The Michigan Judicature Act of 1915

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I.

THE DISTINCTIONS BETWEEN LAW AND EQUITY PROCEEDINGS.

In 1848 a wave of reform in judicial procedure began to sweep over the United States. In that year the legislature of New York enacted the Code of Civil Procedure, a statute of far-reaching importance, for it became the source of—and the model for similar legislation in almost two-thirds of the States in the Union.

In this act the distinctions between law and equity proceedings received distinguished consideration, for the first article dealing with civil actions opened with the sententious announcement that “the distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished.”

Two years later, in 1850, a new constitution was adopted by the people of the State of Michigan. That the New York Code of Civil Procedure had meanwhile begun to exert an influence in this State is very clear from an innovation introduced into that document, for in Article VI, Section 5, it was provided that “The Legislature shall as far as practicable, abolish distinctions between law and equity proceedings.”

Evidently there was a popular demand for a reform of the same general character as that introduced in New York, and the people through their constitution did all that peremptory language could do to obtain suitable legislation on the subject. But the legislature failed to carry out the people’s mandate. Instead it sought to shift the task upon the Supreme Court, and in 1851 a statute was passed which provided that—“The Judges of the Supreme Court shall have the power, and it shall be their duty, within three months after this

1 N. Y. Laws 1848, Ch. 379, § 62.
law shall take effect, by general rules to establish, and from time to time modify and amend, the practice in said Court and in the Circuit Courts, * * * and they shall, once at least in every two years thereafter, if necessary, revise the said rules, with a view to the attainment, so far as may be practicable, of the following improvements in the practice: 1. *The abolishing of the distinctions between law and equity proceedings, as far as practicable.*

Probably the legislative conscience was satisfied by the passage of this act, for nothing more was done by the legislature for more than sixty years. Doubtless also the Supreme Court was not at all disturbed by this gratuitous bequest from the legislature, for no response was vouchsafed by the court. For two-thirds of a century the legislature has waited for the Supreme Court, and the Supreme Court has waited for the legislature, and until the last session the people failed to obtain relief, although the same demand for legislative action was repeated in the constitution of 1908.

In the Judicature Act of 1915 the legislature at last took up the matter. It did not in terms abolish all distinctions between legal and equitable proceedings, as the New York Code had done. Its language is much less sweeping and its immediate object much less pretentious, but a brief survey of the results reached by the reforms in New York and elsewhere will show that the modest provisions of the Judicature Act have really covered a considerable part of the available field of reform.

All that the constitution of 1850 provided for was an abolition of the distinctions between law and equity proceedings as far as the same should be practicable. It contemplated that it might be impracticable wholly to abolish them all. How far, then, is it practicable to remove these distinctions?

**As to Mode of Trial.** It has not been practicable to abolish the distinctions between trials at law and trials in equity. The Codes have all undertaken to abolish every distinction that could be abolished, and yet in every State which operates under the Code, trial by the court in equity cases and trial by jury in law cases has remained, and so long as constitutional guarantees protect the right of trial by jury this striking distinction cannot be erased.

**As to Practice on Appeal.** Since no jury intervenes in equity cases, reversals on appeal do not ordinarily result in new trials, and the appellate court can itself pass upon the correctness of the conclusions drawn below as to matters of fact. This distinction cannot be abolished under modern constitutional guarantees.

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2 Laws of 1851, p. 106.
As to the Relief Granted. Courts of law give judgments for damages or for the recovery of specific real or personal property. Courts of equity give specific relief of many kinds, such as enjoining unlawful acts, compelling the performance of contracts, reforming instruments, setting aside fraudulent conveyances, quieting titles, etc. The distinctions between the two kinds of relief cannot be abolished, nor has it ever been found practicable to abolish the old rule that the remedies of equity cannot be obtained unless the remedies of the law are inadequate. That rule is as firmly intrenched under Code practice as it ever was at common law. The greatest American writer upon the Code and its most able defender admits that the "abolition of the distinction between legal and equitable actions, and of the forms of legal actions, does not abolish the distinctions between remedies. If from the nature of the primary right, and of the wrong by which it is invaded, the injured party would under the old system have been entitled to an equitable remedy, he is still entitled to the same relief, and it may well be termed equitable; if from the like causes he would have been entitled to a legal remedy, he is still entitled to the same relief, and it may properly be described as legal."[4]

As to Parties to Actions. Common law courts recognized only joint and several rights and liabilities. The cases of which the common law courts took jurisdiction were those wherein all the parties on each side formed a homogeneous group capable of being treated as a unit. Generally speaking, the judgment went for or against the entire group, and this resulted largely from the fact that the cases falling under the jurisdiction of the common law courts were simple so far as they involved the interrelation of parties. A single right enjoyed by one or more plaintiffs, was predicated on the breach of a single duty resting on one or more defendants.

But in equity parties were not so rigidly classified. Equitable controversies covered a wider range, involved various duties resting in varying degrees upon different parties, were not looked upon as always two-sided but as many-sided, each party or group of parties sustain more or less complicated interrelations with other individual parties or groups. In cases of this kind the simple and rigid conceptions of joint and several rights and duties, which formed the basis of common law procedure respecting the joinder and non-joinder of parties, were clearly inapplicable, and a wholly different notion of the relations of parties to litigated controversies was necessary. In this way there grew up an entirely different practice in equity respecting the matter of parties. It was not accidental, but

followed as a necessary consequence of the intricacies of equitable relations. These rules of practice respecting parties must be employed in equitable actions; but they are unnecessary in actions at law. Many of the liberal rules of equity, if they were to be made universal, would seldom if ever be resorted to in legal actions. A court of last resort sitting in a Code State recently said: "Equitable doctrines with respect to parties and judgments are wholly unlike those which prevail at common law—different in their fundamental conceptions, in their practical operations, in their adaptability to circumstances and in their results upon the rights and duties of litigants."

Distinctions between things that are different cannot be abolished even by statutory language which expressly undertakes to do so.

As to Pleadings. There are fundamental differences between causes of action in equity and causes of action at law. The nature of the showing necessary to obtain relief in equity is different from that which discloses a right to a judgment for damages. Legal causes of action are reducible to a few material elements. Each part is essential, and to omit one is as fatal as to omit all. A material issue can be raised by the denial of any one. The elements making up the cause of action at law are like links in a chain; the whole chain has only the strength of the weakest link; if one link breaks the chain is gone.

But in equity the material facts are of a different nature. One cannot ordinarily raise a material and decisive issue by the denial of any one. They are of varying degrees of importance, and the pleadings may show a strong or a weak case, which is not true at law. The elements going to make up the cause in equity are not like links in a chain, but like threads in a web; a thread may break but it may not destroy the fabric.

The writer on the Code already quoted has pointed out these distinctions between pleadings at law and in equity as characteristic under all systems of procedure. Statutes have not and cannot abolish them. He says: "In the legal action the issuable facts are few; in the equitable action the material facts upon which the relief depends, or which influence and modify it, are generally numerous and often exceedingly so. In the former they are simple, clearly defined, and certain; in the latter they may be, and frequently are, complicated, involved, contingent, and uncertain. A distinction inheres in the nature of the causes of action, and from this distinction the facts material to the recovery in an equitable suit may be numerous, complicated, affecting the right of recovery par-

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tially instead of wholly, modifying rather than defeating, the remedy if not established; but still they are the material facts constituting the cause of action, and not mere details of evidentiary or probative matter."

It would seem clear, therefore, that no efforts on the part of the reformer could make pleadings at law and in equity identical. In so far as the causes of action are inherently different and founded on different conceptions of the function of allegations, the rules for their statement must also differ. A bill for a divorce on the ground of cruelty is necessarily a very different thing from a declaration for breach of a promise to marry.

If all the foregoing differences between equitable and legal proceedings are insurmountable, how far is it practicable, to use the words of the Michigan Constitution, to abolish the unwelcome distinctions?

One thing is practicable, and that is to abolish limitations on the jurisdiction of courts, giving one tribunal power to adjudicate all cases at law and in equity. This does not result in a confusion of court business. Where one court has the double jurisdiction it is immediately divided up into law and equity divisions, or its business is apportioned to law and equity calendars or dockets.

Thus, in England, the Supreme Court of Judicature Act of 1873 consolidated all the superior courts of England, that is to say, the High Court of Chancery, the Queen's Bench, the Common Pleas, the Exchequer, the High Court of Admiralty, the Court of Probate and the Court for Divorce and Matrimonial Causes, into one Supreme Court of Judicature, with all the powers of the various courts which were merged into it. This combined in one court all equitable and legal powers, and gave to that court full legal and equitable jurisdiction.

The English Judicature Act then proceeded to separate the court into divisions for the more convenient dispatch of business, and these divisions followed in a general way the jurisdictional lines of the old courts which had been consolidated. These were the Chancery Division, the Queen's Bench Division, the Common Pleas Division, the Exchequer Division, and the Probate, Divorce and Admiralty Division.

By the supplementary Act of 1875 it was provided that every person who commenced an action should assign the cause to that division of the court which he deemed proper by marking the name of that division upon the summons by which the action was commenced. Almost all of the so-called Code states have adopted this

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reform of consolidating courts and jurisdiction, and so have other
states which are not to be so classed. On the other hand so pro-
gressive an act as the New Jersey Practice Act of 1912, confines
itself to proceedings in actions at law, and not only does not merge
the law and chancery courts but does not even attempt to change
the chancery practice.

