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SOME OBSERVATIONS ON SECTION 48 OF
THE ILLINOIS CIVIL PRACTICE ACT

MAXFIELD WEISBROD *

Among the innovations introduced by the Illinois Civil Practice Act are those embodied in Section 48 thereof. These observations are confined to that section and will make reference to other appropriate sections of the Act and the Rules adopted by the Supreme Court pursuant thereto only in so far as may be necessary for a clear understanding of this section.

Since the provisions of this section were taken from the New York Rules of Civil Practice, we must, until our reviewing courts have passed upon them, look, at least in part, to the authorities of that state for an interpretation of these provisions. No doubt, our courts in construing these various provisions will be inclined to give them a construction similar to that given by the New York courts unless such construction be contrary to the provisions of our Act or be in conflict with the spirit or policy of the law of our State. It is specifically provided in our Act that it shall be liberally construed, and it would appear that where the courts of review of New York have rendered various technical decisions under its act, those decisions should not, in view of the provisions of our Act, be controlling, but merely persuasive.

Before analyzing the various provisions of this section, it should be noted that the purpose of the provisions, as

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1 Ill. Rev. Stat. 1937, Ch. 110, § 172: "§ 48 (Involuntary dismissal for certain defects.) Defendant may, within the time for pleading, file a motion to dismiss the action or suit, where any of the following defects appear on the face of the complaint, and he may within the same time, file a similar motion supported by affidavits where any of the following defects exist but do not appear upon the face of the complaint. . . ." The subsections are hereinafter quoted in the body of this article.

2 Kerner v. Thompson, 365 Ill. 149 at 155, 6 N. E. (2d) 131 (1936).

stated in a New York case,\(^4\) is the adaptation to actions at law of the old equity practice of raising questions of law by a plea in bar and having these questions determined before pleading to the merits. It is also to be observed that the provisions of this section are not mandatory.

Under our chancery practice as it existed prior to the enactment of the Civil Practice Act, it was proper to file demurrers and pleas to a pleading as the occasion required. The former chancery practice and the practice under this section are analogous in that generally where a demurrer would lie under the former chancery practice, a motion would be proper now; and where a plea would have been appropriate under the former chancery practice, a motion supported by affidavit would be appropriate under this section. The practice of filing motions to dismiss for causes apparent upon the face of a pleading is not novel in Illinois, for it was not uncommon practice in chancery for a defendant to present a motion to dismiss a bill for want of equity apparent upon the face of the bill and for the court to treat such motion as a general demurrer.\(^5\) It may be said in passing that, under the former chancery practice, a plea contained matter wholly dehors the bill, as, for example, a release.\(^6\)

In so far as Section 48 deals with defects appearing upon the face of the complaint, it is merely an amplification of Section 45 of the Act, which substitutes motions for demurrers. The writer inclines to the opinion that, when our reviewing courts are called upon to do so, they will rule that the phrase "face of the complaint" also includes by plain and fair inference the face of the record. It is difficult to conceive how certain objections which may be raised under the various provisions of this section could appear on the face of the complaint. For

\(^5\) Lavin v. Comrs. of Cook County, 245 Ill. 496 at 509, 92 N. E. 291 (1910); Leonard v. Arnold, 244 Ill. 429 at 432, 91 N. E. 534 (1910).
instance, a motion to quash service of process may be made under Section 48. It is quite apparent that a court acquires jurisdiction of the person of the defendant, not when the suit is instituted and the complaint filed, but either by service of process or by his voluntary appearance. Since the motion to quash may be made under Section 48 and the basis for the motion appears from the record other than the complaint, we are impelled to the conclusion that the face of the complaint and the face of the record will be deemed to connote the same thing. But, as a practical matter, we need be little concerned with the suggested conclusion in view of the proviso that where the defects exist but do not appear on the face of the complaint, a motion supported by affidavits may be filed.

If the objection which is set forth in a motion made pursuant to any of the provisions of this section appears on the face of the complaint, plainly no affidavit need accompany the motion; but where the defect does not appear on the face of the complaint, then we must follow the requirement that the motion be accompanied by a supporting affidavit. This affidavit manifestly should contain such additional facts as may be necessary to inform the court of the nature of the objections which render the complaint insufficient or improper and disclose the defects and deficiencies complained of. If no counter-affidavit is interposed, the allegations contained in the supporting affidavit will be taken as true, and the court will dispose of the motion upon that basis. If, however, it is desired to contest the facts set forth in the supporting affidavit, the counter-affidavit will create the issue to be determined by the court.

We further perceive that the motion to dismiss must be filed within the time allowed for pleading. The corresponding rule in New York provides that the motion must

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be filed "within 20 days after service of the complaint," which, under the New York practice, is the time for pleading. In Illinois the trial court in its discretion may extend the time to file this motion. However, in New York it has been held that where more than twenty days have elapsed before service of the motion, the motion will be denied.

Prior to interposing a motion under any of the provisions of this section, counsel would do well to give some consideration to Sections 23, 24, 43, 44, and 45, together with Section 49 and the rules made pursuant thereto, and Rules of the Supreme Court numbered 8, 9, 10, 11, 12, 13, and 21.

In order that the various subsections may be discussed in an orderly fashion, they will be taken up in the sequence in which they occur in the Act. In each case the defect on account of which the motion to dismiss may be filed is stated in the words of the Act.

**Subsection (a)**

"That the court has not jurisdiction of the person of the defendant."

Our Supreme Court, in passing on this subsection, did not follow the New York authorities. In the case of *In re Estate of Rackliffe* it was specifically held that a party making a motion under this subsection of the Act did not, by entering upon the trial, confer jurisdiction upon the court and waive her right to have reviewed her motion attacking the jurisdiction of the court. Our Act is distinguished from the New York Act in that our Rules of Court specifically provide that failure to take a direct appeal from the denial by the court of a motion under this section shall not be deemed a waiver of any error.

