UIC Law Review

Volume 14 | Issue 3 Article 7

Summer 1981

The Constitutionality of Special Interrogatories under the Illinois Civil Practice Act, 14 J. Marshall L. Rev.761 (1981)

Joseph F. Vosicky Jr.

THE CONSTITUTIONALITY OF SPECIAL INTERROGATORIES UNDER THE ILLINOIS CIVIL PRACTICE ACT

THE NATURE AND OPERATION OF SPECIAL INTERROGATORIES

The right to a jury trial is a sacred symbol of American political freedom; however, it is well recognized that a jury's determination of issues is not always dependable.[1] Juries rendering a general verdict wield almost unlimited power and are often subject to caprice.[2] American courts, therefore, have adopted the use of special interrogatories from the early English common law judges who used them to quiz the jury on the grounds of their unanticipated verdict.[3]

Special interrogatories have been codified or provided for by rule in the federal courts and many states.[4] In Illinois they appear under section 65 of the Civil Practice Act,[5] and are available to Illinois courts as one of three types of verdicts: 1) general, 2)

---

1. Green, *Jury Trial and Mr. Justice Black*, 65 YALE L.J. 482, 483-84 (1956) ("Jury trial everywhere has been a process of rough justice, never subject successfully to great refinement and always capable of great abuse."). *See also* J. FRANK, LAW AND THE MODERN MIND 116 (1949):

> It is inconceivable that a body of twelve ordinary men, casually gathered together for a few days, could merely from, listening to the instructions of the judge, gain the knowledge necessary to grasp the true import of the judge's words. For these words have often acquired their meaning as the result of hundreds of years of professional disputation in the courts. The jurors are as likely to get the meaning of those words as if they were spoken in Chinese, Sanskrit or Choctaw.

2. Comment, *Special Findings and General Verdicts-The Reconciliation Doctrine*, 18 U. CHI. L. REV. 321, 322 (1951) [hereinafter cited as *Special Findings*].

3. Morgan, *A Brief History of Special Verdicts and Special Interrogatories*, 32 YALE L.J. 575, 591-92 (1923) (commentator traced the history of both special verdicts and interrogatories, noting the use of special findings in an anonymous case in 1293). *See also* Comment, *The Case for Interrogatories Accompanying a General Verdict*, 52 KY. L.J. 852 (1964) [hereinafter cited as *Case for Interrogatories*] (special interrogatories used in colonial Massachusetts).

4. FED. R. CIV. P. 49(b) (1963). The following is a noninclusive representative sampling of state statutes and rules: ALA. R. CIV. P. 49(c) (1977); 16 ARIZ. REV. STAT. R. CIV. P. 49(g), (h) (1973); ARK. STAT. ANN. § 27-1741.3; ARK. R. CIV. P. 49(b) (1979); CAL. CIV. PROC. CODE § 625 (West 1976); COLO. R. CIV. P. 49(b) (1977); CONN. GEN. STAT. ANN. § 52-224 (West 1960); IDAHO R. CIV. P. 49(b); ILL. REV. STAT. ch. 110, § 65 (1979); KY. R. CIV. P. 49.02 (1971); N.Y. CIV. PRAC. LAW § 4111(c) (McKinney 1963); OHIO R. 49(B) (1980); WIS. STAT. ANN. § 270.30 (West 1973). *See generally* ANNOT., 6 A.L.R.3d 438 (1966).

5. ILL. REV. STAT. ch. 110, §§ 1-94 (1977) constitute the Illinois Civil Practice Act. Special interrogatories were enacted as § 65 as follows:

general with special interrogatories, or 3) special.[6] The general and special verdicts are mutually exclusive.[7] While the general verdict requires the jury to apply the law as given by the judge to the facts,[8] the special verdict is designed to exhibit all the ultimate facts, leaving the legal conclusions to the judge.[9] Special interrogatories are questions submitted by the judge to the jurors, along with the general instructions.[10] By testing the general verdict against the jury's conclusions as to the

---

Unless the nature of the case requires otherwise, the jury shall render a general verdict. The jury *may* be required by the court, and *must* be required on request of any party, to find specially upon any material question or question of fact stated to them in writing. Special interrogatories shall be tendered, objected to, ruled upon and submitted to the jury as in the case of instructions. Submitting or refusing to submit a question of fact to the jury may be reviewed on appeal, as a ruling on a question of law. When the special finding of fact is inconsistent with the general verdict, *the former controls the latter* and the court *may* render judgment accordingly. (emphasis added).

6. 3A NICHOLS ILL. CIV. PRAC. § 3703 (rev. vol. 1977).

7. Wicker, *Special Interrogatories to Juries in Civil Cases*, 35 YALE L.J. 296, 301 (1925) [hereinafter cited as Wicker].

8. Johnston, *Jury Subornation through Judicial Control*, 43 LAW & CONTEMP. PROB. 24, 28 (1980).

9. Wicker, *supra* note 7, at 301.

10. A special interrogatory is not proper unless it relates to one of the ultimate facts upon which the rights of the parties directly depend and unless some answer responsive thereto would be inconsistent with some general verdict that might be returned upon the issues in the case. . . . Interrogatories which ask for a special finding as to mere evidentiary facts are never proper.

Wicks v. Cuneo-Henneberry Co., 319 Ill. 344, 349-50, 150 N.E. 276, 279 (1925).

For example: 1) The following special interrogatory was submitted to the jury by the defendant: "Was the defendant's bus driver, Raymond Jenkins at the time and place in question, guilty of negligence that proximately contributed to cause the occurrence in question?" Freeman v. Chicago Transit Auth., 50 Ill. App. 2d 125, 134, 200 N.E.2d 128, 133 (1964) (the jury answered "no", then returned a general verdict for the plaintiffs; the appellate court reversed plaintiff's judgment and remanded for a new trial). 2) At the request of the defendant, the following special interrogatory was submitted to the jury: "Does the jury find from a preponderance of the evidence that the plaintiff was free from contributory negligence immediately at and prior to the occurrence in question which proximately caused or contributed to cause the alleged injuries?" Kirby v. Swedberg, 117 Ill. App.2d 217, 220, 253 N.E.2d 699, 700 (1969) (the jury answered "no", then returned a general verdict for the plaintiff; the appellate court reversed plaintiff's judgment and remanded for a new trial). *See generally* 35 ILL. LAW & PRAC. *Trial* §§ 332-35 (1958 & Supp. 1980) (describing the tender and submission of special interrogatories, focusing on form and content); 3A NICHOLS ILL. CIV. PRAC. §§ 3736-3760.2 (rev. vol. 1977) (dealt with questions regarding, *inter alia*, number of interrogatories, scope, and form of the questions to be submitted).

Submission of special interrogatories to the jury must be decided by the court as in the case of instructions. ILL. REV. STAT. ch. 110, § 65 (1977) requires that "[S]pecial interrogatories shall be tendered, objected to, ruled upon and submitted to the jury as in the case of instructions." Therefore, § 65 must be read in conjunction with § 67.

determinative facts,[11] the court ascertains the basis for their verdict. The answers that are returned with the general verdict are referred to as special findings.[12]

In effect, special interrogatories provide the court with a means of asserting control over the jury[13] and give the jurors guidelines for their deliberations.[14] Because the statute controls not only the jury, but also the judge, section 65 has been characterized as mandatory.[15] While a judge may give a special interrogatory on his own motion,[16] he *must* so instruct the jury upon request of either party.[17] The statute also requires that upon return of the general verdict, an inconsistent answer to a special interrogatory controls the verdict.[18] This procedure is a

11. Sommese v. Maling Bros., Inc., 36 Ill. 2d 263, 267, 222 N.E.2d 468, 470 (1966); Wise v. Wise, 22 Ill. App. 2d 54, 58, 159 N.E.2d 500, 502 (1959).

12. *See* Burns v. Howell Tractor & Equip. Co., 45 Ill. App. 3d 838, 845, 360 N.E.2d 377, 383 (1977).

13. A judge may assert discretionary control over a jury in the following manners: deciding the admissibility of evidence, questioning witnesses, commenting on lawyers' presentations of the case, selecting a general verdict with or without interrogatories or a special verdict, commenting on the evidence, directing the verdict, and granting a judgment notwithstanding the verdict or a new trial. Johnston, *Jury Subornation through Judicial Control*, 43 LAW & CONTEMP. PROB. 24, 28 (1980).

14. There are four advantages to giving special interrogatories: 1) they provide a method of checking the correctness of the general verdict; 2) they compel the jury to give a detailed consideration to important issues; 3) they may show that some errors were not prejudicial and provide a basis for curing others; and 4) they may have a salutary effect on the morale of the jury. Wicker, *supra* note 7, at 305-07. *See also Case for Interrogatories*, *supra* note 3, at 858-59 (commentator noted the benefits of interrogatories accompanying a general verdict included elimination of jury caprice and ready availability of information about the jury's decision on a particular facet of the case which would aid the appellate court in determining the effect of error in the admission or exclusion of evidence).

