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THE PERSISTENCE OF CHITTY

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WITH the opening of the September, 1936, term of court a new system of assigning law cases was inaugurated by the Circuit Court of Cook County. Prior to that time each judge had his own calendar. As new cases were filed during the year, they were assigned in rotation on the day of filing. All motions were presented to the judge upon whose calendar the particular case appeared. Under the new system no assignment is made until a case is actually ready for trial. All motions preliminary to trial are heard by a "motion judge." After issues are joined, either party may serve a trial notice which, in the absence of objection, places the case upon a trial calendar. In due course it is called by the "assignment judge" who, the parties being ready, assigns the case for trial to the first judge free to hear it. All questions relating to practice and pleading in law cases are presented to the motion judge who disposes, on an average, of seventy matters a day. A large number of final judgments are entered on the pleadings or on motion for summary judgment.

While in law school I was particularly interested in the study of pleading. In addition to the regularly assigned work on the subject I managed to read the whole of Chitty, and although thirty-five years had passed since my reading of it, I still imagined that I remembered all that I had learned from that eminent authority. I thought I knew Chitty by heart. Recently I had occasion to sent to the library for Chitty. It came in two volumes—one of text and one of forms. Upon turning over the pages of the first volume I became alarmed by the evident failure of my memory. With the exception of the forms of action and some elementary rules governing parties and pleadings, there was little in the book familiar to me. The fear that my memory was failing was soon allayed by an examination of the physical condition of the two volumes which furnished demonstra-

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tive proof that I had not been alone in the neglect of the classic author. The entire bar seems to have been guilty of the same neglect, for although the edition consulted was printed in 1883 and the leaves are so brittle that the edges break upon the slightest bending, the first volume, the text, appears as new as if it had never been used, but the second volume, forms, has hardly a solid leaf left.

Had this discovery been made before 1933 when some of us were traveling through the state urging support for a new practice act, our task would have been much lighter. At every meeting we were met by loud and earnest protests on the part of graying gentlemen who looked upon us as a band of revolutionaries seeking to overthrow an American institution—Chitty—second in sanctity only to the Constitution of the United States! One gentleman, in all earnestness, proclaimed that Chitty, to the lawyer, ranked in dignity next to the sacred books of the Bible. If the two volumes I speak of could have been exhibited for comparison, how eloquently they would have testified to the fact that it was not Chitty's learned dissertations on the law of pleading that this protest held in reverence—that, instead, his collection of forms was the indispensable institution.

The Civil Practice Act is not responsible for the repudiation of Chitty to the extent with which it is charged. Much had been repealed by the old Practice Act and much more by the simple and painless process of obsolescence. Apart from the broad rules governing parties and forms of action, the general run of practitioners knew little of what remained vital in Chitty. In fact, few lawyers were thoroughly familiar with the provisions of the old practice act. Like amateur musicians, they practiced "by ear," and form-books constituted their main stock in trade. Now and then a scholarly lawyer did present a point of pleading, supported by Chitty, which to the court appeared as novel, only to have the opposing lawyer derisively meet the argument with the thrust "technicality." If the adoption of the new practice act did nothing more than compel the lawyers of Illinois to read it, it served a useful purpose.

This article is not presented as a critical review of the Civil Practice Act. No attempt is here made to examine decisions of this or any other jurisdiction. These pages are limited to a few observations upon the questions arising under the act with which the *nisi prius* court is most frequently confronted before trial and some phases of the act which are suffering from non-use.

The law journals abound with excellent disquisitions on unnumbered legal questions, but the source materials of all these are the judgments of

reviewing courts. Seldom does one find an article devoted to problems as they appear to and are resolved by the *nisi prius* courts. Our law schools do little to prepare their students for their tasks in the only courts before which they are likely to appear during the early years of their practice. Instruction is limited, perhaps necessarily, to the study of cases decided by the reviewing courts. The student is taught not so much how to ferret out the rules of law from the decisions as to acquire the method of approach to and solution of problems by such reviewing courts. As a practicing lawyer he continues in the same course. He prepares his cases for the trial court in the only way known to him, either by finding reported cases identical with his or, especially in the pleading stage, by bending and twisting his case until it fits into a mold cast by a former opinion. How his case will look through the eyes of the trial judge, even if presented according to a carefully worked out plan, he does not stop to consider, and, of course, it is only in the rare case that nothing happens in the course of the hearing to upset his plans.