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8 Ill. Rev. Stat. 1937, Ch. 110, § 183; ibid., § 259.8.
10 366 Ill. 22, at 27, 7 N. E. (2d) 754 (1937).
in the decision denying such motion, and the party shall have the right to assign such error on appeal from such judgment. Our courts have held that the filing of an answer by the defendant after a denial of his motion to dismiss is not a waiver.\(^{12}\) As illustrative of motions to dismiss that may be made under this subsection, the following will serve as examples: (1) where defendants are members of a partnership, but service of process was not had upon one of the partners;\(^{13}\) and (2) where the Probate Court grants letters of administration upon a non-resident of the county.\(^{14}\)

At common law, lack of jurisdiction over the person could be presented only by a dilatory plea and not by demurrer. In a chancery proceeding the defendant raised the question of lack of jurisdiction over his person by plea; the proper practice was to set the plea for hearing, so that the sufficiency of the plea could be determined, since a demurrer to a plea in chancery could not properly be interposed.\(^{15}\) The proceedings upon the argument upon a plea were nearly the same as those upon the argument of a demurrer.

Under this provision, a defect in the process or its service may be reached. It may be necessary to file a supporting affidavit and to set out the necessary facts. Where the facts are dehors the record, it is obvious that there must be a supporting affidavit; but where the defect appears in the process itself or upon the return thereon, it would seem that an affidavit should not be necessary. Our courts take judicial notice of their own records,\(^{16}\)

\(^{12}\) Waters v. Heaton, 364 Ill. 150 at 153, 4 N. E. (2d) 41 (1936); In re Estate of Rackliffe, 366 Ill. 22 at 28, 7 N. E. (2d) 754 (1937); Wright v. F. W. Woolworth Co., 281 Ill. App. 495 at 504 (1935).

\(^{13}\) Hoffman v. Wight, 137 N. Y. 621, 33 N. E. 554 (1893).

\(^{14}\) Bremer v. L. E. & W. R. R. Co., 318 Ill. 11 at 22, 148 N. E. 862 (1925); In re Estate of Trost, 292 Ill. App. 60 at 64, 2 N. E. (2d) 857 (1937).


and it would thus seem immaterial whether the lack of jurisdiction appears on the face of the complaint or from an examination of some other part of the record. As a matter of precaution, it would be well to accompany a motion with a supporting affidavit.

Undoubtedly the most common occasion for making a motion under this provision would arise from insufficient process, insufficient return of service of process, or a false return. Where the objection is to the process itself, the more logical motion to make would be a motion to quash the summons or to quash the return. This procedure seems the more apt, since an insufficient process, or an improper return by the sheriff, is no reason for dismissing a complaint; for should the summons be insufficient, the remedy would be by the issuance of another summons; and if the return be improper, it could be amended; and if the amendment were improper, the remedy would lie by the issuance of a new summons and service thereof. If this procedure is adopted, we have the very interesting question as to whether the motion should of necessity be made by a special appearance, pursuant to the previous expressions of our courts that a person appearing for the sole purpose of contesting the jurisdiction of the court over his person must do so by a special appearance, and any other participation in the case makes for a general appearance. If Rule 21 is to be interpreted in the light of the decision of In re Rackliffe, just referred to, we are apt to be confronted with a drastic change in our procedure. A defendant need no longer be troubled by the effect of his pleading over after an adverse ruling upon his motion attacking the jurisdiction of the court made under a special appearance, for the rule specifically states that a denial of such motion shall not be deemed a waiver of any error, and the defend-

17 Ladies of Maccabees v. Harrington, 227 Ill. 511 at 524, 81 N. E. 533 (1907).
ant shall have the right to assign such error on appeal from the final judgment.

However, under the New York code a special appearance must be used, as at common law, when a motion to dismiss is made predicated upon the objection that the court lacks jurisdiction of the person of the defendant. And in an Illinois appellate court case where a defendant filed a special appearance and a motion asking the court to dismiss the complaint for want of jurisdiction over the person and subject matter and giving reasons therefor, and with such motion filed the equivalent of a plea of res judicata asking the court to exercise its general jurisdiction to pass upon the Statute of Limitations and plea of res judicata, the court held that this action by the defendant operated of itself to overrule the special appearance and to make it the equivalent of a general appearance.

Suppose, then, that a defendant is a foreign corporation, not licensed to do, nor doing, business in the state and that service of process is had on an alleged agent or officer of such corporation. The argument might be made that the court has no jurisdiction because the defendant corporation was neither licensed to do nor was doing business in the state. The writer inclines to the view that the motion to be made should be one to quash the service of process rather than a motion under this subsection. An excellent illustration involving a set of facts quite similar to the supposititious case is found in Goldey v. Morning News, wherein suit was brought in the Supreme Court of New York by a citizen of that state against the Morning News, a Connecticut corporation, carrying on business in Connecticut only and having no place of business, officer, agent, or property in New York.

21 156 U. S. 518, 15 S. Ct. 559, 39 L. Ed. 517 (1895).
The action was commenced by personal service of the summons in the city of New York upon the president of the corporation, a citizen and resident of Connecticut temporarily in New York. Thereafter, upon the petition of the defendant, who appeared specially and solely for the purpose of removal, the case was removed to the local Federal court. Subsequently, the defendant, appearing specially for the purpose of setting aside the summons and the service thereof, filed a motion, supported by affidavits, to set aside the summons and the service thereof, upon the ground that the defendant, being a foreign corporation carrying on its business solely in another state, transacting no business within the state of New York, and having no agent clothed with authority to represent it in the state of New York, could not legally be made a defendant in an action by service upon one of its officers temporarily in that state. Thereupon the Federal court, after hearing the parties on a rule to show cause why the motion should not be granted, ordered that the service of the summons be set aside and declared to be null and void. The plaintiff sued out the writ of error. The court affirmed the finding and order of the trial court. No point was raised by either party that the method pursued, a motion to quash service of summons, was improper. This procedure is that sanctioned in the majority of the so-called code states.

Under our former practice, if the defendant raised the question of jurisdiction over his person by motion and the motion was overruled and defendant then pleaded in bar, he waived any error in the ruling on his motion, and the ruling was not reviewable, provided that the court otherwise had jurisdiction of the subject matter of the suit. In *Baldwin v. Iowa State Traveling Men's Association*, the United States Supreme Court held that where

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the defendant appears and objects to jurisdiction over his person, he thereby gives the court jurisdiction to decide that question, right or wrong, so that thereafter the judgment at most is only erroneous and not subject to collateral attack.