15. Albaugh v. Cooley, 88 Ill. App. 3d 320, 324, 410 N.E.2d 873, 877 (1980) (judge must on request of either party submit a written special interrogatory upon any material questions of fact); Chapman v. Checker Taxi Co., 43 Ill. App. 3d 699, 715, 357 N.E.2d 111, 123 (1976) ("[T]he trial judge must give a special interrogatory which is properly formulated and submitted on an ultimate question of fact."); 35 ILL. LAW & PRAC. *Trial* § 332 (1958 & Supp. 1980); 3A NICHOLS ILL. CIV. PRAC. § 3737 (rev. vol. 1977); Wicker, *supra* note 7, at 299-300; *Special Findings*, *supra* note 2, at 323.

16. Norton v. Volzke, 158 Ill. 402, 409-10, 41 N.E. 1085, 1087 (1895).

17. ILL. REV. STAT. ch. 110, § 65 (1977) which provides in part: "The jury may be required by the court, and must be required on request of any party, to find specially upon any material question or questions of fact stated to them in writing."

18. Borries v. Z. Frank, Inc., 37 Ill. 2d 263, 266, 226 N.E.2d 16, 18 (1967) (inconsistent special findings control a general verdict); Freeman v. Chicago Transit Auth., 33 Ill.2d 103, 106, 210 N.E.2d 191, 194 (1965) (same principle); Lesperance v. Wolff, 79 Ill. App. 3d 136, 139, 398 N.E.2d 360, 363 (1979) (proper procedure dictates vacating general verdict as to plaintiff to correspond with the special interrogatory); Mathis v. Burlington N., Inc., 67 Ill. App. 3d 1009, 1014, 385 N.E.2d 780, 784 (1978) (trial court bound by jury's answer to special interrogatories). ILL. REV. STAT. ch. 110, § 65 (1977) states

codification of the common law[19] and comports with the constitutional requirements of the right to trial by jury.[20]

While inconsistent special findings control the verdict, there is a presumption in favor of the general verdict.[21] The judge must attempt to harmonize the verdict with the inconsistent special findings.[22] If that is not possible, then before entering

---

in part: "when the special finding of fact is inconsistent with the general verdict, the former controls the latter and the court may render judgment accordingly."

19. Morgan, *A Brief History of Special Verdicts and Special Interrogatories*, 32 YALE L.J. 575, 592 (1923). *See* Walker v. New Mexico & S. Pac. R.R., 165 U.S. 593, 597-98 (1896) ("So that the putting of special interrogatories to a jury and asking for specific responses thereto in addition to a general verdict is not a thing unknown to the common law and has been recognized independently of any statute."); Borries v. Z. Frank, Inc., 37 Ill. 2d 263, 266, 226 N.E.2d 16, 18 (1967) ("The generally prevailing rule is that an inconsistent special finding controls a general verdict, even in the absence of express statutory provision."); People v. Kelly, 347 Ill. 221, 240, 179 N.E. 898, 905 (1931) (DeYoung, J., dissenting) (quoting above cited passage from *Walker*).

20. Walker v. New Mexico & S. Pac. R.R., 165 U.S. 593, 598 (1896) (Court upheld statutory special interrogatories of the Territory of New Mexico against constitutional attack for violating the 7th amendment and set aside a $9,212 judgment for plaintiff); Elliott v. Watkins Trucking Co., 406 F.2d 90, 92 (7th Cir. 1969) (court set aside a general verdict for plaintiff for $35,000 in a personal injury suit and entered judgment based on the answers to special interrogatories concerning contributory negligence; no violation of right to trial by jury found); United Air Lines, Inc. v. Wiener, 335 F.2d 379, 407 (9th Cir.), *cert. dismissed*, 379 U.S. 951 (1964) (no invasion of the province of the jury where special findings conflict with the verdict and compel judgment rendered upon those findings). *Contra*, Amendments to Rules of Civil Procedure for the United States District Courts, 374 U.S. 861 (1963) (Statement of Black and Douglas, JJ., recommending the repeal of FED. R. CIV. P. Rule 49 [Special Verdicts and Interrogatories]):

> Such devices are used to impair or wholly take away the power of a jury to render a general verdict. One of the ancient, fundamental reasons for having general jury verdicts was to preserve the right of trial by jury as an indispensable part of a free government. . . . A scrutiny of the special verdict and written interrogatory cases in appellate courts will show the confusion that necessarily results from the employment of these devices and the ease with which judges can use them to take away the right to trial by jury.

Id. at 867-68. *But cf.* Galloway v. United States, 319 U.S. 372, 396-407 (1943) (Black, J., dissenting) (Black's view of inviolate right to trial by jury).

21. Wicks v. Cuneo-Henneberry Co., 319 Ill. 344, 350, 150 N.E. 276, 279 (1925); Zygadlo v. McCarthy, 17 Ill. App. 3d 454, 457, 308 N.E.2d 167, 169 (1974) (all reasonable presumptions are entertained in favor of the general verdict, not the special findings).

22. *Special Findings*, *supra* note 2, at 324: "When the judge has before him a general verdict and special findings, it is within his power to decide whether the two are consistent or in conflict. If he decides that they are in conflict and cannot reasonably be reconciled, then the special findings will control. . . ." *See* Lewis v. Beckman, 57 Ill. App. 3d 482, 485, 373 N.E.2d 589, 592 (1978) (statutory inconsistency exists only when "special findings are clearly and absolutely irreconcilable with the general verdict"); Cohen v. Sager, 2 Ill. App. 3d 1018, 278 N.E.2d 543 (1972). *Cf.* 1 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE & INSTRUCTIONS § 6.08 (1977): "If the answers

judgment on the answers, the court must decide if the evidence supports those findings.[23]

The jury's answers to the special interrogatories must either be supported by *substantial evidence* or be *not contrary to the manifest weight of the evidence*, in order to supersede the verdict.[24] In the case where the answer fails this test the court may grant a new trial[25] on the theory that the jury was confused.[26]

The appellate courts have developed a second standard: where the *evidence viewed in a light most favorable to the defendant, so overwhelmingly favors the plaintiff, that no contrary verdict could stand on the evidence*, inconsistent answers may be set aside and judgment entered on the general verdict.[27] This

---

can be reconciled with the general verdict, the court should do so and every reasonable intendment in favor of the general verdict should be indulged in an effort to harmonize it and the answers. . . ."; 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL §§ 2511-13 (1971).

23. Freeman v. Chicago Transit Auth., 50 Ill. App. 2d 125, 136, 200 N.E.2d 128, 134 (1964).

24. Borries v. Z. Frank Inc., 37 Ill. 2d 263, 266, 226 N.E.2d 16, 18 (1967); Freeman v. Chicago Transit Auth., 33 Ill. 2d 103, 106, 210 N.E.2d 191, 194 (1965).

25. "[W]here a special finding is merely against the manifest weight of the evidence, remandment for a new trial would be the proper remedy." Lesperance v. Wolff, 79 Ill. App. 3d 136, 142, 398 N.E.2d 360, 365 (1979).

26. Freeman v. Chicago Transit Auth., 50 Ill. App. 2d 125, 140, 200 N.E.2d 128, 136 (1964), *aff'd*, 33 Ill. 2d 103, 210 N.E.2d 191 (1965). *But see* Borries v. Z. Frank, Inc., 37 Ill. 2d 263, 266, 226 N.E.2d 16, 19 (1967) ("To now hold, as plaintiff urges we do, that the jury's confusion manifested by the inconsistent special finding and general verdict automatically necessitates a new trial, would patently nullify the pertinent provision of section 65. . . .").

Inconsistencies may result from practical problems such as misunderstanding the instructions, deliberately disregarding them, or clerical error. Where the special findings are inconsistent with the general verdict, the proper remedy would be to resubmit the interrogatories to the jury for further consideration. If this is not possible and the special findings are consistent with themselves, judgment should be entered on them. But, a new trial should be granted when the special findings are irreconcilably inconsistent with themselves. Wicker, *supra* note 7, at 304; ILL. ANN. STAT. ch. 110, § 65 (Smith-Hurd 1980) (Jenner & Martin Supplement to Historical & Practice Notes).

27. Lesperance v. Wolff, 79 Ill. App. 3d 136, 142, 398 N.E.2d 360, 365 (1979) (judgment for plaintiff contrary to answers to interrogatories); Burns v. Howell Tractor & Equip. Co., 45 Ill. App. 3d 838, 845-46, 360 N.E.2d 377, 383-84 (1977) (judgment for plaintiff in part; remand for new trial as to defendant's liability); Leonard v. Pacific Intermountain Express Co., 37 Ill. App. 3d 995, 1005, 347 N.E.2d 359, 368 (1976) (answers to special interrogatories set aside and judgment for plaintiff); Zygadlo v. McCarthy, 17 Ill. App. 3d 454, 458, 308 N.E.2d 167, 170 (1974) (special findings set aside and judgment entered for plaintiff); Kirby v. Swedberg, 117 Ill. App. 2d 217, 221, 253 N.E.2d 699, 701 (1969) (special findings set aside and new trial ordered).