The reviewing courts and the trial courts are related to each other in much the same way as is the toolmaker and the carpenter who uses the tools. Consciously or unconsciously, each court gives consideration to matters which the other does not. A court of last resort, while concerned with the justice of a decision as applied to the merits of a particular case, cannot escape consideration of the precedent it is establishing. This is particularly true of the courts in common-law states. Whatever may be said of the Supreme Court of the United States as not being a policy-making tribunal, the highest state courts are constantly making policy. They shape and re-shape the law. At one term the policy of comparative negligence is accepted and at the next term the court changes its mind and (without legislative assent) adopts a policy of contributory negligence. One year it decrees that the power of a trustee is limited to the terms of his deed, the next year that the terms may be enlarged, contracted or varied in the interest of conserving the trust estate. There is no vice in this—on the contrary, that is as it should be—but it has no application to the trial court. The decisions of that court do not establish controlling precedents and, therefore, it seldom considers the effect of a particular judgment upon the future state of the law. It deals with myriads of questions as living, concrete, momentary problems which it disposes of, so to speak, "on the run." In the absence of fixed law the trial court, whether it admits it or not, looks to its own sense of justice, and the lawyer who has planned his case according to methods found in the reports is often bewildered by and astonished by the result. Neverthe-

less, it is the trial courts that stand out as the great social agencies administering justice. Less than one per cent of the judgments of the trial courts of record ever reach the reviewing courts. Less than four per cent of the judgments of the Circuit and Superior Courts of Cook County, which deal only with the more important cases (law cases under $1,000 are almost exclusively tried in the Municipal Court) are reviewed. Out of some twenty-six thousand cases decided annually by those courts, about eight hundred are appealed. When we consider the multitudinous orders of those courts relating to questions of pleading and practice, we find that not one in a thousand is reviewed.

The neglect of the law schools as regards the preparation of their students for work in the trial courts, and the failure of practicing lawyers to prepare their cases (when they do prepare) in the light of the trial court's problems and experience, takes away something of real value from the healthy growth of the law. Instead of the law's development flowing, as it should, from the experience of the judges who deal with the bulk of litigation and who can see the administration of justice in its totality, it is fed by nutrition manufactured in the limited laboratory which examines only isolated—even though important—cases.

The infirmity of this system is illustrated by an analogous situation in the development of our penal system. The legislators, in adopting or rejecting penal measures, generally ignore the fund of experience gathered by the judges who listen to thousands and tens of thousands of criminal cases, but formulate their ideas from newspaper reports of *sensational cases*. These represent an infinitesimal fraction of the total volume and usually contain exceptional elements which make them good newspaper copy. Yet they dominate public and legislative thinking on the subject.

Equally, the sensational cases (those published in reports) fix the law for the thousands and tens of thousands of cases in which the exceptional elements which brought the former to the reviewing courts are lacking.

All the foregoing may appear irrelevant to a discussion of certain phases of the practice act, or as an apology for engaging in such a discussion solely from the viewpoint of a trial judge, but it is neither. The purpose of this rather lengthy introduction is to emphasize the need of studying procedural law *primarily* with a view of interpreting it according to the needs of the *nisi prius* courts, not alone because of the great volume of cases in which they function as courts of last resort, but also because procedural rules constitute that portion of the law which is intended to meet the practical requirements of those courts and in the consideration of which many elements enter which are entirely absent when a particular

question reaches a reviewing court. These elements may be relatively unimportant, but they, nevertheless, color the attitude of the trial judge to a marked degree.

A few illustrations will suffice: The Circuit Court of Cook County disposes of approximately thirteen thousand cases a year. Only twelve local judges are available for the work (of the twenty judges of that court, four sit in the Appellate Court, three in the Criminal Court and one in the Juvenile Court). Country judges are not always to be had, they are not looked upon with favor by the bar and, above all, their number is limited to the number of court-rooms available. In these circumstances, reasonable dispatch of business by the judges is imperative if the calendars are to remain fairly free from congestion. Economy of time is a major consideration. To burden the judges with time-consuming complaints consisting of seven or eight counts, covering fifteen or more sheets of reading matter, when one count written on three sheets would not only suffice but serve the purpose better, is looked upon by the judges as indefensible.

