued prior to January 1, 1934, but in which there are no pleadings on file on that date, all pleadings are to be controlled by the new law. If on that date a pleading is on file the subsequent pleadings must conform to the former practice.

Continuing the plan of fixing the matter of transition with reference to the step contemplated, the rule provides that all process (which includes service by publication begun on or after January 1, 1934) issued on or after January 1, 1934, is to be served under the provisions of the Civil Practice Act. This will include alias writs issued on or after such date. All appearances made on or after January 1, 1934, are also to be in accordance with the new law. The trial of all cases, whether it be the initial one or a new trial, regardless of the law under which the pleadings are made up, is to be controlled by the Civil Practice Act,¹⁹ provided such trial had not commenced prior to January 1, 1934. The special trial practice provisions such as summary judgments and discovery before trial are included in the general provision as to trial practice. Consequently, even as to pending cases, there will be a measure of advance discovery not heretofore possible. This portion of the new rule will permit the trial court to apply uniform trial practice rules to all cases.

The last sentence of Rule 1 gives the parties the right, by stipulation, to make the provisions of the Civil Practice Act applicable regardless of the stage of the cause. This will authorize the parties to make up the pleadings under the Civil Practice Act, regardless of the fact that on January 1, 1934, they had been fully or partially completed under the Practice Act of 1907. The sentence also gives the trial court the power, upon motion and hearing to require, at any stage of the case, that the Civil Practice Act apply. In passing upon such motion, the trial court must comply with the requirement of Section 94 that the action or proceeding commenced before the Act shall have taken effect be not adversely impaired or affected. The sentence does not give either the trial court or the parties the right to apply the practice in force prior to January 1, 1934, to causes which by Rule 1, or by the Civil Practice Act, are made subject to the new Act.

¹⁹ §§ 48-73.

It should perhaps be pointed out here that in another respect the new rules control the question as to the law to be applied to pending proceedings. The new rules are adopted in lieu of the schedule of rules in Article IX of the Act, and in lieu of the former rules of the Supreme Court. Consequently, the schedule of Civil Practice Act rules are replaced and suspended, and the Supreme Court rules take their place.

Proceedings regulated by special statute. Section 1 and sub-section 2 of Section 31 provide that the Act should not apply to certain actions specially controlled by statute as named therein, or to "other actions in which the procedure is regulated by special statutes." None of the actions named, and none of those included in the general clause were completely regulated by special statute, and unless supported by some general procedural statute would have been impossible to administer. Given a literal interpretation, and this was entirely possible as the section was framed, the language in Section 1 would have brought about the indicated hiatus and absurdity.²⁰

Rule two of the Supreme Court supplements Section 1 and sub-section (2) of Section 31 of the Act, and provides that the separate statutes referred to therein should control, to the extent to which they regulate procedure in such actions, but that the Civil Practice Act should apply to such actions as to all matters which the special statutes failed to regulate. Consequently, the possible deficiency which might have existed has been remedied.

TRIAL COURT PRACTICE

The rules of the Civil Practice Act dealing with general matters of practice such as the form of papers,²¹ the time of filing complaints,²² summons,²³ alias writs,²⁴ serving papers,²⁵ appearances—answers—motions,²⁶ continuances,²⁷ affidavits in summary judgments,²⁸ admissions from adverse parties,²⁹ dockets,³⁰ and calendars,³¹ were adopted by the court either without change or with such slight change as not to require comment.

²⁰ Illinois Civil Practice Act, Annotated (1933), 1-11.

²¹ C. P. A. § 97, rule 3—now rule 6 of the Supreme Court.

²² C. P. A. § 99 (1), (7), rule 5 (1), (7)—now rule 3 of the Supreme Court.

²³ C. P. A. § 95, rule 1—now rule 4 of the Supreme Court.

²⁴ C. P. A. § 96, rule 2—now rule 5 of the Supreme Court.

²⁵ C. P. A. § 98, rule 4—now rule 7 of the Supreme Court.

²⁶ C. P. A. § 99 (2-6, 8), rule 5 (2-6, 8)—now rule 8 of the Supreme Court.

²⁷ C. P. A. § 101, rule 7—now rule 14 of the Supreme Court.

²⁸ C. P. A. § 102, rule 8—now rule 15 of the Supreme Court.

²⁹ C. P. A. § 104, rule 10—now rule 18 of the Supreme Court.

³⁰ C. P. A. § 107 (1-2), rule 13 (1-2)—now rule 23 of the Supreme Court with subsection (3) of the old section and rule deleted.

³¹ C. P. A. § 108, rule 14—now rule 24 of the Supreme Court.

Order of Proceeding in Will Contests. Perhaps the change in trial practice of greatest interest to Illinois lawyers is that contained in Rule 25 which deals with the order of proceeding in will contests, and which applies to all such cases, the trial of which is had after January 1, 1934, regardless of when suit was filed, or the law under which the pleadings were settled.