The *Kirby* court may have relied on the following language:

> The function of a trial judge in determining whether the answer to a special interrogatory is against the manifest weight of the evidence is analogous to his function in determining whether a general verdict is

"overwhelming evidence" test is also used to determine whether a verdict ought to be directed and a judgment notwithstanding the verdict entered.[28] Thus, where the inconsistent answers are not supported by the evidence, some courts hold that the statute is of no effect.[29] Rather than restricting judicial discretion, therefore, it appears that the occasion of inconsistent findings offers the court wide discretion in its judgment, depending upon how it weighs the evidence. However, this expansive construction of the statute was recently questioned in light of previous Supreme Court cases.[30]

The controlling cases on section 65 are *Freeman v. Chicago Transit Authority*[31] and *Borries v. Z. Frank, Inc.*[32] Together these cases hold that, when inconsistencies occur between the general verdict and special interrogatories, the general verdict is a nullity, even where the special findings are later vacated.[33]

---

against the weight of the evidence, and his authority to act upon his own motion should be the same in both instances.

Freeman v. Chicago Transit Auth., 33 Ill. 2d 103, 105-06, 210 N.E.2d 191, 193-94 (1965).

28. Pedrick v. Peoria & E. R.R., 37 Ill. 2d 494, 510, 229 N.E.2d 504, 513 (1967), a personal injury suit, turned on the issue of contributory negligence as a matter of law and required a directed verdict for the defendant. It set forth the same "overwhelming evidence" test for directed verdicts and judgments notwithstanding the verdict. *Pedrick* was decided after both Freeman v. Chicago Transit Auth., 33 Ill. 2d 103, 210 N.E.2d 191 (1965) and Borries v. Z. Frank, Inc., 37 Ill. 2d 263, 226 N.E.2d 16 (1967), neither of which referred to an "overwhelming evidence" standard.

29. Lesperance v. Wolf, 79 Ill. App. 3d 136, 140, 398 N.E.2d 360, 363 (1979) (mandate of § 65 has no effect where special findings are either contrary to or not supported by evidence); Zygadlo v. McCarthy, 17 Ill. App. 3d 454, 457, 308 N.E.2d 167, 169 (1974) (same principle).

30. *See* Albaugh v. Cooley, 88 Ill. App. 3d 320, 325, 410 N.E.2d 873, 877 (1980) (note 1 of the opinion recognized the nullity theory and contrasted it with cases that entered judgment on the inconsistent general verdict);

> [R]ecent cases . . . apply a misconstruction of the law in holding that the trial court can set aside the answer to a special interrogatory because it is against the manifest weight of the evidence and then enter judgment on the general verdict. Their reasoning is based upon dicta contained in Kirby v. Swedberg, 117 Ill. App. 2d 217, 253 N.E.2d 699 (1969), which directly contradicts the express reasoning of the Supreme Court in *Borries* that the inconsistency between the answer to the special interrogatory and the general verdict under section 65 of the Civil Practice Act, itself makes the general verdict a nullity and necessitates a new trial.

Starbuck v. Chicago Rock Island & Pac. R.R., 47 Ill. App. 3d 460, 465, 362 N.E.2d 401, 405 (1977). This is not completely correct, as the standard used to set aside the special findings and reinstate the general verdict is the "overwhelming evidence" test of Pedrick v. Peoria & E. R.R. Co., 37 Ill. 2d 494, 510, 229 N.E.2d 504, 513 (1967). *See, e.g.*, note 27 and accompanying text *supra*.

31. 33 Ill. 2d 103, 210 N.E.2d 191 (1965).

32. 37 Ill. 2d 263, 226 N.E.2d 16 (1967).

33. That a jury's special finding of fact controls an inconsistent general verdict is established law in [Illinois]. . . . In such cases the for-

Technically, this precludes any subsequent judgment on the general verdict;[34] but, some appellate courts continue to exceed the *Freeman* and *Borries* guidelines and reinstate the general verdict where possible.[35] Any attempt to look to the statute for a literal interpretation is frustrated by the fact that it is couched in both mandatory and permissive language.[36]

These legal gymnastics acquire more significance when the practical economic effects of special interrogatories are considered.[37] In states that still recognize contributory negligence as a complete defense, a general verdict benefits the plaintiff;[38] it permits a jury to ignore the doctrine of contributory negligence and temper the law with their own brand of comparative negligence.[39] Conversely, the special interrogatory, coupled with the prohibition of explaining the effect of the special findings to the jury, protects the defendant.[40] One inconsistent answer finding contributory negligence by the plaintiff can scuttle the plaintiff's case.[41]

---

mer is the verdict of the jury and judgment can be entered thereon; the latter is a nullity. . . . This renders the inconsistent general verdict of no force and effect whatsoever even though the special finding is subsequently vacated.

Freeman v. Chicago Transit Auth., 33 Ill. 2d 103, 109, 210 N.E.2d 191, 195 (1965) (Underwood, J., specially concurring).

34. "[T]here is no corresponding authority for a trial court to enter judgment in accordance with a general verdict when he decides an inconsistent finding is against the manifest weight of the evidence." Borries v. Z. Frank, Inc., 37 Ill. 2d 263, 266, 226 N.E.2d 16, 18 (1967).

35. *See* note 27 and accompanying text *supra*.

36. *See* note 5 *supra*.

37. *See, e.g.*, Chicago Sun-Times, April 19, 1980, at 14, col. 1 (*Man Loses $2 Million Ruling*).

38. *Case for Interrogatories*, *supra* note 3, at 860.

39. Trial attorneys are often critical of special finding procedures. Plaintiffs' counsel in personal injury litigation find solace in the general verdict. This is due primarily to the freedom which the jury has in considering extraneous factors such as ability to pay and possible insurance. One of the strongest reasons these attorneys offer in support of the general verdict is that the jury is free to ignore the doctrine of contributory negligence and apply instead comparative negligence. If a comparative negligence doctrine is desired, then enactment of a statute so providing should be sought. Jurors should not be allowed to enact legislation at their will.

Id.

40. Albaugh v. Cooley, 88 Ill. App. 3d 320, 328, 410 N.E.2d 873, 880 (1980) (opinion note 5: "in virtually every case, the answer to a special interrogatory can only operate in favor of the defendant in controlling the general verdict"). *See also Special Findings*, *supra* note 2, at 327 n.27.

41. Bluestein v. Upjohn Co., No. 75-L-4403 (Cir. Ct. Cook County 1979), *appeal pending*, no. 80-2226 (1st Dist. Ill. Aug. 6, 1980) (plaintiff's $2 million verdict set aside and judgment for defendant on special findings); Mathis v. Burlington N., 67 Ill. App. 3d 1009, 385 N.E.2d 780 (1978) ($183,000 verdict set aside, judgment for defendant affirmed on appeal); Sandquist v. Kefalopoulos, 49 Ill. App. 3d 456, 364 N.E.2d 475 (1977) ($22,000 verdict set aside,

An example of section 65's anomalous results occurred in a recent case, *Albaugh v. Cooley*,[42] which reversed a trial court decision that had set aside a judgment for $20,000 because of inconsistent answers to special interrogatories. The appellate court, although noting the technical discrepancies in the law, decided the case on constitutional grounds and held that section 65 violated the separation of powers clause of the Illinois Constitution of 1970.[43] The court found that section 65 encroached on the judiciary's inherent rule-making power and that such a mandatory procedure could only be provided by a Supreme Court rule.[44]

Albaugh thus joined a number of recent decisions that have similarly invalidated judicial procedure statutes on constitutional grounds.[45] The purpose of this comment is to determine

---

judgment for defendant affirmed on appeal); Starbuck v. Chicago, Rock Island & Pac. R.R., 47 Ill. App. 3d 460, 362 N.E.2d 401 (1977) (on appeal plaintiff's $50,000 verdict vacated, new trial ordered). For examples of inconsistent special findings, see note 10 *supra*.

42. 88 Ill. App. 3d 320, 410 N.E.2d 873 (1980).

43. *Id.* at 326, 410 N.E.2d at 878. ILL. CONST. of 1970, art. II, § 1: "The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another."

44. *Id.* at 328, 410 N.E.2d at 879-80.

45. People v. Cox, 82 Ill. 2d 268, 412 N.E.2d 541 (1980), invalidated ILL. REV. STAT. ch. 38, § 1005-5-4.1 (1979) of the Unified Code of Corrections which codified the standard of review of sentencing and authorized a reviewing court to decrease or increase a sentence in favor of rule 615 (b)(4). This rule empowered the reviewing court to reduce the punishment imposed by the trial court. The *Cox* court relied on "the exclusive power of this court to regulate by rule matters of appellate practice and procedure." 82 Ill. 2d at 275, 412 N.E.2d at 545. While the court cited People *ex rel.* Stamos v. Jones, 40 Ill. 2d 62, 66, 237 N.E.2d 495, 497 (1968) as authority, *Jones* never characterized the court's power to regulate appellate practice and procedure as "exclusive."

