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COURTS and court procedure in Illinois developed in a manner parallel to the general historical trend. In early days the Illinois area was French territory, and from about 1700 was part of the province of Louisiana. The meagre system of law in vogue was French. The affairs of government were conducted by a few officials, military and civil, usually constituting a council, and one of the group was a judge or an officer who performed judicial functions in connection with other duties. When the jurisdiction of Louisiana was fully organized, ultimate appeals lay to the Superior Council for the entire province, which comprised a vast area in the Mississippi valley and beyond.

When the Illinois country was ceded to England under the treaty of Paris in 1763, following the French-Indian war, the English common law was introduced automatically. Many of the French in the district were unwilling to become subjects of England and moved to French or Spanish colonies to the south and west. One thing they did not like was English law, particularly trial by jury. They were not convinced of the justice of determinations by twelve men, many of whom could not read or write.[1] Crudities there doubtless were in legal administration and in the adaptation of principles of law evolved in a relatively complex society, to a pioneer, scattered people wresting a livelihood from a wild country. The mechanics of legal officialdom were also necessarily simple and limited. Nevertheless, the marvel is that there was ready to hand a body of legal principles, rooted in justice, adequate for all essential requirements of the altered environment and society. The history of Illinois law and procedure must trace an elaborate development of statutory enactment and court adjudication, to meet special needs and

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1 From "Illinois Country," prepared by Grace Levy for Illinois Writer's Project, sponsored by Division Departmental Records, State of Illinois. Material furnished by the Illinois Writer's Project has been of substantial assistance in this work.

changing times; but the framework of it all, lending itself to the building of an advanced civilization in a new and primitive land, was the common law of England. There came a time when necessity arose for a pronounced departure from the old procedure—in fact, it was delayed too long; but that does not militate in any way against the great contribution of the common law.

In the English period from 1763 to the end of the Revolutionary War, all governmental authority was at first exercised by the military commandants, but in 1768 a civil court was established. Seven judges were appointed and held the first court at Fort Chartes, December 18, 1768. It was then that the common law of England really became established as the law in force. In 1774 the English Parliament enacted the law known as the "Quebec bill," which constituted an important element in the growing controversy with the colonies. One incidental effect was to extend the boundaries of the province of Quebec to include the Illinois country and to restore to the people therein the ancient French laws in civil cases, without trial by jury.[2] This French interlude did not last long, because with the arrival of George Rogers Clark in 1778 independent colonial control became assured. Colonial dominance became definitely established with the achievement of independence in 1783. In the following year, 1784, Virginia ceded the Northwest Territory to the United States. Virginia's claims, although not always effectively asserted, were based on a charter issued in 1609 and also on conquest. The George Rogers Clark expedition was under Virginia auspices. From 1784 the Illinois territory was subject to such laws as Congress might pass for local government in the area. The congressional legislation for this purpose culminated in the adoption of the Ordinance of 1787.[3]

There was no comprehensive practice legislation for a considerable period during early Illinois history, but running through the provisions for setting up a government and the administration of law is a thread which shows the recogni-

2 Davidson & Stuve, History of Illinois. 1673-1884, pp 165-6.

3 The date of the Ordinance of 1787 was July 13, 1787, about two months before the adoption of the Constitution of the United States on September 17, 1787, by the Constitutional Convention, and more than a year before the Constitution was put into effect in 1789. The Ordinance of 1787 was adapted to the Constitution of the United States by Act of Congress, August 7, 1789.

tion of the common law as applicable and in force. Illustrations of this status are specific items in relation to the jurisdiction of the courts and implications from provisions in regard to some details of pleading and procedure. In the Ordinance of 1787 itself, paragraph 4 provides for the appointment of a court "to consist of three judges, any two of whom to form a court, who shall have a common law jurisdiction and reside in the district and have each therein a freehold estate in five hundred acres of land, while in the exercise of their offices; and their commissions shall continue in force during good behavior." The bill of rights of the ordinance (paragraph 14) includes a provision that the inhabitants of the territory shall always be entitled to the benefits of the writ of habeas corpus and of the trial by jury.

An act of Congress, dated May 7, 1800, created Indiana territory, including Illinois, from the territory northwest of the Ohio River. Illinois did not become a distinct territory until the year 1809, when a territorial government of the first grade was established. This continued until 1812, when a territorial government of the second grade was instituted, which remained in authority until the admission of Illinois as a state in 1818. There is little historical data indicating any important procedural developments during the preliminary territorial period under the general provisions of the Ordinance of 1787 itself, down to 1809, nor during the era of the territorial government of the first grade between 1809 and 1812. A few fragments give some indication of the atmosphere of the practice of law at that time. An act adopted in 1792 provided that counsel should be limited to two on a side and that when no more than two lawyers were practicing at the bar in a particular district a client was not to be permitted to hire more than one. There were also regulations in regard to fees. For a pleading fee, when counsel was employed on an issue of law or fact, joined in the then Supreme Court, the fee was fixed at $2.00. The fee prescribed for certain other services was $1.50, with a retaining fee of $1.00. In a criminal case tried before a jury, the fee was $2.00; if no jury, $1.50.[4]

Dr. Edmund J. James, at one time president of the Uni-

[4] Oddities in Early Illinois Laws, by Joseph J. Thompson, Chicago. Illinois State Historical Library (1922), p. 58.

versity of Illinois, was the author in 1899 of a publication, issued by the Illinois State Historical Society, in regard to laws passed in the period 1809-1812 when Illinois was a territory of the first grade.[5] He refers to four copies of laws passed in 1811, which had been unearthed in Washington. He states that no originals of laws passed during this period are to be found anywhere, and that no copies of laws are known, except those found in Washington. In an appendix to the James publication, however, is a list of laws passed 1809-1811, compiled from "Executive Register for the Illinois Territory, commencing the 25th day of April, 1809." This register is in the office of the Secretary of State at Springfield. Of the four Washington copies of law, two related to the militia, one to the time for holding of the general court at Cahokia, county of St. Clair, and the fourth was an act to repeal an act to encourage the killing of wolves. The law about the general court recites that "from present appearances there is great reason to apprehend the approaching fall will be uncommonly sickly," particularly at Cahokia, and then proceeds to fix a later date for the beginning of the term and return of process. The list compiled from the Executive Register refers to acts concerning general courts, courts of common pleas, county courts, and clerks of court, an act regulating the time of holding court, an act prescribing the manner of taking depositions, and what appears to be a statute of frauds taken from Kentucky.

Available material in regard to Illinois laws when the territorial government was in full flower, 1812-1818, seems relatively complete. The library of The Chicago Bar Association has a full set of the annual laws for this period, in six thin booklets, which afford a striking contrast with the obese volumes of recent years. In these laws the practice references are largely incidental and assume that the system of common law pleading is operative, such as the statute passed in 1812, which fixed the time for filing of declarations and pleadings. An act adopted in 1813 entitled "An Act to

5 Information Relating to the Territorial Laws of Illinois, Passed 1809-1812. Prepared in 1899 by Dr. Edmund J. James, University of Chicago, Publication Number II of the Illinois State Historical Society. A footnote on page 6 of this publication furnishes data in regard to four volumes of laws of Northwest Territory passed by the board of governors and judges in various years from 1788 to 1798.