The Rules of the Supreme Court providing for a motion to quash the writ, service, or return plainly imply that any motion made to question the jurisdiction of the court over the person of the defendant, so far as it appertains to service of process, should be made under the cited rule rather than this provision of the Act.

**Subsection (b)**

"That the court has not jurisdiction of the subject matter of the action or suit, provided the defect cannot be removed by a transfer of the case of a court having jurisdiction thereof."

The New York Act, as originally enacted, did not contain the clause, "provided that the defect cannot be removed by a transfer of the case to a court having jurisdiction." Subsequently, an amendment was made to the New York Act which embodied such provision. It would thus appear that the only decisions of New York courts which would be helpful in determining the meaning of this subsection must be in cases arising subsequent to this amendment to the New York Act.

This subsection may not be interpreted to have reference to the transfer of an action from the law docket to the equity docket, or vice versa, since provision for such transfer is made in Section 44 of the Act. In this connection, it is interesting, historically, to note that Section 40 of the Practice Act of 1907 provided for the transfer of a suit from the law docket to the chancery

24 Ill. Rev. Stat. 1937, Ch. 110, § 259.8 (2).
docket, or vice versa, although the terms of that section were not as liberal as those of Section 44 of the Act.

It is difficult to understand just why subsection (b) was enacted in the language in which it is expressed, in view of Section 36 of our statute on Venue, which provides for a change of venue when a suit is commenced in a wrong court, and Section 37, which provides for a transfer of civil actions between courts of record of concurrent jurisdiction in the same county.

If it appears that no state court has jurisdiction, the action must be dismissed although jurisdiction may exist in the local Federal Court, unless the case is one removable from the State to the Federal courts under the Federal statute, in which case, of course, transfer is made not by virtue of this subsection, but pursuant to the Federal statute.

An apt illustration of a situation where there was not jurisdiction of the subject matter is found in Jacobus v. Colgate, where the plaintiff sought to recover for a foreign trespass. But the decision must be read in the light of the New York laws, which are discussed in a masterly fashion by Mr. Justice Cardozo, then a member of the New York Court.

In another New York case in an action upon a contract between the plaintiff, a resident of New York, and the defendants, a German corporation and an individual, a resident of Germany, the latter moved the court to dismiss upon the ground that the court did not have jurisdiction of the subject matter of the action by reason of a provision in the contract that in case of a dispute the German courts should have sole jurisdiction. The court reversed the order of the trial court dismissing the cause and, in doing so, predicated its opinion solely upon this question of jurisdiction.

Subsection (c)

"That the plaintiff has not legal capacity to sue."

There will be few instances when this objection will appear on the face of a complaint. Natural persons and corporations, unless they are under some disability, have the right to sue, and the presumption will arise that they are not under any disability until the contrary affirmatively appears. Persons purporting to sue in some representative capacity must, of course, make some affirmative showing that they have the right to maintain such action. If there be no such showing, a motion to dismiss should be entertained without any supporting affidavit, since the complaint on its face would show that this deficiency exists. For example, it may appear on the face of the complaint that the plaintiff is a foreign administrator. That would be a perfectly good objection in New York, but our courts have held that a foreign administrator may maintain an action in this state for wrongful death.

As illustrative of a case where the defendant raised the question of the capacity of the plaintiff to maintain an action, reference may be had to Keslick v. Williams Oil-O-Matic Heating Corporation, involving an action brought for wrongful death charging a violation of the Occupational Diseases Act. The suit was instituted by the surviving widow as administratrix of the estate of her deceased husband. Subsequent to the passing of more than one year, the widow individually and a surviving minor child were by an amendment substituted as parties plaintiff. The minor child thereafter was dismissed as party plaintiff leaving only the surviving widow as plaintiff, whereupon the defendant filed a special plea interposing the Statute of Limitations, to which plea the plaintiff demurred. Upon hearing, the demurrer was

30 277 Ill. App. 263 (1934).
overruled, and as the plaintiff elected to stand by the demurrer, judgment of nil capiat was entered. Upon appeal, the Appellate Court held that the original declaration did not state a cause of action since, under the statute, none accrued to the administratrix and that the provisions of Section 39 of the Practice Act of 1907 did not prevent the running of the statute. The plaintiff then obtained leave to appeal to the Supreme Court, where it was held that since the Occupational Diseases Act had previously been declared unconstitutional, a reversal of the judgment would afford the plaintiff no advantage, and thereupon the judgment was affirmed.

The language of this subsection would appear to be broad enough to subject to its provisions a corporation which is not in good standing, that is, a corporation which, for instance, had not paid its franchise taxes as provided by Section 142 of the Corporation Act. It is to be observed, however, that that section of the Corporation Act provides that no corporation so in default shall maintain any action at law or suit in equity, and our Appellate Court has construed that section to mean, not that the suit may be dismissed, but rather that it shall be held in abeyance until the franchise taxes are paid. It is the writer’s opinion that the failure of a corporation plaintiff to pay its franchise tax should more properly be raised upon an answer under the above provision of the Corporation Act and not under this subsection of the Civil Practice Act. Of course, if that question is sought to be raised under this subsection it would of necessity be supported by a proper affidavit.

Subsection (d)

"That there is another action pending between the same parties for the same cause."

Prior to the enactment of the Civil Practice Act the objection of another action pending could be raised at law only by an appropriate plea in abatement. In chancery the objection of another suit pending would also be raised by a plea in abatement. Pleas in abatement in chancery bear a close resemblance to pleas in abatement at common law. It is to be observed that our Abatement Act is still in full force and effect; Section 27 of that act, added in July, 1933, is to the effect that the provisions of the Abatement Act should apply, so far as they may be appropriate, to all cases not governed by the provisions of the Civil Practice Act. But it would appear that the benefits to be derived under this provision are of rather dubious quality.