People v. Jackson, 69 Ill. 2d 252, 371 N.E.2d 602 (1977), invalidated ILL. REV. STAT. ch. 38, § 115-4 (f) (1975) of the Criminal Code regarding *voir dire* in favor of Supreme Court Rule 234 on the grounds that the statute was a legislative infringement upon the judiciary's powers. The constitutional right to trial by an impartial jury does not require that the parties themselves be permitted to interrogate the jurors.

People *ex rel.* Stamos v. Jones, 40 Ill. 2d 62, 237 N.E.2d 495 (1968), invalidated ILL. REV. STAT. ch. 38, § 121-6 (b) (1967) of the Criminal Code which prohibited the continuation of bail pending appeal of a judgment defined as a forcible felony in favor of rule 609 (b) to the contrary. The decision was based on the grounds that in the matter of appeals under the ILL. CONST. of 1870, art. VI, §§ 2, 5, and 7, the legislature may revise court rules only as to direct appeals. Therefore, the statute exceeded legislative authority. The constitutional provision relied upon had recently been amended as to appellate court procedure.

Agran v. Checker Taxi Co., 412 Ill. 145, 105 N.E.2d 713 (1952), invalidated ILL. REV. STAT. ch. 110, § 50 (a) (1951) of the Civil Practice Act, requiring five days advance notice to every attorney of record on *ex parte* judgments. The court held that the statute was an unconstitutional infringement upon the inherent power of the judiciary to render a judgment of dismissal. Like Al-

whether the Illinois statute providing special interrogatories is an unconstitutional legislative infringement on the inherent judicial rule-making power. Moreover, it will contrast the source of the supreme court's rule-making power with its increasing dominance over the legislature in judicial procedure matters.

SOURCE OF ILLINOIS COURT'S RULE-MAKING POWER

The authorities governing the court's rule-making power incude the Illinois Constitution, the common law, and the Civil Practice Act. The starting point is the Illinois Constitution of 1970 which vests judicial power in the supreme, appellate, and circuit courts.[46] Though the constitution does not define "judicial power," it has been described as an exclusive and exhaustive grant of all such power[47] as determined by history and the common law.[48]

---

baugh v. Cooley, 88 Ill. App. 3d 320, 410 N.E.2d 873 (1980), there was no conflicting supreme court rule.

Contra, Strukoff v. Strukoff, 76 Ill. 2d 53, 389 N.E.2d 1170 (1979) (upheld ILL. REV. STAT. ch. 40, § 403 (e) (1977) of the Marriage and Dissolution of Marriage Act on a constitutional challenge that it encroached on judicial rule-making powers; court held that this mandatory provision was entirely statutory in origin and not discretionary; there was no conflicting court rule); People *ex rel.* County Collector v. Jeri, Ltd., 40 Ill. 2d 293, 239 N.E.2d 777 (1968) (upheld a statutory requirement relating to tax sales, redemption, and deeds as entirely statutory in origin and nature and not analogous to the situation in Agran v. Checker Taxi Co., 412 Ill. 145, 105 N.E.2d 713 (1952)).

46. ILL. CONST. of 1970, art. VI, § 1: "The judicial power is vested in a Supreme Court, an Appellate Court and Circuit Courts."

47. People v. Jackson, 69 Ill. 2d 252, 256, 371 N.E.2d 602, 604 (1977); Agran v. Checker Taxi Co., 412 Ill. 145, 148-49, 105 N.E.2d 713, 715 (1952).

48. The doctrine of implied or inherent power of the judiciary has been stated in the following manner:

> Judicial power is vested in the Supreme Court and other courts of this State, but what constitutes judicial power is not defined nor limited by the constitution.
>
> [J]udicial powers, under the system which we inherited, included the regulation of procedure by rules of the superior courts of England. That system, as from time to time modified, was followed in this country prior to the adoption of our Constitutions and prior to any statutes on the subject. . . .

People v. Callopy, 358 Ill. 11, 14-15, 192 N.E. 634, 635-36 (1934).

The doctrine was further expanded when the court explained the doctrine as follows:

> In dividing the powers of government in this State into three separate departments, Article III is declaratory of a basic principle of constitutional law. Each of the three departments is to perform the duties assigned to it and no department may exercise the powers properly belonging to either of the other two. . . If the power is judicial in its nature, it necessarily follows that the legislature is expressly prohibited from exercising it. . . .
>
> Prior to the adoption of the United States constitution, courts exercised complete power in the control of their own procedure. . . . That

Illinois Constitutional Development

From the first constitution in 1818, Illinois has incorporated the concept of overlapping powers,[49] by which the legislative, executive, and judicial branches of government are not "rigidly separated compartments."[50] This application of the separation of powers doctrine has continued through four constitutions and is present today.[51] Though the legislature took an early lead in regulating court practice and procedure,[52] there has been an effort to give the supreme court exclusive rule-making power.[53]

---

system became modified in this country by the adoption of statutes, whereby the legislature usurped a part of this rule-making function. . . . The General Assembly has power to enact laws governing judicial practice only where they do not unduly infringe upon the inherent powers of the judiciary. . . .

Agran v. Checker Taxi Co., 412 Ill. 145, 148-49, 105 N.E.2d 713, 715 (1952).

More recently the appellate court summarized the judicial power in the following manner:

> [W]e can only define "judicial power" by looking to the history of our institutions and to the common law. At common law courts possessed inherent power to institute and prescribe rules of procedure. The 1870 Illinois Constitution gave the courts all powers necessary for complete performance of the judicial function, and the present [1970] constitution continues this practice.

People v. Brumfield, 51 Ill. App. 3d 637, 643, 366 N.E.2d 1130, 1135 (1977).

49. People v. Brumfield, 51 Ill. App. 3d 637, 642, 366 N.E.2d 1130, 1134 (1977) (opinion provided a detailed historical development of separation of powers in the Illinois Constitution).

50. Strukoff v. Strukoff, 76 Ill. 2d 53, 58, 389 N.E.2d 1170, 1172 (1979).

> The doctrine of separation of powers has been historically regarded by this court, "in theory and in practice," as meaning "that the whole power of two or more of the branches of government shall not be lodged in the same hands"; it does not contemplate that there are or should be "rigidly separated compartments" or "a complete divorce among the three branches of government."

Id., citing *In re* Estate of Barker, 63 Ill. 2d 113, 119, 345 N.E.2d 484, 488 (1976). *See* THE FEDERALIST No. 47, at 300-04 (J. Madison) (Rossiter ed. 1961) (interprets political philosophy of Montesquieu and also noted that "there is not a single instance [among several states] in which the several departments of power have been kept absolutely separate and distinct").

> It has been generally recognized that separation of powers does not forbid every exercise of functions by one branch of government which conventionally [are] exercised by another branch. Professor Frank Cooper (1 F. COOPER, STATE ADMINISTRATIVE LAW 16 (1965)) observes: "[T]he real thrust of the separation of powers philosophy is that each department of government must be kept free from the control or coercive influence of the other departments."

Id. at 58-59, 389 N.E.2d at 1172, citing People v. Farr, 63 Ill. 2d 209, 213, 347 N.E.2d 146, 148 (1976).

51. People v. Brumfield, 51 Ill. App. 3d 637, 642, 366 N.E.2d 1130, 1135 (1977).

52. Trumbull, *Judicial Responsibility for Regulating Practice and Procedure in Illinois*, 47 NW. L. REV. 443, 447 (1952) [hereinafter cited as Trumbull].

53. Section 3 of the Proposed Judicial Article (1952) would have vested full power and responsibility for the regulation of practice and procedure in

This was particularly apparent in the 1950s, when the Illinois State and Chicago Bar Associations lobbied for what was to become the 1962 Judiciary Article.[54] While this Article provided the first grant of administrative authority to the supreme court,[55] it remained silent as to the court's rule-making power.[56]

In 1970, Illinois convened a Constitutional Convention which produced a Judicial Article closely resembling that of the 1962 Article.[57] Though the 1970 Constitution provided the supreme court its first grant of supervisory power, the relationship between the legislature and the supreme court was not altered; their powers remained concurrent.[58] In fact, the

---

the courts and read as follows: "The supreme court shall make rules governing practice and procedure in all courts. Subject to such rules, the judges of each district of the appellate court and the circuit judges of each circuit court may make rules governing practice and procedure in their courts." *Id.* at 443 (note 4 explains how the proposed article would modernize the judicial system).

