CIVIL PROCEDURE

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During the 1960 Survey period the proposals for reform of Michigan procedure and practice submitted by the Joint Committee on Michigan Procedural Revision of the State Bar, characterized as "the most significant development" of 1959 in last year's Survey,[1] lost its first battle for adoption—the statutory revision[2] was permitted to die in committee during a short session of the legislature. The bill's premature demise was generally attributed to the massiveness of the bill in relation to the short time available for its study. Understandably, the representatives could not be expected to pass a sizeable package of legislation, of wide and varied scope and range, without a reasonable opportunity to look into its many ramifications. However, the need for a general procedural reform is still very much alive, and the proposed court rules and statutes go far toward meeting this need. Therefore, in the hope that greater understanding of these proposals will generate greater support, or at least enlightened criticism, the next time they are up for adoption, brief references will be made at selected points in this article to the proposed rules or statutes.

MICHIGAN COURT RULES

By virtue of section 3 of Rule 1 and its construction in *Darr v. Buckley*,[3] statutes which deal with matters of practice and procedure, if they are not in conflict with any court rule, and even though they deal with matters inherently trusted to the courts, are themselves to be treated as court rules. Thus, in *Miller v. F. W. Woolworth Co.*,[4] the court held that Section 38 of the Employment Security Act,[5] dealing with appeals from the Appeal Board of the Employment Security Commission, is to be given the status of a court rule. While the result of individual cases, such as *Miller*, may not be bad, the court's legitimizing of a multitude of statutes containing non-conflicting procedural matter can only bode evil for the time-pressed practitioner and judge, for these reasons: 1) The Michigan statutes, like the Bible, speak on

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1. Wunsch, Civil Procedure, 1959 Survey of Mich. Law, 6 Wayne L. Rev. 157 (1959).

2. H.R. 1 (1959).

3. 355 Mich. 392, 94 N.W.2d 837 (1959), discussed in Wunsch, supra note 1, at 159, 160.

4. 359 Mich. 342, 102 N.W.2d 728 (1960).

5. C.L.S. 1956 § 421.38, M.S.A. § 17.540 (Cum. Supp. 1959).

almost every point. 2) No practitioner will be safe in assuming that a seemingly comprehensive court rule is the last word on a procedural point, but the statutes will have to be scoured for coverage of the same matter. 3) If an applicable statute is found, it must then be determined whether it conflicts with the court rule, in which case it can be ignored or, if it does not conflict, it must be followed. Because the court has recorded its unwillingness to find a conflict between court rule and statute unless the conflict is very clear,[6] compliance with the statute will almost always be necessary. A look at the variety of court rules and statutes appertaining to pre-trial discovery, for example, will make our meaning clear.[7] Court Rule 1, section 3, does not appear in the proposed court rules.

Early in the Survey period the court adopted Rule 72A,[8] which provides that certain controlling questions of public law, pending before a tribunal from which appeal may be taken to the Supreme Court, may be certified to the Supreme Court if the governor, by executive message, indicates that it is of such public moment as to require early determination.

On the same day the court also adopted detailed rules "Concerning the Superintendence of the Judiciary of Michigan."[9] Briefly, these rules provide that an administrator appointed by the Supreme Court can investigate the affairs of any court or tribunal in the judicial department or the conduct of any state judicial officer, and make recommendations to the chief justice. If the investigation reveals the possibility of certain types of misconduct enumerated in the rules, a hearing, with proper safeguards, can result in disciplinary action against the offending officer. These new rules, if diligently implemented, could do much to insure honest and orderly administration of the state's judiciary. Certainly, they go a long way toward effectuating the Supreme Court's superintending power over the lower courts, provided for in the Michigan Constitution.[10]

STATUTES

Until last year, the statutes did not expressly indicate the course to be taken by a defendant, sued in a justice court, who wished to assert a set-off or recoupment in excess of the jurisdictional amount

6. See, e.g., Masonite Corp. v. Martin, 314 Mich. 411, 22 N.W.2d 757 (1946); Ismond v. Scougale, 119 Mich. 501, 78 N.W. 546 (1899).