Perhaps what may be a not uncommon situation calling for the use of this provision will occur where an action is instituted by a party against some named defendant, and then the plaintiff's assignor institutes an action against the same defendant for the same matters. Another situation which might arise calling into play this provision of the Act would be where a suit had been instituted against the same defendant in two different jurisdictions upon the same subject matter. Substantially this question arose in Little v. Chicago National Life Insurance Company. In making disposition of the appeal, the Appellate Court specifically held that the motion to dismiss was properly made under this subsection of the Act.

36 Kelley v. Champlain Studios, 228 N. Y. S. 5 (1928).
In *Leonard v. Bye*,38 suit had been instituted in the Superior Court of Cook County to recover from the defendant the superadded stockholder's liability imposed by the Illinois Constitution. The defendant filed his motion and affidavit which set forth that prior to the institution of the present case another suit for the same cause of action was previously filed and was pending in the Circuit Court of Cook County. The motion to dismiss was allowed. A direct appeal was taken to the Supreme Court. That court did not enter into any discussion of this provision of the Act but preferred to bottom its decision upon the broad ground that the Superior Court properly refused to inquire into the jurisdiction of the Circuit Court and that the rule contended for by the appellant would be disruptive of the orderly process of our courts and fatal to the well-known principle that there must be an end to litigation.

**Subsection (e)**

"That the cause of action is barred by a prior judgment."

This subsection obviously provides for the defense of res judicata. Under the Practice Act of 1907, such defense had to be shown by a special plea in bar or by appropriate allegations in the answer. It is difficult to conceive of a well-prepared complaint where such defect would appear on the face thereof.

It is, of course, impossible to state, without knowledge of the issues to be raised, whether the defense of res judicata would be one of law or of fact in any particular case. If the question sought to be raised is whether there was a particular judgment upon which the defendant predicates such defense, a simple question of fact would be presented. However, a situation might arise in which the former adjudication would be binding upon persons who were not parties to the record. For example, one in whose behalf, or under whose direction, a suit is prose-

38 361 Ill. 185, 197 N. E. 546 (1935).
cuted or defended would be barred by the judgment or
decree rendered in the suit, and parol evidence would be
admissible to show who was the real party in interest and
that such person conducted the litigation in the name of
another.\(^9\) Again, if upon the face of the record the pre-
cise question raised in the later case does not appear to
have been determined in the former suit, and yet if its
determination was essential to the judgment rendered
in the former case, then extrinsic evidence would be ad-
missible to make the requisite showing.\(^4\) Our authorities
have held that parol evidence may be admitted to show
what was adjudicated upon in the former suit, but not
what the adjudication was.\(^4\)

Since the plea of former adjudication is an affirmative
defense it follows perforce that the burden of proving
such plea is upon the defendant, and he must show what
was determined by the former judgment relied upon, and
such proof must be clear, certain, and convincing.\(^4\) In
*Brandt v. St. Paul Mercury Indemnity Company*,\(^4\) the
defendant made a motion to dismiss the complaint and
with the motion there was filed the equivalent of a plea
of res judicata. Plaintiff contended that the defendant
did not maintain the burden of proving prior adjudication
under its defense of res judicata. The upper court stated
that under this section of the Civil Practice Act, where
affidavits as to certain facts are filed and no counter-
affidavits are presented, it will be presumed that the trial
court had sufficient evidence before it to justify the order

\(^9\) Smith v. United States Express Co., 135 Ill. 279 at 289, 25 N. E. 525
(1890); Harding v. Fuller, 141 Ill. 308 at 319, 30 N. E. 1053 (1892); Ward
v. Clendenning, 245 Ill. 206 at 223, 91 N. E. 1028 (1910).

\(^4\) Hunter v. Troup, 315 Ill. 293 at 297, 146 N. E. 321 (1925); Wells v.
Robertson, 277 Ill. 534 at 540, 115 N. E. 654 (1917); White v. Sherman,
168 Ill. 589 at 612, 48 N. E. 128 (1897).

\(^4\) Leopold v. City of Chicago, 150 Ill. 568 at 575, 37 N. E. 892 (1894);
Wright v. Griffey, 147 Ill. 496, 35 N. E. 732 (1893).

\(^4\) Smith v. Rountree, 185 Ill. 219 at 223, 56 N. E. 1130 (1900); Sawyer

dismissing the complaint; and thereupon it affirmed the order of the trial court dismissing the case.

The only reason for a motion by defendant to dismiss upon this ground is the desire to obtain a speedy determination of the suit. Apparently the thought back of this subsection is the same as that which produced Section 57 of the Civil Practice Act, often called the section on summary judgments.

Of course, the trial court is not always authorized to try the issues presented upon a supporting affidavit and counter-affidavits; it may be authorized only to determine whether there is an issue to be tried. If such issue be raised, there must be a trial, either by the court, or by jury, if a jury be demanded. A determination by the court that no issue is in fact raised would not infringe upon the constitutional right of trial by jury. But powers granted to a jury under our laws are exclusive, and they are not shared with the trial judge to whom such powers are not committed. If the trial court were permitted to pass upon any issues of fact in a case where a jury demand is on file, then, of course, the plaintiff would not have a trial by jury.⁴⁴

**Subsection (f)**

"That the cause of action did not accrue within the time limited by law for the commencement of an action or suit thereon."