There are important advantages in consolidation of courts, and
it is to be regretted that Michigan is not to enjoy a single court hav-
ing jurisdiction of both law and chancery cases. Where such a
consolidation is made both legal and equitable questions and issues
may properly be raised in the same proceeding, and legal and equit-
able rights and defenses may be set forth in the same pleadings, and
legal and equitable relief may be administered through the same
judgment. It would save the absurdity of the judge as a chancellor
formally enjoining parties from prosecuting an action before him
as a law judge, for if he exercised both law and equity jurisdiction
an equitable counter-claim in the original action would fully meet
the need.

But a still more serious result of the distinction between proceed-
ings at law and in equity has been the disastrous effect of com-
mening an action in the wrong court. This is something which is
wholly unnecessary, and it suggests that

Another thing is entirely practicable, and that is to abolish the
consequences now resulting from commencing a law action in the
chancery court, or an equity action in the law court.

If the two courts were merely two divisions of the same court, or
if one court merely maintained separate law and equity dockets,
nothing would seem more natural than to transfer a case from one
division or one docket to the other when the administration of jus-
tice would be thereby facilitated.

Thus, in England, after having established the five divisions of
the Supreme Court of Judicature, the Judicature Act provided that
any cause or matter might at any time, with or without application
from any of the parties thereto, be transferred from one division to
another.

When any party finds that he is in the wrong division of the
court he is authorized by Rule of Court to notify the other party
that he will at a certain time and place apply for an order trans-
ferring the cause to the proper division.

But this practice is in reality equally appropriate whether there
are two courts, or two divisions or two dockets of a single court.

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7 For example—Georgia, Code, 1895, § 4320; Pennsylvania, Purdon's Dig. Equity; Massachusetts, R. L., 1902, Ch. 159.
And this is the practice which has been adopted by the Michigan Judicature Act. Chapter XI, Sec. 2, provides:

“If at any time it appears that a suit commenced in equity should have been brought as an action on the law side of the court, or if it appear that an action commenced on the law side of the court should have been brought in equity, it shall be forthwith transferred to the proper side, and be there proceeded with, with only such alteration in the pleadings as shall be necessary.”

A serious practical disadvantage incident to the divided jurisdiction which the Judicature Act retains, appears in connection with the question, how the objection of want of equity should be raised. In principle there should no longer be such an objection. A failure to allege facts entitling the plaintiff to any relief would raise a question going to the merits of the bill, but the mere objection that the plaintiff has not shown himself entitled to relief in a court of equity would not necessarily mean any more than that he was on the wrong side of the court. Want of equity ought therefore to be deemed an ambiguous and improper objection. The defendant should logically, either raise the substantial question whether the plaintiff's pleading showed a right to any relief, or he should expressly raise the formal objection that the case is on the wrong side of the court, and ask to have it transferred. But inasmuch as the court on each side has only the limited jurisdiction appurtenant to that side, it is without jurisdiction to determine the substantial question whether the plaintiff is entitled to any relief. All the equity court can do is to pass on the question whether the plaintiff states facts entitling him to relief in equity; and conversely, the law court has jurisdiction only on the question whether plaintiff has alleged a good cause of action at law. It seems, therefore, that the substantial question, whether the pleading shows a right to any relief, must, under the Judicature Act, be split up into two questions, (1) does the bill (or declaration) show a good cause of action in equity (or at law) and, if this question has been determined in the negative and a transfer made to the other side of the court, the defendant is in a position to raise the next question, (2) does the bill (or declaration) show a good cause of action on the side of the court to which it has been transferred? Under the practice in those Code states where the jurisdiction in law and equity has been consolidated, but where the two classes of proceedings, legal and equitable, are still retained, the objection is either that the plaintiff has not alleged facts entitling him to any relief or that his case should
be transferred to the other side of the court. This is good practice, but seems unavailable under the Judicature Act.

The Judicature Act appears, on the whole, to be a very conservative statute in its bearing upon the distinctions between legal and equitable proceedings. So far as it goes it is unquestionably good, and the only strange thing is that after waiting more than sixty years to carry out a reform ordered by the Constitution, the reform was not made more complete. The act does go somewhat farther than here indicated, by removing the distinctions in name between law and chancery summonses, and between parties plaintiff in law and chancery cases, and between the designations of attorneys and clerks of court on the two sides of the court; and it unifies the law and chancery practice in the matter of the persons who are authorized to serve process, and enlarges the territorial scope of the summons at law in emulation of the state-wide scope of the summons in chancery; and in various other details it removes useless differences in the practice relating to law and chancery cases. It may be hoped, that the good effects of the Act will so favorably impress the bar and the public that the way may be paved for a subsequent consolidation of jurisdictions.

(To Be Continued.)

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8 Trustees v. Forrest, 15 B. Mon. 163; Conyngham v. Smith, 16 Ia. 471.
9 Chap. XIII, § 5.
10 Chap. XII, § 1.
12 Chap. XIII, § 22.
13 Chap. XIII, § 27.
THE MICHIGAN JUDICATURE ACT OF 1915.

II. Forms of Action.

The Judicature Act devotes a tiny chapter of two sections to Forms of Action, although only the first section really deals with that subject. In this section it is provided that four ordinary common law actions, assumpsit, trespass on the case, replevin and ejectment, and three extraordinary actions, certiorari, mandamus and quo warranto, are retained, but all other actions are abolished. The action of assumpsit is declared to be proper in all cases where assumpsit, debt or covenant were formerly used, and trespass on the case is declared to be proper wherever case, trespass or trover were formerly maintainable. Assumpsit thus becomes the universal contractual remedy and case the universal tort remedy, so far as damages are concerned. Penalties and forfeitures are to be recovered by the action of assumpsit. But in respect to certain torts—trespass to lands, fraud and deceit and the conversion of personality into money—the plaintiff shall have his election to sue in case or assumpsit.

The situation affecting the ordinary actions is somewhat different from that relating to the extraordinary actions retained by the Act, and a clearer view of the purpose and extent of the reforms effected may be had by a separate consideration of the two groups of actions.

(a) The Ordinary Actions.

In passing sentence of death upon debt, covenant, trespass and trover, the legislature was, in appearance at least, only pursuing a course which has marked the history of the common law for many centuries. Nothing has been more characteristic of the law of England than its forms of action. The modern lawyer knows the names of but few of them, but hundreds are found among the records of the mediæval law courts. Rights were closely wedded to forms in the early law, and forms of action were in truth the only means or instruments by which our forefathers were able to dispense justice.

1 Chap. XI.

2 "How many forms of action were there? A precise answer to this simple question would require a long prefatory discourse, for we should have to draw some line between mere variations upon the one hand and more vital differences on the other; we might easily raise the tale of forms to some hundreds, but perhaps we shall produce the right effect if we say that there were in common use some thirty or forty actions, between which there were large differences." Pollock & Maitland: Hist. of Eng. Law, 564.
Gradually new forms arose and old forms passed away. Every age retained or developed those adapted to its wants and discarded such as had lost their practical value. Thus the formed actions of the common law have always been in a state of flux, reflecting the needs of the day with only the conventional reverence for the past which conservatism always produces.

“Our forms of action,” write Pollock and Maitland, “are not mere rubrics nor dead categories; they are not the outcome of a classificatory process that has been applied to pre-existing material. They are institutes of the law; they are—we say it without scruple—living things. Each of them lives its own life, has its own adventures, enjoys a longer or shorter day of vigour, usefulness and popularity, and then sinks perhaps into a decrepit and friendless old age. A few are still-born, some are sterile, others live to see their children and children’s children in high places. The struggle for life is keen among them and only the fittest survive.”

If we were looking for a strict counterpart or continuation of the common law evolution of actions in the Judicature Act we should expect to find that those actions which had proved to be ineffective or had become outgrown would be the ones to go, and the vigorous and usable actions would be the ones to survive. But in this case no such situation is disclosed. The actions so summarily abolished by the legislature were by no means obsolete and showed no inherent tendency to gravitate toward the scrap-heap. They were all of them familiar tools for litigation, and their names and the rules which governed their use were commonplaces to every lawyer. Why, then, should they have been marked for the slaughter?

As a matter of fact it can hardly be contended that one modern action has any special advantage over another. Each has its own place, with more or less overlapping upon others, and none could be abolished without leaving a hole in the remedial structure. The Judicature Act did not contemplate the withholding of any remedy. What it really did was not to abolish four actions and retain two. It abolished all the common law actions for the recovery of damages and in their place it substituted two entirely new actions called “trespass on the case” and “assumpsit.” It divided all causes of action for damages into two classes, those based on contract and those based on tort, and declared that the former should be called “case” and the latter “assumpsit.” In doing so it employed a common but always misleading method—it used old terms, terms which had been worked over and thought over for centuries, terms which were full of

2 Hist. of Eng. Law, §61.
historical significance and which had become interwoven into the very fabric of the common law, and decreed that henceforth they should mean something entirely different. Such arbitrary and forced changes in the meanings of words are always confusing. We break with the past but retain its language to soothe our feelings, and then, under the spell of the old, familiar terms, we forget that the break was ever made.

It is quite plain that we have not retained the action of assumpsit nor the action of trespass on the case. We have not retained any of the common law actions for the recovery of damages. All are gone, partly by express abolition, partly by implied abolition. In the place of six old actions we now have two new ones. If they had been called "tort action" and "contract action," no one would have been confused or misled. They would have carried the visible badge of novelty. But their character is not dependent upon their names. They are just as new, just as different from any of the common law actions, as though the old names had been abandoned also. This is an outstanding feature of the Act which should not be lost sight of. Old rules and doctrines of assumpsit and case no longer apply; the historical development of those actions no longer throws light on their present scope and meaning; the continuity is gone; the bottles are old but the wine in them is new. Procedure, as far as it relates to damages, has taken a dual instead of a multiple form,— the substantive distinctions between tort and contract are now translated into the field of remedies in lieu of all other distinctions applicable to ordinary actions for damages.