7. M.C.R. 31; M.C.R. 35, § 6; M.C.R. 40; M.C.R. 41; C.L. § 617.1, M.S.A. § 27.849; C.L. §§ 617.6-.13, M.S.A. §§ 27.854-.861; C.L. § 617.13, M.S.A. § 27.913; C.L. § 691.631, M.S.A. § 27.951, C.L. § 441.179, M.S.A. § 28.78(9); C.L. §§ 601.17-.23, M.S.A. §§ 27.37-.43; C.L. § 691.671, M.S.A. § 27.475(1); C.L. §§ 641.21-.22, M.S.A. §§ 27.2411-.2412. This list is not exhaustive.

8. 356 Mich. at xiii (1959), mentioned briefly in Wunsch, supra note 1, at 162.

9. Id. at xv (1959).

10. Mich. Const. art. VII, § 4.

to which that court is limited. The statute[11] allowed the defendant either to assert his claim and be satisfied with a judgment equal to the statutory maximum, or to withdraw his claim and sue for it separately in a subsequent action. The res judicata effect of the first judgment, however, might forever bar the defendant from bringing the second action.[12] Thus, in some cases the justice court could, for all practical purposes, finally determine a controversy in which the real amount in controversy exceeded its jurisdictional maximum. A less serious effect was to require two or more closely related matters to be tried separately. A new statute, passed in 1959, has resolved these problems.[13] If defendant's set-off or recoupment exceeds the court's monetary jurisdiction, he may, by following a simple procedure, have the entire proceedings removed to circuit court for trial.

A few other statutory additions and amendments to the Judicature Act and the Probate Code are worthy of passing notice: In an appeal from a justice court to a circuit court the fees have been slightly increased, the time within which costs must be paid has been expanded, and specific provision has been made for cases where the final day for appeal falls on a Saturday, Sunday or holiday.[14] A new statute requires certain administrative actions of municipal court judges to be taken by a majority of all the full-time judges in the court involved.[15] A recent amendment has enlarged the time within which a writ of restitution may be issued from five to ten days and, if the purchaser has paid over fifty per cent of the purchase price, to six months (during which time the defendant may redeem).[16] One amendment to the Probate Code denotes an executor named in decedent's will as an interested party who may petition the court for appointment of a special administrator of the decedent's estate,[17] and another permits him to apply to the probate court for a determination of heirs, when they are not specified in the grant or conveyance in question.[18]

In summary proceedings to recover the possession of land in a county having a population of more than 180,000 and less than 1,000,000, the complaint must now be made only to a circuit court

11. C.L. § 669.14, M.S.A. § 27.3241.
12. See Jones v. Chambers, 353 Mich. 674, 91 N.W.2d 889 (1958), discussed in Wunsch, supra note 1, at 158.
13. P.A. 1959, 249, C.L. § 669.17a, M.S.A. § 27.3244(1) (Cum. Supp. 1959).
14. P.A. 1959, 100, C.L. § 678.6, M.S.A. § 27.3486 (Cum. Supp. 1959).
15. P.A. 1959, 120, C.L. § 730.125a, M.S.A. § 27.3855(1) (Cum. Supp. 1959).
16. P.A. 1959, 249, C.L. § 630.25, M.S.A. § 27.1999 (Cum. Supp. 1959).
17. P.A. 1959, 126, C.L. § 702.60, M.S.A. § 27.3178(130) (Cum. Supp. 1959).
18. P.A. 1959, 126, C.L. § 702.75, M.S.A. § 27.3178(145) (Cum. Supp. 1959). See also C.L. § 702.78, M.S.A. § 27.3178(148).

commissioner.[19] This amendment also provides that each commissioner may appoint not more than four bailiffs, and the bailiffs so appointed will serve all process, summonses and writs issued by the circuit court commissioner in summary proceedings.