This subsection should prove to be very advantageous in effecting a rapid disposition of matters involving the Statute of Limitations. Prior to the enactment of the Civil Practice Act it was the practice in equity to permit a party to raise the defense of the Statute of Limitations by demurrer if apparent upon the face of the bill.⁴⁵ The defenses of the Statute of Limitations and of laches were

treated as substantially identical defenses, and the defense of laches could be taken advantage of by demurrer where it appeared on the face of the bill.\textsuperscript{46} In actions at law the defense of the Statute of Limitations was regarded as being in the nature of a privilege which a defendant might interpose or not, as he wished; so a defendant desiring to interpose such defense was required to plead it affirmatively;\textsuperscript{47} it could not be raised by demurrer in an action at law.\textsuperscript{48}

A possible exception may exist in actions for wrongful death under the Injuries Act.\textsuperscript{49} Our reviewing courts are, in such cases, not in accord upon the question of how to raise the limitation, whether by demurrer or plea. In \textit{Holden, Admx. v. Schley},\textsuperscript{50} our Appellate Court held that a declaration not showing upon its face that the action was brought within one year stated no cause of action and would be insufficient to support a judgment in the plaintiff's favor. A further appeal was prosecuted by the plaintiff, and our Supreme Court reversed the holding of the Appellate Court without definitely passing upon this phase of the controversy.\textsuperscript{51} In \textit{Hartray, Admr. v. Chicago Railways Companies},\textsuperscript{52} the Supreme Court held that the declaration must positively aver or state facts showing that the action was commenced within one year from the day of death of the person injured and that the omission of such statement made the declaration bad on motion in arrest of judgment. This requirement is based upon the fact that, since the action for wrongful death is entirely a statutory one and the limitation is imposed by the same act, the limitation is one on the right itself and not merely on the remedy, and the plain-
tiff must take the action with all conditions imposed upon it. Hence, in order to bring himself within the requirements of the act, the plaintiff must show that he brought it within the required time. This view had previously been followed by the Appellate Court under the original act, where the limitation was two years, but the Supreme Court reversed the decision and held that the limitation should be raised by plea and not by demurrer. No distinction was there suggested between a limitation imposed by an act which creates a right and the general Statute of Limitations.

In another case, decided by our Appellate Court, the defendant, in the trial court, had moved in arrest of judgment upon the ground that the declaration did not state a cause of action and had urged in support of that motion the fact that there was no allegation in the declaration that the suit was commenced within one year after the death of the deceased. The court held that such allegation was unnecessary inasmuch as a bar by limitation is a matter of defense. The court did say, however, that the fact that the suit was brought within one year after the deceased was killed was disclosed by the record; and our Appellate Court has held that a declaration in an action for wrongful death is not open to objection because it does not aver that the action was commenced within one year from the date of death of the person injured where the record disclosed that the suit was commenced within the statutory year.

The reviewing courts in New York have held that to warrant the granting of a motion to dismiss under a similar provision it must clearly appear from the record

54 Laws 1853, p. 97.
without substantial dispute that the action is barred.\textsuperscript{58} In an action instituted in New York, the defendant presented a motion under a provision similar to ours and supported it by his own and four corroborating affidavits, averring facts which disclosed the defendant's right to the defense of the statute of limitations. No counter affidavits contradicting these facts were filed. The reviewing court held that the lower court should have granted the motion since there was no issue to be tried.\textsuperscript{59}

A case upon this subject that may profitably be read is \textit{Squier v. Houghton},\textsuperscript{60} which discloses an extremely interesting situation on this question of a motion to dismiss a complaint. In addition to other grounds advanced for dismissing the complaint, those of res judicata, release, and the Statute of Limitations were presented. In support of this motion the defendants presented certain affidavits to which plaintiff replied. The motion was granted in part and denied in part. The court disclosed its reluctance to dispose of a suit merely upon affidavits.

The New York courts have held that a motion to dismiss upon the ground that the cause of action did not accrue to plaintiff within the time limited for its commencement may properly be raised under a provision in its code similar to that contained in this subsection.\textsuperscript{61}

\textbf{Subsection (g)}

\textit{"That the claim or demand set forth in the plaintiff's pleading has been released."}

It is inconceivable that any intelligent pleader should set forth in his complaint that his claim has been released.

\textsuperscript{58} Press v. Draper, 247 N. Y. S. 156 (1930).
\textsuperscript{59} Sterne v. Auerbach, 197 N. Y. S. 295 (1922). Where the defendant makes such a motion supported by appropriate affidavits to dismiss the complaint under such provision, and where the facts are not controverted by the plaintiff's affidavits, the motion must be sustained. Koerner v. Apple, 199 N. Y. S. 171 (1923).
\textsuperscript{60} 226 N. Y. S. 162 (1927).
If the defendant seeks to interpose a release in bar of the action, the writer believes he should do so by answer to which plaintiff might reply, rather than by a motion. Under our former chancery practice a complainant might anticipate a defense and allege any matter necessary to explain or avoid it, or failing to do so, after the filing of an answer setting forth, for instance, the Statute of Limitations, he might introduce the new matter into the case by an amendment to the bill. Certainly under our decisions a release is an affirmative defense, and the plaintiff would be permitted to show, for instance, that the release was obtained from him by fraud or some trick or device; and our courts have further held that the question of whether a release was obtained by fraud must be submitted to a jury, notwithstanding the court be of the opinion that it was fairly obtained and understandingly executed, if the opposite conclusion would not be manifestly against the weight of the evidence. Likewise the question of whether a release of the plaintiff’s claim had been obtained by fraud or circumvention must be submitted to the jury and also the question of whether plaintiff signed the supposed release when in great pain and without knowing its character.

In a New York case where a motion was made to dismiss the complaint predicated upon a release of the claim executed by plaintiff, who claimed duress in the procurement of the release from him, the court held that the issue

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62 Nelson v. Wilson, 331 Ill. 11 at 15, 162 N. E. 144 (1928).
63 Dustin v. Brown, 297 Ill. 499 at 511, 130 N. E. 839 (1921); Fitch v. Miller, 200 Ill. 170 at 184, 65 N. E. 650 (1902).
65 Chicago City Ry. Co. v. McClain, 211 Ill. 589 at 594, 71 N. E. 1103 (1904).
67 C. & A. R. R. Co. v. Jennings, 217 Ill. 494 at 495, 75 N. E. 560 (1905); Chicago City Ry. Co. v. Uhter, 212 Ill. 174 at 176, 72 N. E. 195 (1904); Pioneer Cooperage Co. v. Romanowicz, 186 Ill. 9 at 13, 57 N. E. 864 (1900); Whitney & Starrette Co. v. O'Rourke, 172 Ill. 177 at 182, 50 N. E. 242 (1898).
should be submitted to a jury. However, in a case decided in 1932, one of the intermediary reviewing courts of New York, under a similar provision, held that a motion to dismiss a complaint, predicated upon the plaintiff's having released his cause of action, was properly granted, but the plaintiff was given leave to file an amended complaint so that he might set forth additional facts which would obviate the defense interposed by the release.