The attempted retention of assumpsit and case was doubtless a concession to the prejudices of a conservative profession. There has always been a strong antipathy among the lawyers of this State to Code Pleading, and nothing which too closely resembled that much distrusted system could have passed the legislature. "Assumpsit" and "trespass on the case" sounded entirely orthodox and respectable, and exorcised the bogey of a "Code" defection. But the Code, while undoubtedly subject to many, just criticisms, is entirely sound and logical on the point here involved, namely, the forms of personal actions. It openly and frankly abolished them all and substituted a single action in their place. The Judicature Act covertly, but no less effectively, has abolished them all and substituted two actions in their place. This is illogical and unnecessary. One action will equally serve the purposes of two and it is therefore much better. If the old actions are to go why not provide an entirely modern substitute? Why stop short in the process of simplification?

The origin of forms of action must be sought in history, not in
logic. They were incidental to the old English system of original writs. After the Norman conquest the source of judicial power was deemed to be the King. The courts were his courts, and the judges his judges. They had only the jurisdiction which he gave them, and the royal method of conferring jurisdiction was through the royal writ. A suitor in the king's court had to obtain the king's order to his judges to take jurisdiction of the case, as well as to get jurisdiction over the person of the defendant, and the original writ performed both functions. It was at once a notice to the defendant to come into court and an authorization to the court to take jurisdiction of the controversy. Now if the writ was the court's warrant for taking up the case, it was clear that the writ must specify the nature of the action, for the king gave no carte blanche to his judges. There were as many different kinds of writs as there were different kinds of controversies. Every writ was good for all the cases which could be construed to fall within its terms, but for no others. New forms of writ were devised to meet new needs, and when once a form of writ was prepared, copies of it were issued to all who thought they could use it. The writs gave form to the actions, and all actions which could be prosecuted under the same writ were therefore of the same form. There were as many forms of action as there were forms of writs.

But under our theory of government the courts no longer need a special warrant for trying cases, for the judicial power to adjudicate all controversies is given to them originally and directly from the people. Therefore forms of writs cease to have any utility. Original writs in the old sense therefore necessarily disappear and judicial writs take their place as notices to defendants that they must appear before the court. The nature of the case need not be specified in the notice or summons, for the defendant may obtain full information from the pleadings. Hence a single form of summons is sufficient, and the only compelling reason for the different forms of action has disappeared.

Logically the whole question is one of convenience in judicial administration. If many forms of action are better adapted for general use they should be employed; but if fewer forms result in a simpler and more effective procedure, then fewer should be used. So far as personal actions for damages are concerned, there does not seem to be the slightest occasion for more than one form—a simple civil action. The single action has been used in England and in the Code States of this country with complete success. All the strictly personal actions heretofore in use in Michigan—assumpsit, debt, covenant, trespass, case and trover—are adapted to identical pro-
cedural treatment. The same form of summons is adapted to all of them, the same kind of statement of facts will constitute a cause of action in each, the same kinds of pleadings will raise the same kinds of issues in each, and the incidents of the trial, judgment and execution are the same in all of them. So far as these actions are concerned the Judicature Act stopped just short of the logical and practical goal.

When we turn to the actions for the recovery of specific property the case is somewhat different. Replevin and ejectment involve procedural incidents which are not found in the actions sounding solely in damages, and these features tend to separate and differentiate them from actions of the latter kind. In the Code States the effort was made to reduce all actions to a single form, and general provisions in the Codes of Civil Procedure declared that all forms were abolished and that thereafter there should be but one form for the enforcement of all rights and the redress of all wrongs, to be known as a civil action. But even in the original New York Code it was seen that special provisions were needed to cover the case of replevin, and a separate chapter of nine sections was drawn up for this purpose. But lest the new practice should be contaminated by any of the old doctrines of the common law this new Code scrupulously avoided the word replevin and all its derivatives, substituting the name "Claim and Delivery." But the characteristics of the action under the new name were so strikingly similar to those which distinguished the old action that gradually the old terms came back, and the present New York Code has an elaborate article of forty-seven sections which in Chase's Code is frankly called "Action of Replevin" and which uses the term replevin, replevy or replevied many times. Actions to recover possession of personal property are in all jurisdictions necessarily in a class by themselves, and there is no advantage in attempting to carry out a forced uniformity by suppressing a distinguishing nomenclature. "The rules of pleading in replevin cases are specially provided by statute and constitute an exception to the ordinary rules governing other cases," says the Court in a typical western Code State. If, then, in spite of well directed efforts to reduce all actions to uniformity the Codes have been forced to recognize the claim of replevin to independent existence, the Judicature Act only showed an appreciation of fundamental principles and of the results of experience in retaining this action.

4 Laws of New York, 1848, Ch. 379, Tit. 7, Ch. 2.
6 Woodbridge v. DeWitt, (1897), 51 Nebr. 98.
Ejectment is not so clear a case of separate identity, since it lacks the provisional summary features of replevin. The original New York Code seems to have contemplated the feasibility of merging this action with the rest, but experience showed that a different treatment was required in various respects, so that a body of statutory provisions relating to the practice in "Actions to Recover Real Property" grew up, making an Article consisting eventually of thirty-five sections. However, in most of the Code States and in England it has been found practicable to employ the ordinary rules or practice almost exclusively in actions for the recovery of possession of real property, so that the retention of ejectment is less fully justified than the retention of replevin.

(b) THE EXTRAORDINARY ACTIONS.

Certiorari, mandamus and quo warranto have been retained. It is possible to dispense with the writ of certiorari, and it has been done in a few jurisdictions. Thus in Ohio both writs of error and writs of certiorari are abolished by statute, and the courts are given power to order transcripts of proceedings to be furnished as formerly they could do by such writs. And the same thing has been done in Kansas and Nebraska. In a number of states the writ has been called a writ of review. But in the great majority of our states, as well as under the very enlightened English practice, the writ of certiorari is still the standard method of obtaining a review of the acts of inferior courts and officers or boards exercising quasi judicial functions. It is hard to see what real advantage is to be gained by merely changing its name, and while it would be possible to make the practice in certiorari cases formally identical with that in the ordinary actions, by substituting a declaration in place of the affidavit now used, and a summons or rule to plead in place of the writ, and a plea in place of the return, such changes would not seem to be entirely free from criticism. The affidavit does not contain a substantially full statement of the facts on which the action of the court is to be founded, but these facts really appear in the return. Again, the return, unlike a plea, is an official statement which is to be taken as true, so that only questions of law can be raised in regard to those facts. The question raised by the action of certiorari is one respecting the legal correctness of judicial or quasi...
judicial acts, rather than of the existence and infringement of private
rights. In every ordinary personal action there must be set up a
"cause of action," which is defined to be a statement of facts show-
ing a primary right in the plaintiff and a violation of that right by
the defendant. But in certiorari no such cause of action is in-
volved. Hence to attempt to abolish certiorari as a distinct remedy
and to enforce parties to employ the forms applicable to ordinary
actions at law, would be a surrender of substance to form, and a
worship of uniformity at the expense of logical discrimination.

Mandamus is much more susceptible to uniform treatment than
certiorari. Here we are always concerned with the existence of a
cause of action in the ordinary sense, for the question involved is
not the propriety of past official conduct but the right of the appli-
cant to force the doing of an official act for his own benefit or ad-
vantange. The petition in mandamus, as used in this State, is required
to state the facts on which the party relies, exactly as does a declara-
tion, and the affidavit (or return to the alternative writ) is an an-
swer to those facts consisting of denials or facts in confession and
avoidance, which in theory is quite comparable to a plea, though
practically more like an answer in chancery. To the answer the
person prosecuting the action may, for the purpose of framing an
issue, be allowed to plead exactly as in case of a replication. The
fact that the writ or order to show cause issues after the petition is
filed, instead of in advance of it as in case of a summons preceding a
declaration, is not at all an important difference. In fact our practice
of commencing ordinary actions by declaration and rule to plead is
a very similar proceeding, and the rule to plead in a mandamus case
would merely become a special order rather than a common order
as now employed in ordinary actions. In a number of states actions
of mandamus are commenced by filing the same pleading as in other
actions.

But even if these changes in the practice were made, we should
still have to retain mandamus as a separate category of procedure,
because we have not adopted a single civil action but still retain two
actions, assumpsit and case, in neither one of which would mandamus
properly be included. So that although the action could have been
made much more like the ordinary actions without any great diffi-
culty, which would doubtless have been a real advantage in unifying
and standardizing judicial proceedings, we should not have thereby
avoided doing what the Judicature Act did in retaining the separate
action of mandamus.

13 See, for example, the Ohio Statute, Gen. Code, §§ 12283-12302.
In quo warranto, again, we have a situation very similar to an ordinary action, where the attorney general or relator sets up in substantially the style of a common declaration the facts which constitute a cause of action against the defendant. The information, accordingly, although its allegations are very general, is a close counterpart of a declaration, the summons employed is precisely the same sort of writ as that used in ordinary actions, and the plea to the information is of course the same sort of pleading in form as a plea to a declaration, though in substance it aims rather to show a title than a defense. The replication authorized to be filed to the plea is clearly an ordinary pleading. The discretionary feature, when it applies, is no different from that in mandamus and would merely result in requiring an order for the issuance of the summons or the substitution of a special rule to plead.