Lastly, the installment judgment statute has been amended[20] to prevent judges from altering the amounts and times of payment of installment judgments after the initial order without first giving notice to the other party. In addition, the garnishment of wages to recover such a judgment can now be ordered by the court only after due notice to the defendant and only if installments are due when the order is made. To further protect the rights of installment judgment debtors, a section has been added to the statute which requires the proceedings for an installment judgment to appear as part of the record of the judgment, and which strictly controls the issuance of a transcript of the judgment.

RECENT DECISIONS

Jurisdiction: In two cases of collateral attack on foreign judgments based on lack of jurisdiction, the court sustained the jurisdiction of the out-state court. Neither case represents a change in principles which are generally accepted. In the first, *Johnson v. Haley*,[21] defendant entered a special appearance in a California trial court, contesting its jurisdiction. She argued that service on her in Michigan by publication, under a statute permitting such service on persons involved in automobile accidents in California,[22] was improper since she was not the owner of the car nor was the driver her agent. When the California court ruled against her on this point she withdrew from the case, but the trial continued and resulted in a judgment for plaintiff. The Michigan Supreme Court ruled that she was barred from attacking the jurisdiction of the California court by her failure to appeal the adverse ruling on jurisdiction through the courts of that state. In *Ohio Dep't of Taxation v. Kleitch Bros., Inc.*,[23] the court upheld the personal jurisdiction of an Ohio court in assessing a tax on defendant and entering a judgment in that court without first serving process upon him. The decision was based, *inter alia*, on the right of a state to collect taxes through summary proceedings.

19. P.A. 1959, 157, C.L. § 630.13, M.S.A. § 27.1987 (Cum. Supp. 1959).

20. P.A. 1959, 167, C.L. §§ 691.715, .717, .721, M.S.A. §§ 27.1485, .1487, .1491 (Cum. Supp. 1959).

21. 357 Mich. 411, 98 N.W.2d 555 (1959). This case is also discussed infra with respect to res judicata.

22. As to the constitutionality of such statutes, see Hess v. Palowski, 244 U.S. 352 (1927).

23. 357 Mich. 504, 98 N.W.2d 636 (1959).

In a third case, *Young v. Morrall*,[24] the court upheld a judgment against garnishee defendant, a Michigan corporation, where jurisdiction was originally acquired by personal service of a writ of attachment. Garnishee defendant entered a special appearance and moved to dissolve the attachment, which was granted. It then entered a general appearance, which it later withdrew. By affirming the judgment for plaintiff the court tacitly approved the lower court's finding of personal jurisdiction. It is not stated whether jurisdiction was acquired by personal service of the attachment writ or by the general appearance, but it is reasonable to assume that either would suffice to confer such jurisdiction. The dissolution of the attachment would not serve to destroy jurisdiction, since the writ is also a summons; the unilateral withdrawal by the defendant of its general appearance would likewise fail to destroy the jurisdiction previously acquired.

Pleading: In *Ginger v. Brookfield*[25] plaintiff filed his declaration seeking attorney's fees and defendant answered. Plaintiff then filed an amended declaration incorporating by reference his original declaration and adding the following allegation:

> Plaintiff alleges the fact to be that when demand was made upon defendant to pay statements rendered on balance of his account, his only complaint was that he was not certain such legal expense was an allowable deduction on income tax return, saying, "If I was sure they were allowed, I would pay them."[26]

The defendant did not file an amended answer. On plaintiff's appeal from a relatively low verdict in his favor, the court affirmed on the ground that plaintiff had failed to establish the condition precedent, the defendant's firm belief that the fees would be deductible. Aside from the fact that this ground may be untenable,[27] it would have been preferable for the court to have decided the more important questions it raised and then side-stepped: (1) Did the amendment contain a "material allegation" which, if not answered, constitutes an admission,[28] and if so, (2) did plaintiff's failure to call the attention of the pre-trial judge to defendant's failure to answer constitute a waiver of the admission?[29] The court might also have considered

24. 359 Mich. 180, 101 N.W.2d 358 (1960), also discussed infra under the topic "Stipulations."

