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CHANGES IN ILLINOIS CIVIL PRACTICE—1950—1960:
C.P.A. §§21-71 AND RELATED SUPREME
COURT RULES

PRENTICE H. MARSHALL AND THOMAS P. SULLIVAN

WITHOUT DOUBT THE single significant development in Illinois civil practice and procedure during the past ten years was the adoption of the 1956 Civil Practice Act. As the 1933 Act represented twenty-six years experience under its forerunner—the 1907 Act—so, too, did the 1956 Act embody and codify the wisdom gained from twenty-three years experience under the 1933 Act.

Comment will be made upon the changes brought about by the act in six areas of practice and procedure: parties, pleading, piecemeal appeals, discovery, jury practice, and post trial motions. Not every change in these areas is noted. Space does not permit that. Remarks have been limited to those changes which the authors deem to be the most significant.

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PARTIES

As our social and economic structures have become more complex, the concepts of parties to litigation have broadened. Society now demands that the courts make themselves available to determine today's complex multi-party controversies. These demands were satisfied by the "party" provisions of the 1956 Practice Act.

Third party proceedings. Prior to the passage of the 1956 Act, there was no statutory authority for a defendant to join a third party defendant, *i.e.*, a party to whom the defendant would look for recovery

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in the event the plaintiff prevailed in his suit against the defendant. Only if the action involved a counterclaim was a limited third party practice sanctioned.¹ Section 25 of the 1956 Civil Practice Act² authorizes a broad third party practice. A defendant may bring a third party complaint against "a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him." The original defendant can implead only a person who is liable to him, and may not, by use of section 25, force the original plaintiff to sue a third party whom he did not wish to sue. However, once the third party defendant is before the court, the original plaintiff may assert any claim against the third party defendant which he could have asserted had the party been joined as a defendant originally.

Intervention. Statutory regulation of intervention was also provided for for the first time by section 26.1 of the 1956 Act. Many of the restrictions which arose from prior decisions³ were obviated. For example, it is no longer necessary that the intervenor have a direct interest in the suit.⁴ Section 26.1 provides for intervention as of right under certain conditions,⁵ and for intervention in the discretion of the trial court in other cases. The court may specify the terms under which intervention will be granted, so that the original parties will not be prejudiced or delayed in conducting the litigation.⁶

Interpleader. Decisional limitations had discouraged attempts at interpleader. For example, if all parties against whom relief was demanded did not claim the same thing, debt, or duty, or if all adverse claims did not depend on or arise from a common source, or if the plaintiff claimed any interest in the subject matter, or if the plaintiff had incurred an independent liability to either or any of the claimants

¹ See *Johnson v. Moon*, 3 Ill.2d 561, 121 N.E.2d 774 (1954).

² ILL. REV. STAT. ch. 110, § 25 (1959). Unless otherwise stated, all subsequent references to statutory sections in this article are to chapter 110 of the 1959 ILLINOIS REVISED STATUTES.

³ See, e.g., *Bernero v. Bernero*, 363 Ill. 328, 2 N.E.2d 317 (1936) (direct interest in subject matter necessary); *Hairgrove v. City of Jacksonville*, 366 Ill. 163, 8 N.E.2d 187 (1937) (intervenor has no control over issues).

⁴ *Mensik v. Smith*, 18 Ill.2d 572, 166 N.E.2d 265 (1960); *but see Cooper v. Henrichs*, 10 Ill.2d 269, 140 N.E.2d 293 (1957).

⁵ Among the Illinois statutes which provide an unconditional right to intervene are ILL. REV. STAT. ch. 11, § 29 (1959) (attachment); ILL. REV. STAT. ch. 119, § 22a (1959) (replevin); ILL. REV. STAT. ch. 48, § 39s-9 (1959) (review of prevailing wage); ILL. REV. STAT. ch. 46, § 23-25 (1959) (election contest).

⁶ *Dowsett v. City of East Moline*, 8 Ill.2d 560, 134 N.E.2d 793 (1956).

—interpleader would not lie.⁷ Section 26.2 of the act now provides that it is no objection that the several claims do not have a common source or are not identical or are adverse to or independent of one another. Neither is it now an objection that the plaintiff claims he is not liable in whole or in part to any or all of the claimants.

Actions against joint debtors or partners. Section 27 of the former Practice Act was completely rewritten to provide that all parties to a joint obligation, including a partnership obligation, may be sued jointly or severally. This revision eliminated the dichotomy that partnership obligations were joint and several in equitable actions but joint only in actions at law.⁸

Actions against partnerships. Section 27.1 of the 1956 Act provides that partnerships may be sued in the firm name, or by bringing an action against the partners in their names as individuals doing business as a partnership. Thus, partnerships are treated as separate entities for procedural purposes, much the same as corporations.