54. Levin, *Legislative Approval of Judicial Reform: The Uncertain Summer of '61*, 65 ILL. B.J. 254, 255-60 (1977) [hereinafter cited as Levin]. In 1951 the Illinois State and Chicago Bar Associations created the Joint Committee on Judicial Article to promote judicial reform and amend the Illinois Constitution. Various proposals and a referrendum in 1958 failed. A second bill amending the Judicial Article passed both houses of the General Assembly in 1961 and was approved by the voters in a referrendum in 1962. This new provision unified the trial courts, established separate appellate courts, reduced gross population disparities between judicial districts, granted security of tenure to judges, authorized mandatory retirement, allowed for the removal of judges for cause by a judicial commission, and vested in the Supreme Court administrative control over the entire court system. *Id.* at 254. However, political realities required forfeiture of the hard fought for clause granting the supreme court exclusive rule-making power. *See generally* note 108 and accompanying text *infra*.

55. The Judiciary Article of 1962 amended the ILL. CONST. of 1870, art. VI. Section 2 provided in pertinent part that "[g]eneral administrative authority over all courts . . . is vested in the Supreme Court and shall be exercised by the Chief Justice in accordance with its rules."

"The Judicial Amendment of 1962 provided the first express constitutional statement that it had administrative authority." People v. Thornton, 54 Ill. App.3d 202, 208, 369 N.E.2d 358, 362 (1977) (Green, J., specially concurring).

56. *See* People *ex rel.* Stamos v. Jones, 40 Ill. 2d 62, 65, 237 N.E.2d 495, 497 (1968) ("These provisions [1962 Judiciary Article] do not suggest an intention to effect a general revision of the rule-making power of this court as it existed prior to the adoption of article VI.").

57. *See* Levin, *supra* note 54, at 265 ("In most respects, the 1970 judicial article followed the structure and retained the reforms of the one approved in Springfield nine years before . . .).

58. ILL. CONST. of 1970, art. VI, § 16 provides in part that: "[g]enuine administrative and supervisory authority over all courts is vested in the Supreme Court and shall be exercised by the Chief Justice in accordance with its rules." The term "supervisory was employed to fortify the concept of a centrally supervised court system." ILL. ANN. STAT., ILL. CONST. art VI, § 16, Constitutional Commentary, at 527-28 (Smith-Hurd 1971).

"Express constitutional authority for the supreme court to exercise supervisory power over the court system appeared for the first time in the

Convention Report on Recommendations on the Judiciary Article commented that the recommended language of the article in "no way affects existing constitutional status of the Legislative and Judicial Departments in respect to the general subject of rule making power in matters of practice and procedure."[59]

While there were some limited exclusive grants of power to the supreme court,[60] the constitution provided "for an annual judicial conference to consider . . . the administration of justice and . . . report thereon annually in writing to the General Assembly."[61] The result was that the 1970 Constitution made no general revision of the court's rule-making power.[62] Considering the past efforts of local and state bar associations, legislative action, and the 1970 Constitutional Convention to provide for an exclusive grant of such power to the court, the Illinois citizens' repeated rejections of the idea indicates that no such grant was intended. Thus, there is no support in the Illinois Constitution of 1970 for the assertion that the court has complete rule-making power.[63]

Illinois Common Law

Another source for the supreme court's rule-making power

Constitution of 1970. People v. Thornton, 54 Ill. App. 3d 202, 208, 369 N.E.2d 358, 362 (1977) (Green, J., specially concurring).

59. Rolewick, *Voir Dire Examination of Jurors: A Brief Study of the Action of the Illinois Judicial Conference in Recommending Revisions in Supreme Court Rule 234*, 25 DEPAUL L. REV. 50, 62 (1975) (citing SIXTH ILLINOIS CONSTITUTIONAL CONVENTION, 6 RECORD OF THE PROCEEDINGS at 825 (1972)).

60. ILL. CONST. of 1970, art. VI, § 4(b), (c) (Supreme Court—Jurisdiction), § 6 (Appellate Court—Jurisdiction), and § 16 (Administration). These provisions are significant to centralized administration and supervision and vest exclusive rule-making power in the supreme court subject to certain limitations contained therein. Note, *People ex rel. Stamos v. Jones: A Restraint on Legislative Revision of the Illinois Supreme Court Rules*, 6 J. MAR. J. 382, 392-94 (1973) [hereinafter cited as *Restraint on Legislative Revision*].

61. ILL. CONST. of 1970, art. VI, § 17: "The Supreme Court shall provide by rule for an annual judicial conference to consider the work of the courts and to suggest improvements in the administration of justice and shall report thereon annually in writing to the General Assembly not later than January 31."

62. "I conclude that the drafters [of the 1970 Constitution], unable to agree as to the desirable limits of the rulemaking power of the two bodies, deliberately refrained from speaking to that question and left the issue as it existed prior to 1962 . . . ." People v. Thorton, 54 Ill. App. 3d 202, 208, 369 N.E.2d 358, 362 (1977) (Green, J., specially concurring). *See generally* People *ex rel.* Stamos v. Jones, 40 Ill. 2d 62, 65, 237 N.E.2d 495, 497 (1968) (Justice Schaefer's analysis of the effect of the 1962 Judiciary Article on the court's rule-making power).

63. *See* note 122 and accompanying text *infra*.

is derived from the common law.[64] While common law courts possess inherent power to institute and prescribe the rules of procedure,[65] the custom in the United States has been to legislate court procedure and practice.[66] The court's common law rule-making power eroded in America as a result of a legislative reform movement in both England and the United States which flourished in the eighteenth century.[67] The movement was aptly described by Chief Justice Marshall: "Judicial power is never exercised for the purpose of giving effect to the will of the judge always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law."[68]

Some Illinois cases have held that the doctrine of inherent power grants the supreme court complete power to control its own procedure and appear to rely on English precedent.[69] This interpretation, however, may be challenged in three ways.[70]

---

64. "It is a matter of general information among those who have read legal history, that the common law of England, as it was changed to suit the genius of our institutions, afforded, prior to the adoption of our constitution, the concept of judicial power." People v. Callopy, 358 Ill. 11, 14, 192 N.E. 634, 636 (1934). *See Restraint on Legislative Revision*, *supra* note 60, at 384 (common law was brought to Illinois through the Northwest Ordinance of 1787).

65. "[The Supreme Court of Illinois] has inherent power to institute and prescribe rules of practice, and it is there pointed out that the power is also expressly conferred by statute. That courts have power to make rules of procedure and practice has been frequently announced in this state." People v. Callopy, 358 Ill. 11, 19, 192 N.E. 634, 638 (1934). *Accord*, People v. Brumfield, 51 Ill. App. 3d 637, 643, 366 N.E.2d 1130, 1135 (1977).

66. People v. Callopy, 358 Ill. 11, 15, 192 N.E. 634, 636 (1934). *See generally* Kaplan & Greene, *The Legislature's Relation to Judicial Rule-making: An Appraisal of Winberry v. Salisbury*, 65 HARV. L. REV. 234, 252 (1951) (the monuments of procedural reform of the nineteenth century were legislative); Trumbull, *supra* note 53, at 447 (judicial rule-making power is subject to paramount legislative authority). *See also* comment, *The Proposed Federal Rules of Evidence: Of Privileges and the Division of Rule-Making Power*, 76 MICH. L. REV. 1177, 1179 (1978) ("Historically, making rules of procedure for the federal courts has been a joint enterprise of the Supreme Court and Congress.").

67. People v. Thornton, 54 Ill. App. 3d 202, 209, 369 N.E.2d 358, 363 (1977) (Green, J., specially concurring) (citing Agran v. Checker Taxi Co., 412 Ill. 145, 149, 105 N.E.2d 713, 715 (1952)). *See* Pound, *The Rule-Making Power of the Courts*, 12 A.B.A.J. 599 (1926).

68. Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738, 866 (1824).

69. Prior to the adoption of the United States Constitution, courts exercised complete power in the control of their own procedure. . . . That system became modified in this country by the adoption of statutes, whereby the legislature usurped a part of this rule-making function. . . . The General Assembly has power to enact laws governing judicial practice only where they do not unduly infringe upon the inherent powers of the judiciary.

Agran v. Checker Taxi Co., 412 Ill. 145, 149, 105 N.E.2d 713, 715 (1952). *See* Pound, *Regulation of Judicial Procedure by Rules of Court*, 10 ILL. L. REV. 163, 172 (1915).