25. 359 Mich. 1, 101 N.W.2d 351 (1960).

26. Id. at 2, 101 N.W.2d at 351.

27. It can be argued that the quoted allegation was only included by plaintiff to show that defendant admitted owing the fees, and that the so-called condition precedent, never properly raised in plaintiff's declaration or defendant's answer, should be disregarded.

28. M.C.R. 23, § 2. Defendant was not required to file a new answer to the amended declaration. M.C.R. 26, § 3.

29. M.C.R. 35, § 4(4).

the propriety of pleadings of this type which contain evidentiary matter.[30]

Perhaps the foregoing case indicates the court's unwillingness to strike down pleadings for unimportant technical errors.[31] This theory is supported by the decision in *Nowicki v. Podgorski*.[32] There the court held that, absent a timely objection, it was not error to put a claim for damages for fraud in the same count with a claim for damages arising from violation of a non-competition clause in a contract.

Detroit Edison Co. v. Public Serv. Comm'n[33] and *Peoples Savings Bank v. Stoddard*[34] dealt, respectively, with amendments to pleadings during and after trial, construing Court Rule 25. In the first case the court held that amendments during trial are proper where the opposite party is "offered . . . time for study or preparation or production of additional testimony,"[35] especially where the amendment does not conflict with the party's basic position and no surprise is claimed. In the second case the court refused to permit the trial court to plant its decision in an amendment offered after proofs were in, where defendants were not given the "opportunity to answer, reopen proofs, and brief and argue the issue prior to decision."[36] Both cases indicate that amendments will only be countenanced where the opposite party is offered a fair chance to respond to the new pleading. The proposed court rules would not seem to change the result of these cases.[37]

Joinder: Joinder of parties defendant was permitted in *Pullum Window Corp. v. Feldstein*,[38] where plaintiff sued five individual defendants to recover the purchase price of merchandise sold to an Indiana corporation with which the defendants were connected. The declaration contained three counts, one based on an Indiana statute, the second sounding in trespass on the case, and the third on the common counts in assumpsit. The court held that the several claims constituted but one cause of action.[39] Since this single cause was being

30. See M.C.R. 17, §§ 1,2.
31. See Hongiman, Mich. Court Rules Annot. 165 (1949).
32. 359 Mich. 18, 101 N.W.2d 371 (1960).
33. 359 Mich. 137, 101 N.W.2d 273 (1960).
34. 359 Mich. 297, 102 N.W.2d 777 (1960).
35. Supra note 33, at 144, 101 N.W.2d at 276.
36. Supra note 34, at 325, 102 N.W.2d at 791.
37. State Bar of Michigan, Part III, Final Report, Joint Committee on Michigan Procedural Revision, Rule 10.18 (1960). (This report will hereinafter be cited as "proposed rules.")
38. 357 Mich. 82, 97 N.W.2d 762 (1959).
39. The court distinguished Coke v. Brunswick-Balke-Collender Co., 270 Mich. 233, 258 N.W. 257 (1935).
The court has defined the term "cause of action" in earlier decisions. See Multiplex Concrete Mach. Co. v. Saxer, 310 Mich. 243, 253, 17 N.W.2d 169, 172 (1945);

asserted against all of the defendants, the joinder statute was not violated.[40] The court expressly relied on the rule of the leading case of *Gilmer v. Miller*,[41] but nowhere in its opinion did it go through the detailed analysis called for in *Gilmer* to determine whether the joinder served the ends of justice.

The Restatement of Torts provides that in an automobile negligence case where suit is brought under the statute holding the owner liable for injury negligently caused by his automobile, it is not necessary to join every co-owner, each of whom may be proceeded against separately.[42] Citing this section of the Restatement, the court held, in *Frazier v. Rumisek*,[43] that if one of two joint owners of the automobile dies, it is not necessary to join the deceased's estate in a suit to recover from the survivor.