PLEADING

Equal in importance to modern concepts of “parties” are up-to-date concepts of pleading. The 1933 Practice Act did much to destroy old common-law pleading requirements in Illinois. Little remained to be done in 1956.

Pleading and proof in the alternative. Section 43(2) provides:

When a party is in doubt as to which of two or more statements of fact is true, he may, *regardless of consistency*, state them in the alternative or hypothetically in the same or different counts or defenses, whether legal or equitable. A bad alternative does not affect a good one. (Emphasis added.)

The draftsmen of the 1956 Act stated in the Joint Committee Comments that the words “regardless of consistency” were inserted in order to make it clear “that alternative pleading of facts is sanctioned in spite of inconsistencies, removing any doubt in that regard under the present act.”⁹

In *McCormick v. Kopmann*,¹⁰ the Third District Appellate Court

⁷ *Platte Valley State Bank v. National Live Stock Bank*, 155 Ill. 250, 40 N.E. 621 (1895); *Curran v. Harris Trust & Sav. Bank*, 348 Ill. App. 210, 108 N.E.2d 729 (1952).

⁸ See *Sternberg Dredging Co. v. Estate of Sternberg*, 10 Ill.2d 328, 140 N.E.2d 125 (1957). That case, construing pre-1956 law, held that § 15 of the Uniform Partnership Act, Ill. Laws 1917, at 625, did not change the rule in equity that all partnership obligations are joint and several.

⁹ ILL. ANN. STAT. ch. 110, § 43 at 514 (1956).

¹⁰ 23 Ill. App.2d 189, 161 N.E.2d 720 (1959).

approved joinder of a count under the Wrongful Death Act in which the plaintiff alleged that the deceased was exercising due care at the time of his death, and a count under the Dram Shop Act in which it was alleged that the deceased's intoxication proximately caused his death. In the course of its opinion, the court said:

. . . Where, . . . the injured party is still living and able to recollect the events surrounding the accident, pleading in the alternative may not be justified, but where, as in the case at bar, the key witness is deceased, pleading alternative sets of facts is often the only feasible way to proceed.¹¹

The court went on to hold:

Alternative fact allegations made in good faith and based on genuine doubt are not admissions against interest so as to be admissible in evidence against the pleader.¹²

The court also held that the plaintiff had the right to go to the jury on both counts even though her proof under the wrongful death count contradicted and tended to rebut the proof she submitted under the dram shop count, and vice versa. The court said:

The provisions of the Civil Practice Act authorizing alternative pleading, necessarily contemplate that the pleader adduce proof in support of both sets of allegations or legal theories, leaving to the jury the determination of the facts.¹³

Joinder of causes of action. The 1956 Act continued in effect the provision of section 44(1) that a plaintiff may join any causes of action against any defendant, and the defendant may set up any claims whatever against the plaintiff. The legislature added the following provision:

If a cause of action is one heretofore cognizable only after another cause of action has been prosecuted to a conclusion, the two causes of action may be joined; but the court shall grant relief only in accordance with the relative substantive rights of the parties.

The Supreme Court of Illinois has held that this provision authorizes the joining of a bill in equity seeking specific performance of a contract to purchase a leasehold interest in real estate, and a separate count for relief in the nature of a creditor's bill to discover assets.¹⁴ The Supreme Court reversed the First District Appellate Court's hold-

¹¹ *Id.* at 201-02, 161 N.E.2d at 728.

¹² *Id.* at 203, 161 N.E.2d at 729.

¹³ *Id.* at 205, 161 N.E.2d at 730.

¹⁴ *Young v. Wilkinson*, 18 Ill.2d 428, 164 N.E.2d 39 (1960).

ing¹⁵ that section 49 of the Chancery Act¹⁶ precludes creditor's bills until a judgment has been entered and execution has been returned unsatisfied.

Amendments. In *Fitzpatrick v. Pitcairn*,¹⁷ the Supreme Court held that the plaintiff's claim was barred by the statute of limitations where the plaintiff sued the agent of the proper defendant, but did not discover his mistake until after the statute of limitations had run. Subsection (4) of section 46 sets up five requirements, compliance with which will avoid the consequences of the *Pitcairn* rule: The plaintiff must (1) commence suit within the statute of limitations; (2) inadvertently fail to join the proper defendant; and (3) actually serve the right defendant, his agent or partner, although in the wrong capacity; (4) the correct defendant must know of the original action and that it involved him; and (5) the amended complaint must state a cause of action which arises under the same transaction set up in the original pleading. If these conditions are met, the plaintiff may amend his complaint, after the statute of limitations has run, to include the proper defendant.

Section 46(4) was held to be exclusive in *Fabey v. Production Steel Co.*,¹⁸ where a plaintiff who admittedly did not comply with all its requirements was held to be barred from amending her complaint after the statute of limitations had run, to include a corporate defendant whose servant had injured the plaintiff within the scope of his employment. Compare *Lau v. West Towns Bus Co.*,¹⁹ in which the Supreme Court held that the statute of limitations did not bar the amendment of a complaint to include a company which assumed the liabilities and took over the assets of a reorganization trustee in bankruptcy, where the suit against the trustee was commenced in time.