70. *See generally* Trumbull, *supra* note 52, at 444-49. Professor Trum-

First, when Illinois was granted statehood, the General Assembly authorized the supreme court to prescribe forms for the usual process served and for the keeping of dockets, records, and proceedings;[71] however, the legislature concurrently passed an act governing practice and procedure in the supreme and circuit courts.[72] These statutes also directed that English common law be in force as the rule of decision, but only until repealed by the general assembly.[73] Therefore, the legislative intent from the beginning was a judicial rule-making process subject to a "paramount legislative authority."[74]

The Founding Fathers made a similar reference to the notion that in a republican form of government the legislature predominates.[75] Legal historians and philosophers have also taken a view that the legislature was intended to be supreme: this was accomplished in the Constitution by the "sweeping clause."[76] Included in the legislature's power to make the laws necessary and proper to effect governmental policies, was general judicial rule-making power.[77] While the idea of legislative supremacy

---

bull, secretary of the Joint Committee on the Judicial Article of 1951, explained the proposed Judicial Article of 1952 in terms of a matrix. It was composed of the development of court procedure in England, the federal system, and Illinois, against separation of powers and constitutional considerations. While the author concluded that responsibility should be vested "in the agency which can best discharge it," he noted that inherent rule-making power was not without limits:

> Thus historical precedent provides support for the doctrine of implied or inherent rule-making power of the courts, but not such clear support for the extension of the doctrine to an assertion that judge-made rules prevail over statutes or that practice acts may be held unconstitutional as infringements upon, or usurpation of, judicial power.

Id. at 449.

71. Ill. Laws 1919, pp. 377-78.

72. *Id.* at 139.

73. *Id.* at 3.

74. "Presumably the common law included judicial rule-making power . . . to be exercised subject to paramount legislative authority." Trumbull, *supra* note 52, at 447.

75. THE FEDERALIST No. 51, at 322 (J. Madison) (Rossiter ed. 1961).

76. U.S. CONST. art. I, § 8, cl. 18: "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers. . . ."; 1 W. CROSSKEY, POLITICS AND THE CONSTITUTION 557-62 (1953). "It would be dangerous to commit the interests of the citizens to the mere arbitrary will of those who ought to distribute justice. The legislature should assist the understanding of the judges, force their prejudices and inclinations, and subject their wills to simple, fixed and certain rules." *Id.* at 558. "[A]ll the other powers of the state must obey the legislative power in the execution of their several functions, or else the constitution is at an end." *Id.*

77. "The power . . . is the general judicial-rule-making power that belongs to Congress as a 'necessary and proper' incident of 'the [national] judicial Power' for which the Constitution provides." 1 W. CROSSKEY, POLITICS AND THE CONSTITUTION 558 (1953).

has tempered from the age of legislative reform, many still view "the taproot of rule-making power" as a legislative delegation.[78]

Second, there is no direct parallel between the supreme court and the King's Bench.[79] Though a comparison to the English common law lends support for some judicial rule-making power, Americans were wary of the history of tyranny in the English judiciary.[80] The English system was based on the theory of fused powers where all branches of government found their antecedents in the High Court of Parliament.[81] While the judges may be in a better position to establish the mechanical details of court procedure, there are advantages to the shared system used in Illinois.

The benefit of a cooperative, rather than exclusive, grant of power is that the legislature has the opportunity to debate fundamental or substantive matters[82] and restrain any judicial excesses. Where the judiciary controls the rule-making power, only the approval of a majority of the supreme court judges may be required.[83] A good example of shared responsibility is the federal system where there is no question as to Congress's ultimate control.[84] Therefore, to look to the English common law for Illinois' inherent judicial rule-making power is to blur the facts of history and the separation of powers distinction.

---

78. "The taproot of rulemaking power in this country is legislative delegation, though there is also nourishment from the inherent role of a constitutionally independent judiciary." Weinstein, *Reform of Federal Court Rulemaking Procedures*, 76 COLUM. L. REV. 905, 906 (1976) (author noted that the majority approach regarding cooperation between the legislature and judiciary is a wiser method and that so long as the legislature is not seeking to destroy a court's power to act effectively, statutes should supersede rules).

79. Comment, *The Inherent Power of Court to Formulate Rules of Practice*, 29 ILL. L. REV. 911, 914 (1935) (author responded to the 1933 Civil Practice Act and to the decision of People v. Callopy, 358 Ill. 11, 192 N.E. 634 (1934), and noted that judges are more conversant with attorney problems than the legislature; the purpose of the court's rule-making power is to facilitate the trial of the case and avoid technicalities; however, it was suggested that state statutes supersede supreme court rules).

80. *Id.* at 918.

81. *See* Trumbull, *supra* note 52, at 445.

82. Winberry v. Salisbury, 5 N.J. 240, 254, 74 A.2d 406, 418-19 (1950) (Case, J., concurring) (highlighted the benefits of the checks and balances of the legislature over the judiciary as to rule-making).

83. "The justices make the decision; four of them; perhaps three of them; on their own handiwork, a rule that cuts deeply into property and property rights." Winberry v. Salisbury, 5 N.J. 240, 255, 74 A.2d 406, 419 (1950) (Case, J., concurring).

84. *See* Trumbull, *supra* note 52, at 446. For other comparative material on the federal view of rule-making, see Fitzgerald, *Congressional Oversight or Congressional Foresight: Guidelines from the Founding Fathers*, 28 AD. L. REV. 429, 437-41 (1976); Comment, *The Proposed Federal Rules of Evidence: Of Privileges and the Division of Rule-Making Power*, 76 MICH. L. REV. 1177 (1978).

Finally, the English courts historically created both procedural and substantive law.[85] The Illinois Constitution, however, provided that the supreme court is vested with "general administrative and supervisory authority";[86] it did not allow for the court's creation of substantive or fundamental law.[87] However, drawing a line between fundamental and procedural matters is difficult and probably best left to a case by case analysis.[88] Thus, Illinois has modified and adapted English common law. It is necessary to consider the predominance of the legislature, the separation of powers, and the substance versus procedural distinctions in Illiois law, before citing English common law as authority for inherent judicial rule-making power.

Illinois Civil Practice Act

A third element in the equation of supreme court authority is the express act of the General Assembly. In 1933, the legislature passed the Civil Practice Act which gave the supreme court certain rule-making power.[89] The legislature intended to continue controlling the permanent, fundamental, and major portions of judicial practice, such as pleading, parties, and general trial practice, while the supreme court supplied the details of the working machinery and administrative features.[90] The purpose of this dichotomy was to promote flexibility and avoid technicality.[91] The power that was delegated to the supreme court has been variously described as concurrent,[92] complementary,[93]

85. Comment, *The Bounds of Power: Judicial Rule-Making in Illinois*, 10 LOY. CHI. L.J. 100, 102-03 (1978) [hereinafter cited as *Bounds of Power*].

86. ILL. CONST. of 1970, art. VI, § 16: "General administrative and supervisory authority over all courts is vested in the Supreme Court."

87. *See Bounds of Power*, *supra* note 85, at 105 n.48.

88. People v. Brumfield, 51 Ill. App. 3d 637, 643, 366 N.E.2d 1130, 1135 (1977).

89. Sunderland, *The Provisions Relating to Trial Practice in the New Illinois Civil Practice Act*, 1 U. CHI. L. REV. 188 (1933). The legislature conferred extensive rule-making power upon the Supreme Court and approved 41 rules as part of the Act. The author noted that the legislature should continue to deal with the "more fundamental principles of procedure." *Id.* at 189.

90. Jenner & Schaefer, *The New Rules of the Illinois Supreme Court under the Illinois Civil Practice Act*, 1 U. CHI. L. REV. 752 (1934).

91. Sunderland, *Observations on the Illinois Civil Practice Act*, 28 ILL. L. REV. 861, 862 (1934) (commentator noted that he looked forward to rules made by the profession and warned against too many and too detailed rules).

92. People v. Brumfield, 51 Ill. App. 3d 637, 643, 366 N.E.2d 1130, 1135 (1977) (court appeared to define "concurrent" by inference; it noted the court's inherent rule-making power which it says was recognized by the legislature when it granted the Illinois Supreme Court in the 1933 Civil Practice Act; the implication is that there are two branches of government that exercise rule-making power which may operate parallel to each other).

and supplementary.[94]

The Civil Practice Act provides that "the Supreme Court . . . has power to make the rules of pleading, practice and procedure . . . supplementary to but not inconsistent with the provisions of this Act. . . ."[95] The supreme court rules correspondingly note that the rules on proceedings are to govern "together with the Civil Practice Act."[96] Thus, from a literal interpretation, it would seem that the rule-making power is to be supplementary.

In considering the effect of this shared power on a statute providing for special interrogatories, a quick reference to the constitutional right to trial by jury[97] in Illinois raises the question that section 65 might be a fundamental matter. The right to trial by jury in Illinois is different from that under the federal constitution inasmuch as the supreme court and legislature have flexibility in adjusting its details.[98] For example, *voir dire* procedures are totally within the supreme court's purview.[99] The control over the jury's deliberations in setting aside a plaintiff's actual money judgment is more than mere procedure and has the earmarks of fundamental interference with the right of

93. "Although the 1970 Constitutional Convention characterized the court rule-making function as 'concurrent,' ". . . it should have been depicted as complimentary. Concurrent power implies the joint exercise of authority over a single function. In actuality, control over some matters was delegated to the legislature, reserving the remainder to the judiciary." *Bounds of Power*, *supra* note 85, at 100 n.5, citing 2 RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 1067 (1969-1970).