In will contest cases, although the contestant filed the bill in chancery attacking the testament, the proponent was required to open and close. The burden of proof rested with him. The rule as established in the *Donovan*³² case was that the burden of proof resting upon the proponent included three matters, (1) that he proceed in the first instance, (2) that he establish the prima facie validity of the will, and (3) that he offer in chief not only evidence making a *prima facie* case, but all other evidence relating to the issue of testamentary capacity.

The new rule reverses the order of putting in proof, and requires the contestant in the first instance to put in his case in chief. The proponent is then to proceed with his case. This change in practice will not only tend to reduce the number of will contests, but will also shorten them considerably. The proponent, instead of proceeding in the dark, will hereafter be able definitely to shape his evidence so as to meet only the issues raised by the contestant, and the judge and jury will throughout the trial have a much clearer conception of the exact issues involved. This change in the order of putting in evidence will not alter the burden of proof. The proponent will continue to be required to establish a prima facie case as to the validity of the will, and the testamentary capacity of the testator. Rule 25 merely eliminates the first feature of the former "burden of proof" doctrine—that which required the proponent first to proceed with his case.

Opening Judgments by Confession. Rule 26 of the new rules sets up a uniform practice to be employed in opening judgments by confession.³³ The rule provides for three stages.

The first stage is a consideration by the trial judge of the motion of the defendant to open the judgment. This motion must be supported by affidavits of the nature prescribed for summary judgments.³⁴ This means that the affidavits must be made upon the personal knowledge of the affiants; that they set forth with particularity the facts upon which the defendant bases his motion, and his *prima facie* defense; that they have attached thereto sworn or certified copies of all papers upon which defendant relies; that they consist of such facts as would be admissible in evidence; and that they affirmatively show that the affiant, if sworn as a

³² *Donovan v. St. Joseph's Home*, 295 Ill. 125, 132, 129 N.E. 1 (1920).

³³ Rule 26 is modeled after rule 47 of the Circuit and Superior Court of Cook County.

³⁴ Supreme Court Rule 15 (which is § 102 of the Civil Practice Act unchanged).

witness, can testify competently thereto. If all the facts to be shown are not within the personal knowledge of one person, two or more affidavits are to be used.³⁵

The only question to be considered upon the presentation of the motion and affidavits is as to whether a *prima facie* defense on the merits to all or a part of the plaintiff's demand has been shown. At this time the court considers only the motion and affidavit of the defendant. Nothing is presented by the plaintiff, except that plaintiff's counsel may argue orally as to whether or not the defendant's motion sets up a *prima facie* defense. If the court is of the opinion that the defendant has set up a *prima facie* defense, it must then set the motion down for a full hearing. Prior to the hearing on such motion, the plaintiff is given the right to file counter-affidavits. If at the full hearing it appears that the defendant has a defense on the merits, and if it appears that he has been diligent in presenting his motion, the court will then sustain the motion of the defendant either as to the whole or part of the judgment, depending upon the motion and supporting proof. The case is then to proceed to trial. The original judgment is to stand as security pending the trial, and execution and further proceedings are to be stayed until further order of the court. However, the stay of execution and the stay of further proceedings is applicable only to the portion of the original judgment as to which a defense has been shown. As already indicated, the operation of the judgment is to be stayed only from the time the court sustains the motion to open judgment, and not from the time of the preliminary hearing as to whether or not a *prima facie* defense has been shown on the part of the defendant. The parties are given the option to proceed to trial on the pleadings, affidavits, and motions on file at the time of the full hearing, or they may file further pleadings as they desire, on leave of court.

The rule gives the plaintiff the right to amend his complaint so as to include any claims which may have accrued subsequent to the entry of the original judgment. It is important to note that the rule limits the trial of such case (after the motion to open has been sustained) to the court without a jury, unless the defendant or plaintiff demand a jury and pay the proper fee to the clerk at the time of the entry of the order opening the judgment.

Instructions. No change was made with reference to instructions in civil cases, and the requirement of Section 67 of the Act that there be a single, written, narrative form of instruction, limited to the law of the case will continue to apply.

³⁵ For a discussion of this affidavit, see Illinois Civil Practice Act, Annotated (1933), 367-369.

Rule 27, however, regulates instructions in criminal cases. Shortly after the passage of the new Act it was discovered that by a series of coincidences revolving around a failure to provide specifically for instructions in criminal cases, such instructions were left dependent upon a provision in the Criminal Code³⁶ that criminal trials be conducted according to the common law. This permitted instructions in criminal cases to be oral, and did not bar the trial judge from commenting upon the evidence.³⁷ Rule 27 seeks to remedy the matter by providing that Section 67 of the new Act should apply in giving instructions in criminal cases. This restores the former rule so far as limiting the court to a written instruction upon the law only is concerned.