Judgment on the pleadings. Section 45 of the 1956 Act gives statutory recognition to motions for judgment on the pleadings, although the courts had entertained and sanctioned such motions prior to the enactment.²⁰

¹⁵ *Young v. Wilkinson*, 22 Ill. App.2d 304, 160 N.E.2d 709 (1959).

¹⁶ ILL. REV. STAT. ch. 22, § 49 (1959).

¹⁷ 371 Ill. 203, 20 N.E.2d 280 (1939).

¹⁸ 16 Ill. App.2d 312, 148 N.E.2d 6 (1958).

¹⁹ 16 Ill.2d 442, 158 N.E.2d 63 (1959).

²⁰ See *Milanko v. Jensen*, 404 Ill. 261, 88 N.E.2d 857 (1949) (plaintiff's motion granted); *Harrison v. Kamp*, 395 Ill. 11, 69 N.E.2d 261 (1946) (defendants-cross plaintiffs' motion granted); *Manthei v. Heimerdinger*, 332 Ill. App. 335, 75 N.E.2d 132 (1947) (defendant's motion granted).

There has been some confusion between motions for judgment on the pleadings and for summary judgment. In *Tompkins v. France*,²¹ plaintiff's motion was entitled, "summary motion for judgment on the pleadings." Defendant contended that this was a motion for summary judgment. Notwithstanding the designation, the Appellate Court held it was a motion for judgment on the pleadings, and that it had been properly granted because there was no issue of fact to be tried and plaintiff was entitled to judgment under the averments and admissions made by the pleadings.

Motions for summary judgments and decrees. Section 57 of the 1956 Act contains summary judgment provisions substantially identical to those found in rule 56 of the FEDERAL RULES OF CIVIL PROCEDURE. Under the prior Illinois Act, summary judgments were permitted in four types of actions: (1) upon a contract, express or implied; (2) upon a judgment or decree for the payment of money; (3) to recover the possession of land, with or without mesne profits; and (4) to recover specific chattels.²² Today a summary judgment may be entered in any action if the pleadings, depositions, admissions, and affidavits on file reveal that there is no genuine issue as to any material fact. Thus, in *Allen v. Meyer*,²³ a summary decree was entered awarding specific performance of an oral contract to convey realty. On appeal, it was contended by the defendant that summary judgment or decree was proper only where the issues involved were simple. The Supreme Court rejected this contention, saying:

The statute has since been amended to provide for the entry of summary judgment or decree in any proper case. . . . We regard this as a salutary development. Summary judgment procedure is an important tool in the administration of justice. Its use in a proper case, wherein is presented no genuine issue as to any material fact, is to be encouraged. The benefits of summary judgment in a proper case inure not only to the litigants, in the saving of time and expenses, but to the community in avoiding congestion of trial calendars and the expenses of unnecessary trials.²⁴

The Supreme Court also held that the trial court had properly considered discovery depositions in ruling on the motion.²⁵

²¹ 21 Ill. App.2d 227, 157 N.E.2d 799 (1959).

²² Ill. Laws 1941, at 464. See *Conrad v. Beaubien*, 334 Ill. App. 198, 78 N.E.2d 846 (1948).

²³ 14 Ill.2d 284, 152 N.E.2d 576 (1958).

²⁴ *Id.* at 292, 152 N.E.2d at 580.

²⁵ *But see Simaitis v. Thrash*, 25 Ill. App.2d 340, 166 N.E.2d 306 (1960), where the Appellate Court warned that it must be shown that the facts are unequivocally admitted in the discovery deposition to warrant the entry of a summary judgment.

Jury demands. Two significant changes with respect to the filing of jury demands were made in section 64 of the act. The first of these changed the time for defendant to file a demand from the time of filing his appearance to the time of filing his answer. Thus, it is no longer necessary for defendant to file a jury demand when he files a motion or a special appearance.²⁶ The second important change concerns itself with the time within which a defendant must file a demand for a jury trial, where the plaintiff has filed a jury demand and subsequently withdraws it. Under the former practice, the defendant had to file his demand "at the time of such waiver."²⁷ Under new section 64, defendant must demand a jury "promptly after being advised of the waiver. . . ." This provision gave rise to an interesting case.