94. " '[S]upplementary' power, places the initiative for changing rules of procedure with the legislature and limits the court to the promulgation of rules which are [additional] to, but not inconsistent with, the legislature enactments." Note, *The Rule-Making Powers of the Illinois Supreme Court*, 1965 U. ILL. L.F. 903, 906-07 [hereinafter cited as *Rule-Making Powers*]. *See also* Graham, *Introduction: The Illinois Supreme Court at the Threshold*, 1978 U. ILL. L.F. 104, 107-08.

95. ILL. REV. STAT. ch. 110, § 2 (1979).

96. Ill. Sup. Ct. R. 1 (1977).

97. ILL. CONST. of 1970, art. I, § 13: "The right of trial by jury as heretofore enjoyed shall remain inviolate."

98. People v. Lobb, 17 Ill. 2d 287, 299, 161 N.E.2d 325, 332 (1959) ("The constitutional guarantee of the right of trial by jury is not so inelastic as to render unchangeable every characteristic and specification of the common-law jury system. Flexibility for the adjustment of details remains, as long as the essentials of the system are retained."); People v. Kelly, 347 Ill. 221, 236, 179 N.E. 898, 904 (1931) (both the opinion of the *Kelly* court and the dissent compared the judge's right to comment on the facts to the role of special interrogatories, citing Walker v. New Mexico & S. Pac. R.R., 165 U.S. 593 (1896), which dealt with the constitutionality of statutory special interrogatories) ("The Legislature may make any reasonable regulation or condition respecting the mode or method of enjoying the right of trial by jury so long as it does not substantially impair the right itself.").

99. People v. Jackson, 69 Ill. 2d 252, 371 N.E.2d 602 (1977) (invalidating statute regarding *voir dire* and upholding competing supreme court rule).

trial by jury. At the very least it falls within the gray area between fundamental and procedural matters and such problem areas should be referred to the legislature.[100]

The legislature has an additional power in state government. Not unlike the practical economics surrounding the financial control asserted by a judge in considering the effect of special interrogatories, the legislature holds the purse strings and controls the budgets of the other governmental branches including the judiciary.[101] There is the possibility that the legislature might show its displeasure with an uncooperative judiciary through reduced appropriations.[102]

ILLINOIS SUPREME COURT: ASSERTING ITS DOMINANCE IN RULE-MAKING

Despite the lack of a clear mandate from the Illinois Constitution, the common law, or the legislature, the trend of the Illinois Supreme Court toward judicial dominance over court procedure was predicted and encouraged.[103] In fact, prior to the Civil Practice Act of 1933, legal authorities suggested a three stage development: common law procedure, statutory rule, and court rule, and charged that all legislative procedural rules were constitutionally void and should be left to the judiciary to draft.[104]

While the supreme court asserted that its inherent judicial functions are beyond legislative control, it recognized that the demarcation lines between legislative and judicial rule-making

---

100. *Cf.* Hanna v. Plumer, 380 U.S. 461, 472 (1965), which stated:

> [T]he constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.

101. THE FEDERALIST NO. 48, at 310 (J. Madison) (Rossiter ed. 1961).

102. *See generally* United States v. Will, 101 S. Ct. 471 (1980) (Supreme Court upheld statutes to revoke increase in article III judges' compensation where those statutes became law before scheduled increases had taken effect). "[T]he Compensation Clause [U.S. CONST., art. III, § 1] does not erect an absolute ban on all legislation that conceivably could have an adverse effect on compensation of judges." *Id.* at 486. "The [Constitutional] Convention finally adopted [Gouverneur] Morris' motion to allow increases by the Congress, thereby accepting a limited risk of external influence in order to accommodate the need to raise judges' salaries when times changed." *Id.* at 483.

103. Pound, *Regulation of Judicial Procedure by Rules of Court*, 10 ILL. L. REV. 163, 165 (1915).

104. *Id.*; Wigmore, *All Legislative Rules for Judiciary Procedure Are Void Constitutionally*, 23 ILL. L. REV. 276, 277 (1928).

could not be clearly drawn.[105] Initially judicial procedure statutes were upheld whether or not there was a competing court rule.[106] But a case decided shortly after the 1933 Civil Practice Act went into effect, reconfirmed that the court had inherent power to institute and prescribe rules of practice.[107]

In the following years there was a movement in Illinois to revise the judiciary, particularly the cumbersome appellate system.[108] Possibly in response to this prevailing mood of reform,

---

105. "The doctrine of separation of powers . . . does not contemplate that there are or should be 'rigidly separated compartments' or 'a complete divorce among the three branches of government.'" Strukoff v. Strukoff, 76 Ill. 2d 53, 58, 389 N.E.2d 1170, 1172 (1979), citing *In re* Estate of Barker, 63 Ill. 2d 113, 119, 345 N.E.2d 484, 488 (1976).

> The line of demarcation between the various departments of government is not distinct and cannot be clearly and distinctly drawn. Nor can the various departments of government operate entirely distinct from and without connection or dependence upon each other.

People v. Kelly, 347 Ill. 221, 234, 179 N.E. 898, 903 (1931), citing People v. White, 334 Ill. 465, 478, 166 N.E. 100, 105 (1929).

106. In People v. Kelly, 347 Ill. 221, 179 N.E. 898 (1931), the court reversed a conviction of larceny of an automobile and remanded because the trial judge commented on the evidence in violation of §§ 72-73 of the former Practice Act. Here, there was no competing court rule. The statutes altered the English common law which would have allowed such instruction of the jury. The court upheld the statutes, finding no violation of the right to trial by jury and no encroachment of the inherent judicial powers.

Furthermore, the court held that the legislature may reasonably regulate court procedure including the method of enjoying the right to trial by jury so long as the right was not substantially impaired. A vigorous dissent challenged the statutes as violating the right to trial by jury and encroaching upon a matter exclusively judicial. It was also argued that such judicial power was provided by the common law and vested in the judiciary by the state constitution.

107. The court in People v. Callopy, 358 Ill. 11, 192 N.E. 634 (1934), reversed and remanded a criminal conviction because the trial judge expressed his opinion as to the evidence in oral instructions in contravention of court rule 27. In the intervening years, following People v. Kelly, 347 Ill. 221, 179 N.E. 898 (1931), the legislature had passed the Civil Practice Act of 1933. It repealed §§ 72-73 of the former Practice Act (prohibiting a judge's comment on the evidence to the jury) and provided no substitute statute, leaving the matter subject to court rule. ILL. REV. STAT. ch. 110, §§ 2, 67 (1933). *See* notes 89-90 and accompanying text *supra*.

The issue before the court in *Callopy* was whether the Illinois Supreme Court had power to make rules of practice and procedure in the absence of a statutory enactment. The court answered affirmatively and upheld Rule 27 on the basis of their inherent and statutory power to institute and prescribe court rules. In so doing, the court noted that the applicable common law had been modified, improved, and adapted by American legislation and practice. Therefore, authority quoted from English common law may be misleading.

The dissenting opinion would have found Rule 27 unconstitutional as violating the right to trial by jury. The dissent also relied on common law authority (English and American) protecting the judge's power to comment on the evidence.

108. Witwer, *The Illinois Constitution and the Courts*, 15 U. CHI. L. REV. 53, 73 (1947) (noting the cumbersome appellate system in Illinois and that

the court's 1952 decision in *Agran v. Checker Taxi Co.*[109] invalidated a procedural statute regarding notice provisions as to *ex parte* judgments. The court held that while there was no competing court rule, the statute regulated a purely jurisdictional matter which was within the sole province of the court and infringed on the inherent power of the judiciary.[110] *Argan* was a pivotal case, reflecting the court's changed attitude as to the relationship between the court and the legislature regarding procedural rule-making.[111] Within months of this decision, a new Judiciary Article for the then current Illinois Constitution of 1870 was proposed which would have vested the supreme court with rule-making powers.[112]

Thereafter, the court consistently upheld its rules in the face of a constitutional challenge. In *People v. Lobb*,[113] where there was no competing statute, the court affirmed its rule regarding *voir dire* procedures, under a constitutional challenge that it violated the individual's guarantee of a right to trial by jury. The court again relied on its inherent powers[114] to uphold a court rule.

Three years later, in 1962, the new Judiciary Article was enacted, but without the provision granting the supreme court its rule-making powers.[115] Nevertheless, shortly after the Article's implementation, the Illinois Supreme Court decided *People ex rel. Stamos v. Jones*[116] and found that the court's rule concerning appeal and bail proceedings superseded a conflicting statute. Thus, the judicial rule-making power asserted by *Agran* was still viable under the new constitutional provision.[117]

In 1975 friction developed between the judiciary and the legislature as to *voir dire* examination. The supreme court rule vested the court with the right to conduct the *voir dire* supplemented by the attorney's examination, while the statute recog-

---

the supreme court had discretion in only 10-16% of the cases it heard; additionally, that the court should have full power to determine those cases over which it would assert jurisdiction; author was subsequently president of the 1970 Illinois Constitutional Convention).