The same is true of chancery decrees containing thirty or forty pages of recitals of fact which weaken the force of the decree and violate the spirit of section 64 of the Civil Practice Act. When told to rewrite the offending decree the average lawyer feels abused, but the court considers that decrees thus drafted increase the bulk of files to be preserved and add to the cost of administration by taking the time of the court to peruse them, and by increasing the expense of recording, which, even under an economical system of photostating, amounts to approximately twelve cents a page.

Another example of the trial court's attitude deriving from considerations of the practical is found in its liberality in allowing written or oral interrogatories in proceedings for discovery before trial. The trial judge knows that the more frank and full the disclosures are, the more likely they are to lead to an amicable settlement of the case. He is influenced by this consideration in view of the condition of the court's calendars. The reviewing court would probably never know his motive. Often a trial judge will brush aside an objection to the form or time of service of a notice. To the lawyer raising the objection that action appears capricious, but the fact is that since the parties are already before the court, it might just as well dispose of the motion and thus save its own time and economize the labors of the clerk in the matter of entries on the minute book, the docket and the record book.

If the practical view of any situation taken by the trial court during the pleading stage of a case results in added labors to the reviewing

courts, that can be remedied by those courts by discouraging appeals on such questions when they do not go to the ultimate justice in the case. Now that the supreme court has the rule-making power, it need not concern itself so much with the effect of a decision on a question of pleading or practice as establishing precedent. If it does not approve of a particular practice in the trial court, it needs only to indicate the desired change by a few words in its rules.

Viewed from the standpoint of the trial courts, the Illinois Civil Practice Act has succeeded remarkably well in reaching the good aimed at. That aim is specifically declared in section 4 of the act: "This Act shall be liberally construed, to the end that controversies may be speedily and finally determined according to the substantive rights of the parties," and in paragraph 3, section 33: "Pleadings shall be liberally construed with a view to doing substantial justice between the parties." But doing substantial justice between the parties does not necessarily mean that each case shall be tried on the evidence. Substantial justice may and often does require the disposition of a case on the pleading. Every litigant should have his day or hour in court, as the justice of his case requires, but none should be permitted to take the time of the court to the hindrance and delay of other litigants, with hollow claims or frivolous defenses.

Certain values of the practice act are somewhat dissipated by the resistance to them on the part of a considerable portion of the bar. Traditional practices are directly challenged by the new act and many lawyers are struggling valiantly against this attempt to force them to forget revered methods of common law practice. Even those time-honored rules which admittedly led to repeated injustices, often resulting in the tragic loss of meritorious cases—such as that which prohibited amending a declaration, after the statute of limitations had run, in which the pleader forgot to allege that the plaintiff was in the exercise of due care and caution for his own safety, when no one suspected that he wasn't—even those still have their champions. Strange, how evils, if only long enough indulged in, acquire a degree of sanctity and find numberless advocates to proclaim them as rights!

Despite this resistance, the act is succeeding. Its inherent values are compelling respectful acceptance of it by the bar. Those phases of it which caused apprehension on the part of its friends and advocates have given the least amount of trouble. The innovations in respect of joinder of parties, of causes of action, of combining legal and equitable issues, of substituting motions for demurrers and special pleas, have, judged by the

infrequency with which these questions are presented, given little trouble to the bar. Even the prophecies that the reviewing courts would be deluged by cases requiring interpretation of the act have not been fulfilled. During the five years since the effective date of the act, the Supreme Court has had proportionately fewer cases in which questions of pleading or practice alone were involved than during any similar preceding period.

So far as the *nisi prius* courts are concerned, the most numerous questions arising under the act are those dealing with *pleading in law cases* and with *discovery*.

In connection with pleading in law cases, several matters occupy the attention of the courts daily. The habit of stating a cause of action at law as many times and in as many counts as the pleader can conjure up theories seems to be most deeply rooted in the lawyers' consciousness. While the distinction between law and equity jurisdiction is preserved, nothing is clearer than that the most essential reform sought by the Civil Practice Act was the establishment of *one form of action* for all cases—law and equity alike—and that the equity system of pleading is favored. Section 33 provides that "all pleadings shall contain a plain and concise statement of the pleader's cause of action, counterclaim, defense or reply." There seems to be no ambiguity in this language and yet it is the rare case which conforms. Paragraph 2 of the same section provides: "Each separate claim or cause of action *upon which a separate recovery might be had, shall be stated in a separate count*, etc."[1]

Rule 12 of the supreme court is as follows:

Different breaches of a contract, bond or other obligation, and different breaches of duty, whether statutory or at common law, or both, growing out of the same transaction, or based on the same set of facts may be treated as a single claim or cause of action, and set up in the same count.