In *Westmoreland v. West*,²⁸ plaintiff filed a demand for a jury trial. Defendants filed an answer denying the allegations of the complaint. When the case was called for trial, defendants failed to appear, whereupon plaintiff waived a jury and the court entered judgment for plaintiff. Subsequently, defendants petitioned to vacate the judgment on the ground, *inter alia*, that under section 64(1) they were entitled to be advised of plaintiff's waiver of a jury, and to be permitted an opportunity to file their own demand, before the court could proceed to trial without a jury. The trial court struck the petition to vacate, and defendants appealed. The Appellate Court held that section 64(1) required that the defendants be advised of the waiver, and that the defendants did not waive their right to a jury trial unless they were so advised.²⁹

It should be noted that the rule applied in the *Westmoreland* case obtains only when defendant has filed an answer and then does not appear for trial. If a defendant fails to answer, the plaintiff need not notify him of a withdrawal of his jury demand, for by failing to answer, a defendant waives his right to demand a jury trial.³⁰

²⁶ Note the provisions of § 59 of the Practice Act, and Supreme Court rule 8 as to extending the time of filing a jury demand. See *Hudson v. Leverenz*, 10 Ill.2d 87, 139 N.E.2d 255 (1956) (dictum).

²⁷ Ill. Laws 1947, at 1348.

²⁸ 19 Ill. App.2d 161, 153 N.E.2d 275 (1958).

²⁹ Compare *Till v. Kara*, 22 Ill. App.2d 502, 161 N.E.2d 363 (1959), in which defendants apparently did not argue the *Westmoreland* concept.

³⁰ *Lichter v. Scher*, 11 Ill. App.2d 441, 138 N.E.2d 66 (1956); *Anzalone v. Johnson*, 345 Ill. App. 410, 103 N.E.2d 383 (1952).

PIECEMEAL APPEALS

Prior to the passage of the 1956 Act, any party against whom judgment was rendered had a right of immediate appeal, even though the cause remained undisposed of as to other parties.³¹ In suits brought in equity for an accounting, a decree for an accounting referring the cause to a master to take an account, and specifying the principles of the accounting, was an appealable order.³² These rules have now been changed. Section 50(2) of the 1956 Act provides: If multiple parties or if multiple claims for relief are involved in an action, the court may enter a final order, judgment, or decree as to one or more but fewer than all of the parties or claims only upon an express finding that there is no just reason for delaying enforcement or appeal. In the absence of that finding, any order, judgment, or decree which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not terminate the action, is not enforceable or appealable, and is subject to revision at any time before the entry of an order, judgment, or decree adjudicating all the claims, rights, and liabilities of all the parties. The section is patterned after rule 54(b) of the FEDERAL RULES OF CIVIL PROCEDURE, and is designed to prevent piecemeal appeals.

A considerable number of appeals have been dismissed since the passage of the 1956 Act because the appellant failed to comply with section 50(2). See, for example, *Peterson v. Gwin*,³³ where the defendant appealed from an order dismissing count II of his counterclaim and denying him leave to file an amended counterclaim. The Supreme Court of Illinois dismissed the appeal, pointing out that there were other claims for relief undisposed of in the trial court, and that the order appealed from did not contain a finding that there was no just reason for delaying appeal.

The Illinois Supreme Court has held that the rule of the *Altschuler* case, mentioned above, has been superseded by section 50(2). In *Ariola v. Nigro*,³⁴ the trial court had referred the causes to a master to take an account, and had specified the principles of the accounting. On plaintiffs' appeal, the Supreme Court of Illinois held that section

³¹ Ill. Laws 1953, at 507.

³² *Altschuler v. Altschuler*, 399 Ill. 559, 78 N.E.2d 225 (1948).

³³ 17 Ill.2d 261, 161 N.E.2d 123 (1959).

³⁴ 13 Ill.2d 200, 148 N.E.2d 787 (1958).

50(2) was applicable, "and that the present appeal must fail for plaintiffs' omission to obtain an express finding that there is no just reason for delaying appeal until the matters reserved by the trial court have been decided."³⁵ In *Smith v. Hodge*,³⁶ the court held that an order quashing a writ of attachment in aid of an action to recover a money judgment is not appealable without the express finding prescribed in section 50(2). In *Getzelman v. Koehler*,³⁷ a partition decree was held neither final nor appealable where an account had not been taken and the section 50(2) finding was not incorporated in the partition decree. However, in *Merchants Nat'l Bank v. Weinold*,³⁸ the Appellate Court held that a decree determining the validity of a trust and the interest of the beneficiaries thereunder is appealable even though the decree directs the trustee to file a supplemental account.