The knotty problems of joinder of parties, only partly raised by the foregoing cases, but forcefully illustrated in a long line of difficult and sometimes confusing decisions culminating in *Pullum Window Corp.*,[44] is treated clearly and logically in the proposed court rules.[45] In brief, parties *must* be joined if "their presence in the action is essential to permit the court to render complete relief"[46] and *may* join or be joined if there is some common legal or factual thread which binds them together or which will make their presence in the action promotive of the "convenient administration of justice,"[47] the same requirement construed in *Gilmer*. The strictness of the "necessary joinder" provision and the liberality of the "permissive joinder" provision is in large measure mitigated by provisions which give the courts broad discretion to proceed without parties or to order separate trials based largely on considerations of common sense to prevent unfairness, delay, extra expense, and embarrassment.[48]

Class Actions: It is obvious that a class suit should not be availed of to provide a larger fee for an attorney who commences a private suit the result of which happens, incidentally, to benefit a larger group. The Supreme Court implicitly agreed in *Simpson v. Mulle*.[49] There,

Brewster Loud Lumber Co. v. General Builders' Supply Co., 233 Mich. 633, 638, 208 N.W. 28, 30 (1926); Otto v. Village of Highland Park, 204 Mich. 74, 80, 169 N.W. 904, 906 (1918).

40. C.L. § 608.1, M.S.A. § 27.591.

41. 319 Mich. 136, 29 N.W.2d 264 (1947). See discussion in King & Wunsch, Civil Procedure, 1958 Survey of Mich. Law, 5 Wayne L. Rev. 175, 178-181 (1958).

42. Restatement, Torts §§ 878, 882 (1939).

43. 358 Mich. 455, 100 N.W.2d 442 (1960).

44. Supra note 38.

45. Proposed rules 20.3-20.7, 50.5.2.

46. Id. 20.5.

47. Id. 20.6.

48. Id. 20.5.2, 20.6.2, 50.5.2.

49. 358 Mich. 441, 100 N.W.2d 490 (1960).

plaintiff sued to recover attorneys fees alleging that he had successfully prosecuted a class suit and that the members of the class should cough up his fee. He had succeeded in securing a consent decree which set aside an assessment for a drain relocation, but did not succeed in securing an injunction against a subsequent relocation. The court noted that a subsequent relocation might cost some of the so-called class members more, and others less, than the voided relocation; that no notice had been given pursuant to Rule 16; that the bill on its face, by speaking of the "[p]laintiffs and 'the other resident and non-resident owners' " did not purport to be a class action; and ruled that no showing was made that the entire class was adequately represented. If this had been a class suit in the first place, the consent decree, not favorable to all members of the class, could not have been entered without the court's approval *after* notice to the members of the class.[50] This would have given such members an opportunity to object to the decree.

The proposed court rules contain section 1 of Rule 16 essentially unchanged. New sections are added which enable the court to enter a variety of orders to better protect absent class members,[51] which expand the requirements for actions brought by fiduciaries where it is impractical to bring all the beneficiaries before the court,[52] and which require particular allegations, under oath, to be contained in a complaint in an action to enforce secondary rights of shareholders against their association.[53]

Res judicata: Merger: A series of cases handed down during the Survey period reaffirmed the well-accepted rule of res judicata and merger: "Res judicata applies not only to issues which were determined on their merits but also to matters which the parties had an opportunity to present for adjudication."[54] In *Johnson v. Haley*[55] the Supreme Court ruled that defendant's failure to appeal a California trial court's denial of her motion to quash service through the appellate courts of that state barred her from again raising the same issue in a collateral attack on the California judgment when plaintiff sought to enforce it in this state. In *Strech v. Blissfield Community Schools Dist.*[56] plaintiff's bill of complaint to set aside a condemnation award originally made in proceedings at law, on the ground that the

50. M.C.R. 16, § 1.
51. Proposed rule 20.8.4.
52. Id. 20.8.3.
53. Id. 20.8.2.
54. Strech v. Blissfield Community Schools Dist., 357 Mich. 620, 623, 99 N.W.2d 545, 546 (1959).
55. 357 Mich. 411, 98 N.W.2d 555 (1959), discussed supra under the topic "Jurisdiction."
56. Supra note 54.

bias and prejudice of the jurors was fraudulently concealed, was dismissed. Normal diligence on plaintiff's part would have disclosed such bias and prejudice during the original hearing and appeal. Such matters as were raised or should have been raised then cannot now be urged in a collateral attack on the award.