Regulate Proceedings in Civil Cases and for other purposes," included such practice details as the following: declaration to be accompanied with copy of the writing or account sued upon; several sections in regard to capias and bail (resort to arrest in civil proceedings for debt appears to have been common, by reason, doubtless, of the tendency of delinquent debtors to resume their pioneer wanderings);[6] defendant to file pleas before end of third day of term, and if found bad to plead to merits instanter; default for want of plea and dismissal for want of replication; continuances; if action based on writing, whether or not under seal, defendant cannot deny unless he does so by oath accompanying plea; when judgment arrested new suit not required, but court may order new pleadings commencing where the error began; and no plaintiff shall suffer non-suit after the jury have retired from the bar.

At the same session of the legislature an act was adopted entitled: "An Act Regulating the General Court," approved December 10, 1813. The first sixteen sections of this act and the last two sections, 40 and 41, deal with matters of jurisdiction, process and court mechanics; but sections 17 to 39, both inclusive, constitute a somewhat comprehensive chancery act. Another 1813 act embodied provisions which were thereafter common in the equity practice in this state until the adoption of the Civil Practice Act. The most important provisions to be noted are Section 17, which authorizes the judges of the General Court to exercise the powers and authority usually exercised by a court of chancery, and Section 18 as follows:

> That in all suits in chancery in the said General Court, the rules and methods which regulate the high court of chancery in England, shall as far as the said General Court may deem the same applicable, be observed except as hereinafter mentioned.

A Chancery Act in terms practically identical with sections 17 to 39 of the 1813 act had been approved December 19, 1812, effective January 1, 1813, but probably was covered by the general repeal clause of the act approved December 10, 1813.

In the laws of 1816-1817 is one which has kindred echoes

[6] For an interesting history of bail legislation in Illinois see Tuttle v. Wilson, 24 Ill. 553 (1860).

to this day. It was an act to prevent attorneys residing in Indiana from practicing in the courts of Illinois territory.

The Constitution of 1818 provides for the transition from territorial to state laws by Section 1 of the "Schedule" as follows:

Sec. 1. That no inconveniences may arise from the change of a territorial to a permanent State government, it is declared by the convention, that all rights, suits, actions, prosecutions, claims and contracts, both as it respects individuals and bodies corporate, shall continue as if no change had taken place in this government in virtue of the laws now in force.[7]

Article IV of the Constitution of 1818 is devoted to the judicial power of the state, but concerns itself primarily with the organization of the courts. It leaves to the General Assembly to prescribe by law the jurisdiction which the court shall have and exercise. One special provision (Section 7 of Article IV) is that all process, writs and other proceedings shall run in the name of the People of the State of Illinois. Included in the statement (in Article VIII) of "The General Great and Essential Principles of Liberty and Free Government" is a clause (Section 7) that the right of trail by jury shall remain inviolate; another "principle" is the following (Section 12) which well may still spur the courts, the bar, and all interested in the administration of law:

"Section 12. Every person within this State ought to find a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws."

The status of the common law in the newly organized state was not left long to inference and implication. The first act passed by the state legislature (approved February 4, 1819) provided that the common law and the English statutes down to a certain date (except certain statutes specified) were to be in force in Illinois until changed by the legislature. A typical pronouncement of the Illinois Supreme Court is the statement in *The Pitts Sons' Manufacturing Company* v. *The Commercial National Bank of Chicago*,[8] that the common

[7] The constitutions of 1848 and 1870 contain similar provisions to continue existing rights in force under the new constitutions. Constitution of 1848, Sec. 1 of "Schedule"; refers to existing laws in addition to rights, etc. Constitution of 1870, Sec. 1 of "Schedule"; similar to 1848 provision.

[8] 121 Ill. 582, 13 N.E. 262 (1887).

law system of pleading obtains in Illinois, modified by statute.

The principal practice legislation in Illinois history consisted of (a) the Practice Acts of 1819, 1827, 1845, 1872 and 1907, governing the procedure in common law cases; (b) the Chancery Acts in the first four of said enumerated years respectively; and (c) the Civil Practice Act, approved June 23, 1933, and effective January 1, 1934. There were also intermediate enactments; and statutes regulating the practice in special actions, some features of which will be discussed hereinafter. The general tenor of the practice legislation may be discerned from consideration, in brief summary, of the provisions of the Practice Act of 1819, the first to be adopted after the admission of Illinois to statehood. Much of this act confirmed and re-enacted practice provisions passed in the territorial period, the general characteristics of which have already been stated. The act consisted of 45 sections, of which the following is an outline:

Sections 1, 2 and 3 deal with bail; 4 and 5 with oath required to support pleas in abatement and pleas non est factum (denial of deed); 6 provides that plaintiff in replevin and defendant in all other actions may plead as many several matters, whether of law or fact, as he shall think necessary; 7 deals with trial calendars to be prepared by clerk; 8 with limitations of time within which actions may be brought; 9 with actions on bonds providing that plaintiff may assign as many breaches as he sees fit; 10 with mutual debts; judgment for plaintiff or defendant for balance owing; 11 with tender-effect on costs; 12 with swearing of interpreters; 13 prohibits non-suit after jury retires from bar; 14 provides that not more than two new trials should be granted the same party in the same cause; 15 that a scrawl may be treated as seal; 16 provides that where there are several counts, one of which is faulty, and entire damages are given, the verdict shall be good, but that defendant may apply to court to instruct jury to disregard faulty count; 17 provides that no negro, mulatto or Indian shall be a witness, except in pleas of state against them, or in civil pleas where negroes, mulattos or Indians alone shall be parties; 18 defines mulatto; 19 eliminates certain grounds for staying or reversing judgment after verdict, and certain techni-

cal pleading requirements; 20 provides that the court shall not regard grounds of demurrer not specially alleged, unless matter is essential to action or defense; 21 provides that papers read in evidence, though not under seal, may be carried from bar to jury; 22 that after issue joined in ejectment on title only, no exception of form or substance shall be taken to declaration; 23 contains special provisions regarding action of detinue; 24 provides that judgment on confession shall be equal to a release of errors; 25 makes provision for Supreme Court to appoint one justice to inspect clerk's office and report thereon; 26 deals with execution from Supreme Court; 27 provides that the Supreme Court may decide its forms and modes of proceedings, 28 bars review by Supreme Court, unless judgment or decree be final, and amount, exclusive of costs, is $20, or relates to franchise or free-hold; this section also contains a considerable number of additional appellate provisions; 29 provides that the Supreme Court, or any justice thereof, may grant commissions for the examination of witnesses, and clerks of Circuit Court may issue commissions for taking of depositions de bene esse; 30 provides that sheriff, coroner, etc. may serve summons or other writs upon the defendant found in bailiwick and return not found as to others; 31 provides that case may proceed against a defendant served; 32 to 39, respectively, are substantially confirmations of sections 1 to 5 and 6 to 9 of Territorial Act of 1813; 40 departs from section 7 of Act of 1813 in some particulars, and provides that all causes shall be tried in the first court, unless good cause shown for continuance; 41 contains further particulars in regard to trial calendars; 42 deals with motion for continuance; affidavit to state what witness will testify; if court does not think facts material or relevant, or if adverse party admits, no continuance; in any event, party required to use due diligence to procure testimony; 43 provides that no declaration necessary in any scire facias to revive judgment or foreclose a mortgage; 44 provides that no suit to be commenced by any person who is non-resident, or not a free-holder, or householder, until he furnishes security for costs; 45 that clerk is to issue fee bills against security for costs; sheriff to collect.