Rule 10 provides:

All matters which, prior to January 1, 1934, were within the jurisdiction of a court of equity, whether directly or as an incident to other matters before it or which the equity court could have heard so as to do complete justice between the parties, may hereafter be regarded as a single equitable cause of action, and when so treated as a single cause of action shall be pleaded *without being set forth in separate counts and without the use of the term "count" in such pleading.*

Rule 11:

When actions in law and in chancery which may be *prosecuted separately* are joined, the party joining such actions may, if he desires to treat them as *separate causes of action*, plead such causes of action in distinct counts, marked respectively "separate action at law" and "separate action in chancery."

[1] In this and subsequent quotations from the act and rules, the italics are added.

The purpose of the last provision was to safeguard the trial by jury for the law action without depriving the parties of the right to join in one suit the law and chancery actions.

Unless section 33 and Rule 12 are construed as prohibiting splitting up *actions at law* arising out of the same set of facts, the effort of the Civil Practice Act to establish only *one form of action* will miscarry, for Rule 10 definitely prohibits dividing an equity complaint into counts, and if multiple counts under the same circumstances are allowed at law, the uniformity aimed at by the act is lost. We shall soon find ourselves deciding whether a case is in equity or at law by looking to the form rather than the substance of the complaint. But the unforgettable forms of Chitty and the habits acquired by following them are not to be easily overcome by mere statutory provisions. That the nuisance of multiple counts persists from habit is illustrated by the fact that although virtually every complaint in equity presents a more complicated set of facts and asks for a greater variety of relief than does any complaint at law, no lawyer ever thinks of dividing an equity complaint into plural counts.

But what happens with the simplest claim at law? A lawyer receives the following letter:

DEAR MR. BROWN:

In the evening of last September 15th, I was walking eastwardly on the south side of Jackson Boulevard, a through street in the City of Chicago, and was carefully crossing Hoyne Avenue. It was dark on Hoyne Avenue. On that street, at a short distance south of Jackson Boulevard, there was a light-flashing sign warning northbound traffic to stop. An automobile owned and driven by John Jones, running northwardly with great speed, without warning, without lights, without slowing down or stopping, carelessly or wilfully struck me, whereby I was seriously injured all over my body.

As a result of it I have already spent $300 for medical care and lost more than $1,000 of income. Some of my injuries are permanent, will require medical care in the future and will interfere with my earning power.

Please bring suit.

This simple, complete statement of a cause of action against one person, arising out of one occurrence, becomes, in the hands of Mr. Brown, a complaint of seven counts covering some seventeen sheets of legal cap, four counts charging negligence, as follows: (1) violation of the statute regulating speed; (2) violation of the statute requiring warning on approaching an intersection; (3) failure to have machine under control and stop before crossing the boulevard; and (4) absence of headlights; and the other three counts being repetitions of the first three, except that each charges wilful and wanton conduct instead of negligence.

This is not an imaginary or isolated complaint. It represents the type

of pleading in vogue in a majority of cases before I started striking, on the court's own motion, all such complaints whenever they came to my attention. To this day the matter of similar complaints is by no means inconsiderable. The question of multiple counts is a matter of daily wrangling before the court. Very often an innocent litigant suffers from the insuppressible appetite of his lawyer for repetition and redundancy. To illustrate: Whenever possible, plaintiffs want their cases tried in the state courts, while defendants seek to remove them to the federal courts. Plaintiff brought suit against four fire insurance companies for the recovery of damages in the sum of $4,000. Under the policies severally issued by the four defendants, each was responsible only for a proportionate share of the loss. Had the complaint consisted of one count, removal to the federal court would have been denied because two of the defendants were local companies and, even if the actions were held to be severable on the ground that each policy of insurance was a separate contract, the amount involved in each action would have been less than $3,000. But the plaintiff chose to file a complaint embodying a separate count for each defendant and in each count laid the *ad damnum* at $4,000. He thus admitted the severability of the claims and charged each defendant with a liability of $4,000. The order for removal was entered.

