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When the reform of legal procedure was taken up in New York in the fifties and common law pleading was supplemented by the code, New Jersey also made reforms, but they consisted in the simplification of the procedure at common law. Special demurrers for defect of form were abolished, amendments of pleadings were to be freely allowed, and the necessity for special pleadings was done away with by provisions that in all actions in which the defendant pleads the general issue and gives notice of special matter to be given in evidence, the plaintiff might give notice of special matter in denial or defense. In actions on promissory notes and bills of exchange, it was permitted to join makers and endorsers in an action on the common counts with a copy of the note or bill and of the endorsements, and in actions of ejectment all the old fictions were done away with and a schedule of brief form of pleading was provided. No attempt was made to do away with the old forms of action; the principles of pleading at common law remained unaffected, except that special matters might be set up in defense or reply in informal statements rather than in special pleas and replication. The act of 1855 was supplemented by rules of court and modified by subsequent statutes, but the statutes and the rules were few. No elaborate code of practice was adopted and both practice and pleading became matters of tradition rather than positive law, and were incidental rather than matters of substance. There was little controversy over questions of pleading or practice and there are but few reported cases in recent years on these subjects.

The provision for the informal statements of matters of defense and reply did away with the necessity for special pleading and the latitude allowed in the use of the common counts was not restricted by any rules like the English rules adopted at the Hilary term, 1852. The result was that while the forms of common law pleading were retained and the practice was governed by common law rules, there was little need for special pleading and

* An article entitled "Should the Demurrer be Abolished in Connecticut" will follow in the February issue.—Ed.

most cases were brought to issue upon a declaration on the common counts and a plea of the general issue with bills of particulars and informal notices of the defense. The issues of fact were not clearly defined, and the real merit of common law pleading which consists in stating in advance the precise cause of action and the exact legal defense and the production of a definite issue was no longer realized. It came to be true, as Lord Justice Cotton said of the English practice, "Under the old system of pleading at common law the purpose was to conceal as much as possible what was going to be proved at the trial." The Lord Justice added, "but under the present system, it is our duty to see that the party so states his case that his opponent will not be taken by surprise."[1]

It was substantially this new English system that was adopted in the rules prescribed by the New Jersey Practice Act of 1912. These rules do away with the division of causes of action into actions of contract and in tort. The pleadings consist of a complaint and an answer and it may be a reply. A case is at issue when the material facts on one side are denied on the other. All pleadings must contain a plain and concise statement of the facts on which the pleader relies (and no others) but not the evidence by which they are to be proved. The statement must be divided into paragraphs numbered consecutively, each containing, as nearly as may be, a separate allegation. Dates, sums and numbers must be in figures.

Objections to the complaint must be made by motion and these may be in the nature of a plea in abatement or a demurrer, but a demurrer may be made also in the answer. Demurrers as such and all pleas to the jurisdiction or in abatement are abolished. Objections to the answer also are made upon motion. Commissioners are to be appointed before whom certain interlocutory motions are made.

The new Practice Act itself makes no reference to the forms of pleading. These are treated in the rules of court provisionally adopted in the Act and these rules govern many other matters of a good deal of importance. It was thought best to have the details of practice provided for in rules which are expressly declared to be subject to the control of the court rather than to have them in the form of statutes, which must be rigidly obeyed. One of the important purposes of the Act is to extend the power

[1] *Spedding v. Fitzpatrick,* 38 C. D., 411.

of the court with respect to the parties to actions at common law and to the causes of action that may be joined in a single suit. It changes an action at common law from a contest between the two parties with the court as umpire, to a means of determining the rights of all the persons that are interested in a controversy arising out of a given transaction. The Act provides that all parties claiming an interest in the subject of the action, and in obtaining the judgment demanded, either jointly, severally or in the alternative, may join as plaintiffs and that persons interested in separate causes of action may join if the causes of action have a common ground of law or fact and arose out of the same transaction or series of transactions; and so also any persons may be made defendant who either jointly, severally or in the alternative are alleged to have a claim or interest in the controversy, or whom it is necessary to make a party for the complete determination or satisfaction of any question involved therein. No action may be defeated by the non-joinder or mis-joinder of parties, and new parties may be added, and parties mis-joined may be dropped by order of the court at any stage of the cause, as the ends of justice may require. The plaintiff may join any causes of action and the defendant may counterclaim and set off any cause of action and issue a summons to other parties, and judgment may be given for or against one or more of several plaintiffs or several defendants and the court may determine the ultimate rights of the parties on each side as between themselves and grant the defendant any affirmative relief to which he may be entitled.

The other important subject of the Act is the practice on appeal. Bills of exceptions and writs of error in all cases are abolished and an appeal may be taken in any case in which the plaintiff has heretofore been entitled to a writ of error, and the appeal is in the nature of a re-hearing upon any question of law involved in any ruling, order or judgment below. This does not, however, do away with the necessity of making objections at the trial to the admission of evidence or the ruling of the judge. No judgment may be reversed or a new trial granted on the ground of misdirection or the improper admission or exclusion of evidence, or for error as to matters of pleading or procedure unless after examination of the whole case it shall appear that the error injuriously affects the substantial rights of the parties. One rule provides that in case of a new trial there shall be a new trial only of

the question with respect to which the verdict is found to be wrong, if separable, and if a new trial is ordered because the damages are excessive or inadequate, and for no other reason, the verdict shall be set aside only with respect to damages and shall stand good in all other respects. Where there is a lack of proof of some matter capable of being proved by incontrovertible evidence, the Court of Appeals may allow it to be supplied.

Having made these general provisions with regard to the character of an action at common law and with regard to the practice upon appeal, the statute provides that the Supreme Court should provide rules for all the common law courts to give effect to the provisions of the statute and otherwise to simplify judicial procedure, and that these rules shall supersede, so far as they conflict with them, the statutory and common law regulations heretofore existing, and the Act itself provides a set of rules which are to be deemed to be the rules of court, subject to suspension and amendment in any particular by the court, as experience shall prove to be expedient.

These rules regulate the joinder of parties, prescribe the order of pleadings and the forms of the several pleadings, and regulate briefly the time of filing papers and the course of practice. They make provision for striking out answers and giving summary judgment in certain cases. They provide for preliminary references to commissioners for discovery of documents before trial; and with regard to the trial, there is provision that the jury may answer written questions embracing disputed facts in issue and the amount of damages, and find a general verdict subject to the opinion of the court on the answers to these questions. Sample forms of complainant's answer, counterclaim, etc., are given in the rules.

The effect of the plan embodied in the statute and the rules will be to give the courts of common law much more latitude than heretofore in dealing with cases brought before them. The courts of law and equity are necessarily distinct courts under the constitution, but this statute gives to the courts of law some powers formerly characteristic of equity tribunals. One is the power to make a decree which will be something more than a money judgment, and another is the power to deal with all persons interested in the subject matter of a controversy and to establish their rights as between themselves.

The change in the forms of pleading makes the pleading at common law substantially similar to those already in use in the Court of Chancery. Common law pleadings had the advantage of being based upon established rules of law as to what constituted a cause of action, and what the legal defenses were. It was indeed by means of them that the rules of law were established. They have served their purpose and the modern lawyer is impatient with the logic by which the result was reached. The old pleadings used in the modern way failed to state the real issue and often concealed the facts. It may well be better to reach an issue upon a statement of the facts on both sides and to let the Court apply the law to the facts so stated, but whether the facts constitute a cause of action or a defense will no longer appear upon the face of the pleadings drawn in accordance with the established forms.

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