Section 28 of this act recognizes the dual mode of appel-

late review—appeal and writ of error, which persisted in Illinois until the adoption of the Civil Practice Act. Historically, appeal was the method of chancery review, and writ of error applied to common law; but in Illinois each method became available both in law and in chancery. An authentic work on Illinois appellate procedure,[9] before the adoption of the Civil Practice Act, enumerates the chief distinctions between writ of error and appeal, and proceeds to comment as follows:

> There is no valid reason for preserving the two distinct methods of writ of error and appeal for the purpose of staying execution pending appellate review. The sixth point of distinction[10] is perhaps the most important. Longer time in which to seek review has an advantage to a dilatory practitioner though it unnecessarily delays justice. The present rule as to appeal meets the necessities of the situation, and would clearly suffice if supplemented by a power to move in the higher court for a right of review after the expiration of the time, in cases where delay was unavoidable. The distinctions between writ of error and appeal are historical, and much would be gained by statutory provision for a single method of appellate review in civil cases.

In either method of review there was a sharp differentiation between matter to be incorporated in the record proper on the one hand, and the bill of exceptions (in law cases), or certificate of evidence (in chancery cases), on the other hand; and matters which should have been incorporated in a bill of exceptions, or certificate of evidence, could not be brought before the court of review for consideration by action of the clerk in putting them in the record proper.[11]

The Chancery Act of 1819 was in all substantial respects a repetition of the territorial Chancery Act of 1813, with some co-ordination and simplification.

Between 1819 and the adoption of the Practice Act of 1827, and the Chancery Act of the same year, there were few significant changes in practice and the same statement may be made with respect to the provisions of the 1827 laws themselves. There had been change in policy from time to time about the stage of proceeding when a bill in chancery was required to be filed. Thus, in a law passed in 1821, it was provided that, both in law and chancery, process might issue

9 Dodd and Edmunds, Illinois Appellate Procedure, § 180.

10 This distinction relates to the periods of time within which the respective modes of review must be sought.

11 Dodd and Edmunds, Illinois Appellate Procedure, § 858.

before filing of the declaration or bill; but when the laws of 1827 were enacted the practice had become settled that a bill in chancery had to be filed at the commencement of the proceeding, while process in law cases was still permitted to issue before the filing of the declaration.

The method of taking depositions in chancery had been prescribed by Section 27 of the act, approved December 10, 1813, and this was confirmed by Section 10 of the Chancery Act of 1819. An act adopted in 1823 provided that depositions may be taken and read at law in the same manner as in chancery. Equivalent provisions continue to be operative down to the present time.

From an early date scattered acts are to be found in the statutes dealing with the procedure in special actions and proceedings. In 1827 statutes are already to be found covering the subjects of account, amendments, jeofails, attachments, detinue, qui tam, quo warranto, and others. The ultimate extent of these special statutes may be visualized from the fact that in 1935, at the next succeeding session of the legislature following the adoption of the Civil Practice Act, when it was sought to bring the proceedings in these special actions into conformity with the new practice, ninety-nine separate bills were required for the purpose.

There was a real revision of the Illinois statutes in 1845. In fact it was the only actual comprehensive revision, with legislative authority and sanction, in the history of the state. There were, however, a few so-called revisions in the interval between 1827 and 1845. Thus the "Revised Code of Laws (1828)" purports to contain "those of a General and Permanent Nature passed by the Sixth General Assembly, commencing December 1, 1828, and those enacted previously thereto and ordered by the General Assembly to be Republished." It contains no practice act, and the applicability of the previous statutes is determined only from the fact that they are not included in the repeal clauses. In 1833 there was better performance of the task of compilation—compilation rather than revision was the intention. The "Revised Laws of Illinois" of that year "containing all Laws of a general and public nature passed by the eighth General Assembly, at their session, held at Vandalia, commencing the 3rd

day of December, 1832, and ending March 2, 1833, together with all Laws required to be republished by the said General Assembly" sets forth in full the Practice and Chancery Acts of 1827, and certain other practice legislation. There was a similar "revision" in conjunction with the laws of 1834-1837. The reviser's or compiler's undertaking was beset with difficulties. The introduction to the 1834-1837 revision becomes plaintive about it. The reviser refers to Supreme Court decisions which turned on punctuation and spelling in the statutes, and states that because of them he dared not give these details the attention which they needed. He finally derives comfort from the plight of one of Cromwell's judges, who exclaimed: "It is impossible to spell correctly with Irish goose quills."

The revision of 1845 was conducted and completed under pressure of time limitations and other conditions, but was performed admirably. The reviser, M. Brayman, commenced the work in April, 1844, at the suggestion of Governor Ford. The legislature was not then in session, but when it was convened and informed about the beginnings which had been made, it adopted a joint resolution authorizing the reviser to proceed and to complete his work under the joint direction and supervision of the Judiciary Committees of the Senate and House. This resolution was adopted on January 18, 1845, and fixed February 10th of that year as the date for the completion of the work—a period of less than a month. The revision was not accomplished within the time limit specified but the reviser and legislative committees devoted themselves diligently to the task and finished it before the close of the session. The chapters on Practice and Chancery Acts embodied in the revision are illustrations of the clear, disentangled presentation of the existing statutory provisions governing the respective branches of law.

Indeed the 1845 revision may be regarded as crystallizing the Illinois statutory law and as affording the fundamental background for subsequent statutory developments. Thus, 46 sections of the first 67 sections of the Practice Act of 1872 were based primarily on sections of the act of 1845; the subsequent sections of the act of 1872 deal in great part with the subject of appeals. Similarly, 94 sections of the 127 sec-

tions of the Practice Act of 1907 were taken from the act of 1872, with relatively insubstantial alterations.

New matters in the 1872 Act included: distinctions between the actions of "trespass" and "trespass on the case" abolised (Sec. 21); counts in trover and replevin may be joined in the same action (Sec. 22); amendments before judgment (Sec. 23); bringing in new defendants (Sec. 24); provisions regarding granting or denying continuances on amendments (Sec. 25); ordinarily no dismissal after plea of set-off (Sec. 30); affidavit of plaintiff's claim and defendant's affidavit of merits (Secs. 36-37, discussed below); assessment of damages on interlocutory judgment (Sec. 40—originated in 1863); instructions to be in writing (Sec. 52—originated in 1847); writ of error coram nobis abolished—corrections to be made by court upon motion (Sec. 66).