Despite the efforts of the Supreme Court to construe section 50(2) in a way which will remove uncertainties for the practitioner as to whether or not orders are appealable, complications have arisen. In *Oppenheimer Bros. v. Joyce & Co.*,³⁹ the First District Appellate Court held that a final decree in a multiple party or claim case was appealable even though the "appeal formula" of section 50(2) was *not* included in the decree. The trial court had held that plaintiff was not entitled to an accounting in equity, and had transferred the case to the law side of the court. The decree taxed costs, including master's fees, against the plaintiff, and ordered issuance of execution for the costs. The plaintiff appealed from this decree, and the defendants moved to dismiss the appeal on the ground that the decree adjudicated fewer than all the matters at issue and did not contain the section 50(2) finding. The Appellate Court concluded that because the decree ordered immediate execution, the trial court "must have determined that this order was final and that there was no just reason for delaying enforcement or appeal."⁴⁰

Conversely, a decision of the Fourth District Appellate Court held an order non-appealable even though it contained the "appeal for-

³⁵ *Id.* at 207, 148 N.E.2d at 791. See also a companion case, *Hanley v. Hanley*, 13 Ill.2d 209, 148 N.E.2d 792 (1958).

³⁶ 13 Ill.2d 197, 148 N.E.2d 793 (1958).

³⁷ 14 Ill.2d 396, 152 N.E.2d 833 (1958).

³⁸ 22 Ill. App.2d 219, 160 N.E.2d 174 (1959).

³⁹ 17 Ill. App.2d 408, 150 N.E.2d 381 (1958).

⁴⁰ *Id.* at 410, 150 N.E.2d at 382.

mula" of section 50(2). In *Veach v. Great Atl. & Pac. Tea Co.*,⁴¹ the complaint was cast in two counts, both referring to the same accident and injury. The defendant moved to strike both counts; the trial court struck the second count, but permitted the first to stand, and in its order inserted a finding that there was no just reason to delay enforcement or appeal. The Appellate Court dismissed plaintiff's appeal on the ground that the order was not final and appealable. Presiding Justice Schenineman said:

. . . [W]hen only one claim is involved, although stated in several ways, a ruling on pleadings which does not dispose of the single claim, is interlocutory, and the trial court has no authority to confer appellate jurisdiction by a finding that there is no just reason for delaying enforcement or appeal.⁴²

Perhaps the problem created by the *Oppenheimer* decision (that an order may be held to be appealable even though it does not dispose of all of the matters in the case and does not contain the "appeal formula") is put to rest by the recent decision of the Illinois Supreme Court in *Biagi v. O'Connor*.⁴³ There the court held that an order entered before the effective date of the 1956 Civil Practice Act, although appealable when entered, under the prior practice, could be appealed currently upon the entry of a final decree, because section 74(1) of the act provides: "The appeal presents to the reviewing court all issues which heretofore have been presented by appeal and writ of error." The court reasoned that under the former practice, a writ of error brought the whole record to the reviewing court, including orders which were final and appealable when entered. Thus, under *Biagi*, it may be that orders made final and appealable under section 50(2) may be appealed either at the time of entry or at the time the entire litigation is disposed of in the trial court.

DISCOVERY

Of all the reforms accomplished by the 1956 Act, those in the area of discovery are among the most important. Prior to the new act, depositions were taken pursuant to the practice prescribed by the Evidence and Depositions Act.⁴⁴ Other types of discovery, such as the examination of documents, were authorized by Supreme Court rules,

⁴¹ 22 Ill. App.2d 179, 159 N.E.2d 833 (1959).

⁴² *Id.* at 182-83, 159 N.E.2d at 835.

⁴³ 18 Ill.2d 238, 163 N.E.2d 461 (1959).

⁴⁴ Ill. Laws 1955, at 1998-2000.

but were generally regarded as inadequate. Indeed the entire Illinois system of discovery had been abundantly criticized.⁴⁵

THE MECHANICS OF DISCOVERY

The mechanics, or methods by which discovery may be obtained, have been greatly simplified. Under the old procedure, depositions of parties and non-parties alike were taken by service of a notary public subpoena. If the deponent failed to appear for deposition, or upon appearing refused to answer the questions put to him, a separate, ancillary proceeding was commenced, in the name of the notary public to enforce his subpoena. Enforcement was limited to the threat of contempt,⁴⁶ a highly technical remedy, and the ever-present possibility that the discoverer might not obtain the information he sought in time for trial. Today, service of a deposition notice on a party is sufficient to require the deposition appearance of the party; no subpoena is necessary.⁴⁷ As to non-parties, the clerk of the trial court issues discovery subpoenas on request which are served in the ordinary manner on the deponent. And the court's sanctions can be invoked in the pending litigation.

Equally important are the comprehensive provisions of rule 19-12 relating to the consequences of refusal to comply with discovery. In the event of a party's refusal, the trial court may, in addition to the contempt sanction, strike the recalcitrant's pleadings, enter judgment against him, bar him from maintaining his action, stay proceedings in the pending litigation until the party complies, and impose economic penalties in the form of costs and attorney's fees in favor of the party seeking discovery. The most drastic of these sanctions—striking the offending parties' pleadings and entering judgment against him—has been exercised with approval.⁴⁸ Furthermore, the rule specifically

⁴⁵ Fitzpatrick & Goff, *Discovery and Depositions*, 50 Nw. U. L. REV. 628, 630-32 (1955); Note, *The Need for Revision of the Discovery Procedure in Illinois*, 1949 U. ILL. L. F. 335.