In another New York case one of the motions made to dismiss the complaint was based upon the ground that the cause of action had been discharged by a general release under seal, for a valuable consideration, which had not been tendered back or returned. The principle of this case is an exception to the statement made in the first sentence under the subsection. The facts in the case cited disclose an unusual situation in which plaintiff quite properly pleaded a release obtained by alleged fraud and deceit.

In a fourth New York case, the defendant moved for judgment upon the complaint and presented an affidavit alleging a satisfaction of the claim set forth in the complaint. The plaintiff filed no affidavit in opposition to the motion. The court held that since the facts were not controverted, the complaint should be dismissed pursuant to a similar provision in the New York Rules of Civil Practice.

**Subsection (h)**

"That the claim on which the action or suit is founded is unenforceable under the provision of the statute of frauds."

The defense of the statute of frauds like the defense of the statute of limitations is in the nature of a privilege

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68 Rizzuto v. United States Shipping Board E. F. Corp., 210 N. Y. S. 482 (1925); Perloff v. Kelmenson, 233 N. Y. S. 861 (1929).
69 Gray v. Fogarty, 261 N. Y. S. 842 (1932).
which may be asserted or waived. Under our former practice act, where it appeared from the face of the declaration that the agreement sued on was within the statute of frauds and failed to meet its requirements, advantage thereof might be taken by a general demurrer. This defense can be disposed of in a summary manner and more expeditiously by a motion under this subsection than by an answer.

Of course, if the defense of the statute of frauds is not apparent from the face of the complaint, the motion would require support by a suitable affidavit or affidavits setting forth the necessary allegations. This, of course, would not preclude the plaintiff from filing a counter-affidavit if he desired to raise an issue of fact. This is an apt illustration of the analogous manner in which demurrers and pleas were used under the prior chancery practice heretofore referred to.

The manifold situations in which the defense of the statute of frauds might properly be interposed is disclosed, in part, in a number of New York decisions. Briefly, they are as follows:

The plaintiff alleged an oral promise that if the plaintiff married the defendant she would have dower interest in certain realty. The motion to dismiss on the ground that the promise was within the statute was granted.

In an action for specific performance to compel the conveyance of certain real estate, the defendant moved to dismiss upon the ground that the contract upon which the action was founded was unenforceable by reason of the statute of frauds. The motion was supported by appropriate affidavits, to which plaintiff filed a counter-affidavit. The court held that the issue thus raised was one of fact to be determined accordingly.

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72 Lundquist v. Child, 182 Ill. App. 585 (1913, abst. dec.).
In an action to recover for the breach of an oral contract to give the plaintiff a written employment contract, the defendant moved to dismiss, with a supporting affidavit, on the ground that the alleged contract sued on was unenforceable under the statute of frauds. The plaintiff filed a counter affidavit which set forth facts insufficient to show that the contract was enforceable. The court sustained the motion.\textsuperscript{75}

The plaintiff sought to recover for commissions arising out of an oral contract to make and execute a mortgage. The defendant moved, with success, to dismiss upon the ground that the statute of frauds was a bar to the enforcement of such an oral agreement.\textsuperscript{76}

\textbf{Subsection (i)}

\textit{"That the cause of action did not accrue against the defendant because of his infancy or other disability."}

It is quite probable that the complaint would not disclose the fact that the defendant was under any of the disabilities which might be a defense under this provision so that if the defendant desired to interpose such defense, it would be done preferably by answer rather than a motion. The question whether the defense should be interposed by motion or by answer, taking into consideration the previous expression of our reviewing courts upon the liability of minors, would be whether a pure question of law or one of fact was to be presented. For example, our courts have held that a minor will be liable only for necessaries, and they have defined “necessaries” to be “such things as supply the personal needs of an infant, either those of his body, such as food, clothing, lodging and the like, or those of his mind, as instruction suitable


\textsuperscript{76} S. W. Straus & Co. v. Felson, 215 N. Y. S. 534 (1926).
and requisite for the proper development of his mind."

Our courts have further held that the rights of a minor who seeks to avoid a contract for the purchase of personality are fixed and determined by the law and not by the contract. It has also been decided in this state that a minor cannot commence or engage in a legal proceeding in his own name. He cannot appear by an attorney but must appear, if at all, by a representative, such as a general guardian, guardian ad litem, or next friend. In light of these authorities, it appears that it would be difficult to assert a defense of infancy by motion.

In a New York case, a mother had filed suit against her minor son for personal injury arising out of the negligent operation of the son’s automobile in which the mother was riding, and the court held that the complaint was erroneously dismissed since it stated facts from which it might have been found that the son had been emancipated. The question is here passed by whether a son may be liable to his mother for torts committed by the son upon the mother.

**Subsection (2)**

"A similar motion may be made by the plaintiff in case of a counter-claim, under similar circumstances."

The observations above made with regard to motions on behalf of the defendant to dismiss are of course applicable to counter claims; so no discussion is needed under this subsection.

80 Crosby v. Crosby, 246 N. Y. S. 384 (1930).
"If, upon the hearing of such motion, the opposite party shall present affidavits or other proof denying the facts alleged or establishing facts obviating the objection, the court may hear and determine the same and may grant or deny the motion; but if disputed questions of fact are involved the court may deny the motion without prejudice and shall so deny it if the action is one at law and the opposite party demands that the issue be submitted to a jury."

It is quite apparent from the language of this subsection that it was the intention of the framers of the Act that the court shall hear the disputed questions upon affidavits and counter-affidavits within the discretion of the court, except, of course, in a case where a trial by jury has been demanded. It is further to be observed that the subsection provides that upon a hearing of such motion the opposite party may present affidavits or other proof. A strict construction of that language apparently means that the moving party may present only affidavits, but that the opposite party might introduce oral evidence, and he would only be required to meet the matters set out in the supporting affidavits filed by the moving party.