More interesting, perhaps, is the case of *Shank v. Castle*[57] where plaintiff's action at law to recover damages for mental anguish as the result of her parent's breach of an agreement for custody of her child was dismissed because plaintiff could have asked for damages in an earlier chancery suit brought by her parents for custody of the child. In the earlier suit plaintiff filed a cross-bill alleging mental anguish and successfully prayed for custody of the child. She did not, however, ask for damages for breach of the prior agreement. Her failure then to request such damages was fatal to her law action.

Where the issues or the parties are not the same as those before the court in the prior litigation, it is well settled that res judicata does not apply. Thus, a prior successful suit to quiet title to property is not decisive in a subsequent suit for an injunction to restrain interference with the property against a defendant who was not a party in the prior suit.[58] A circuit court can litigate, in a libel suit, the issue of the truth of defendant's statements about the plaintiff with respect to her ethics as a real estate broker even though, in a prior hearing before the deputy commissioner of the Michigan Corporation and Securities Commission to revoke her license, the complaint, based on the same unethical conduct allegedly published by defendant, was dismissed because unproved.[59]

The proposed court rules contain a somewhat unique but sensible application of the merger doctrine. The parties are required, with limited exceptions, to join all claims "which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the action."[60] This seems to embrace the generally accepted rule against splitting causes of action. In the ordinary case, as in *Shank v. Castle,* discussed above, the full thrust of this rule does not appear until subsequent litigation, when res judicata or merger is pleaded to bar a party from asserting a claim he could have raised in a prior action. At this time, it is too late for him to correct his earlier omission and his right, which may be substantial, will go unredressed. The proposed court rule, however, requires the party who may later desire to

57. 357 Mich. 290, 98 N.W.2d 579 (1959), discussed infra under the topic "Law and Equity." This decision contains a good statement of the rules of res judicata.

58. Giegling v. Helmbold, 357 Mich. 462, 98 N.W.2d 536 (1959).

59. Cochrane v. Wittbold, 359 Mich. 402, 102 N.W.2d 459 (1960).

60. Proposed rule 20.3.1.

assert the claim of merger to object, by motion at pre-trial, to improper failure to join. His failure to so move constitutes a waiver of the joinder rules and the other party will not be barred by merger from later raising the claims not actually litigated. The result is that, unless the opposite party files timely objection, plaintiff may split his cause of action. This proposed rule fairly places the burden of calling the court's attention to a split cause of action on the party who may later get a windfall as a result of it.

Law and Equity: Under existing rules of practice, an action at law and a suit in equity cannot be consolidated, but they can be heard at the same time.[61] Thus, in *Insealator, Inc. v. Wallace*[62] an action at law for commissions was combined for trial with a chancery action for injunctive relief and damages for breach of a fiduciary relationship and appropriation of trade secrets. This is certainly an efficient way to handle related matters under existing procedure, and perhaps a preview of procedural reform to come. However, the decisions in other recent actions involving the division between law and equity wreaked havoc on plaintiff's otherwise legitimate claims. In *Hack Inv. Co. v. Concrete Wall Co.*[63] plaintiff paid a judgment in a negligence action and then attempted to recover all or part of his money back from a joint tort-feasor. He started in equity to secure *indemnity* and, on defendant's motion to dismiss, was advised either to transfer to law or to amend his complaint to seek *contribution.* He elected to transfer to law, where he lost his case by failing to prove freedom from concurrent negligence. He then commenced a new suit at law for reimbursement of his proportionate share of the loss, but ran afoul of a statute which provides that contribution among joint tort-feasors must be brought in equity within six months after plaintiff discharges the original judgment.[64] On appeal, the allowance of defendant's motion to dismiss was affirmed. Had the plaintiff been permitted, in the first instance, to seek indemnity or contribution in the alternative in a single complaint before a unified court, as he may do under the proposed reform, the result might have been different;[65] defendant might not have been left with a windfall. Similarly, in *Shank v. Castle,*[66] where plaintiff's action at law to recover damages for breach of a custody agreement was dismissed on the grounds of res judicata because the claim should have been raised in a prior