Motions under Section 48 of the Civil Practice Act. Section 48 of the Act provides for a preliminary motion to dismiss a suit on any of the grounds there enumerated. The question arose as to whether, on an attack by motion under section 48 upon the jurisdiction of the person of defendant, the pleading by defendant following an outright denial of his motion would constitute a waiver of the issue of jurisdiction, and preclude a subsequent raising of the question on review.³⁸ Under the former practice, if the defect appeared on the face of the record, the defendant had to elect to stand on his motion and suffer default in order to save the question for review. If he pleaded, he was deemed to have waived.³⁹ If the attack was based upon matters *dehors* the record, a pleading by defendant following a denial of his objection did not prevent the issue being raised on review.⁴⁰ That the rule should be the same in both cases is obvious. Rule 21 permits the issue of jurisdiction over the person to be raised on review where the defendant pleads upon denial of his motion, regardless of whether the basis of the motion is *dehors* the record or appears on its face. The rule is the one applied in the United States Supreme Court.⁴¹

³⁶ The old practice act applied to civil and criminal cases. It provided for written instructions limited to the law of the case. *People v. Kelly* 347 Ill. 221 (1932). The new act repealed the old one. It adopted the old practice with reference to instructions, except for slight alteration. However, the new act is limited in application to civil cases. This left criminal cases unprovided for, and made instructions in such cases dependent upon the common law, which permits instructions to be oral, and also permits the judge to comment upon the evidence. *People v. Kelly*, 347 Ill. 221, 179 N.E. 898 (1932).

³⁷ *People v. Kelly*, 347 Ill. 221, 179 N.E. 898 (1932). For an instructive and illuminating analysis of this problem under the Civil Practice Act by the trial judge in *People v. Kelly* see Hon. Harry Fisher, *Effect of the Civil Practice Act Upon Instructing Juries in Criminal Cases*, 28 Ill. L. Rev. 451 (1934).

³⁸ See Millar, *Pleading under the Illinois Civil Practice Act*, 28 Ill. L. Rev. 460, 473 (1934); comments therein made on this problem prompted rule 21.

³⁹ *Kinsella v. Cahn*, 185 Ill. 208, 53 N.E. 1119 (1906).

⁴⁰ *Grand Lodge v. Cramer*, 164 Ill. 9, 45 N.E. 165, 45 N.E. 165 (1896).

⁴¹ *Hitchman Co. v. Mitchell*, 245 U.S. 229, 62 L.Ed. 260, 385 S.Ct. 65 (1917).

Directed Verdicts. Section 68 of the Act sets up a practice which permits the trial court to reserve its decision on motions for directed verdicts made at the close of the testimony, and to submit the case to the jury under proper instructions. Thereafter, either before or after the verdict, but before judgment, the court is permitted again to consider the motion for directed verdict, and it may either enter a directed verdict or allow the jury verdict to stand.⁴² The rule applies only to motions to direct which are made at the close of all the testimony, and leaves unaffected the common law right of the defendant to move for a directed verdict at the close of the plaintiff's case,⁴³ and to secure a ruling thereon.

Under the language of Section 68 the trial court judge could not reconsider the motion if he failed formally to reserve his decision upon it before submitting the cause to the jury. Furthermore, the language of the section seemed to leave the court, on a failure to reserve, only with the alternative of granting a new trial should he decide subsequent to the verdict that a directed verdict should have been granted when the motion was made.⁴⁴

The first paragraph of rule 22 attempts a regulation of the matter by permitting the trial court to entertain a motion for judgment *non obstante veredicto* in all cases where, under the evidence in the case, it would have been the duty of the court to direct a verdict at the close of the evidence. Under this rule the failure of the court to reserve its decision on the motion to direct a verdict before submitting the case to the jury will not prevent the court from entering a proper judgment contrary to the verdict. While the rule does not allow the court to reconsider the previously overruled motion to direct a verdict it accomplishes the same purpose by permitting the court to consider a motion to enter a judgment *non obstante veredicto* upon which motion the court is to consider the question as to whether the case made would have withstood a motion to direct a verdict made at the close of all the evidence.

The second paragraph of Rule 22 extends to trial courts the power given

⁴² Rule 53 of the Circuit and Superior Court of Cook County, after which Supreme Court rule 22 was modeled. Rule 175 of the new rules of the Municipal Court contains a provision similar to that in § 68 of the Civil Practice Act except that the reservation of a decision upon the motion to direct is made mandatory.

⁴³ This is also true of Rule 175 of the Municipal Court of Chicago. It is submitted that any attempt to apply the mandatory provision of that rule to motions made at the close of plaintiff's case would involve a serious constitutional question.