109. 412 Ill. 145, 105 N.E.2d 713 (1952). *See* note 45 *supra*.

110. *Id.* at 150, 105 N.E.2d at 715.

111. *See Restraint on Legislative Revision*, *supra* note 60, at 389; *Rule-Making Powers*, *supra* note 94, at 909.

112. *See* Trumbull, *supra* notes 52-53, at 443.

113. 17 Ill. 2d 287, 161 N.E.2d 325 (1959).

114. *Id.* at 299, 161 N.E.2d at 332.

115. *See* Levin, *supra* note 54, at 262.

116. 40 Ill. 2d 62, 66, 237 N.E.2d 495, 498 (1968) ("Because it exceeds the authority granted to the General Assembly by the Constitution, § 121-6 (b) of the Code of Criminal Procedure is invalid.").

117. *See Restraint on Legislative Revision*, *supra* note 60, at 391.

nized the attorney's absolute right to question prospective jurors.[118] The Illinois Supreme Court revised its rule and within months the General Assembly amended a conflicting statute in such a manner that emphasized the disparity.[119] Three subsequent appellate court cases found that, where this supreme court rule and a statute conflicted, the rule must control so long as the rule is adopted pursuant to the court's supervisory and administrative powers.[120]

Then, in *People v. Jackson*,[121] the supreme court followed the lead of the appellate courts, and found that the conflicting *voir dire* statute was a legislative infringement on the judiciary's powers. This important decision has drawn the commentators into sharp disagreement. Some hailed the decision as an assertion by the Illinois Supreme Court of its exclusive rulemaking authority and a move toward a comprehensive and unified system of procedure;[122] another found it a usurpation of legislative autority and abandonment of the concept of concurrent governmental power.[123]

Against this backdrop of mounting judicial dominance over court procedure, the issue of special interrogatories was addressed. *Albaugh v. Cooley*[124] relied heavily on *Agran* and held that in the absence of a conflicting supreme court rule, the mandatory statute governing special interrogatories[125] was an infringement on the court's inherent rule-making power. The decision in *Albaugh* goes a step further than *Agran* and sug-

118. Rolewick, *Voir Dire Examination of Jurors: A Brief Study of the Action of the Illinois Judicial Conference in Recommending Revisions in Supreme Court Rule 234, 25* DE PAUL L. REV. 50, 61 (1975) (rule 234 provided judges with full power to control *voir dire*, where ILL. REV. STAT. ch. 38 § 115-4 (f) (1975) allowed for each opposing party the right to conduct their own *voir dire*).

119. *Id.*

120. People v. Thornton, 54 Ill. App. 3d 202, 369 N.E.2d 358 (1977); People v. Menken, 54 Ill. App. 3d 199, 369 N.E.2d 363 (1977); People v. Brumfield, 51 Ill. App. 3d 637, 366 N.E.2d 1130 (1977).

121. 69 Ill. 2d 252, 371 N.E.2d 602 (1977).

122. Bonaguro, *The Supreme Court's Exclusive Rulemaking Authority*, 67 ILL. B.J. 408 (1979); Fins, *Impropriety of Illinois Legislature's Infringement upon the Constitutional Rule-Making Authority of the Supreme Court*, 66 ILL. B.J. 384 (1978); Graham, *Introduction: The Illinois Supreme Court at the Threshold*, 1978 U. ILL. L.F. 104, 109 (which highlights People v. Jackson, 69 Ill. 2d 252, 371 N.E.2d 602 (1977), catalogued relevant authorities analyzing the conflict between the legislature and the courts over procedure and the Illinois Civil Practice Act of 1933).

123. *See Bounds of Power*, *supra* note 85, at 113 (concluded that the expansionist trend exhibited in *People v. Jackson* usurped legislative rulemaking authority).

124. 88 Ill. App. 3d 320, 326-28, 410 N.E.2d 873, 878-80 (1980).

125. ILL. REV. STAT. ch. 110, § 65 (1977).

gests that such a mandate must come from a specific supreme court rule.[126]

There are some difficulties in comparing the judicial control of special interrogatories in *Albaugh* with either the *ex parte* procedure in *Agran* or the format for conducting a *voir dire* examination of potential jurors in *Jackson*. The prior decisions dealt with procedural matters; such as notice of court proceedings, right of the court to dismiss cases, interest of the judiciary in streamlining trial practice to reduce delay and expense, and supervision of appellate procedures, which have been defined by the constitution. Only in *Albaugh* is there direct involvement in jury deliberation which in turn affects the constitutional right to trial by jury.[127] Thus, section 65 takes on a fundamental rather than procedural nature,[128] and matters that are either substantive or mixed substantive and procedural questions should be left for the legislature to control.[129]

CONCLUSION

The controversy over special interrogatories draws together four major concerns: 1) the uncertainty as to the correct application of section 65; 2) the practical economic effect of special interrogatories; 3) the clear trend of the judiciary to assert their dominance over procedural rule-making; and 4) the substantive nature of special interrogatories. Based on the Illinois Constitution, the state common law, and national precedent,[130] judicial rule-making is correctly guided by the legislature, with the cooperation of the supreme court. In the last thirty years Illinois has repeatedly rejected the notion of exclusive judicial control over court rules in numerous legislative sessions that led to the 1962 Judiciary Act and then in the 1970 Constitutional Convention.[131] Furthermore, Illinois' common law has recognized the concept of overlapping powers and from early statehood provided for legislative dominance in court procedure.[132] Finally, the Civil

126. 88 Ill. App. 3d 320, 328, 410 N.E.2d 873, 879-80 (1980).

127. ILL. CONST. of 1970, art. I, § 13: "The right of a trial by jury as heretofore enjoyed shall remain inviolate." *See also* note 20 and accompanying text *supra*.

128. Albaugh v. Cooley, 88 Ill. App. 3d 320, 335, 410 N.E.2d 873, 885 (1980) (McNamara, J., dissenting).

129. *Bounds of Power*, *supra* note 85, at 105 nn. 48-55 (distinguished substance and procedure in light of People v. Lobb, 17 Ill. 2d 287, 161 N.E.2d 325 (1959) and Agran v. Checker Taxi, Co., 412 Ill. 145, 105 N.E.2d 713 (1952)). *See* note 100 and accompanying text *supra*.

130. FED. R. CIV. P. 49 (b) (1963). *See* note 78 and accompanying text *supra*.

131. *See* Levin, *supra* note 54, at 254; Trumbull, *supra* note 52, at 443-44; *Rule-Making Powers*, *supra* note 94, at 905.

132. *See* Trumbull, *supra* note 52, at 444-49.

Practice Act and the Illinois Supreme Court Rules specificially provide for a supplementary approach which is consistent with constitutional and common law history.[133]

Section 65 has mirrored Illinois' common law and legislative guidelines. Special interrogatories developed from the common law and were codified by the legislature.[134] They are more than "rules of pleading, practice and procedure"[135] and affect the individual's fundamental right to a jury trial, therefore, it was appropriate for the legislature to act. Despite the mandatory nature of the statute, a judge still has considerable discretion in weighing the evidence and reconciling the special findings with the general verdict and has the availability of broad decisional law.[136]

Albaugh v. Cooley is currently on appeal to the Illinois Supreme Court.[137] The court's reversal would give effect to precedent.[138] An affirmance, finding the statute unconstitutional, would subject juries to greater judicial discretion and would also cast doubt on the entire Civil Practice Act.[139] Should the judges seize the rule-making power, they would be the ultimate arbiters of their own rules,[140] but might subject themselves to hostile legislative review of the court's appropriation.[141] Considering the fundamental importance of the right to trial by jury, it is necessary for the people of Illinois to secure that right from wide judicial discretion through this legislative act.

Joseph F. Vosicky, Jr.

133. ILL. REV. STAT. ch. 110, § 2 (1977); Ill. Sup. Ct. R. 1.

134. Albaugh v. Cooley, 88 Ill. App. 3d 320, 336, 410 N.E.2d 873, 885 (1980) (McNamara, J., dissenting). *See* note 19 and accompanying text *supra*.

135. ILL. REV. STAT. ch. 110, § 2 (1977).

136. 88 Ill. App. 3d 320, 410 N.E.2d 873 (1980).

137. *Id., appeal docketed*, No. 54138 (Ill. Sup. Ct., Jan. 30, 1981).

138. *See* note 19 *supra*.

139. *See Bounds of Power*, *supra* note 85, at 112.

140. Kaplan & Greene, *The Legislature's Relation to Judicial Rule-Making: An Appraisal of Winberry v. Salisbury*, 65 HARV. L. REV. 234, 254 (1951).

141. *See* THE FEDERALIST No. 48, at 310 (J. Madison) (Rossieter ed. 1961).