⁴⁶ *Lorsbach v. Hartford Fire Ins. Co.*, 315 Ill. App. 32, 42 N.E.2d 338 (1942); *Ross v. Wells*, 6 Ill. App.2d 304, 127 N.E.2d 519 (1955).

⁴⁷ ILL. SUP. CT. R. 19-8, ILL. REV. STAT. ch. 110, § 101.19-8 (1959). All Supreme Court rules referred to herein will be found in chapter 110 of the 1959 ILLINOIS REVISED STATUTES under the appropriate rule number, prefixed by the common section number, 101, and a decimal point.

⁴⁸ *Coutrakon v. Distenfield*, 21 Ill. App.2d 146, 157 N.E.2d 555 (1959) (defendant's pleadings stricken); *Sager Glove Corp. v. Continental Cas. Co.*, 18 Ill. App.2d 568, 154 N.E.2d 833 (1958) (plaintiff's pleadings stricken).

provides that its authorized sanctions come into play if a non-party unreasonably refuses to comply with discovery at the instance of or by collusion with a party.

Equally streamlined were the 1956 provisions relating to discovery of documents⁴⁹ and the admission of facts and genuineness of documents.⁵⁰ And in 1957, the Supreme Court adopted its rule 17-1 prescribing the procedure to be followed for the physical and mental examination of parties and other persons.

THE SUBJECTS OF DISCOVERY

But the mechanics of discovery were not the only subject of reformation and innovation. During the past ten years the scope or subject matter of discovery has been broadened greatly.

Names of witnesses. The discovery enabling section of the 1956 Act specifically provides that "a party shall not be required to furnish the names or addresses of his witnesses."⁵¹ On the other hand, Supreme Court rule 19-4 authorizes discovery of "the identity and location of persons having knowledge of relevant facts." In *Krupp v. CTA*⁵² and *Hruby v. CTA*,⁵³ the Supreme Court of Illinois held that discovery of the names of persons having knowledge of the event was authorized by rule 19-4 and not prohibited by section 58(3). The court narrowly construed the term "his witnesses" appearing in section 58(3) to mean persons whom the party intended to call to testify at the trial.⁵⁴ In the *Hruby* case the court rejected an additional argument that the names and addresses of persons having knowledge of relevant facts were immune from discovery as a part of the "work product" of the lawyer. The court noted particularly that names of the persons had been gathered by a CTA conductor before any lawyer had entered the case or any litigation was contemplated. Accordingly, the names were not "work product," and disclosure of them did not entail disclosure of "memoranda, reports or documents made by or for a party in preparation for trial. . . ."⁵⁵

⁴⁹ ILL. SUP. CT. R. 17.

⁵⁰ ILL. SUP. CT. R. 18.

⁵² 8 Ill.2d 37, 132 N.E.2d 532 (1956).

⁵¹ ILL. REV. STAT. ch. 110, § 58(3) (1959).

⁵³ 11 Ill.2d 255, 142 N.E.2d 81 (1957).

⁵⁴ Although decided subsequent to the adoption of the 1956 Practice Act, the facts in the *Krupp* case arose prior to the adoption of the act and the promulgation of rule 19-4.

⁵⁵ ILL. SUP. CT. R. 19-5.

The question remains as to whether or not a party may call as a witness at the trial a person whose name he has not disclosed in response to discovery seeking the names of persons having knowledge of relevant facts. However, it appears to be an issue addressed to the trial court's sound discretion.⁵⁶

Insurance coverage. While the existence or non-existence of insurance coverage is irrelevant at trial, the Illinois Supreme Court held in *People ex rel. Terry v. Fisher*⁵⁷ that it is the proper subject of discovery, because "the presence or absence of liability insurance is frequently the controlling factor in determining the manner in which a case is prepared for trial."⁵⁸ In addition, the court was of the opinion that discovery of this type afforded a plaintiff "a realistic appraisal of his adversary and of the case he must prepare for, and affords a sounder basis for the settlement of disputes."⁵⁹ The *Terry* decision clearly indicates that rigid tests of materiality, relevancy, and admissibility at trial are not proper criteria for discovery. Indeed, the *Terry* decision goes well beyond the generally accepted discovery test: "Is the inquiry calculated to lead to material and relevant proof?"

Physical examination. In *People ex rel. Noren v. Dempsey*,⁶⁰ the Supreme Court held that the Illinois courts have inherent power to require a litigant who puts his physical condition in issue to submit to a physical examination. As originally introduced in the legislature, section 58(1) of the 1956 Practice Act provided that ". . . physical or mental examination of parties shall be in accordance with rules." However, this provision was deleted and the bill as adopted contained no authority for court rules providing for physical and mental examinations. Thus, the court's opinion in the *Noren* case would, on first impression, appear contrary to the will of the legislature. However, the court's rationale was that orders respecting physical examination fall within the *inherent power* of the judiciary to regulate judicial procedure. Following the *Noren* case, the court adopted rule 17-1, regulating the procedure for physical examinations and the conditions under which they should be ordered.