Examples of plaintiffs suffering by filing multiple counts are numerous. One further illustration will suffice. A sues B for personal injuries resulting from an automobile accident. His complaint consists of two counts —one charging negligence, the other wilful and wanton conduct. The jury finds a verdict for the plaintiff on the wilful and wanton count. The trial court, on a motion for a new trial, sets aside the jury's finding of malice and enters a simple tort judgment on the verdict. On appeal the case is reversed on the ample ground that the finding of guilty on the second count amounted to an acquittal on the first, and that since the trial court found (apparently rightly) that the evidence did not justify a finding of wilful and wanton conduct, the judgment cannot be supported by the second count which failed to allege due care on the part of the plaintiff. This reversal would have been avoided had the plaintiff's complaint consisted of only one count in which he alleged negligence and included a single paragraph charging in the alternative wilful and wanton conduct.[2]

It is argued that authority for multiple counts is to be found in section 34 which reads: "Every complaint and counterclaim shall contain specific prayers for the relief to which the pleader deems himself entitled. Such relief, whether based on one or more counts, may be asked in the alterna-

[2] Ellinger v. Paulson, 295 Ill. App. 620, 15 N.E. (2d) 29 (1938).

tive"; and in section 43 which provides: "When a party is in doubt as to which of two or more statements of fact is true, he may state them in the alternative, or, when they appear in different counts or defenses [whether legal or equitable] he may state the counts or defenses which contain them in the alternative." But, read in the light of the specific provision of section 33 that "all pleadings shall contain *a* plain and concise statement of the pleader's cause of action, etc.," neither section 34 nor section 43 justifies more than a single statement of the same cause of action.

Section 34 refers to cases where different types of relief are sought and is not inconsistent with the provision of paragraph 2, section 33 that each claim or cause of action upon which *a separate recovery might be had* shall be pleaded in separate counts. Where the plaintiff joins two causes of action based on the same set of facts, each claim justifying a different type of recovery and he is uncertain as to which claim he will be able to sustain, he *may* state his claim in alternative counts. A good illustration is an action based on a breach of contract for the sale of real estate. The plaintiff, desiring specific performance, but being uncertain whether that relief will be granted, asks in an alternative count damages for the breach.

Section 43 simply provides for the case of a party who is uncertain as to the facts upon which his right of recovery depends. If a different recovery might be had on the basis of different facts, such facts *may* be pleaded in alternative counts. *At best, these sections are permissive and not mandatory.*

Randall Dairy Co. v. Pevely Dairy Co.[3] is often cited as the reason for caution against pleading only one count. In that case the charge was that defendant, in pursuit of a plan to destroy the business of the plaintiff, slandered the plaintiff and also enticed some of his employes. The court held that that amounted to pleading in one count two separate actions upon which separate recoveries might be had and reversed the judgment on that *and other* grounds. Granting that two counts were permissible on the theory that separate recoveries might be had, it seems clear that the case should not have been reversed on the ground that one count was insufficient because the two acts complained of were in furtherance of a single design and were thus properly pleaded in one count.

In other states, under statutes similar to ours, the courts have condemned the practice of dividing into numerous counts claims arising from the same set of facts.[4]

[3] 278 Ill. App. 530 (1935).

[4] Gabrielson v. Hague, 55 Wash. 342, 104 Pac. 635 (1909); Lund v. Salt Lake County, 58 Utah 546, 200 Pac. 510 (1921); Coleman v. St. Paul, etc., 110 Wash. 259, 188 Pac. 532 (1920).

Not only is the splitting up causes of action into numerous counts persisting, but a pernicious practice is developing under the provisions of sections 23 and 24 of the act—the former authorizes numerous persons to join in one action as plaintiffs, in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, and the latter authorizes the joining of any number of defendants who, it is alleged, have or claim an interest in the controversy, or in any part thereof, or in the transaction or series of transactions out of which the same arose or against whom a liability is asserted—by filing complaints with as many counts as there are plaintiffs or defendants, as the case may be. Each count is in reality a separate and distinct lawsuit and the attempted joinder is claimed to be effected by clipping together in one batch a number of disjointed actions. Not a single count actually joins the parties in one cause of action.

The evil of multiple counts is stressed here not so much because of the unnecessary labor it puts upon the court, but rather because of a conviction that not until we get rid of this type of pleading will the bar seriously follow the provisions of the act that a pleading should consist of a plain and concise statement.