⁴⁴ The provisions of rule 53 of the Circuit and Superior Court of Cook County, and of rule 175 of the Municipal Court of Chicago sought to meet the problem by having the clerk of court enter a formal order of reservation in all cases, whether the court reserved or not (Circuit and Superior Court); or to make a reservation mandatory (the Municipal Court). See discussion in Illinois Civil Practice Act, Annotated (1933), 166-170.

to the Appellate and Supreme Court by the last paragraph of sub-section 3b of Section 68 of the Act, to have a jury assess damages where, upon entry of a directed verdict after reservation of decision thereon before submission to the jury, or judgment notwithstanding verdict after verdict returned on failure to reserve a decision on the motion to direct, or where no motion to direct was made, it appears that the party in whose favor the directed verdict, or judgment notwithstanding the verdict is entered is entitled to recover damages and none have been assessed. The use of the term "the jury" in the latter portion of the sentence might, on first reading, seem to imply that the assessment of damages should be made by the jury hearing the issues on the trial. However, this strict interpretation seems not to have been intended, as it would greatly curtail the operation of the rule which is intended to give the trial court the same right granted to the reviewing courts.⁴⁵ The reviewing court is not so limited.

The third sentence of Rule 22 extends to paragraph 3c of Section 68 the power granted to the reviewing court under paragraph 3b, to order a partial remandment solely for the purpose of assessing damages where it appears that such damages were not assessed in the trial court.

Summary Judgments. With one exception, the new rules leave the summary judgment practice unaffected.⁴⁶

The exception is that of the practice to be employed in the use of summary judgments with reference to counter-claims.

Under language of Section 57 of the Act it appears that unless counter affidavits are filed by the defendant raising a question of fact, summary judgment must be entered for the plaintiff on his affidavit or affidavits. The defendant may not be able to meet the plaintiff's summary judgment claim, but he may, on the other hand, have a meritorious counter-claim which will offset the plaintiff's claim either in whole or in part, or might even entitle him to affirmative relief against the plaintiff. Such facts existing, it is unfair to permit plaintiff to secure judgment for the amount of his claim, and to issue execution thereon pending a trial on the defendant's counter-claim.

The court remedied the matter by providing in Rule 16 that the trial court may in such cases reserve action on the summary judgment application of the plaintiff, or enter summary judgment for the plaintiff, and stay execution until the issues on the counter-claim are disposed of.

⁴⁵ For a discussion of the constitutional issue involved in submitting the issue of damages to a jury other than the one hearing the trial itself see: Illinois Civil Practice Act, Annotated (1933), 167, 339-342.

⁴⁶ Rule 15, prescribing the content of affidavits in support of and in opposition to motions for summary judgment, is Section 102 of the Civil Practice Act, unchanged.

In order to prevent the use of unfounded counter-claims interposed merely for the purpose of forestalling judgment on plaintiff's affidavit, the rule requires that the defendant's counter-claim appear to be meritorious. In the language of the rule, the trial court is to determine "if there is merit in the defendant's counter-claim" before staying execution on plaintiff's claim. Of course, this determination cannot be made solely from a consideration of the answer in which the counter-claim is asserted. A disclosure of the evidence supporting the counter-claim is necessary. A counter-claim is accorded the same treatment as a defense, and in order to be entitled to any weight whatever the evidentiary facts upon which it is based must appear.⁴⁷

In permitting the entry of judgment for plaintiff in the face of a counter-claim, the rule adopts the English practice.⁴⁸ In New York summary judgment for plaintiff is denied until the counter-claim has been tried.⁴⁹

Until the adoption of Rule 16, doubt existed as to the propriety of a motion for summary judgment by a defendant upon a counter-claim. In the Civil Practice Act, reference was made only to a motion by "the plaintiff."⁵⁰ While it was suggested that the word "plaintiff" was used to indicate the party instituting an action, and therefore included a defendant advancing a counter-claim,⁵¹ it was not certain that this suggestion would be followed. Rule 16 removes the ambiguity and permits the defendant to employ the summary judgment procedure in prosecuting his counter-claim. In employing the summary judgment with his counter-claim the defendant is required to comply with Rule 15, just as is the plaintiff. Also, the provisions of Rule 16 with reference to a stay of execution on the summary judgment will apply, and if the plaintiff's claim appears meritorious, action on defendant's counter-claim may be abated pending a consideration of plaintiff's claim, or judgment may be entered and execution stayed.

Frequently, a defense will be interposed to a part or to the whole of plaintiff's demand, and in addition a counter-claim will be asserted by defendant. Rule 16 does not expressly refer to this situation. The mere presence of the counter-claim does not abrogate the ordinary rules governing

⁴⁷ This is the practice in New York and in England. See *Columbia Graphophone Co. v. Leviten*, 209 App. Div. 215 (1924), 204 N.Y.S. 421 (1924); *Smith v. Cranleigh, Inc.*, 224 App. Div. 376, 377, 231 N.Y.S. 201, 202 (1928); *Ball, Watmough, Clark and Hills, The Annual Practice* (1933), 199.