Privileged matters and protective orders. With a broadened scope of discovery we find recurrence of questions concerning "privileged"

⁵⁶ See *Jay Bee Warehouse Co. v. American Eagle Fire Ins. Co.*, 270 F.2d 883 (7th Cir. 1959).

⁵⁷ 12 Ill.2d 231, 145 N.E.2d 588 (1957).

⁵⁹ *Id.* at 239, 145 N.E.2d at 593.

⁵⁸ *Id.* at 238, 145 N.E.2d at 593.

⁶⁰ 10 Ill.2d 288, 139 N.E.2d 780 (1957).

matters. Rule 19-5 regulates the subject. The biggest area of contention has been the so-called privilege against disclosure of counsel's "work product" or documents made in preparation for trial. In *McGill v. Illinois Power Co.*,⁶¹ the court held that the transcript of a discovery deposition is not privileged work product, while in *Kemeny v. Skorch*,⁶² the Appellate Court held that an "examining" physician's report (as distinguished from a "treating" physician's report) is a document made for a party in preparation for trial and not available through discovery proceedings.

Of interest in this area is *Haskell v. Siegmund*,⁶³ in which the Third District Appellate Court held that statements contained in the defendant's insurer's file were not privileged communications, were not counsel's work product, and were not immune from disclosure at trial as documents made in preparation for trial. While the *Haskell* case did not involve pre-trial discovery, the decision suggests a departure from other Appellate Court opinions holding such investigative documents immune from disclosure as having been made in preparation for trial.⁶⁴ The Supreme Court of Illinois has granted leave to appeal in the *Haskell* case.⁶⁵

Thus, in the past ten years, Illinois has made remarkable strides in the area of discovery.

VOIR DIRE EXAMINATION

The outrageous backlog in the trial of civil jury cases in Cook County provoked an outstanding effort by the Illinois Supreme Court to shorten the time consumed in the trial of such cases. The court's effort in this regard was addressed to the *voir dire* examination of prospective jurors. Through the years these examinations had gradually become extremely tedious and argumentative. Oftentimes they consumed an inordinate portion of the total time devoted to the trial of a particular case. Therefore, in 1958, the Supreme Court adopted its rule 24-1 which provides that the trial court shall initiate and conduct the *voir dire* examination of jurors in both civil and criminal

⁶¹ 18 Ill.2d 242, 163 N.E.2d 454 (1959).

⁶² 22 Ill. App.2d 160, 159 N.E.2d 489 (1959).

⁶³ 28 Ill. App.2d 1, 170 N.E.2d 393 (1960).

⁶⁴ *Hayes v. CTA*, 340 Ill. App. 375, 92 N.E.2d 174 (1950); *Chapman v. Gulf M. & O. R.R.*, 337 Ill. App. 611, 86 N.E.2d 552 (1949).

⁶⁵ *Haskell v. Siegmund*, No. 36356, Ill. Sup. Ct.

cases, allowing the parties to supplement the examination, but forbidding the examination of jurors concerning matters of law or instructions. In *People v. Lobb*,⁶⁶ the court sustained the validity of the rule over constitutional objections, holding that the scope and extent of *voir dire* examination always rested within the discretion of the trial court and was always subject to reasonable limitation. The history of the rule in practice has demonstrated its wisdom. It has contributed to the more expeditious trial of individual cases.

INSTRUCTING THE JURY

New provisions were added to the Practice Act in 1956 relating to the mechanics of requesting and settling instructions. Section 67 (3) provides that the trial court "shall hold a conference with counsel to settle the instructions. . . ." The reviewing courts have been strict in requiring specific objections to be made to instructions, both at the conference on instructions and in the post-trial motion. In *Onderisin v. Elgin, J. & E. Ry.*,⁶⁷ the court said:

Enlightened trial practice does not permit counsel under the guise of trial strategy to sit idly by and permit instructions to be given the jury without specific objection and then be given the advantage of predicating error thereon by urging the error for the first time in a post-trial motion.⁶⁸

This year marks another milestone in Illinois practice and procedure. Effective February 1, 1961, the Supreme Court of Illinois adopted rule 25-1 relating to the use of standardized jury instructions in civil cases, called "Illinois Pattern Jury Instructions." These instructions were prepared by a committee of attorneys appointed several years ago by the Supreme Court. The product of their work has been published in a bound volume, ILLINOIS PATTERN JURY INSTRUCTIONS. New rule 25-1 provides that whenever a pattern instruction is applicable, "the IPI instructions shall be used, unless the court determines that it does not accurately state the law." If IPI does not contain a pertinent instruction, "the instruction given on that subject should be simple, brief, impartial and free from argument."