While too much pleading is the inveterate habit of the lawyer when representing the plaintiff, too little is the invariable fault of the same lawyer when he represents the defendant. We learned from Chitty to say as much as possible when pleading for the plaintiff and as little as possible when pleading for the defendant. The general issue was such a convenient instrument that the profession simply cannot give it up without a struggle, despite the peremptory provision of section 40 that "General issues shall not be employed." The form of the general issue has disappeared but its substance by way of general denials persists unabated. True, this practice is often followed, reprehensibly enough, for the purpose of gaining time, but much more often it is the result of the convenient habit of giving as little information as possible about the defense.

For some unaccountable reason, plaintiffs' lawyers quite universally neglect filing replies to answers setting up new matter by way of defense as is provided by section 32. This has already resulted in disaster to at least two cases.[5]

If the establishment of one form of action is the most important reform sought to be effected, the discovery innovations of the act stand next in line of importance. The bar has not yet taken the advantage of them that

[5] Lewis v. Niemann, *et al.*, 293 Ill. App. 639, 12 N.E. (2d) 701 (1938) (Abst.); Wiedoeft v. Frank Holton & Co., 294 Ill. App. 118, 13 N.E. (2d) 854 (1938).

it should. Only recently has it begun to show an appreciation of the value of discovery depositions. The careful plaintiff's lawyer ought to examine the defendant and his witnesses at the earliest opportunity, even before the answer is filed, and the defendant's lawyer ought to examine the plaintiff and his witnesses immediately after service of summons. There seems to be an unfounded impression that discovery depositions cannot be had until issues are joined. There is no basis for this. Such discovery may be had for the purpose of preparing the answer or amending the complaint.

If full advantage were being taken of the discovery provisions, an incalculable number of cases would be disposed of without taking the time of the court. Evidence to support this assertion is abundant. The number of settlements outside of court are increasing in a direct ratio with the increased use of discovery before trial. Lawyers become aware of the strength or weakness of their cases from the testimony of the parties and their witnesses while the facts are fresh in their minds. They get a record of it made before the power of suggestion improves the memories of willing witnesses. The same inducement to settlement is discovered which previously appeared for the first time after days had been spent in selecting a jury and taking testimony. It is to be hoped that in the interest of furthering speedier justice as well as in the interest of its clients, the bar will avail itself of these salutary provisions to a far greater extent than it does now.

Rule 17 which deals with discovery of documents and books gives little trouble. The only debatable portion of it is the exception contained in section 1 of the rule which provides: "This rule shall not apply to memoranda, reports, or documents prepared by or for either party in preparation for trial." The main disputes arise over the question as to whether statements of parties or witnesses taken before the commencement of the suit need be disclosed to the other party. In the absence of guidance from the reviewing courts, the exception should be interpreted as embracing only such documents as the lawyer or his party makes in preparation for the *actual trial*. Since all parties and all witnesses are subject to oral examination before trial, there seems to be no reason for excluding from the scope of discovery written statements made by such parties or witnesses.

Rule 19 provides for discovery by depositions. The most frequent question raised in connection with this rule is whether it is necessary to subpoena a party who is already in court to appear before the notary, or whether the court may order him to appear. Where oral discovery is

sought under paragraph 1, section 58 of the act which provides: "Whereever a bill for discovery, or interrogatories in a bill for relief, would heretofore have been available, the same discovery may hereafter be had by motion filed in the cause," there can be no doubt of the court's power to order the parties to appear and testify. But where it is sought under Rule 19 which provides that it may be had "by deposition before trial, in the manner provided by law for taking depositions in chancery cases," the question is not so easily answered. A subpoena, however, is simply a form of process, and where the parties are already before the court, there seems to be no reason for holding that the court may not order such parties to submit themselves for examination.

By far the most discouraging experience with the taking of oral depositions comes from the unprincipled practice of some lawyers of harassing the party seeking discovery, by instructing the witnesses not to answer certain questions. The only course open to the examiner is to have the questions certified to the court for ruling. Often this process is repeated several times. No penalty for such abuse is provided. Neither is there sufficient provision in the rule defining the powers of the court or the extent of its control over the procedure. The new federal rule is a great improvement over the Illinois rule. It is to be hoped that our supreme court will soon amend its rule by adopting so much of the federal practice as could be made to harmonize with ours.