In the 1907 act the following were the principal additions: appearance in writing required, accompanied by statement of address for service of papers; manner of service, etc. (Sec. 16): use of name of plaintiff who refuses to join (Sec. 17); suit by assignee in his own name, with special provisions in regard to assignment of wages (Sec. 18); designation of chancellors (Sec. 23); copy of pleading for adverse party (Sec. 25); oral submission of controversy (Sec. 26—originated in 1887, known as "Tuley Act"); "Short Cause Calendar" (Secs. 27-31, discussed below); claim for rent may be joined in forcible entry and detainer (Sec. 38); in certain types of pleas in abatement defendant, if not sustained, may plead over (Sec. 45); conditions under which plea puis darrein continuance shall or shall not waive former plea (Sec. 50); reference of matters of account to referees (Sec. 68); special verdict provisions (Sec. 79—included in 1872 act, but repealed at intermediate stage and restored, with changes, in 1887); appeals from interlocutory orders concerning injunctions and receivers (Sec. 123—originated in 1887).

The Chancery Act of 1845 was not changed in great degree by the Chancery Act of 1872, although many of the sections were rewritten. The changes consisted of such matters as: Section 1 and other sections make specific references to the Superior Court of Cook County; Section 5 adds provision for conservators; Section 11, dealing with service of summons,

omits certain limitation to "white" person; Section 26 relates to filing of further interrogatories; Section 39 provides for reference to master (new section, although incidental references to masters in 1845 act); Section 50 deals with bills to construe wills, appoint trustees, or quiet title (originated in 1869; Sections 42, 49, 51 are additional provisions in regard to enforcement of decrees, creditors' bills, and exemptions.

Supplementing the general principles of common law pleading, the Practice Act of 1907, and the Chancery Act of 1872, made up, in all major particulars, the former system of procedure with which all but the fledglings of our bar were familiar—reasonably familiar—and consituted also the kind of practice which, until the last decade, the bewildered layman encountered when his business took him to the law courts.

There were efforts from time to time to simplify and modernize practice, or to introduce an element of informality, but in no comprehensive way. The following were some of the endeavors of this character:

Section 1 of Territorial Act of 1813 provides, with respect to the first pleading, not that it must be a declaration, but that there should be filed with the clerk "a declaration or petition to the court or other statement in writing containing the true nature of his, her, or their demand or complaint." The same language appears in Section 32 of the Practice Act of 1819; but by the time of the adoption of the Practice Act of 1827 the requirement was that this pleading should be a declaration, and the law so remained for a hundred years.

Section 19 of the act of 1819 seeks to abolish certain technicalities. It provides that no judgment after verdict shall be stayed or reversed for the omission of the words "force and arms" or "against the peace," or for mistaking of the Christian name or surname of either party, sum of money, quantity of merchandise, day, month or year, in the declaration or pleading, (the name, sum, quantity or date being right in any part of the record or proceeding) or for omission of the averment "this he is ready to verify" or "this he is ready to verify by the record," or for not alleging "as appeareth by the record," or for omitting the averment of

any matter without proving which the jury ought not to have given such verdict, or for not alleging the suit or matter of action is within the jurisdiction of court, or for any informality in entering up the judgment by the clerk.

One is impressed not so much by the extent of improvement which these changes achieved as the maze of technicalities which had existed in the practice, and which continued to exist, notwithstanding these few relaxations.

In 1833 a law was passed entitled "An Act Simplifying Proceedings at Law for Collection of Debts." It provided that a petition should be filed with the clerk wherein the plaintiff states simply that he holds a bond or note of the defendant (setting forth copy) and concludes with an allegation that the debt remains unpaid and prayer for judgment. The plaintiff had the alternative of proceeding by declaration in the regular way. This law continued in force for many years and appears in the Practice Act of 1845 as Sections 33 to 36.

Section 14 of the Practice Act of 1845 permits the defendant to plead as many matters of fact in several pleas as he may deem necessary for his defense, or to plead the general issue and give notice in writing of special matters intended to be relied on for a defense at the trial. This section provides also that replications and rejoinders may be several by special permission of the court. The changes in the 1845 act are, to some extent, confirmations of previous enactments.

The well and favorably known Section 55 of the Practice Act of 1907 provides that if the plaintiff in any suit upon a contract, express or implied, for the payment of money shall file with his declaration an affidavit of claim, he shall be entitled to judgment as in case of default, unless the defendant files an affidavit of merits. This was the forerunner (but fell far short) of the summary judgment procedure under the Civil Practice Act. It had its beginning in acts passed between 1845 and 1872 to regulate the practice in certain specified circuits.[12] By Section 36 of the Practice Act

[12] Laws of 1853, pp. 173-174 (Cook County, cf. Castle v. Judson, 17 Ill. 381 (1856); Laws of 1857, p. 29 (13th Judicial Circuit); Laws of 1859, p. 59 (11th Judicial Circuit); Laws of 1859, p. 78 (City Courts of Aurora and Elgin); all of which acts require affidavit of merits by defendant. Laws of 1857, p. 11 (13th & 17th Judicial Circuits and Cook County Court of Common Pleas) imposed as condition that plaintiff file affidavit of claim.

of 1872, as amended by Laws of 1877, p. 148, provisions in substantial accord with the provisions of Section 55 of the Practice Act of 1907 were made applicable in the courts of the State generally. The Constitution of 1870 contained a prohibition against the passage of local or special laws regulating the practice in courts of justice.[13]

Reference has already been made to the new sections of the Practice Acts of 1872 and 1907. The amendments incorporated in the Practice Act of 1907 were included (among other proposals not adopted) in the recommendations of a Practice Commission appointed in 1899 by Governor Tanner in pursuance of a joint resolution adopted by the legislature.[14] The report of the Commission included recommendations relating to criminal law, police magistrates, justices of the peace, and miscellaneous matters, in addition to proposed changes in civil procedure. The report of the Practice Commission (presented in 1901) was not acted upon promptly, and in 1905 Governor Deneen, in his annual message, stated that only three of the numerous reforms suggested had been enacted into law, and urged further consideration. The Practice Act of 1907 was one of the results, but not until the next session.

The "Short Cause Calendar," for cases requiring not more than one hour's time, came into the law in 1889, and its substance is preserved in Rule 24 of Supreme Court Rules accompanying the Civil Practice Act.