That the assimilation of this action to an ordinary action is feasible has been amply shown by the experience of many jurisdictions. Thus, in Ohio, California, Iowa, and Kansas, the ordinary forms of pleadings and proceedings are employed, with only such incidental special provisions as necessarily result from the peculiar nature of the rights and liabilities involved and the means necessary to enforce them. In place of the peculiar practice of a suggestion of damages, a regular action may be brought by the person whose right has been adjudicated.

But as pointed out above in connection with the action of mandamus, our two ordinary actions of assumpsit and case do not adapt themselves very well to the incorporation of this action, and so long as we keep that dual system of ordinary actions this extraordinary action should probably be retained. And it must be conceded that in many states which have abolished all the ordinary forms, and now use only the "civil action" so called for all ordinary purposes, quo warranto is still prosecuted by means of an information, so that in spite of our failure to provide for a single ordinary action we are at least abreast of these states in respect to quo warranto.

(To be Continued.)

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15 People v. Sutter St. Ry. Co. (1900), 129 Cal. 545, 547.
16 Code, 1897, §§ 4313-4315.
18 Kansas, Gen. St., 1909, § 6281; Iowa, Code, 1897, § 4323.
THE MICHIGAN JUDICATURE ACT OF 1915.

III. PARTIES TO ACTIONS.

It would not be worth while to discuss all the provisions which the Judicature Act has made on the subject of parties to actions, but certain features of this legislation which are deemed particularly novel and important will be briefly treated under the following heads:

I. ACTIONS TO BE BROUGHT IN THE NAME OF THE REAL PARTY IN INTEREST.

The Judicature Act provides that "Every action shall be prosecuted in the name of the real party in interest, but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute, may sue in his own name without joining with him the party for whose benefit the action is brought."

This provision was taken almost literally from the New York Code of Civil Procedure and is found in substantially identical form in practically all the so-called "codes." It has been subjected to sixty-five years of litigation for the purpose of construing its meaning, so that at the present time this statute is pretty well understood. Since the provision has been adopted from the "code" it must follow that its interpretation by the "code" courts has also been adopted, and it will therefore be comparatively easy to summarize its effect.

In the first place, while the different codes vary in the verb employed, some using "must" and some "shall," these words seem to be treated as equivalents, and the rule is that the statute is mandatory.²

¹ It adopts the literal phraseology of the Iowa Statute, except that it substitutes "shall" for "must." Iowa Code, 1897, § 3459.

² Eaton v. Alger, 57 Barb. (N. Y.) 179; Chase v. Dodge, 111 Wis. 70; Phoenix Ins. Co. v. Carnahan, 63 Ohio St. 258.
The term “real party in interest” suggests on its face that it has reference only to the person who would gain or lose as the result of the controversy, or, in other words, to the holder of the beneficial interest. In which case an assignee of a chose in action for collection, who is bound to turn over the avails of the suit to his assignor, would not be the real party in interest and could not sue. Under this view the Michigan case of Moore v. Hall, which sustained the right of an agent to whom negotiable paper had been indorsed for collection, to sue thereon in his own name, would no longer be good law.

But the great majority of code states have taken a more practical view of the statute, and have found its meaning in the purpose which it was obviously intended to serve, namely, to introduce the equity rule that the action was to be brought by any party who was in a position to get a judgment which would bar further litigation. Thus, in Sturgis v. Baker, the Supreme Court of Oregon said: “The statute requiring that every action shall be prosecuted in the name of the real party in interest was enacted for the benefit of a party defendant, to protect him from being harassed for the same cause. But if not cut off from any just offset or counter-claim against the demand, and a judgment in behalf of the party suing will fully protect him when discharged, then is his concern at an end. This is the test as to whether such a defense is properly interposed.” And in Geiselman v. Starr, the Supreme Court of California said: “Where the plaintiff shows such a title as that a judgment upon it satisfied by defendant will protect him from future annoyance or loss, and where, as against the party suing, defendant can urge any defenses he could make against the real owner, then there is an end of the defendant’s concern and with it of his right to object; for, so far as he is interested, the action is being prosecuted in the name of the real party in interest.” This test has been approved by many courts and is supported by the great weight of authority under the code.

The beneficial interest in the result of the action is such an interest as satisfies the equity rule, for one who holds such an interest is clearly in a position to get a judgment which will end the litigation.

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3 See Stewart v. Price, 64 Kan. 191, where the majority of the court strongly argue the correctness of this view. This case was expressly overruled two years later by Manley v. Park, 68 Kan. 400.

4 48 Mich. 143.

5 43 Ore. 236.

6 106 Calif. 651.

7 Greene v. McAuley, 70 Kan. 601; Chouteau v. Boughton, 100 Mo. 406; Hays v. Hathorn, 74 N. Y. 486; Seybold v. Grand Forks Nat. Bank, 5 N. D. 460; Chase v. Dodge, 111 Wis. 70; Elnquist v. Markoe, 45 Minn. 305.
so far as the defendant is concerned. Hence such an interest will constitute one the real party in interest under the new Judicature Act.8

But a naked legal title is also one upon which a valid judgment can be founded, and such a title is enough to constitute the holder the real party in interest, although he has no beneficial interest whatever. Thus it has been held that the plaintiff was the real party in interest when he sued as assignee for collection only of a claim for wages,9 when he sued as assignee of a claim for breach of contract of employment, when the assignment was merely colorable as between the parties,10 where he sued as assignee of an assignable tort claim, the transaction being without consideration and merely for the purpose of preventing a removal to the federal courts,11 and where he sued as assignee for a foreign corporation which was not entitled to sue, there being no consideration for the assignment and the corporation being by agreement entitled to whatever should be recovered.12 As said by the United States Circuit Court of Appeals in Kent v. Dana,13 "Where, as in Ohio, the code of procedure requires that the suit shall be brought by the real party in interest, it is nevertheless held that, when the plaintiff is the lawful holder of the note, it is no defense to the maker to show that the transfer under which the plaintiff holds it is without consideration, or subject to equities between him and his assignor, or colorably [sic], or merely for the purpose of collection, and that it is sufficient if he have the legal title, either by written transfer or delivery, whatever may be the equities of his relation with his assignor." One who holds the legal title is entitled to sue as real party in interest even against the will of the owner of the entire beneficial interest.14

It will follow from these authorities that any party who has heretofore been entitled to sue in his own name in Michigan must be the real party in interest under the new Act, for clearly a judgment obtained by any such plaintiff would be a complete protection to the defendant from further litigation on the same cause of action. Therefore it may safely be said that so far as this provision goes it does not prevent anyone from suing who could have sued under the former practice.

9 Falconio v. Larsen, 31 Ore. 137.
10 Friedman v. Schulman, 46 Misc. (N. Y.) 572.
11 Vimont v. Chicago etc. R. R. Co., 64 Ia. 513.
13 100 Fed. 56; 40 C. C. A. 281.
Accordingly, if the new statute as to the real party in interest is to introduce any change in the practice it must be in the direction of enlarging the class of persons who are authorized to sue in their own names.

It must be admitted that the prior practice as to parties plaintiff in this state was in some respects very liberal. By statute we had authorized actions by assignees in their own names, which covered a substantial portion of the field intended to be covered by the code through its “real party in interest” rule. And the decisions of the Supreme Court of this state have in several instances shown a surprising indifference to forms and technicalities. One of the most remarkable of these decisions is Watson v. Watson, where a woman of full age brought an action in her own name against defendant for her own seduction, and the objection was made that the statute did not authorize an action in her name. It was conceded that the statute did not expressly authorize such an action, but on the contrary it expressly provided that she might authorize her father or any other relative to bring the action in her behalf and for her use and benefit. The court held that in spite of the want of authority in the statute and in spite of the provision as to an action in her behalf by her father or other relative, she might nevertheless prosecute the action in her own name. And in justification of this holding the court said:—“The policy of legislation in this state has been to permit the real party to bring an action in his or her own name and testify in his or her own behalf. It is no longer necessary for assignees to sue in the name of the assignor or to bring an action in the name of one person for the use and benefit of another, even in cases of tort where the action is assignable.”

This was a very advanced position for the court to take, and doubtless was a case of judicial legislation, but it was in the interest of directness and simplicity in procedure. It indicated a policy in harmony with the object now sought to be accomplished by the legislature through the rule under discussion. And the court has very recently given expression to views almost literally identical with some of those quoted above from the decisions in code states. In Union Ice Co. v. Detroit & Mackinac Ry. Co., the insured sued a tortfeasor for causing the loss of its building by fire, and it was claimed that subrogation agreements with various insurance companies were relevant evidence, but the court held otherwise, saying: “The de-
fendant is interested only in knowing that a judgment, in the suit brought, will relieve it from all liability for the consequences of its tort,” thereby suggesting the equity rule as to who might properly prosecute an action.

But there has not been an entirely consistent policy in this regard on the part of the court. Thus, in Richelieu & Ontario Navigation Co. v. Thames & Mersey Ins. Co., the plaintiff chartered a steamship to the Owen Sound Steamship Co., under an agreement that the charterer should keep the vessel insured. A policy of insurance was taken out by the charterer in the defendant company, and the premium was paid by the charterer. The policy contained an agreement that the loss should be paid to the plaintiff. The court said: “It was understood by the defendant that the insurance was in fact made for plaintiff’s benefit, and it was really so made. A payment to plaintiff would absolve defendant from any duty to the Owen Sound Steamship Company, if any such duty existed. Under such circumstances we think the defendant entered into contract relations which plaintiff has a right to assert directly.”