⁴⁸ *Sheppards & Co. v. Wilkinson*, 6 T. L. R. 13 (1889); *Slater v. Cathcart*, 8 T. L. R. 92 (1891), *Odgers, Pleading and Practice* (8th ed.), 62.

⁴⁹ *Dietz v. Glynne*, 221 App. Div. 329, 223 N.Y.S. 221 (1927); *Aetna Life Ins. Co. v. National Dry Dock and Repair Co.*, 230 App. Div. 486, 245 N.Y.S. 365, 366 (1930).

⁵⁰ § 57.

⁵¹ *Illinois Civil Practice Act, Annotated* (1933), 143.

the necessity of an affidavit of defense to plaintiff's application for summary judgment. If the defense presents an issue of fact, plaintiff's motion for summary judgment must be denied; if the defense does not controvert the facts which establish plaintiff's right to recover, it will be disregarded, and the counter-claim disposed of under Rule 16.

Discovery before Trial. Rule 17, concerning discovery of documents, somewhat narrows the scope of Section 103 of the Civil Practice Act.

Memoranda, reports or documents prepared in preparation for trial, as well as communications between attorney and client, are expressly declared to be beyond the purview of the rules and need not be included in the affidavit of documents. As these classes of documents, if listed, would have been privileged from production, the change is not drastic.⁵²

Section 103 of the Civil Practice Act was derived from English Order 31, Rule 12,⁵³ and like its source described the documents to be included in an affidavit of documents as those "relating" to the controversy. Rule 17 substitutes the word "material" for "relating." The precise significance of the change in language is not apparent. English authors in describing their discovery practice use the words "relating to" and "material" interchangeably.⁵⁴

Possibly documents "material" to the merits of a controversy are such documents as would be admissible in evidence. If so, Rule 17 will operate less broadly than does the similar English rule for, there, documents must be listed which may lead to a train of inquiry which "may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary."⁵⁵

Photographs, which were not mentioned in Section 103 of the Civil Practice Act, are by Rule 17 required to be listed. X-ray photographs are, of course, included.

Rule 18 omits the provision in Section 104 which authorized requests for admissions of the accuracy of synopses or abstracts of public records and confines the requests for admissions to copies of the public records. The burden of pointing out the inaccuracy of a synopsis or abstract might well have been so great as to have impaired the effectiveness of the Civil Practice Act provision.

Rule 19 provides that depositions of parties and witnesses may be taken before trial in the manner provided by law "for the taking of depositions in chancery cases." This departure from the language of Section 105 of the

⁵² Ball, Watmough, Clark & Hills, *The Annual Practice* (1933), 511 et seq.

⁵³ Ball, Watmough, Clark & Hills, *The Annual Practice* (1933), 534.

⁵⁴ Odgers, *Pleading and Practice* (8th ed.), 282.

⁵⁵ Brett, L. J., in *Compagnie Financiere v. Peruvian Guano Co.*, 11 Q. B. D. 55, 63 (1882).

Civil Practice Act makes it apparent that the rule is concerned with the right to take depositions. The chancery practice in taking depositions is to be followed regardless of the legal or equitable character of the action, and the right to take depositions is no longer dependent on the character of the action.

PLEADING

Regulation of Form. Both Rule 11 (equity) and Rule 12 (law) supplement Section 33 of the Act. That section deals with the form of pleading and requires each count to be separately stated, and also requires each paragraph of such count to contain a complete allegation. The Act was silent as to whether or not one count in a pleading could adopt by cross reference allegations of fact made in another count. The Act was equally silent as to whether adoption by cross reference from the answer to the complaint could be made. Rules 11 and 12 expressly permit adoption by reference in both law and equity cases, from count to count or pleading to pleading, by providing that if the facts are adequately stated in one part of a pleading or in one pleading, they need not be repeated elsewhere in such pleading or in other pleadings.

The right to cross refer, and the privilege granted of not requiring a re-pleading of facts already pleaded will not affect the definite use of the count system for setting up separate causes of action as required under Section 33 (2). Separate causes of action, and separate claims, with two exceptions hereinafter noted, must be set out in separate counts, complete in themselves. The only effect of the provisions of Rules 11 and 12 is to permit the parties to adopt in one count or portion of a pleading, facts pleaded in other counts or other pleadings; and the count after having adopted facts elsewhere pleaded must itself state a complete cause of action.

Rule 11 definitely sets at rest the question as to whether the Act introduces the count system into equity pleading by providing that "the equitable matters may be pleaded without being set forth in separate counts, and without the use of the word 'count'." However, the rule does require that where legal and equitable causes of action are set forth in one pleading the equitable matters are to be set forth separately from those at law.