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

⁶⁷ 20 Ill. App.2d 73, 155 N.E.2d 338 (1959).

⁶⁸ *Id.* at 78, 155 N.E.2d at 341. See also *Saunders v. Schultz*, 20 Ill.2d 301, 170 N.E.2d 163 (1960), *affirming* 22 Ill. App.2d 402, 161 N.E.2d 129 (1959).

VERDICTS

Section 68 governs the procedure concerning the rendition of verdicts and defective or unproved counts. Subsection (2) makes prompt rendition of judgment on a verdict mandatory. Under former practice, the trial court was permitted but not required to enter judgment immediately upon return of a verdict.⁶⁹ Subsection (2) of section 68, by eliminating delay in the rendition of judgment, effected a desirable change in the law, resulting in more uniformity in the time for filing post-trial motions and appeals.

Section 68(3) requires the trial court, on motion, to direct the jury to find a separate verdict upon each demand where there are several counts based on different demands upon which separate recoveries might be had. Application of subsection (3) is illustrated in *Madison v. Wigal*.⁷⁰ There, the plaintiffs sought both compensatory and punitive damages. The general verdict returned by the jury was in excess of the amount of compensatory damages sought by one of the plaintiffs. The Appellate Court held that it was error for the trial court, over defendant's objection, to submit a general form of verdict in which punitive and compensatory damages were not segregated. Compare the statement in the Joint Committee Comments to section 68(3):

Separate verdicts are appropriate only when recovery on different demands is sought in the same complaint. Therefore, the words "upon which separate recoveries might be had" have been added, making clear that the provision authorizing separate verdicts applies only to separate causes of action based upon separate transactions.⁷¹

As to subsection (4) of section 68, some cases decided under the former Practice Act recognized no distinction between grounds defectively pleaded as distinguished from pleaded grounds not proved.⁷² A different result was reached when the unproven count was a willful and wanton count.⁷³ The new subsection contains separate provisions respecting the effect of defective grounds and the effect of unproved grounds.

As to defective grounds, subsection (4) provides that a verdict will not be set aside provided there is at least one ground which will sustain

⁶⁹ *Kauders v. Equitable Life Assur. Soc'y*, 299 Ill. App. 152, 19 N.E.2d 630 (1939).

⁷⁰ 18 Ill. App.2d 564, 153 N.E.2d 90 (1958).

⁷¹ ILL. ANN. STAT. ch. 110, § 68, at 545 (1956).

⁷² See, e.g., *Scott v. Parlin & Orendorff Co.*, 245 Ill. 460, 92 N.E. 318 (1910).

⁷³ *Greene v. Noonan*, 372 Ill. 286, 23 N.E.2d 720 (1939).

the verdict. As to unproved grounds, no verdict will be set aside for the reason that the evidence is insufficient to support a verdict on one of the grounds unless a motion has been made to withdraw that ground and there is a showing of prejudice.

POST-TRIAL MOTIONS

Section 68.1 of the Practice Act provides for motions for a directed verdict at the close of all the evidence and for motions after trial. It established a simplified new procedure—a single post-trial motion—for post-trial relief in jury cases, but made no substantial change in the basic policy of the procedure established by the former Practice Act. A party must seek all relief desired in the single post-trial motion, which must be in writing.⁷⁴

Subsection (6) requires the court to rule upon all relief sought. Even though a ruling on a portion of the relief sought renders further rulings unnecessary for the moment, the act requires the trial court to enter conditional rulings on all post-trial motions presented. In making these conditional rulings, the trial court must determine what it would rule if its unconditional rulings were reversed. In *Stilfield v. Iowa-Illinois Gas & Elec. Co.*,⁷⁵ it was held that the trial court committed error in granting judgment *non obstante veredicto* in its unconditional ruling, and committed an abuse of discretion in its conditional award of a new trial. That case is an application of the last sentence of subsection (6) which requires the reviewing court, if it determines that the unconditional rulings are erroneous, to review and determine the conditional rulings. This results in economy both for parties and the judiciary.

CONCLUSION

The foregoing is by no means a comprehensive study of the changes the authors have witnessed in these areas of practice in the past ten years. Indeed, each subject—parties, pleading, piecemeal appeals, discovery, jury practice and instructions, and post-trial motions—is deserving of an individual article. But what has been written should demonstrate that Illinois has not remained stagnant in these areas of practice. It has moved ahead, maintaining its position as an enlightened procedural state.

⁷⁴ *McKinney v. Cratty*, 18 Ill. App.2d 561, 153 N.E.2d 113 (1958).

⁷⁵ 25 Ill. App.2d 428, 167 N.E.2d 295 (1960).