This is a direct holding that where two persons make a contract for the sole benefit of a third person, such third person may sue thereon in his own name, though he is a stranger to the consideration and not a party to the promise.

But where a husband bought an interest in a farm under an agreement with the grantor that he would live on the farm and work it, but if he died before his interest was paid for the grantor should refund to the grantee’s wife the payments already made, it was held that the wife could not sue. The court said: “She was not a party to the contract and had paid none of the consideration * * * This case comes within the general rule that a promise made by one person to another for the benefit of a third person, a stranger to the consideration, will not support an action by the latter.” And in Linneman v. Moross’ Estate it was held that where property was conveyed by a father to his son in consideration of the son’s promise to pay the grantor’s daughter $10.00 a week, no action at law could be maintained on this promise by the daughter.

Now it is quite clear that all three of these cases are identical in principle, for in each a sole beneficiary sought to enforce a contract made between others. If the first case was right the second and third...

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33 28 Mich. 132.
31 98 Mich. 178.
were wrong. If want of priority is the only objection to a sole beneficiary suing in his own name, will these cases which deny the right to sue be affected by the new provision as to the real party in interest?

Another common situation is where a debtor contracts with another to pay his debt, as when a grantee of land subject to a mortgage promises his grantor to pay the mortgage debt. Can the mortgagee sue the grantee on this contract? Our court has held that creditors cannot recover upon an agreement made by a third person with the debtor to pay their claims, to which they are not parties, and which has not been assigned to them. Will the new Act change this?

The provision as to the real party in interest was doubtless intended to authorize actions to be brought directly by the very person who is substantially and beneficially interested in the result, and if the sole beneficiary of a contract has any real interest in its performance he ought to be able to sue upon it. It may be that the real question here is rather one of right than of remedy. But it is certainly true that many courts have held that the code provision as to the real party in interest does authorize action by the sole beneficiary of a contract made by and between others. Thus in Paducah Lumber Co. v. Paducah Water Supply, the Supreme Court of Kentucky said:

"This court has held the doctrine well settled, a party for whose benefit a contract is evidently made may sue thereon in his own name, though the engagement be not directly to or with him (Smith v. Lewis, 3 B. Mon., 229; Allen v. Thomas, 3 Met. 198), which practice is not only in accordance with the rule found in Chitty on Pleading, but seems to be required by section 18, Civil Code, that in express terms provides every action must be prosecuted in the name of the real party in interest, except that under section 21 a fiduciary or trustee may bring an action without joining with him the person for whose benefit it is prosecuted." And the Supreme Court of Missouri, in Ellis v. Harrison, held that a person for whose benefit an express promise is made, in a valid contract between others, may maintain an action upon it in his own name, and justified the ruling as follows: "By our code of procedure, it is provided that every action shall be prosecuted in the name of the real party in interest, with certain exceptions; one of which is that the trustee of an express trust may sue in his own name. The statute then declares that such a trustee "shall be construed to include a person with whom, or

23 89 Ky. 340, 347.
24 104 Mo. 270, 277.
in whose name, a contract is made for the benefit of another.' R. S. 1889, secs. 1900, 1991. Reading these sections together, it would seem to be clearly implied that the beneficiary in such a contract is to be regarded as the real party in interest, and that, as such, he may sue thereon in his own name; while on the other hand, the contracting party (as trustee of an express trust, within the statutory definition) may likewise maintain an action on the same contract."

That the real objection to such actions heretofore recognized in this state is the technical one of want of privity to support the title of the plaintiff in an action at law and not the substantial want of a right in the plaintiff, is indicated by what our court said in Palmer v. Bray,26:—"It has been repeatedly held by this court that in a suit in equity a person for whose benefit a promise is made may enforce it in his own name." This would imply that now, when a legal title is no longer necessary to support an action at law, a legal action may properly be brought by the beneficiary of a contract made by and between others.

This doctrine should doubtless include a contract made by a debtor to pay the debt to a third person, as where a grantee of land subject to a mortgage promises his grantor to assume the mortgage debt. It cannot be objected that there is no right in the mortgagee, for our statute expressly creates it.27 "Such an agreement, though made with the grantor of the property, inures to the benefit of one having a mortgage upon it."28 That being so it would follow that the mortgagee would be the real party in interest and the proper plaintiff in an action at law. This is clearly stated by the Supreme Court of Colorado in Starbird v. Cranston,29 where the court says:—"'According to this generally accepted view, the liability of the grantee, who thus assumes the payment of an outstanding mortgage, does not depend upon any extension of the equitable doctrine concerning subrogation; it is strictly legal, arising out of a contract binding at law; the mortgagee, instead of enforcing the liability by a suit in equity for a foreclosure, may maintain an action at law against the grantee upon his promise, and recover a personal judgment for the whole mortgage debt.' * * *

Under our code the action must be prosecuted in the name of the real party in interest; and certainly the beneficiary, or person for whose benefit the promise is made, is the real party in interest, whether the promise is evidenced by a simple contract or one under seal."

24 126 Mich. 87.
2. NON-JOINDER AND MIS-JOINDER OF PARTIES.

"No action at law or in equity shall be defeated by the non-joinder or mis-joinder of parties. New parties may be added and parties mis-joined may be dropped, by order of the court, at any stage of the case, as the ends of justice may require." This provision was taken from the New Jersey practice act of 1912. Up to the present time no decisions have been published in New Jersey construing this provision, but inasmuch as New Jersey took the provision in substance from Order 16, rule 11, of the English Supreme Court Rules, the decisions in England as to the meaning and scope of those portions of the rule which correspond to the New Jersey and Michigan statutes would be authoritative adjudications.

The Judicature Act cannot be taken as intending any change in rights or liabilities. Thus in Kendall v. Hamilton, Lord Cairns in delivering the opinion of the House of Lords, said: "Although the form of objecting, by means of a plea in abatement, to the non-joinder of a defendant who ought to be included in the action, is abolished, yet I conceive that the application to have the person so omitted included as a defendant ought to be granted or refused, on the same principles on which a plea in abatement would have succeeded or failed."

So in Wilson & Sons v. Steamship Co., the Court of Appeal, per Lord Esher, said that "it was not intended by the Judicature Act to alter people's substantive rights. A larger power was given to the court by the new procedure as to joinder of parties; but that procedure ought, as it seems to me, to be administered with regard to the principles of the old law on the subject."

Accordingly, wherever a plea in abatement or a demurrer would have been proper under the old law on the ground of defect of parties defendant, a motion by defendants to dismiss unless the additional parties be brought in will be proper, or the plaintiff might of course make a motion for leave to amend by adding other defendants. And the same reasoning would apply to non-joinder of plaintiffs. In case of new plaintiffs being brought in pursuant to an order of the court, there would seem to be no insuperable objection to employing the equity rule in all cases and making a necessary party plaintiff a defendant if he refused to join voluntarily as a plaintiff. The broad...
power conferred on the court to order in new parties in both law and equity actions would doubtless suffice to warrant such a proceeding. In Cullen v. Knowles, the Queen’s Bench Division ordered a joint promisee who refused to join as plaintiff, to be brought in as a defendant, and declared that the judgment could easily be adjusted to meet such a separation of plaintiffs. The New Jersey Practice Act, which concerns itself only with law actions, expressly authorizes one who should join as plaintiff to be made a defendant in the first instance if he refuses to join. If compulsory joinder of missing plaintiffs were to be deemed proper under the Judicature Act, some form of process would be necessary in addition to the amendment of the declaration, just as in the case of the compulsory bringing in of ordinary defendants. In either case an amendment of the summons or rule to plead and service of the same would be necessary, or the practice prescribed by old Circuit Court rule No. 6, now repealed, might be followed, a new writ being issued in the nature of a summons directed to the new parties sought to be added as defendants. So far as bringing in new parties goes, the new Act seems to add little to the old practice respecting new parties defendant, except to make the method more direct, but in respect to bringing in new parties plaintiff the new Act marks a substantial advance, for our court had always refused to permit amendments adding new plaintiffs.

As for getting rid of superfluous parties, plaintiffs have long had the privilege of voluntarily dismissing as to any of the defendants upon payment of costs as to them, and thereupon amending their declarations accordingly. But the same privilege has not been accorded in respect to dropping superfluous plaintiffs. It would seem as though so utterly technical and easily obviated a defect as misjoinder of plaintiffs would have been deemed amendable under our liberal statute of amendments which authorized the court “to amend any process, pleading, or proceeding either in form or substance, for the furtherance of justice, at any time before judgment rendered therein,” but the construction given to this statute has not permitted such amendment, but on the contrary our Supreme Court has held that “it is well settled that a misjoinder of plaintiffs is fatal.”

So that the new Act will effectually destroy this useless and senseless rule of the common law.

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22 Practice Act, 1915, § 5.
23 Follower v. Laughlin, 12 Abb. Pr. (N. Y.) 105.
25 Old Circuit Court Rule 27, b.
26 How. St. (2nd Ed.) § 12959.
3. JOINDER OF PARTIES SEVERALLY LIABLE.