Of the two exceptions to the requirement of Section 33 (2) that matters upon which a separate recovery might be had be stated in a separate count, the first is contained in Rule 12. The rule is a revision of sub-section (1) of Section 100 of the Act, and supersedes it. As was true of the sub-section which it replaces, the rule is limited to law cases, and permits different breaches of a contract, and different breaches of duty, growing

out of the same transaction, or based on the same set of facts, to be treated as a single claim or cause of action, to be set up in a single count.⁵⁶

Under this rule injury to person and property caused by a single act or series of related acts may be pleaded in one count. The second paragraph of the rule informs the pleader that where his separate causes of action or counter-claims at law arise out of the same transaction or the same set of facts, facts may first be set out, to be followed by a statement of the various legal grounds upon which he claims to be entitled to recover under such facts.

To a large extent this is an adaptation of the equity practice of pleading a set of facts which give rise to a plurality of claims. However, Rule 12 does not entirely capitulate to equity in that the causes of action claimed must arise out of a single transaction or its equivalent—a series of connected facts which may be included in the same transaction.⁵⁷ The rule is permissive only, and does not prevent the use of separate counts if the pleader so desires. Where the single fact statement is employed such single statements must support each cause of action claimed under it.

The second exception to Section 33 (2) is contained in Rules 10 and 11 which deal with equity pleading. It might have been said that under the somewhat mandatory requirement of Section 33 (2)—that of separately stating matters upon which separate recoveries might be had—it would not have been possible to permit legal matters incident to complete equitable relief to be stated in an equity action as heretofore.⁵⁸ This would have been intolerable, and would greatly have limited the jurisdiction of the equity courts. Apparently the court felt that the question should not be left in doubt, for Rule 11 expressly provides that "all matters which could have been united in a single equity case prior to January 1, 1934, may thereafter be regarded as a single cause of action, and may be pleaded without being set forth in separate counts, and without the use of the term 'count' in such pleading." The same rule is made to apply to answers and counterclaims.

In order to make certain that neither the Act nor the rule should permit the inclusion in a single equity case of law matters which could not have been so included prior to January 1, 1934, the second portion of the

⁵⁶ For a discussion of the relationship between §§ 33 (a) and 100 (1) see: Millar, Pleadings under the Illinois Civil Practice Act, 28 Ill. L. Rev. 460, 466 (1934); Illinois Civil Practice Act, Annotated (1933), 360-364.

⁵⁷ For a discussion suggesting a rule such as was adopted by the court, see Millar, Pleading under the Illinois Civil Practice Act, 28 Ill. L. Rev. 460, 466 (1934).

⁵⁸ An argument against that interpretation is contained in Civil Practice Act, Annotated (1933), 93-103.

rule provides that such matters must be set forth in separate counts when joined with an equity action in the same complaint under the authority granted in Section 44 (1).

Under the law existing prior to January 1, 1934, a pleader, in setting up his cause of action in equity, was not required to include in his pleading law matters incident to his equitable relief. He could make them the subject of separate causes of action. The right thus to bring separate causes of action is not impaired either by the Act or the rules.

Under the provision of Section 44 (1) permitting a pleader to join legal and equitable causes of action in one complaint, it seems clear that the pleader could at his option either have set up in separate counts in the same pleading containing his equitable causes of action, the legal matters which might properly be an incident to the equity action, and thus preserve the legal character of such matter, or he could have pleaded such matter in the equitable portion of his complaint, making them equitable, at least in the sense that the chancellor would hear them without a jury as an incident to granting complete equitable relief.⁵⁹

This placed the pleader in a position of being able by a mere mechanical shaping of his pleading to deprive the equity court of its ancient and well known right to grant complete relief, even though the matter which it might further administer be set up in the same pleading. In this way he could avoid the danger, too, of bringing separate actions. Under this practice the pleader, and not the chancellor would become the director of the suit. He might curry the favor of chancery to the extent to which it is to his advantage, but still, while seeking such favor, deny the chancellor jurisdiction over matters incident to complete equitable relief, and as to which he felt he might secure greater advantage at law through the jury.

Rule 10 seems designed to prevent this Jekyll and Hyde procedure. It provides that all matters which the equity court could have considered prior to January 1, 1934, whether directly or as an incident to matters before it, under its power to do complete justice between the parties, shall be heard and decided in the manner heretofore practiced in such courts.

This rule appears not to have been designed merely to overcome the inference in Section 33 (2) heretofore discussed, that matters upon which separate recoveries might be had be separately pleaded, and so to preserve the right of the complainant to bring all matters before the equity court, because, as already indicated, the first sentence of Rule 11 effectively does that. Rule 10 must be given a further meaning. This factor, coupled with the mandatory language employed in Rule 10, seems effectively to

⁵⁹ See Illinois Civil Practice Act, Annotated (1933), 95-96.

bar the plaintiff, at his option, from splitting his equity action by the use of counts within a single pleading.