Although it is not of state-wide scope, mention should be made of the act adopted in 1905 providing for the establishment of the Municipal Court of Chicago, and prescribing for that court a modern system of practice. Although the Municipal Court Act indicated a willingness of the legislature to sanction this type of practice in a local court, the opposi-

13 Article IV, § 22.

14 The membership of the Commission was as follows: John S. Miller, Chicago, Chairman (appointed to the Commission on nomination of the judges of the Appellate Court for the First District); Robert McMurdy, Chicago (on nomination of The Chicago Bar Association); E. P. Williams, Galesburg (on the nomination of the judges of the Supreme Court); William L. Gross, Springfield (on the nomination of the Illinois State Bar Association); and Walter S. Horton, Peoria (on the nomination of the Governor). George W. Duwalt, Chicago, was the Commission's first secretary; upon his death, J. L. Bennett, Chicago, was elected his successor.

tion to anything of the same character for the courts of the states generally continued unabated.[15]

Notwithstanding the foregoing changes there continued in force an antiquated practice at law, with the many separate technical forms of common law actions, and a totally different, but equally obsolete, technical procedure in chancery. A declaration at common law still began: "For That, Whereas,"[16] and a bill in chancery still ended: "And your Orator will ever pray, etc.,"—the "etc." signifying: "for the salvation of your Lordship's soul."[17] In appellate matters the confusing alternatives of appeal and writ of error could still be pursued, with the needlessly cumbersome assignment of errors as a concomitant, and the distinctions between the record proper and bill of exceptions or certificate of evidence continued to menace the unwary.

Adherence to old forms was not in itself a matter of great moment because, after all, forms can be learned or obtained from a book or printer, and habit bestows facility in their use; but comfortable inertia in employing old forms was conducive to an attitude which prevented scrutiny of existing procedure on its merits and affirmative measures to improve it, and contributed to protracted and deplorable delay in necessary change.

It is apparent, therefore, that in the history of Illinois procedure until after the Practice Act of 1907, the system of common law pleading and practice in all of its essentials continued in force. In the meantime there had been pronounced advances in procedure in England and in this country. England was the home of the common law system and one would suppose that it would be there, if anywhere, that fealty to tradition and established custom would insure retention of old ways. Yet in England the common law system of pleading, and the correlative separate practice in chancery, were completely abandoned, as having outlived their usefulness, by a series of measures which culminated in the

15 See Debates on legislative proposals of 1915, pp. 384 to 434 of House Debates of Forty-ninth General Assembly.

16 See remarks of Representative Isaac S. Rothschild, pp. 430-431 of House Debates, 1915, Forty-ninth General Assembly.

17 Horace Kent Tenney "Equity Practice," 11, The Chicago Bar Association Record 188 (1928).

Judicature Act of 1875, more than a quarter of a century before renewed adherence to the old practice in Illinois by the adoption of the Practice Act of 1907. In the United States, radical changes, beginning with the adoption of the Field Code in New York in 1848, were effected even before procedural reform in England. With a few exceptions, of which Illinois was the most outstanding and persistent, all of the states adopted a simplified system, based either on the New York code, or less detailed adaptations thereof. It is not necessary to hold a brief for the New York code, or "code pleading" in general. Mistakes were made in New York and elsewhere in certain particulars, including the extent to which it was sought to cover multitudinous contingencies by specific provision. Nevertheless, in all of these jurisdictions there was at least a modern approach and an escape from throttling outworn restrictions; and, once these restrictions were out of the way and unhampered, judgment could be invoked to devise a satisfactory system of practice, original methods and errors were in due course corrected, and a suitable practice, both in realization and potentiality, was achieved.

As has been indicated, efforts to modernize the practice were made at different periods in Illinois. An outline of changes down to and including 1907 has already been presented. Moderate as were the proposals of the Tanner Practice Commission, many of them were eliminated in connection with the passage of the 1907 act. In 1911 a comprehensive court and practice bill was introduced by former Judge Hiram T. Gilbert (then a representative in the General Assembly), which appalled the legislature by its very magnitude. In 1913 and 1915 briefer, but well conceived practice bills (separate bills for common law and chancery), in the preparation of which Messrs. Gilbert and Edgar B. Tolman collaborated, were presented and debated at length. In 1931 a concentrated effort was made to pass a bill, the purpose of which was to confer upon the justices of the Supreme Court the power to regulate practice by rules. Some of these proposals received considerable support on the part of the bar and in the legislature, but entrenched opposition prevented their passage.

The final successful effort to modernize procedure in Illi-

nois resulted in the adoption of the Civil Practice Act in 1933. The initiation of the undertaking had no specific relation to practice. In connection with some arbitration proposals submitted to the Chicago Bar Association, representations were made to the Board of Managers that business men hesitated to resort to the courts and sought other means of settlement of their disputes because of the marked inefficiency, delay, and expense of legal administration. Whereupon, the Board of Managers, on July 11, 1929, adopted the following resolution:

WHEREAS, in a report of the Committee on the Judiciary made to the President and Board of Managers of The Chicago Bar Association under date of April 4, 1929, the Committee advances in support of its recommendation for the establishment of an Arbitration Branch of the Municipal Court, the alleged expense, technicalities and delays incident to litigation, and general failure of the courts to meet the needs of modern business; and

WHEREAS, although approving the said report and advocating the establishment of such an Arbitration Branch of the Municipal Court, the Board of Managers of The Chicago Bar Association feels that without vigorous and effective efforts to remedy these alleged defects in the usual operation of judicial tribunals, it would be derelict in its duty to the profession and to the public.

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF MANAGERS OF THE CHICAGO BAR ASSOCIATION: That the Committee on the Judiciary of The Chicago Bar Association be and it is hereby directed to make a thorough investigation of the said alleged defects in the operation of the courts with a view to determining the facts with relation to the same and to discovering the causes of such of the conditions complained of as may exist; and to recommend to the Board of Managers at an early day such action as will be calculated most effectively to correct such defects.

This resolution was referred to the Judiciary Committee and assigned by it to a subcommittee.[18] The subcommittee, with keen realization of the magnitude of the assignment and profound misgiving as to what it might be able to accomplish, began a general survey of the subject. There were, from the outset, problems of orderly, systematic approach, but there was no dearth of material in regard to the deficiencies of the courts. It soon became clear that the faults, and also the remedies, resolved themselves into two categories—

[18] The members of this original subcommittee of the Judiciary Committee of The Chicago Bar Association were as follows: Harry N. Gottlieb, Chairman, William H. Holly, Chester Arthur Legg, Isaac S. Rothschild, Floyd E. Thompson; and Charles O. Loucks, Chairman of Judiciary Committee, ex officio.

those which lay within the province of the lawyer and those which rested with the public. It was further patent that the lawyers were disposed to point to the shortcomings of the public, and, to put it mildly, vice versa. The range of conditions needing change and improvement included such matters as the following: antiquated, technical practice; the laws of evidence; the spirit and standards of the bar; method of selection of judges; time and diligence devoted by judges to their work and mechanics of the conduct of the court's business; indifference of voters in judicial elections and lack of discrimination in voting; shirking of jury duty; the attitude of the press; lack of respect for law and its administration. The whole field would have to be covered before the task was really performed and the attainment of any single objective might seem fragmentary; but a beginning had to be made. Ultimately the lawyers would have to emphasize the importance of a different attitude in other quarters; but it seemed that when that time came they could do so with far better grace if they had first fulfilled an obligation particularly incumbent upon themselves. Hence, the determination to proceed first with the effort to obtain a modern system of legal practice.