Under an old statute it has long been competent in this state to join as defendants any or all parties severally liable upon the same negotiable instrument, and judgment might be rendered for or against any of the parties so joined. This is a very common form of statute, found substantially in the great majority of the states which have adopted the code. But the Judicature Act has superseded it, and in its place has provided that "It shall be lawful for any plaintiff to include in one action as defendants, all or any of the parties who may be severally or jointly and severally liable, and to proceed to judgment and execution according to the liability of the parties." This is substantially the language employed in the English practice, except that our Act does not permit the joinder of parties alleged to be liable in the alternative.

It broadens the former practice in several respects. In the first place the joinder is no longer confined to persons liable on bills of exchange or promissory notes. Nor is it even necessary that they be liable on the same instrument, whatever its character may be, as is so common in American statutes. Several and joint and several promisors on any sort of an obligation, written or oral, come within the terms of the statute.

In terms the statute goes even farther than this. It does not confine the cases to which it applies to those arising on contract, but is broad enough to include all kinds of several or joint and several liabilities, one variety of which would be several liabilities of tort-feasors. The question arises, therefore, whether several tort-feasors can be joined under this statute and a judgment be recovered against such of them as are proved to be liable. But it would seem quite clear that unless radical changes are made in the rules as to joinder of causes of action, the several liabilities of several wrongdoers cannot be determined in a single action, because if the liability is several and not joint it must be a case where there is no community or co-operation in the wrongdoing, in which case there would be as many distinct and separate torts as there are parties who are severally under liability. When a number of parties, each acting separately, pollute a stream, they are severally and not jointly liable for the wrongful

41 How. St. (2nd Ed.) § 12705.
42 How. St. (2nd Ed. § 12707.
43 See 15 Encyc. Pl. & Pr. 741.
44 Chap. 12, Sec. 15.
45 Order XVI, rule 4.
46 15 Encyc. Pl. & Pr. 741.
acts. But to join them all in a single action would be not only a joinder of parties severally liable but a joinder of different causes of action, each one against a different defendant. Such a result could not have been contemplated by the statute now under discussion, for it purports to refer to the joinder of parties only. Even if a joint cause of action in tort is alleged against a number of defendants—and such a tort would of course in its nature be joint and several—if the proof should fail to establish the joint character of the tort there would at most appear to have been a number of separate torts committed by the several parties defendant, and if judgments were to be rendered against each in such a case, they would be separate judgments on distinct and different causes of action and not judgments establishing several liabilities on the same cause of action. Whether as a question of joinder of causes of action such a proceeding might be convenient and desirable is another matter, and its propriety would involve the sections of the Judicature Act covering joinder of actions.

4. INTERVENTION.

Intervention is a proceeding native to the civil law and familiar to the ecclesiastical and admiralty law, but not known in the early equity practice nor found among common law remedies. Pothier defines it as “an act by which third person demands to be received as a party in a case formed between other parties, either to join with the plaintiff and demand the same thing he does or something connected with it, or to join with the defendant and oppose with him the demand of the plaintiff which he is interested in defeating.” Chitty says that “in some courts a third person, not originally a party to the suit or proceeding, but claiming an interest in the subject matter, may, in order the better to protect such interest, interpose his claim, which is a proceeding termed in the Ecclesiastical Courts intervention.” Intervention is unknown in our Courts of Law and Equity, but is admitted in the practice of the Ecclesiastical Courts. In modern equity practice, however, it has become common. Thus, in Marsh v. Green, the Supreme Court of Illinois said that “any person feeling that he has an interest in the

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47 Cooley on Torts (3rd Ed.) 250.
48 Oeuvres Complètes, Traité de la Procédure Civile, pt. 1, ch. 2, sec. 7, § 3.
49 The term does not appear in the Corpus Legum of Haenel, which would indicate that the proceeding was developed subsequent to Justinian’s time.
50 General Practice (1st Am. Ed.) 492. See The Oregon, 45 Fed. 62, 76, for its use in admiralty.
51 79 Ill. 385.
litigation may apply to the court, and be permitted to intervene and become a party, and have his rights passed upon on the hearing. But in common law actions, where no statute creates such a right, no intervention has ever been permitted. The Judicature Act has given us a very broad statute on intervention, which provides that "In an action either at law, or in equity, anyone claiming an interest in the litigation may, at any time, be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding."

This provision is fully as broad as the statutes of Louisiana, Iowa, California, and a half dozen other states which have followed their lead, and should receive the same liberal interpretation which the courts of those states have almost universally given. In a leading case in Iowa, arising under a statute substantially the same as ours, the plaintiff sued on two promissory notes in which he was named as payee. A third party filed a petition in intervention alleging that he was the real and beneficial owner of the notes, and that the plaintiff had no interest in them except the legal title. At common law two actions would have been necessary, for the plaintiff as the holder of the legal title would have been clearly entitled to recover, and the third party would then have had to sue him for money had and received. But the court, speaking through a very eminent lawyer and judge, John F. Dillon, held that the design of the statute was to prevent a multiplicity of actions, and since the third party was beneficially entitled to the avails of the suit it was proper for him to intervene and obtain a judgment for that which he was ultimately entitled to get.

The statute does not specify what interest or how great an interest is necessary to permit an intervention. Any interest is sufficient, and the fact that the intervenor may or may not be able to protect his interest in some other way is not material. Accordingly, where an action was brought by an alleged owner of a tract of land condemned for public use to recover the award, third persons who claimed an interest in the land were permitted to intervene. The court said: "If the whole of the award should be paid over to the plaintiff, and

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51 See Rocca v. Thompson, 223 U. S. 317, for an interesting discussion of intervention.
52 Chapter XII, Sec. 11.
54 Code, 1897, §§ 3394-3396.
56 Taylor v. Adair, 22 Ia. 479.
57 Coffey v. Greenfield, 55 Calif. 382.
the fact should be that she was not entitled to the whole of it, but that the intervenors were severely entitled to a part of it, they could maintain actions against her to recover their shares. The fact that they might, at their election have a remedy against the city would not deprive them of this right of action. If this is so, why may not they intervene in this action, in order to have the award apportioned, and to recover their share? Why should they have to wait until the money was paid over to the plaintiff, and then sue her?"  

In a recent California case the Supreme Court held that where property was attached as belonging to the defendant, a third person who claimed to own it might properly intervene in the action. Stockholders have been permitted to intervene to defend an action upon a note fraudulently executed by the officers of the company, when the company refused to defend. A subsequent attaching creditor who has levied on property already levied upon in a prior action, may intervene to defeat the lien of the prior levy. The purpose in all these cases is to simplify litigation and so far as possible dispose of an entire controversy and the rights involved in it or affected by it in a single action. But the intervenor's interest must be a legal or equitable one, and not a mere moral or sentimental interest for or against the record parties. The character of the interest which the intervenor must possess is well summarized by Mr. Pomerooy in his work on Code Remedies as follows: "The intervenor's interest must be such that if the original action had never been commenced, and he had first brought it as the sole plaintiff, he would have been entitled to recover in his own name to the extent at least of a part of the relief sought; or if the action had first been brought against him as the defendant, he would have been able to defeat the recovery in part at least."  

5. CONSTRUCTION OF ACT.  

The second section of the Judicature Act declares that the entire Act is remedial in character and as such shall be liberally construed to effectuate its intents and purposes. This section should have an important bearing upon the construction to be given and the scope to be accorded to the foregoing provisions relative to parties, for it at once frees the court from the shackles of the old rule that

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25 Dennis v. Kolm, 131 Calif. 94.  
26 Majors v. Taussig, 20 Colo. 44. And see also State v. Holmes, 60 Neb. 39; Fitzwater v. Bank, 62 Kan. 163.  
27 McEldowney v. Madden, 124 Calif. 108.  
proceedings in derogation of the common law are to be strictly con-
strued. It will therefore rest largely with the court to determine
how far the new provisions are to be carried as remedial instru-
ments. The experience of every procedural reform demonstrates
the controlling influence of the court, for no statute can be so clear-
ly worded that its scope and meaning is not largely dependent upon
the sympathetic, indifferent or hostile attitude of the judiciary. With
a Supreme Court already committed by a long and distinguished
history to the doctrine that the best test of procedure is its efficiency
and convenience rather than its historical regularity, the Judicature
Act may well be expected to mark a new epoch in the administra-
tion of the law in Michigan.

(To be Continued)

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THE MICHIGAN JUDICATURE ACT OF 1915.

IV. PLEADINGS.

The Judicature Act, re-enacting a long-standing statute of the State, makes it the duty of the Supreme Court to enact general rules of practice for the Circuit Courts with a view to the attainment of the following improvements:

"2. The abolishing of all fictions and unnecessary process and proceedings."

"3. The simplifying and abbreviating of the pleadings and proceedings."

"6. The remedying of such abuses and imperfections as may be found to exist in the practice."

"7. The abolishing of all unnecessary forms and technicalities in pleading and practice."

But lest the Supreme Court should misconceive its duty in the premises, the Act went further and made two radical provisions respecting pleading, one providing a new test for the sufficiency of declarations and the other abolishing demurrers and dilatory pleas. The Supreme Court, however, took prompt measures to revise and reform the current rules of pleading, and a complete revision of the Circuit Court Rules, prepared and proposed by a Committee of the State Bar Association, was approved and adopted by the Court as a necessary supplement to the reforms made by the Judicature Act. So that in dealing with the Act it is quite essential to treat the new Rules as an integral part of it, and in the following discussion the Statute and Court Rules will be considered together.

I. THE DECLARATION.

By statute, while the old forms of declarations are permissible, it is declared that "no declaration shall be deemed insufficient which shall contain such information as shall reasonably inform the defendant of the nature of the case he is called upon to defend."