If this is the purpose of the rule, much can be said in its favor. If plaintiff seeks equitable relief in a single pleading he should be required to submit all matters contained in that pleading to the equity court. As indicated in the case of *Brown v. Circuit Judge*,⁶⁰ it would be difficult, to say the least, to have a case in which several parties have several interests which may each be more or less affected by what happens to the rest, decided partly by the law court and partly in some other way. It has been an experience uniformly agreed upon for many years that the only way to do complete justice to all, which is the fundamental basis and object of equity, is to have the chancellor consider each and all of the varied interests involved, and to adjust and weigh them one to the other. When it becomes necessary to invoke equity, the necessities of the case, and the interests of justice and equity invariably require that all of the parties (and often persons who are not at first parties), and all things concerned in the controversy be brought before the chancellor to have their respective interests charged or protected, and to end the controversy once for all. To say the least, the "conscience" of equity would often be irked should the pleader be permitted to hamstring the court by placing the "tempting dish" of granting complete equitable relief to the parties beyond the reach of the court merely by placing part of such relief in a separate count, and so beyond the hand of equity.

There is also a question as to whether such a mechanical division of a pleading would not be a breach of the constitutional rights of the defendant. The Circuit Courts are given original jurisdiction in all causes in equity.⁶¹ In an equity cause the defendant has the constitutional right to have the entire case decided by one tribunal, to end the entire controversy once for all. As remarked by the court in the *Kalamazoo* case,⁶² "the system of chancery jurisprudence has been developed as carefully and as judiciously as any part of the legal system, and the judicial power includes

⁶⁰ 75 Mich. 274, 42 N.W. 827 (1889). ⁶¹ Illinois Constitution (1870), Art. VI, Section 12.

⁶² 75 Mich. 274, 42 N.W. 827 (1889). This case involved the constitutionality of a statute which permitted either party in an equity case to demand a jury—whose verdict was to be binding upon the chancellor. The court held that "the right to have equity controversies dealt with by equitable methods is as sacred as the right of trial by jury." The statute was held unconstitutional even though the constitution directed that the distinction between actions at law and suits in equity be abolished. The court said that this direction meant that the legislature was to go only as far as was practical, and that it would be impractical to have equity matters considered in any except the traditional way.

See also a collection of similar cases in Clark on Code Pleading (1928), 60-61. See also a discussion of this matter by one of the authors of this article in Supplement (1934) to Illinois Civil Practice Act, Annotated (1933), 4-8.

it." Any change which transfers to another court or body (the jury in law cases) a part of the traditional jurisdiction and power of the chancery court, is a plain violation of the constitutional provision giving the courts equity jurisdiction. The legislature may change the formalities of legal procedure but it cannot deprive the judiciary of its power over the enforcement of rights.⁶³

Rule 10 is modeled after Connecticut rule 175.⁶⁴

APPELLATE PRACTICE⁶⁵

The changes in appellate procedure effected by the rules are almost all purely isolated matters of mechanics not admitting of a very connected discussion. A few matters of distinct innovation will be discussed, however.⁶⁶

Amendment of Pleadings. The court indicated that it would exercise the power, granted it by Section 92 (1a) of the Act, to amend pleadings by providing a rule regulating the manner of making such application.⁶⁷ The necessary showing required of the applicant includes the following:

⁶³ It is true, of course, that the same arguments could have been, and may be made of the right heretofore existing (and remaining unaffected by the act or the rules) to bring separate actions. Is it any less a breach of faith with the equity court to deny it jurisdiction of part of the possible complete case by employing separate actions than when the separation is accomplished by the use of a count in a single pleading? Perhaps not. But some indication of the jealousy of the equity court, and the attitude of the Supreme Court of Illinois may be had in the case of *Stickney v. Goudy*, 132 Ill. 213, 13 N.E. 1034 (1890), where the court held that equity will be presumed to have taken full jurisdiction of matters of law which are incident to complete relief in equity, and if the equity case is first tried and the bill dismissed generally, a subsequent action at law will not be permitted to be maintained as to the incidental law matters involved, since the equity court will be presumed to have decided the legal matter as well as the equitable.

⁶⁴ Connecticut Practice Book (1922), 282. Practically no cases have arisen interpreting the Connecticut rule. All of them arise under a provision in the Connecticut Act [Practice Book (1922), §§ 5752-53] that issues of fact not cognizable by equity before January 1, 1880, are to be placed on the jury docket upon request. This is somewhat similar to the provision in Rule 11 of the Illinois Supreme Court that matters not heretofore cognizable in equity be pleaded in separate counts.

In the case of *Purdy v. Watts*, 91 Conn. 214, 99 Atl. 496 (1916), the action of the trial court in considering legal matter incident to the equitable relief, even though it was separately stated in the pleading, was upheld.

All the cases in Connecticut are collected in the Connecticut Practice Book (1922), 282; and in Supplement (1934), to Illinois Civil Practice Act, Annotated (1933).