61. Van Kovering v. Eggebeen, 292 Mich. 457, 290 N.W. 867 (1940).
62. 357 Mich. 233, 98 N.W.2d 643 (1959).
63. 356 Mich. 416, 97 N.W.2d 106 (1959).
64. C.L. §§ 691.561-.564, M.S.A. §§ 27.1683(1)-(4) (Cum. Supp. 1959).
65. Provided plaintiff had commenced his action within six months after satisfying the judgment, as required by the statute.
66. Supra note 57.

equity action, a different result might have obtained if plaintiff (who was defendant in the earlier action) had been required to plead all of her claims arising out of the same transaction in her original cross-bill.[67]

The abolition of procedural distinctions between law and equity is a significant aspect of the proposed reform. This change from existing practice, it should be firmly noted, is not in any way intended to impinge upon well established substantive distinctions between the two bodies of law.[68] Thus, the constitutional right to trial by jury in actions at law and the exercise of the chancellor's "equitable discretion" are carefully preserved. Other states have succeeded in unifying the procedure without clouding the distinctions of substance;[69] there is no reason why Michigan cannot also do so.

Pre-trial Discovery: In an important decision[70] construing Rule 35, section 6, the court brought the scope of the Michigan discovery rules, at least in one area, closer to those of federal practice. With Justices Black, Kelly and Kavanagh dissenting, the court held that, notwithstanding the Dead Man's Act,[71] the representative of deceased's estate can take a deposition from an "opposite party" which includes matters equally within the knowledge of the deceased, without waiving the witness' disqualification to testify at the trial. Rule 35, section 6(b), which limits the taking of depositions to relevant matters "admissible under the rules of evidence governing trials," was held to pertain only to the evidence itself and not to the qualifications of the witness from whose mouth it issues.[72]

This decision, as Justice Black notes in his dissent, may leave a substantial tactical advantage in the hands of the protected party if the pre-trial judge grants his motion for discovery of the disqualified witness. Having taken the deposition and learned information vital

67. It is not clear whether plaintiff failed to request such damages in her cross-bill because counsel believed that a joinder of a legal claim was improper, or whether the thought of damages did not occur to plaintiff until she succeeded in the equity action. In any event, it would have been much more difficult to waive the damages claim by oversight had the proposed reform been in effect.

68. See State Bar of Michigan, Part I, Final Report, Joint Committee on Michigan Procedural Revision 17, 18 (1960).

69. See Blume & Reed, Pleading and Joinder 266 (1952).

70. Banaszkiewicz v. Baun, 359 Mich. 109, 101 N.W.2d 306 (1960)..

71. C.L. § 617.65, M.S.A. § 27.914.

72. M.C.R. 31, § 1, and 35, § 6(d) seem to permit depositions, once taken, to be read at the trial and to be used for a variety of purposes. If this were to be automatically permitted in the case of a deposition taken from an "opposite party" whose testimony is excludable under the Dead Man's Act, these rules, in conjunction with the instant case, would effectively nullify that statute. Therefore, the court noted, by way of dictum, that the protected party may object under M.C.R. 35, § 6(e) to the introduction of the deposition at the trial, and have it excluded.

to his cause, he can then use it or not at the trial as he sees fit, while the other party has absolutely no voice in the decision. Thus, for those who desire the extension of discovery to relevant matters, even though excludable at trial, for the purpose of ferretting out other evidence which may be admitted, this decision is a first step. Perhaps, with the dissent, it can be argued that the court rules should not be extended beyond their obvious and advertised[73] limits by judicial decision, but only by amendment to the court rules. Adoption of the proposed court rules, which broaden discovery by deposition to include testimony "reasonably calculated to lead to the discovery of admissible evidence,"[74] would do the job.