Pleadings have always served a double function, namely, raising issues and giving notice, but the former has usually overshadowed the latter. It was never a valid objection to a pleading that it did not give sufficient notice, but it was always a fatal defect if it

1 Judicature Act, Ch. I, § 14.
2 Ch. XIV, § 2.
3 Ch. XIV, § 4.
4 Chap. XIV, § 2.
failed to raise an issue. Of course if it raised an issue it usually gave enough notice, and yet the resort to bills of particulars shows how frequently this was not true. The two functions are really different. "Pleadings," says the Supreme Court of Delaware, "are designed not only to put in issue single points, but to apprise the parties of what they are to come prepared to try."

This distinction between the notice-giving and the issue-raising functions of pleadings has been developed in a very interesting way in Michigan. When the defendant has wished to present an affirmative defense he has not pleaded in confession and avoidance as at common law or as is done under the Code, but he has pleaded the general issue and set up a notice of special defense under it. The notice does not raise an issue in the strict sense, but merely gives notice. Even when the trial of the case includes a trial of the matters involved in the general issue as well as of those involved in the notice, at least a portion of the trial is not based upon an issue at all. And when the defendant waives the benefit of the general issue and demands the right to open and close, the general issue substantially disappears and the entire trial goes forward without any issue at all on the pleadings.

This might be claimed to really involve only a statutory form of issue, on the theory that the allegations in the notice serve the same purpose as those in a plea of confession and avoidance, and the statute is merely to be taken as dispensing with a denial of them. Such statutory issues are common under the Codes. But this explanation is not sound, for the reason that the test of the sufficiency of the notice is not the same as that for a plea in confession and avoidance or an affirmative defense under the Code. Technical niceties of legal form have no place there, and allegations in the notice cannot be objected to on the ground that they are so far mere conclusions or matters of evidence that a denial of them would not raise an issue. The sole test of the sufficiency of the notice is its capacity to give information. "The accuracy required in special pleading has never been applied to a notice of special defense, and to so hold would defeat the very object in view in thus simplifying the rules of pleading. It is sufficient if such a notice fairly apprises the plaintiff of the defense that will be set up."

For many years our practice has thus demonstrated the feasibility of basing litigation upon pleadings which are drawn solely to give notice. If this rule can be applied to defenses it can of course

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5 Reading's Heirs v. State (1833) 1 Harr. 216.
be applied to declarations, for the theory of allegations is identical for all the pleadings in the case. If defendants can be permitted to employ pleadings against which only the objection of surprise at the trial can be successfully made, there is no reason why plaintiffs cannot be allowed to do the same. The rule as to notices of special defenses has worked admirably, and no lawyer would favor its repeal. Then why not make it general, and apply it to the pleadings of both parties?

This is just what the Judicature Act has expressly done. "No declaration shall be deemed insufficient which shall contain such information as shall reasonably inform the defendant of the nature of the case he is called upon to defend." Such is the language of the Act. It is substantially the same language that has long been applied by our Court to notices of special defenses. Our practice has thus become symmetrical and uniform, and the function of all pleadings has become primarily that of giving notice. The purpose of pleading has ceased to be the exemplification of the subtleties of pleader's logic and has become the intelligible disclosure of the real nature of the respective claims of the parties.

If this sensible and reasonable test is to be substituted for the old test of the common law, the old forms of declaration ought to give place to others more in harmony with the new standard of sufficiency. The cumbersome, discursive, redundant and involved precedents which our local practice books have scrupulously preserved for professional use, and which conservative lawyers could hardly refuse to follow, ought to be supplanted by other more modern, direct and business-like forms which disclose on their face a greater regard for efficiency than for conventionality. These the New Circuit Court Rules have given us. For the first time the Supreme Court has officially approved a set of pleading forms, and has offered them to the profession as models to be followed. They are substantially identical with the forms under which all the litigation of Great Britain has been conducted for more than forty years.\(^7\)

In 1912, when New Jersey abandoned the Common Law System of pleading and adopted a new practice act better fitted to modern needs, a set of official pleading forms was made a part of the rules of court, and while fewer in number and less representative than those which our Supreme Court has adopted, they are, as far as they go, exactly the same kind of forms. In Connecticut the admirable

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\(^7\) See Bullen & Leake's Precedents of Pleadings (7th Ed. 1915) where hundreds of currently used English forms almost exactly conforming to the official Michigan forms, may be found.
system for many years in force has involved the use of official pleading forms issued and approved by the Courts. And in the recent report of the Board of Statutory Consolidation of New York, prepared by some of the ablest lawyers of that State, one of the defects in the present system was declared to be the want of official forms of pleading. Under the New Circuit Court Rules Michigan has patterned after the best thought and practice of the time in respect to its forms of pleadings.

The problem of inconsistent causes of action and defenses is expressly taken up in the New Rules, which declare that such "causes of action or defenses are not objectionable, and when the party is in doubt as to which of two or more statements of fact is true he may in separate counts or paragraphs allege or charge facts, although the same may be inconsistent with other counts or paragraphs in the same pleading."

There are two possible ways of solving the problem of inconsistent causes of action or defenses. One is to allow alternative pleading of facts in the same count or defense, and the other is to allow the inconsistent facts to be set up positively in different counts or paragraphs. The method of using alternative allegations is the one most in accord with modern ideas of truthfulness in allegations. Inconsistent allegations do not look frank and honest on their face. People in their personal affairs who wish to tell the truth do not tell inconsistent stories, each with absolute positiveness. They say that the facts are either this way or that way. No other form of expression would meet the conscientious scruples of an honest man. Why, then, should not the pleader do the same? Why force him to take a position as a pleader that he would never think of taking as a man? The only reason by which such a course could be justified is that it is the historic method of the common law, and nobody is deceived by what a pleader says. It is not, however, in accord with modern ideas for a pleader to assert what he does not believe, and if the belief is in the alternative the allegations should be in the same form.

Alternative pleading has been authorized in some jurisdictions by statute. In others it has been sanctioned by the courts without a statute. The New Rules do not expressly authorize it, but there

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8 Circuit Court Rules, Rule 21, § 7.
is a seeming discrepancy on the point in the Rules. As originally prepared by the Committee of the Bar Association, Rule 21, Section 7, expressly authorized alternative pleading, but the Supreme Court changed it by substituting an authorization of inconsistent counts or defenses. But when we turn to the authorized pleading forms, it appears that the Supreme Court retained the alternative form of allegations as submitted by the Bar Association Committee. This alternative form is found in forms No. 1 and No. 31. It would thus appear that in so wording Rule 21, Section 7, as to authorize inconsistent counts and defenses, the Supreme Court did not intend to prohibit or discourage a resort to alternative allegations in proper cases, and for this reason it approved the forms appropriate to that kind of pleading. The conclusion seems necessary therefore that both methods are open to Michigan pleaders, and they may make their allegations in the alternative when in doubt as to which of two inconsistent facts is true, or they may set up each version of the facts in a separate count alleged positively.

2. JOINDER OF COUNTS.

The question of the right to join counts has always been befogged by historical considerations. Under the common law practice the courts took jurisdiction of cases under the authority conferred by the original writ, and this writ contained a summary of the case which the plaintiff was proposing to litigate. Obviously, since there could be but one writ in any case, no counts could be united in the same declaration which did not fall within the scope of the case made by the writ. Furthermore, the common law laid great stress upon singleness of issue, and hence it looked with distrust upon any joinder of counts which did not all permit of the same plea.

But under modern conditions in this country neither one of these objections to a free joinder of counts has any weight. The sole test of the right to join should be convenience. All procedure is but a means to an end. It seeks to produce in the most direct and effective way a determination of conflicting rights. Anything which makes for convenience is generally good; anything which results in inconvenience is generally bad.

The joinder of counts is, in principle, nothing but consolidation of actions. No joinder can take place which brings together counts triable only in different courts or in different jurisdictions. This is an absolute limitation. Further, a consolidation of actions or
joinder of counts is usually productive of no convenience when the
different actions or counts affect different parties. But aside from
these two restrictions it is very difficult to lay down any definite
rule limiting joinder which will work successfully.

The New York Code of 1848, which has been followed in some
twenty-eight other states, adopted the plan of classifying actions
into about half a dozen classes, and then allowing only those to be
joined which should all fall within some one class. These classes
were arbitrary and were doubtless intended solely as an aid to
convenience in judicial administration, but they have not proved a
great success. Kansas, with its strong tendency to ignore conven-
tionality, after operating for about forty years with this provision,
abolished it a few years ago, and substituted a statute making no
limitation whatever in the right to join causes of action except
identity of parties. And the recent Report of the Board of Sta-
tatutory Consolidation of New York, in proposing an abandonment
of the old joinder statute says:— "This method of prescribing the
causes of action that may be joined has led to great confusion and
to constructions almost without number. In Bliss's New York
Annotated Code there are over eighteen pages of citations under
Section 484 (the Joinder Statute)."

The Judicature Act has made a notable advance in our practice
regarding joinder, without falling into the errors committed by the
Codes. It provides in substance that the plaintiff may join in one
action, either at law or in equity, as many causes of action as he
may have against the defendant, but if it appear that any such causes
of action cannot be conveniently disposed of together the Court
may order separate trials. This is substantially the rule in England,
and has been adopted, though in quite different language,
in the New Jersey Practice Act of 1912. It is also the rule adopted
by the Supreme Court of the United States for equity cases, and
has been proposed as one of the new civil practice rules for New
York. It has therefore already undergone the test of long use
in England and has commended itself strongly to American legis-
latures and courts.