Apparently it was not intended that the moving party might introduce oral evidence in support of his motion or his affidavits. It would thus appear that the provision as to other proof is for the adverse party, the moving party being restricted to his motion and affidavits, if any. Should the court see fit to permit the adverse party to adduce oral evidence, this would certainly be permissible under this subsection of the Act. The writer is aware of no case in which oral evidence was adduced by the adverse party, although it can be assumed without refer-
ence to any instance that quite frequently documentary evidence is appended to affidavits by either party, and apt reference is made thereto in the affidavit.

Are we to construe the language of this subsection to mean that the court which hears the motion shall exercise its judicial discretion in the matter? Apparently the framers of the Act intended just this, for we must take notice of the fact that in Section 45 the word "shall" is used, whereas in this subsection the word "may" is used. Certainly it was intended to create some distinction; and one is perforce compelled to adopt the conclusion that under this subsection the court is given a generous latitude, which we are wont to call judicial discretion, in determining the method of disposing of a motion made pursuant to this subsection where the opposite party has not demanded the submission of the issue to a jury. This conclusion is, of course, strengthened by the statement in this subsection that the court "shall" deny the motion without prejudice where the opposite party has demanded "that the issue be submitted to a jury." We thus have the result that where a cause is to be submitted to the court without the intervention of a jury, and a motion to dismiss is made under any of the provisions of this section, the case would be heard upon a motion and perhaps, in addition, affidavits. Trial by affidavit offends our sense of justice. Personally, the writer is violently opposed to trying issues upon affidavits. In such cases we are excluded from the right of cross-examination, we do not have the benefit of the physical presence of the affiant, and in all probability the language of the affidavit would be that of the attorney and not of the affiant, which in effect sometimes means that we have, not the affidavit of the subscriber, but rather the statement of the attorney. This argument, however, ignores the provisions of Section 69 of the Act, which gives the court discretion to require the presenta-
tion of evidence by oral examination of the witnesses. Could not either party suggest to the court that the ends of justice would best be served by permitting oral examination of witnesses pursuant to this section? If the court entertained the suggestion and permitted such oral examination, should the court restrict the oral proof to the adverse party, upon the suggested theory? Or may not the court, pursuant to the provisions of Section 69, permit both parties to introduce oral evidence in support of their respective affidavits and motions?

The courts in New York have held, where the affidavits submitted by the moving party clearly disclose the defense and the adverse party does not present affidavits or other proof, that the court must dismiss the action.81

At this point, it may be well to repeat that our subsection 3 provides that if disputed questions of fact are involved, the court shall deny the motion if the action is one at law and the opposite party demands that the issue be submitted to a jury. But when must the demand for a jury be made? Section 64 of the Act provides that the plaintiff must make his demand for a jury at the time suit is commenced and that a defendant desirous of a trial by jury shall make his demand at the time of filing his appearance. Section 64 further provides that if the plaintiff files a jury demand and thereafter waives it, the defendant shall be granted a jury trial upon motion made at the time of such waiver and upon the payment of the required fee. We also have the interesting question of whether the defendant waives his right to a trial by jury when he presents a defense by motion and affidavit, since he has elected to present such defense by a method which does not admit of a jury trial. It may well be that the defendant should file his appearance and jury demand and pay the required fee prior to or at the same time he files his motion, or he might have his motion serve as

81 Stern v. Auerbach, 197 N. Y. S. 295 (1922).
his appearance and pay the required fee for appearance and jury demand and thus preserve his right to a trial by jury and abide the future event of the disposition of his motion.

Again, shall the common-law rules of evidence apply at a hearing upon the motion and supporting affidavit? What rules of evidence apply? Let us assume that matters alleged in an affidavit would not be competent evidence upon a trial before the court and a jury; shall the opposite side first move the court to strike from the affidavit the objectionable matter and, having had a hearing upon that motion, then have another hearing upon the original motion and supporting affidavit?

Let us assume that the defendant has made a motion to dismiss under any of the above provisions, with or without a supporting affidavit, depending upon the nature of the motion, and that the trial court upon hearing denies the motion; can the defendant have the issues so raised reviewed before proceeding further in the nisi prius court? The Act appears to be silent upon the question. Undoubtedly, the Supreme Court could remedy the defect by appropriate rules and provide for the necessary procedure granting and governing adequate review.

This subsection may well be subjected to attack as being unconstitutional since it attempts to restrict to actions at law the principle that issues of fact shall be submitted to a jury. It may well be that, if the constitutionality of this subsection is squarely presented to our Supreme Court, the court would reach the conclusion, in order to avoid holding the subsection unconstitutional, that the language used is merely illustrative and not exclusive. It would seem that only by such reasoning could the court avoid holding the subsection unconstitutional.

There can be little doubt now that parties litigant in
will contests have the right to a trial by jury and that the
verdict of the jury is binding and has the same force and
effect as a verdict at law;\textsuperscript{82} and there can be little doubt
that either party to a divorce proceeding may have it
heard by a jury, with all the concomitant features of a
trial at common law, and that the verdict has the same
force and effect, not being merely advisory, as in an ordi-
nary chancery suit.\textsuperscript{83} It is further to be observed that
while Rule 11 seems to carry out the thought back of this
subsection, it fails to take cognizance of suits in equity
in which the verdict of a jury is binding. But we must
not overlook Section 63 of the Act which provides for
juries in equity cases. One is left to speculate whether,
in fact, it was intended to effect any change in chancery
practice so far as trial by jury may be a feature thereof.

In \textit{Sullivan v. Hillside Fluor Spar Mines}\textsuperscript{84} the plaintiff
instituted suit in the Superior Court of Cook County to
recover damages under the Occupational Diseases Act.
At the time the suit was instituted, the plaintiff demanded
a trial by jury. The defendant filed a motion to strike
each count and dismiss the complaint upon the ground
that the court had not jurisdiction of the proceeding.
With the motion was filed a supporting affidavit. The
plaintiff filed a counter-motion to strike the supporting
affidavit or, in the alternative, to be permitted to file a
counter-affidavit, and that the issues be submitted to a
jury. The trial court, permitting the filing of the counter-
affidavit, refused to strike the other affidavit, refused to
submit the issues to a jury, and dismissed the complaint.
The plaintiff appealed directly to the Supreme Court
and squarely presented the proposition that it became
the duty of the trial court to submit the issues to a jury

\textsuperscript{82} Kellan v. Kellan, 258 Ill. 256 at 258, 101 N. E. 614 (1913); Louby v.
Key, 258 Ill. 558 at 563, 101 N. E. 946 (1913); Dowie v. Sutton, 227 Ill. 183
at 190, 81 N. E. 395 (1907).