The difficulties seemed insurmountable. The subcommittee was repeatedly warned of the hopelessness of its program in the light of the failure of previous efforts to secure practice reform. Nevertheless, it was felt that the change would have to come some time; that it took seventy-five years to accomplish practice reform in England and it was then brought about, not by lawyers, but by pressure from outside; that it would be better for lawyers to make the attempt, and even if it could not be done within a reasonable period of years and would have to be carried on by successors of those who inaugurated it, the mere fact that a concerted group was making a persistent, continuous effort might cut off decades from the time it would take to attain the goal. In this particular instance, however, it did not take as long as anticipated to accomplish the first objective. Aided by a number of favorable circumstances, it proved possible to secure the adoption of the Civil Practice Act in the fourth year of work.

In the first two years the Chicago committee labored on

the manifold aspects of the undertaking and carried the project through to formulation of drafts for submission to the bar. In the material which the committee assembled was an article which had been prepared under the auspices of the American Bar Association by Professor Edson R. Sunderland of the Law School of the University of Michigan. It proved of special value, both in itself, and on account of benefits to which it led indirectly. This article was published in the Chicago Tribune in several installments, beginning July 11, 1926, and was reprinted by the Tribune in pamphlet form under the title "Hundred Year War for Legal Reform." In addition to tracing the history of the struggle for legal reform, the article was an illuminating statement of the elements required for an adequate modern system of practice. At the request of the committee, Professor Sunderland attended conferences in Chicago, and, ultimately, Professor Sunderland and the Legal Research Institute of the University of Michigan were enlisted to aid the committee. The original draft of the Civil Practice Act was prepared by Professor Sunderland, assisted by the Legal Research Institute. Although subjected to substantial modification and supplementation as a result of further work by the committees and general discussions and suggestions by the bar, the Sunderland draft provided the main structure of the final legislation.[19]

Besides the vast amount of detailed work involved there were important questions of policy which the committee had

[19] In addition to Professor Sunderland, both the Chicago and Illinois Committees were greatly indebted for invaluable assistance to Professors Oliver Roy McCaskill (University of Illinois), Robert W. Millar (Northwestern University), Edward W. Hinton (University of Chicago), Charles T. McCormick (Northwestern University), John V. McCormick (Loyola University), Walter F. Dodd, Chicago (formerly Professor of Law at Yale University), and Judges Harry M. Fisher and John M. O'Connor. Messrs. Albert E. Jenner, Jr., and Walter V. Schaefer of Chicago, in conjunction with Isaac S. Rothschild, of the Chicago and State Bar Committees, had an active part in the preparations for the Legislative Session of 1933 and the efforts to secure the adoption of the act at that session. Professor McCaskill became Editor-in-Chief and Messrs. Jenner and Schaefer Associate Editors of the "Illinois Civil Practice Act Annotated," published under the auspices of the Illinois State Bar Association in 1933. The portions of that work dealing with appellate procedure were prepared by Mr. Jenner, under the supervision of Mr. Dodd. Mr. Jenner also was a principal factor in conformity legislation of 1935 and special legislative matters in 1937, and has been prominent in active matters in the state down to the present time. Since 1937 he has been Chairman of the Section on Civil Practice and Procedure (State and Federal) of the Illinois State Bar Association.

to decide. For example, discouragement caused by past failures to secure comprehensive legislation led to urgent advice that only piece-meal improvements be sought. On the other hand, it was believed that there would be little appeal and little by way of constructive achievement afforded by unrelated segments, and that it would be better to concentrate on a correlated whole. The latter was the course adopted, and the wisdom of the action was demonstrated not only by the general result but by what occurred in connection with some of the particular proposals. Thus, mention has already been made of previous unsuccessful efforts to secure enactment of a law to confer rule-making power, as to practice details, upon the Supreme Court. The proposals were in general terms and there was distrust of the possible implications of bestowing such power. The Civil Practice Act, within limitations of policy determined by the act itself, expressly confers on the Supreme Court general rule-making power in practice matters, and, as an indication of the contemplated purview of the rules and manner of exercise of the power, the Civil Practice Act as adopted contained a supplementary schedule of rules to be effective until changed by the Supreme Court. In this form, a proposal which had been rejected before was adopted when presented in its proper setting as a part of a comprehensive practice program.

It was felt from the beginning that the practice proposals should represent not the ideas of any limited group or locality, but the consensus of opinion of the bar of the entire state. Accordingly, after the preliminary work by the Chicago committee it was determined that the matter should proceed under the auspices of the Illinois State Bar Association. The Chicago Bar Association committee, however, (as an independent special committee instead of a subcommittee of the Judiciary Committee) continued to carry on its labors as a co-ordinating and co-operating unit in the state-wide effort.[20]

The Chicago committee draft was printed under the title

[20] The committees of the Illinois State Bar Association which participated were as follows: Committee on Judicial Administration (1931). Former Supreme Court Justice Floyd E. Thompson (a member of the original Chicago subcommittee) was Chairman of this committee. Its membership also included the four other members of the Chicago subcommittee. Additional members were: A. S. Cuthbertson, Bunker Hill; E. D. Shurtleff, Marengo; Joseph E. Dailey, Peoria; O. L.

"Proposed Consolidated Civil Practice Act (with Annotations)" and then circulated about the state by the Committee on Judicial Administration of the Illinois State Bar Association. The annotations were prepared by Professor Sunderland. As a result of state-wide discussion and suggestions which emanated from the bar changes were made and embodied in a printed "Amended Draft" similarly circulated.[21] The pre-legislative campaign culminated in the adoption of a resolution of June 3, 1932, at the annual convention of the Illinois State Bar Association at Danville, approving the proposed bill,[22] and a similar resolution of approval passed by the Board of Managers of The Chicago Bar Association on December 22, 1932.

The bill was introduced on March 16, 1933, by Senator Mark A. Penick, as Senate Bill No. 359. It was passed by the Senate on April 20th and by the House (with amendments) on June

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McCaskill, Urbana; Edward Barry, Bloomington; J. Paul Califf, Aledo; H. W. Buhring, Blue Island; Roy C. Martin, Benton.

