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The Bill Abolishing the Demurrer, and Other Procedural Acts

By BERNARD C. GAVIT*

One act in the field of civil procedure was passed at the last session of the General Assembly which makes such a significant change in the law that it seems desirable to call the attention of the members of the Bar to the act and to discuss it very briefly. The act referred to was House Bill Number 55, introduced by Representative Windfield K. Denton, of Evansville. The act was approved by the Governor March 9, 1937, and will be published as Chapter 185 of the Acts of 1937. The act is as follows:

An act concerning proceedings in civil cases.

Section 1. Be it enacted by the General Assembly of the State of Indiana, That (1) all objections to pleadings heretofore raised by demurrer or motion shall be raised by motion. Only one such motion, which may include any or all of the grounds therefor, shall be addressed to any pleading, and such motion may be addressed to the pleading in its entirety, or to any paragraph separately, or to each and every paragraph, and upon any amendment being made to a pleading, or part thereof, then one such motion may be addressed to such amended pleading or amended part thereof. The party filing such motion, may, upon leave granted by the court, amend such motion at any time before it is acted upon by the court. Such motion shall point out by separately numbered specifications, the particular defects asserted, either as matter of law or pleading of fact, and shall ask for such relief as the nature of the defects may make appropriate, such as the dismissal of the action or the entry of a judgment where a pleading is substantially insufficient in law, or that a pleading be made more definite and certain in a specified particular, or that designated immaterial matter be stricken out, or that necessary parties be added, or that designated misjoined parties be dismissed, and so forth.

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(2) Where a pleading or a division thereof is objected to by a motion to dismiss or for judgment or to strike out the pleading, because it is substantially insufficient in law, the motion must specify wherein such pleading or division thereof is insufficient.

(3) After rulings on motions, the court may make such orders as to pleading over or amending as may be just.

(4) Upon motions based upon defects in pleadings, substantial defects in prior pleadings may be considered in so far as they are material to the ruling sought.

Sec. 2. All laws and parts of laws in conflict herewith are hereby repealed.

This act was copied from the recent Illinois Code of Civil Procedure and reaches the same results as the new proposed Federal Rules of procedure. Under this act it seems rather clear that questions as to the jurisdiction of the person of the defendant, as to the legal capacity of the plaintiff, and as to the pendency of a prior action may now only properly be raised by a plea in abatement. So far as other grounds for demurrer are concerned, there is simply a change in terminology. A defect of parties apparent on the face of the record should be raised by a motion to require the inclusion of the omitted party. The question of lack of jurisdiction of the subject matter should be raised by a motion to dismiss. A question of misjoinder of actions should be raised by a motion to separately docket the actions misjoined. The question of the insufficiency of a complaint to state a cause of action should be raised by a motion for a judgment on the pleadings, giving specific reasons why the complaint is insufficient. The motions to make more specific and to strike out are still available, although it is to be noted that the statute prohibits the filing of more than one motion.

It will be seen that all of the present grounds for demurrer may still be used under the name of an appropriate motion. The significant feature of the bill is the provision in sub-section 3 which repeals the existing statutes giving a plaintiff the absolute privilege of filing an amended pleading and a defendant the absolute privilege of answering over if his attack on the plaintiff's pleading is insufficient. The statute by implication permits a pleading to be amended before a motion addressed to it has been ruled upon, but after the motion has been ruled upon the privilege of amendment or of answering over is within the discretion of the court. On this score the act is a return to the common law procedure and is in line with all of the recent procedural reforms in other states.

By its terms the act also sanctions a motion to dismiss to raise the question of the sufficiency of the complaint, but it is suggested that as between this motion and a motion for judgment on the pleadings a defendant would certainly wish to use the latter. There might

be some difficulty about sustaining a judgment of dismissal as *res judicata*, but no difficulty about sustaining a judgment on the pleadings as *res judicata*.

There seems to be one difficulty in connection with this act. It is difficult to see how the motion for judgment on the pleadings will be available as against an affirmative answer, where as is usual there is an intervening general denial.¹ In Illinois and other states where this procedure is available a general denial is prohibited, so that the motion for judgment on the pleadings is available both to the plaintiff and defendant. It is believed that the act therefore makes no provision whereby the sufficiency of a so-called affirmative answer may be raised.

A number of other acts in the field of procedure were passed at the last session of the General Assembly, only one of them carrying an emergency clause. This was House Bill Number 391. It provides that when a judge is compelled by mandate of the Supreme Court to grant a change of venue from himself in the absence of an agreement between parties, the appointment of the new judge is to be made through the Clerk of the Supreme Court or the Governor. Two Uniform Laws were passed. One compels the courts to take judicial notice of foreign law, and the other provides for accountings by trustees. This latter act brings within the jurisdiction of the courts much the same type of administration as now prevails as to the estates of decedents. The act, however, expressly exempts trusts created prior to the passage of the act and allows a testator or settlor to exempt the administration of the trust estate from the necessity of a court accounting by express provision in the deed or will creating the trust.

Senate Bill Number 113 provides for an additional method of appellate review by certificate, but is expressly supplemental to existing law.

House Bill Number 150 provides for the joinder of actions for injuries to persons and property where the causes of action involved arose out of the same transaction. It also provides for a new trial for insufficient damages in any case.