12 Chap. VIII, § 1.
13 Order XVIII, Rule 1.
16 Report of Board of Statutory Consolidation, Rule 180.
3. DILATORY DEFENSES.

Demurrers, pleas in abatement and pleas to the jurisdiction are abolished. Instead of these is substituted a motion to dismiss, or proper allegations in the answer in equity, or a notice under the plea at law.

The abolition of these remedies is quite striking at first sight, but it does not make a very substantial change in the practice. The difference between a demurrer and a motion to dismiss is only in appearance. They serve the same purpose. Demurrers seem to have acquired a bad reputation of late, for they have been abolished in England and in New Jersey, and in the federal courts in equity. The chief objection to them is that they produce delay, and a more summary method of raising points of law is desirable. Of course the delay could be avoided by merely allowing them to be set down for argument within a limited time after being filed. But a motion is a more flexible remedy than a demurrer, because it can not only be directed to the face of the opponent’s pleading but may bring new facts into the record by affidavit. So that the change made in this regard, while not revolutionary, is doubtless good.

But a much more important feature of the new Act is the permission offered to raise points of law in the answer or notice under the plea. Matters in abatement at law have long been pleadable by way of notice under the general issue, contrary to the orthodox theory of the common law that a plea in bar was a waiver of defenses in abatement. But we have never before gone to the point of permitting demurrers and pleas to the same matter to be filed at the same time. But under the new Act this is permissible, as it should be, for there was never any sound reason for the common law rule forbidding it. The English practice, in connection with the abolition of demurrers, provides for the raising of points of law in the same pleading in which issues of fact are presented, and the new New Jersey Act does the same. Some American States which have retained the demurrer have by statute offered litigants the same privilege, which is of course a matter not at all dependent on the abolition of demurrers. By pleading all defenses at the same time, whether they consist of points of law or matters of fact, much time can be saved. This is the chief advantage to be gained.

17 Order 25.  
19 U. S. Equity Rules, Rule 29.  
20 Old Circuit Court Rule (Law) 6.  
4. THE GENERAL ISSUE AND NOTICES THEREUNDER.

The Judicature Act has not made any general change of first importance in the use of the general issue and notices of special defenses, but the New Rules have introduced a striking innovation, with the design of extending still further the underlying idea of notice as the main purpose of pleading.

One of the worst abuses of the common law system of pleading was the use of general issues under which all sorts of special defenses were admissible. The plaintiff came to court almost absolutely in the dark as to what he was to be called upon to meet. Our practice cured this evil to the extent of requiring notice of defenses which were in their nature affirmative. But this only met half the difficulty. It did not touch the further hardship imposed upon the plaintiff of being kept in ignorance of the nature of the negative defenses which the defendant would rely upon. The whole declaration was put in issue. It would be an unusual case where the defendant would really intend to controvert all the plaintiff's allegations, but the plaintiff was nevertheless required to assume that he might do so and to be prepared for attack anywhere along his whole line.

This use of an unspecified and unrestricted general denial, designed and employed largely for the purpose of throwing dust in the plaintiff's eyes, is parallel to the use of an unspecified general demurrer. In Michigan an enlightened conception of fair play, far in advance of that in most other American jurisdictions, has long condemned the use of a demurrer which did not specify in detail the points of attack contemplated by the demurrant. But we never followed this up with a supplementary rule requiring the same specification of points of attack under a general issue. So that although the defendant might intend to really contest only one or possibly none of the plaintiff's allegations, the plaintiff was nevertheless obliged to carry the burden and expense of proving all the allegations of his declaration.

The New Rules have remedied this glaring defect. They provide that where the defendant really intends to take issue on only a part of the allegations in the plaintiff's declaration, he must point out that part, and when he does not intend to controvert any of the plaintiff's allegations he must say so. The penalty for failure to observe these rules is the taxing against the defendant of the plaintiff's expenses incurred in proving or preparing to prove

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21 Old Circuit Court Rule (Law) 5, (a).
22 Circuit Court Rule 23, §§ 7 and 8.
those parts of his case which the defendant has misled him into believing were to be contested at the trial.

These rules will do much to convince the public that litigation is not a mere game of chance carried on by lawyers at the expense of their clients. They will, if enforced, limit the scope of the trial to the real points in controversy, and will save the public thousands of dollars in court expenses through the saving of time in the conduct of trials. Courts will be able to do more business, jurors and witnesses will be less seriously burdened, and the costs of preparing records for appeal will be materially reduced.

While the exact provisions of these rules are not found in the practice of any other jurisdiction, similar results are obtained in a somewhat different way to a limited extent in England and much more completely in New Jersey.

In England it is provided that "it shall not be sufficient for a defendant in his statement of defense to deny generally the grounds alleged by the statement of claim or for a plaintiff in his reply to deny generally the grounds alleged in a defense by way of counter-claim, but each party must deal specifically with each allegation of fact of which he does not admit the truth, except damages." But there is no penalty for making specific denials of matters which the party does not really intend to controvert, so that this provision alone would not be sufficient to produce a real disclosure of a party's position. To supplement this another rule is found which provides that "any party may, by notice in writing, at any time not later than nine days before the day for which notice of trial has been given, call on the other party to admit, for the purposes of the cause, matter or issue only, any specific fact or facts mentioned in such notice. And in case of refusal or neglect to admit the same within six days after service of such notice, or within such further time as may be allowed by the Court or a Judge, the costs of proving such fact or facts shall be paid by the party so neglecting or refusing, whatever the result of the cause, matter or issue may be, unless at the trial or hearing the Court or a Judge certify that such refusal was reasonable."

But the burden of obtaining a disclosure is under these rules thrown on the party not making the denials, instead of upon the party who makes them. It is the latter who ought always to tell what he really intends by them.

In New Jersey the practice is better, and approaches very near to that set forth in the New Michigan Rules. The court rules

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24 Order 19, Rule 17.
attached to the New Practice Act in that state provide that "Allegations or denials, made without reasonable cause, and found untrue, shall subject the party pleading the same to the payment of such reasonable expenses, to be taxed by the Court, as may have been necessarily incurred by the other party, by reason of such untrue pleading." This, of course, goes somewhat farther than the Michigan Rules, for the same penalty is applied to a party who either alleges too much or denies too much. The foregoing provision is also supplemented by another which requires denials to be specific except when the defendant intends in good faith to controvert all the allegations, in which case they may be general.

And the New Jersey Act also contains a provision relative to express admissions almost exactly like that quoted above from the English Rules. It is quite clear, therefore, that the practice is not novel, and has been in force in much the same form as we have it for three or four years in New Jersey, with nothing so far observable to throw doubt upon its entire success.

5. REMEDY FOR UNCERTAINTY IN PLEADING.

The Judicature Act gives no remedy for a defective pleading except a motion to dismiss or a plea or answer. But it is obvious that something corresponding to the common law special demurrer for uncertainty ought to be available to prevent the too frequent claim of surprise at the trial. This need has been met by the New Rules, which provide that "whenever a pleading, at law or in equity, is deemed to be indefinite, uncertain or incomplete, a further and better statement of the nature of the claim or defense or further and better particulars of any matter stated in any pleading may be ordered on motion, upon such terms as to costs and otherwise as may be just."

This is designed to prevent parties from lying in wait for their adversaries at the trial in cases where the pleadings are obviously so uncertain as to give the other party insufficient notice. If adequacy of notice is to be the sole test of sufficiency, as the Judicature Act declares, then unless there is some means of objecting to the insufficiency prior to the trial there will be many miscarriages of justice. And if such means of objecting does exist, it will be fair and right for the court to hold that on the trial pleadings

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26 Laws 1912, Chap. 231, Appendix, § 19.
27 Laws 1912, Chap. 231, Appendix, § 40.
28 Laws 1912, Chap. 231, § 18.
29 Rule 21, § 8.
shall be liberally construed from the point of view of notice, for failure to ask for a better notice may well be deemed a waiver of many defects.

The motion for a further or better statement is the remedy in use under the English practice, and such a motion is in universal use under the Codes. Some question has arisen as to the precise relation between this remedy and that by demand for a bill of particulars. It would seem that they might well be deemed coordinate and concurrent remedies in many cases. In Conover v. Knight, the Supreme Court of Wisconsin said upon this point:— "We are not disposed to draw any nice distinction between the functions of an order for a bill of particulars and an order requiring a pleading to be made more definite and certain, for we think such distinction has no tangible existence in reason or law." Clearly there are many cases where no demand of particulars under the old practice could successfully be made, but where the pleading is nevertheless defective as a notice. In such cases a remedy now exists by motion. If it is the defendant's notice of special defense which thus falls short of the prescribed standard, the remedy is one unknown to our former practice in any form, for it has always been the rule that an objection to evidence was the only way to reach a defective notice, and that no means existed for testing the sufficiency of the notice at a preliminary stage. Doubtless the use of motions for uncertainty may become a source of abuse, and in many jurisdictions they are employed with such frequency and for so little reason that they have become a real nuisance. But our Rule provides an effective cure for improper use, in the discretion given the court to impose terms, and if the trial courts refuse to allow this remedy to become an instrument for annoyance and delay it should prove to be a very convenient and useful addition to our practice.

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30 Order XIX, Rule 7.
31 (1893) 84 Wis. 636.
32 This statement is cited with approval in Stocklen v. Barrett (1911) 58 Ore. 281.