In the following year (1932) a special committee was organized. The committee was assigned to the supervision of Judge Thompson, then Vice-President of the Illinois State Bar Association. The composition of the special committee was as follows: Harry N. Gottlieb, Chicago, Chairman; G. D. Burroughs, Edwardsville; J. Paul Califf, Aledo; George A. Cooke, Chicago; A. S. Cuthbertson, Bunker Hill; Walter F. Dodd, Chicago; T. F. Donovan, Joliet; C. E. Feirich, Carbondale; W. J. Fulton, Sycamore; Clarence W. Heyl, Peoria; E. W. Hinton, Chicago; William H. Holly, Chicago; Chester A. Legg, Chicago; Charles O. Loucks, Chicago; Roy C. Martin, Benton; O. L. McCaskill, Urbana; Charles P. Megan, Chicago; Robert W. Millar, Chicago; John M. O'Connor, Chicago; A. A. Partlow, Danville; Erwin W. Roemer, Chicago; Isaac S. Rothschild, Chicago; Henry B. Safford, Monmouth; E. D. Shurtleff, Marengo; John J. Sonsteby, Chicago; W. C. Townley, Bloomington; Cairo A. Trimble, Princeton; Daniel P. Trude, Chicago; John E. Wall, Quincy; and Henry C. Warner, Dixon. The 1933 Committee (under Judge Thompson, as Vice-President) presented the proposed act to the 1933 legislature and conducted the efforts to secure its adoption. The following cooperated with the Committee in the course of the year 1932-1933 and throughout the legislative period, and were added to the committee for the years 1933-1934, when the committee was vested with great responsibilities in the initiation of the new procedure; Rudolph J. Kramer, E. St. Louis; Albert Huber, Rock Island; John V. McCormick, Chicago; James H. Murphy, Carlinville; Palmer D. Edmunds, Chicago; J. Bert Miller, Kankakee; DeGoy B. Ellis, Elgin; Edward R. Johnston, Chicago; John Gutknecht, Chicago; Albert E. Jenner, Jr., Chicago; Louis A. Busch, Champaign; Frederic Burnham, Chicago; Alex Elson, Chicago; G. H. Couchman, Hoopeston; A. W. O'Harra, Carthage; Claire C. Edwards, Waukegan; Walter V. Schaefer, Chicago; Hal M. Stone, Bloomington; Edgar Eldredge, Ottawa; and Homer H. Cooper, Chicago.

21 For a detailed statement of the participation by the bar of the state in the consideration and ultimate formulation of the proposed legislation, see Report of Committee on Judicial Administration (Floyd E. Thompson, Chairman) Annual Report of Illinois State Bar Association, 1932, p. 273.

22 Annual Report of Illinois State Bar Association, 1932, p. 317.

14th. The Senate concurred in the House amendments on June 15th. The struggle to obtain enactment of the legislation during the many weeks it was pending, with alternately falling and rising hopes as difficulties were encountered and overcome, may be left to the imagination. For the record here it may be appropriate to reiterate a statement which was made shortly after the passage of the act in regard to the attitude of the legislature and Governor Henry Horner:

> There is only one thing I want to say about the history of the effort to obtain a modern system of practice in Illinois. It relates to the debt we owe to the members of the legislature themselves and to the Governor of the state for the actual adoption of the legislation, which, of course, was the final, vital part of the whole business. I do not have the temerity to call a roll of names, although I have very vividly in mind a lot of names, leaders of both parties in both houses, members from Cook County and members from downstate, who made the cause their own and battled zealously and effectively to accomplish the result. One reason why it is not particularly fair to mention names is that many members were inclined to take an active part in the debate, but were willing to refrain in order that the measure might not be over-talked. But nevertheless they worked quietly and persuasively to develop the necessary support. It was a splendid manifestation of disinterested public service on the part of those who were in the front of the fight and those who worked inconspicuously, and I am glad of the opportunity to make this expression of acknowledgment and appreciation. As for the governor, all I need to say is that his support throughout, beginning with his inaugural message, was simply a *sine qua non*."[23]

Proposed practice changes to be effected by the Civil Practice Act were summarized at the time, as follows:

1. A plain, concise statement of the facts upon which a claim or defense is based in both law and chancery proceedings. (Abolition of old forms, no formal distinctions between the different actions at law, and one form of action for both law and chancery.)

2. Procedure for summary judgment, with proper safeguards, so as not to delay relief and clog the courts if the merits of the controversy do not warrant. This procedure is now utilized to advantage in many states in this country and in England. In one court in England, King's Bench Division, figures were compiled in 1927, and it was found that 4280

[23] Annual Report of Illinois State Bar Association, 1934, pp. 86 and 87. Special mention should now be made of Senators Harold G. Ward and R. M. Shaw, and Representatives Benjamin S. Adamowski and Elmer J. Schnackenberg.

summary judgments were rendered in this court, as compared with 1258 judgments rendered after trial of issues. This means that the dockets were relieved of more than seventy-five per cent of the cases which would otherwise have come before the courts for formal trial. The use of this procedure is regarded as contributing more to the efficiency of the English courts than any other one feature of their practice.

3. The use of the declaratory judgment, so that, without the necessity of perpetrating something, a party may have a controversy settled in court in order that he may know how he may proceed safely. More than twenty states now provide for declaratory judgments. An illustration of the value of this procedure, if available, is afforded by the Auditorium case in Chicago.[24] A controversy arose as to whether under the provisions of the ground lease, the tenant had the right to erect a new building or whether the lease would be forfeited if the present building were torn down. The tenant sought to have the courts adjudicate the question, but they declined for the reason that nothing had been done to warrant application to the courts for any remedy. As a result the tenant could not take the risk of erecting the new building. If the tenant could have invoked provisions for declaratory judgment, the question of the right to replace the old building could have been determined in advance and the project might have been consummated.

4. Provisions for preliminary procedure such as discovery before trial and other measures to expedite the disposition of cases.

5. Improved methods of selecting and instructing jurors.

6. Many provisions on such subjects as service of summons, joinder of parties and joinder of causes of action, consolidation and severance of actions, verdicts and the like which reflect simply the wisdom of modern experience and obviate certain elements of technicality, delay, and expense.

7. A simple appellate procedure. (Provides single form of

[24] Willing v. Chicago Auditorium Association, 277 U.S. 274, 48 S. Ct. 507, 72 L. Ed. 880 (1928). Declaratory judgments may now be obtained in the United States courts by virtue of the Federal Declaratory Judgment Act of 1934, which was held constitutional in Aetna Life Insurance Company of Hartford v. Haworth, 300 U. S. 227, 57 S. Ct. 461, 81 L. Ed. 617 (1937). The constitutionality of state declaratory judgment procedure had been sustained in Nashville, Chattanooga & St. Louis Ry. v. Wallace, 288 U.S. 249, 53 S. Ct. 345, 77 L. Ed. 730 (1933).

review and abolishes all distinctions between the common law record, the bill of exceptions and certificate of evidence, for the purpose of determining what is properly before the reviewing court.)

8. Provisions for regulation of practice, within proper limits, by rules of court. These rules are to supplement the statute, but are not to be in conflict with it. A schedule of the rules to be initially operative is appended to the act. This rule-making power, without allowing departures from any fundamental legislative policy, provides a continuous machinery for improvement of procedure from time to time without awaiting legislative enactment.

This entire program of change, except the provision for declaratory judgments, was carried through by the adoption of the Civil Practice Act. Subsequent attempts to obtain legislative sanction of the declaratory judgment procedure have also failed. The jury instructions ailment was alleviated by the original act, but there has been a relapse. The end of these stories is not yet. The efforts to achieve the unattained goals will go on.