\textsuperscript{83} Garrett v. Garrett, 252 Ill. 318 at 327, 96 N. E. 882 (1911); Razor v.
Razor, 42 Ill. App. 504 at 508 (1891).

\textsuperscript{84} 360 Ill. 607, 196 N. E. 826 (1935).
and that its failure to do so was in violation of this subsection of the Civil Practice Act. The Supreme Court did not pass on this question but stated that, since the plaintiff could not maintain his cause of action based on the Occupational Diseases Act for the reason that it was unconstitutional under the previous decisions of that court, the question as to whether plaintiff was entitled to a jury trial on the issues made in the trial court by motion and affidavit became immaterial.

Our Appellate Court has had occasion to pass upon this subsection and has held that, where affidavits are filed embodying certain facts and no counter-affidavits are filed thereto, the court would presume that the trial court had sufficient evidence before it to justify the entry of an order based upon the motion and supporting affidavits. The court then added the sentence, "This is particularly true where the record shows no request by plaintiff to submit the facts alleged in said motion to a jury."

In a subsequent case the plaintiff, as assignee, sought to enforce a deficiency decree by means of a creditor's bill. The defendant filed an answer and a counterclaim, the counterclaim praying that the plaintiff be perpetually enjoined from enforcing or attempting to enforce the deficiency decree. The plaintiff filed a motion to strike the defendant's answer and counterclaim, which motion the trial court granted. On an appeal from that decision, the Appellate Court held that the plaintiff, in making his motion, was required to set up so much of the proceedings had and relied upon in the suit wherein the deficiency decree was rendered as would supply the necessary information, and that the method of doing so should have been pursuant to the provisions of this subsection of the Civil Practice Act.


"The raising of any of the foregoing defenses to the action by motion shall not preclude the raising of them subsequently by answer unless the court shall have made a decision therein; and a failure to raise any of them by motion shall not prejudice raising them by answer."

This subsection plainly contemplates that a defendant may exercise his discretion in determining whether to raise by motion or by answer any of the defenses afforded to him by this subsection and that only when a decision is made upon a motion shall the defendant be precluded from raising the same defense by answer.

A careful analysis of the subsection will disclose that it provides for no drastic change in our procedure as it formerly existed. Certainly, prior to the enactment of the Civil Practice Act, where a demurrer had been filed to a pleading, the demurrant might, at any time prior to hearing on the demurrer, ask leave to withdraw it and to plead to the bill or declaration. We should read this subsection in connection with Rule 21 of the Rules of the Supreme Court to find that liberal practice which the Act itself contemplates. This is aptly illustrated by the provision in the rule that if a defendant has entered a special appearance and a motion attacking the jurisdiction of the court, which motion the court overrules, and thereafter the defendant enters upon the trial, such action does not waive any error in the decision upon the motion made under the special appearance.\(^87\)

Our Appellate Court has held that where a complaint did not state a cause of action, the defendant by pleading over after its motion to dismiss was overruled, did not waive its right to urge the question upon appeal.\(^88\) How-

\(^87\) In re Estate of Rackliffe, 366 Ill. 22 at 28, 7 N. E. (2d) 754 (1937).
\(^88\) Wright v. F. W. Woolworth Co., 281 Ill. App. 495 at 504 (1935); Waters v. Heaton, 364 Ill. 150 at 153, 4 N. E. (2d) 41 (1936).
ever, this procedure has always been the practice in Illinois where the declaration was insufficient to support a judgment. 89

Assume that a defendant had raised any one or more of the defenses available to him under this subsection and an adverse ruling was made by the trial court; if the defendant should again raise these same defenses in his answer, the plaintiff undoubtedly would immediately move to strike them from the answer on the ground that the court had already passed upon them and that they were therefore res judicata. Could not the defendant now say that the judge who heard the first motion, whether he be the same judge then hearing the motion to strike or some other judge, had committed error, and that therefore he was entitled to raise the question anew? Certainly under our former practice, the trial judge, at any time before trial, where he was satisfied that an erroneous ruling had been made on the sufficiency of any pleading, could set aside the order and cure the error without regard to whether he or some other judge had made the ruling in question and without regard to the fact that more than a term had elapsed between the former ruling and the present ruling. 90

Our Appellate Court has expressed itself to the effect that, where the court has ruled against a defendant who had made a motion under this section of the Civil Practice Act, the defendant was thereafter precluded from raising the same question in his answer, 91 and the reviewing court held that the trial court properly struck the defenses in question from the defendant's pleading.

89 People v. Powell, 274 Ill. 222 at 224, 113 N. E. 614 (1916).
90 Shaw v. Dorris, 290 Ill. 196 at 204, 124 N. E. 796 (1919); Dowie v. Priddle, 216 Ill. 553 at 556, 75 N. E. 243 (1905); Ft. Dearborn Lodge v. Klein, 115 Ill. 177 at 181, 3 N. E. 272 (1885); Mater v. Silver Cross Hospital, 285 Ill. App. 437 at 440, 2 N. E. (2d) 138 (1936); Luther v. Mathis, 211 Ill. App. 596 at 599 (1918).
However, it will be observed that the defendant apparently did not raise the question of the possibility of an erroneous ruling by the trial court upon its previous ruling.

It is hoped that many of the perplexing problems engendered by these provisions and the other sections of the Civil Practice Act will soon be presented to our Supreme Court so that we may have the benefit of its opinions, and if any changes be needed to give us the best code now extant, we should be able to secure it in view of the readiness of our Legislature to enact such additional remedial legislation as may be necessary to achieve that end.