⁶⁵ The Appellate Court of Illinois, First District, on January 12, 1934, adopted a new set of rules which are as forward looking and as salutary as those of the Supreme Court. In many instances they are the same.

⁶⁶ A detailed analysis of the changes in Appellate Practice effected by both the Supreme Court rules, and the new rules of the Appellate Court of the First District is contained in a pamphlet written by one of the authors, which appears as a supplement to Illinois Civil Practice Act, Annotated (1933).

⁶⁷ Rule 50.

- (1) necessity;
- (2) that no prejudice will result;
- (3) that the issues raised by amendment are supported by the facts in the record.

These requirements are substantially those prescribed in other states where the practice is employed.⁶⁸

Interlocutory Appeals. In its Rule 31 the court makes the requirement that before appealing from an interlocutory order or decree entered on an *ex parte* application the appellant must first present, on notice, a motion to vacate such order or decree.

The innovation introduced by Section 78 of the Act, of permitting the Appellate Court, or a single judge thereof, if in vacation, to stay the force and effect of an interlocutory order or decree, or to stay the entire proceedings in the trial court, is hedged about by Rule 31 through the requirement that notice of the application to stay be given to the opposite side, that the opposite side be given a hearing, that bond be required, and that a complete record be presented upon the application.^{68a}

Leave to Appeal from a New Trial Order. Section 77 of the Act merely provided that an application for leave to appeal from an order granting a new trial could be made to the reviewing court, without setting up the manner in which the application was to be made. Rule 30 sets up the practice. In it the court substantially adopts the former practice on applications for writs of error in Workmen's Compensation cases,⁶⁹ and in applications for writs of certiorari in appeals from the Appellate Court.⁷⁰

Applications for Leave to Appeal in One Year. Section 78 (1) of the Act requires appeals to be taken within 90 days of the entry of judgment, but permits an application for leave to appeal to be made to the reviewing court after the ninety days, and within one year of the entry of judgment. A showing that there is merit in appellant's claim for an appeal, and that the delay is not due to appellant's culpable negligence is required to be made.

Rule 29 further regulates the practice by requiring the application and supporting affidavits to be printed, and by requiring the record on appeal to be presented with the application. The opposite party is given an opportunity to present counter suggestions. Furthermore, the court is given the power to require bond as a condition precedent to granting the leave.

⁶⁸ See Illinois Civil Practice Act, Annotated (1933), 329-332.

^{68a} That a stay of the proceedings in the trial court will be granted only under exceptional circumstances has been so stated in *Engles v. Rosenthal*, 274 Ill. App. 272 (1934).

⁶⁹ Rule 60.

⁷⁰ Rule 32.

Since the entire proceeding must take place within one year, including the rendering of the decision of the court, and the service of notice that leave to appeal has been granted,⁷¹ the new rule materially reduces the one year period set forth in section 76 (1). Also, as in the case of applications for leave to appeal from an order granting a new trial, the expense of the proceeding will make applicants hesitate to apply for leave to appeal unless they are reasonably sure that it will be granted.

Separate Appeals by Co-parties. Under the Act as enacted by the legislature, no provision was made for a separate appeal by a co-party. Rule 35 provides for separate appeals by co-parties whose interests conflict with those of the appellant. In order to indicate his desire to prosecute a separate appeal, the co-party must add a division to his notice of appearance under a title "Separate Appeal by Co-Party." The separate appeal is required to proceed upon the same time schedule as that to be followed by the appellant, so that both appeals will be before the reviewing court at one and the same time.

Use of Original Stenographic Report. The Civil Practice Act⁷² permitted the use of an original stenographic report of evidence only where the parties so stipulated. This was the practice existing under the former law. Under it, appeals were often prevented by the appellee through a mere refusal on his part to join in a stipulation to use the original stenographic report, since the expense of having a copy made up by the clerk was often prohibitive, particularly if the report was lengthy. Rule 36 (1G) remedies this unconscionable situation by permitting the trial court to order that the original stenographic report, or original master's report of evidence be employed.

"Short Record" Practice. The Civil Practice Act sets up no machinery through which an extension of the time for filing the record on appeal in the reviewing court could be secured. Rule 36 (2c) adopts the old "short record" practice existing under Section 100 of the Practice Act of 1907. Under it the appellant may secure an extension from the reviewing court of the time within which to file a completed record on appeal upon presenting a "short record" to the court at the time the application is made. The "short record" is to consist merely of enough of the record to show final judgment or decree, a notice of appeal filed within the time limited by the Act, proof of its service, and the filing and serving of appellant's *praecipe* for record. The application must be made, and the "short record" presented within the time limited by Section 113 of the Act, and Rule 36, for presenting the complete record on appeal.

⁷¹ Rule 34 (1b).

⁷² § 113 (1G).