The bill was signed by the governor on June 23, 1933, but by its terms was not to go into effect until January 1, 1934. The intervening months were a period of intensive study. The bar went back to school. The Illinois State Bar Association itself, in order to be of assistance in the inauguration of the new practice, arranged for the preparation and publication of a work on the subject.[25] This was in readiness for the bar in December 1933.

The original schedule of rules appended to the Civil Practice Act at the time of its adoption never went into effect. Section 3 of the act provides that the original schedule shall be deemed to be the rules of court subject to suspension and amendment in any part thereof, by the Supreme Court, as experience shall show to be expedient. The rules were amended by the Supreme Court in December, 1933, and the amended schedule went into effect with the Ciivil Practice Act itself on January 1, 1934. Some of the amendments were due to new enlightenment gleaned during the six months'

[25] Illinois Civil Practice Act Annotated, with Forms, under direction of Illinois State Bar Association, O. L. McCaskill, Editor-in-Chief. Albert E. Jenner, Jr. and Walter V. Schaefer, Associate Editors (Chicago, The Foundation Press, 1933).

study by the bar; others were required because of cases of criminal law and special law proceedings not yet brought into conformity with the Civil Practice Act. Supreme Court rules were necessary with respect to these last mentioned matters and were not covered by the schedule appended to the Civil Practice Act.

Several companion bills were enacted at the same session as the Civil Practice Act, but in the main, conformity legislation, dealing with many types of special actions, was left until the 1935 session, to which some reference has already been made. Of the 99 "bottles" of new legal elixir offered to the legislature in that year, 91 were assimilated into the law and only 8 were left hanging on the wall.

The history of practice in Illinois since the adoption of the Civil Practice Act has been characterized by new impulse and stimulus in the performance of the function of legal machinery and a zealous application of the principles of the new procedure in harmony with its spirit and purposes. There has been, naturally, some grudging acceptance; but in the main, a gratifying attitude of support, essential for successful operation, has been manifested by the bar, the *nisi prius* courts, and the reviewing courts. Even before the effective date of the act, its influence began to be felt. Thus, in a case decided by the Appellate Court of the First District, in December 1933, the court stated as follows:

> While not controlling, it is significant as indicating the policy of this State, that the new Practice Act, which will go into effect January 1, 1934, . . . and which treats of service by publication and mailing, provides in substance for such service only "in any civil action affecting property or status within the jurisdiction of the court, or in any action at law to revive a judgment or decree." [26]

Illustrative expressions of the Illinois Supreme Court appear in *Minnis* v. *Friend*,[27] and *People* v. *Frick*,[28] In the Frick case the court stated:

> The Legislature made it clear by provision therein that the Civil Practice act was to receive a liberal construction. Statutes tending to effect objects of great public utility are to receive liberal and benign interpretation.

26 Fitzgerald v. First National Bank, 272 Ill. App. 570; 579 (1933).
27 360 Ill. 328 341-2, 196 N.E. 191 (1935).
28 367 Ill. 446, 452, 11 N.E. (2d) 955 (1937).

A recent article in The University of Chicago Law Review makes this comment:

> 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.[29]

The provisions for discovery constitute one of the important new features of the Civil Practice Act. These permit the ascertainment in advance of the essential facts in a case, and contribute to expeditious disposition of litigation before or at trial. Certain safeguards to prevent abuses are necessary, and watchfulness must be exercised to see that the discovery provisions meet this need; but formerly (and to a certain extent, still today) artificial restrictions were imposed in some jurisdictions, by court construction, against so-called "fishing expeditions," "exploring the other party's case," and the like. The prevailing present-day view in regard to inquiring into the adversary's case was enunciated by William Howard Taft, as an Ohio judge, in the case of *Shaw* v. *Ohio Edison Installation Company,*[30] in which he stated: "There is no objection that I know why each party should not know the other's case." The label "fishing expedition" may properly be utilized to preclude needless and harassing interrogation; but the modern tendency is illustrated by the recent decision of *Laverett* v. *Continental Briar Pipe Company, Incorporated,*[31] which declares that the new Federal Court Rules permit the broadest type of examination and that it will not avail a party to raise the familiar cry of "fishing expedition." One incidental effect of the operation of the discovery provisions is that when real facts are once known

[29] Judge Harry M. Fisher, "The Persistence of Chitty," 6 U. of Chi. L. Rev. 359, 364 (1939).

[30] 17 Week. L. Bull. 274, 9 Ohio Dec. Rep. 809 (Super. Ct. of Cincinnati).

[31] 25 F. Supp. 80 (1938).

equitable settlements are facilitated and court expense and congestion are thereby reduced. A busy practitioner in one particular field estimates that in each year since the Civil Practice Act became effective about two hundred and fifty of his cases have been settled as a consequence of the use of the discovery procedure. Facts such as these afford some conception, if not precise measure, of the savings to litigants, courts and public resulting indirectly from the discovery provisions.

The atmosphere of a new approach to court procedure both during the campaign for the Civil Practice Act and following its adoption, (whether directly influenced thereby or not) has been attended by important new adjudications outside of the field of civil procedure, such as the Illinois Supreme Court cases of *People* v. *Fisher*,[32] *People* v. *Bruner*,[33] and *People* v. *Callopy*,[34] Discussions of *People* v. *Fisher*, holding that right to jury trial may be waived in felony cases, and *People* v. *Bruner*, declaring invalid a hundred year old statute which provided that juries in criminal cases should be judges of law as well as of fact, may be presented more appropriately elsewhere. *People* v. *Callopy* was also a criminal case, but related to Supreme Court Rule No. 27, which requires that "in criminal cases the court shall give instructions to the jury in accordance with Section 67 of the Civil Practice Act." This rule was upheld and the judgment below was reversed because the court instructed the jury orally as to the law and reviewed the evidence, expressing opinion thereon in oral instructions. The opinion of the court presents a scholarly statement of pertinent legal history extending back to the common law of England and early colonial and territorial days. The question at issue was whether the Supreme Court had power to make a rule governing practice and procedure where no statutory enactment existed, and the conclusion was in the affirmative. On the question of the distribution of rule-making powers, consideration should be given also to the recent case of *Winning* v. *Winning*,[35] which holds that trial courts cannot adopt rules in

[32] 340 Ill. 250, 172 N.E. 722 (1930).
[33] 343 Ill. 146, 175 N.E. 400 (1931).
[34] 358 Ill. 11, 192 N.E. 634 (1934).
[35] 366 Ill. 57, 7 N.E. (2d) 750 (1937).

conflict with the Civil Practice Act or rules of the Supreme Court.

There have been a few amendments of the Civil Practice Act and some changes in Supreme Court Rules. The elasticity in practice provisions, which was an objective of vesting the rule-making power in the Supreme Court, has been realized; but it has been the general view that court practice should not be kept in a state of flux or ferment by frequent changes, and it has been found that consideration of revisions or additions by the Supreme Court at approximately two-year intervals has sufficed. The principal revisions have been in appellate procedure. The last changes were made in 1938.

Ferment is not wise. But practice cannot remain static. The legislature, the courts, and the bar will have continuing responsibilities to keep our procedural system abreast of developing needs.