Another troublesome question is whether depositions taken under Rule 19 constitute testimony admissible at the trial. The rule provides that "Any party to a civil action may cause to be taken, on oral or written interrogatories, by deposition before trial, in the manner provided by law for taking depositions in chancery cases, *the testimony* of any other party or of any other person, which is relevant to the prosecution or defense of the action," and "When the party or person to be examined is a corporation . . . . *the testimony* of one or more of its officers . . . . may be so taken." The word "discovery" is not present. Moreover, Rule 20 provides: "No disclosure as to any matter, whether obtained by complaint for discovery or by motion under rules, shall be conclusive, but may be contradicted by other testimony." As to discovery depositions, Rule 20 is meaningless unless such depositions are to be treated as testimony in the case.

It is regrettable that the bar is slow in taking advantage of various valuable innovations introduced by the Civil Practice Act. It was hoped that plaintiffs would resort to summary judgment proceedings very frequently. This has not happened. Neither has the bar seen the value of

combining discovery and summary judgment wherever possible by taking the depositions of a defendant and when they disclose that the defense pleaded is frivolous, attach the testimony to the plaintiff's affidavit for summary judgment. Perhaps if the supreme court would extend to defendants the right to seek summary judgments, the use of this speedy and wholesome method of disposing of cases would become more popular.

Another neglected provision is section 41. It is as follows: "Allegations and denials, made without reasonable cause and not in good faith, and found to be untrue, shall subject the party pleading the same to the payment of such reasonable expenses, to be summarily taxed by the court at the trial, as may have been actually incurred by the other party, by reason of such untrue pleading." Cases of such false pleadings are numerous. They appear most frequently in personal injury actions in which defendants, almost as a matter of course, deny the agency of the person operating the vehicle or, admitting the agency, deny that he was engaged in the principal's or master's business at the time of the occurrence. If such defenses, when false, entailed penalties, they would soon disappear.

It not being the purpose of this article to analyze the entire Civil Practice Act, but merely to record a few impressions from the mind of a trial judge, many interesting questions raised by the act have not been touched upon. For instance, in the early days of the administration under the act, much of the time of the court was consumed by interpretations of section 46 relating to amendments. The entire subject has now been clarified by the recent case of *Metropolitan Trust Co. v. Bowman Dairy Co.*[6] As it now stands, the statute of limitations is restored to its common-law function of preventing suits on stale claims. This function has in the past been overshadowed by using the statute of limitations to defeat just lawsuits, commenced in ample time, whenever the draftsman of the declaration was either inexpert or was insufficiently informed upon his facts.

I have deliberately refrained from citing or discussing the cases arising under the act which have been passed upon by the reviewing courts of this state, with the exception of *Randall Dairy Co. v. Pevely Dairy Co.*[7] and *Metropolitan Trust Co. v. Bowman Dairy Co.*, just noted. These have been referred to not only for the purpose of calling attention to the rulings of the courts but more particularly because they illustrate the difference between a conservative and liberal treatment of the act. The *Metropolitan* case is in harmony with the spirit of the act and definitely conducive to a higher type of justice. For, after all, the success of the reforms contem-

[6] 369 Ill. 222, 15 N.E. (2d) 838 (1938) aff'g 292 Ill. App. 492, 11 N.E. (2d) 847 (1937).

[7] 278 Ill. App. 350 (1935).

plated by the act depends upon its interpretation during the first decade or two of its life. Resort to previous rulings under the common-law system or under foreign codes is likely to be more harmful than helpful. The purpose of the act is to discard objectionable or archaic rules of procedure. Even where the substance of provisions was borrowed from other jurisdictions, what seem to be trifling changes in ours were made deliberately with a view to avoiding narrow interpretations.

If we succeed in keeping in mind the spirit of the act and the objects sought to be attained by the authors, our improved procedure will be a valuable contribution to the administration of justice. We must avoid the pitfalls which confront most legal reform measures. In the early stages the original objects are kept in mind; then, with the accumulation of interpretive decisions on isolated questions, these objects are forgotten and we embark upon a course of interpreting these decisions rather than the act itself. In seeking the legislative intent, let us look forward and not backward (to reported cases). By so doing we shall develop a procedural system that will do honor to the courts of Illinois.

We need not forget Chitty if only we discard his outmoded forms.