In one other case dealing with depositions,[75] the court held that Court Rule 35, section 6(d)(2), which permits the deposition of a party to be used "for any purpose," is qualified by the requirement, in section 6(d), that it be "admissible under the rules of evidence." Therefore, it was not error to exclude from evidence a deposition containing irrelevant and immaterial matter. However, the court seemed to approve the use of the same deposition to contradict or impeach the deponent, notwithstanding the inadmissible matter.[76]

Pre-trial Conference: Court Rule 23, section 2, provides that a material allegation in a declaration or bill of complaint which is not answered constitutes an admission by defendant. Some language in *Ginger v. Brookfield*[77] raises the possibility that the requirement that admissions of fact be considered at the pre-trial conference[78] may impose upon the plaintiff the duty to call the court's attention to such admissions or waive their benefit. Such a rule would prevent defendant from making a damaging admission by oversight.

The judge's pre-trial summary "controls the subsequent course of the action unless modified at or before trial to prevent manifest injustice."[79] Does the passage of a new ordinance, clearly applicable to the case, after the issuance of the pre-trial summary but prior to trial, entitle a party to amend the summary and his pleadings to indicate reliance on the ordinance? The answer is No, at least in a case where the ordinance is obviously passed to help defendant defend the suit and where, if the amendment were allowed, it would clearly be decisive. This was the effect of a split decision in *Willingham v.*

73. See Honigman, Mich. Court Rules Annot. 78 (Supp. 1959).

74. Proposed rule 30.2.

75. Insealator, Inc. v. Wallace, 357 Mich. 233, 98 N.W.2d 643 (1959), also discussed supra under the topic "Law and Equity."

76. See M.C.R. 35, § 6(d)(1).

77. 359 Mich. 1, 101 N.W.2d 351 (1960), also discussed supra under the topic "Pleading."

78. M.C.R. 35, § 4(4).

79. M.C.R. 34, § 4.

City of Dearborn,[80] where plaintiff sought by mandamus to force the city to issue a permit to build a structure based on plans which would have violated no zoning ordinance or other law in effect when the permit was originally refused, but which would have violated the zoning ordinance subsequently passed apparently for the purpose of preventing plaintiff from implementing his building plans. Understandably, the courts, both circuit and Supreme, were "irked by such *pendente* legislation and its suit defensive purpose." For that reason, as well as the four to four split, the case should not be taken as the last word on the important question whether new and applicable law, appearing after pre-trial summary but before trial, can, by amendment to the pre-trial summary and pleadings, become relevant to the decision of the case.[81]

Stipulations: An oral stipulation made in open court between the parties, read into the record, which effects a settlement of the case conditioned upon certain acts by the defendant, is binding *upon the court* where the substantial rights of only the parties are involved and where the defendant performed the conditions in reliance on the stipulation.[82] Thus, the court cannot tax costs and attorney's fees to the defendant where the stipulation provided that, upon the conditions being fulfilled, the cause would be dismissed without costs. For some reason the court did not mention Rule 11.

Of course, stipulations executed in accordance with Rule 11 are also binding *upon the parties*. In *Young v. Morrall*[83] garnishee defendant, an insurance company, agreed with plaintiff's attorney that the issue of its liability should be decided by the court solely on briefs. In their stipulation it was agreed that all facts in plaintiff's declaration be taken as true and admitted. As a result of this stipulation, garnishee defendant was prevented from asserting as a defense a clause in the policy which might have relieved it from liability were it permitted to raise new facts contradicting plaintiff's declaration.

There is a possibility, suggested in the *Bowman* case,[84] supra, that the court can ignore a stipulation as to *facts* if it so chooses, and pro-

80. 359 Mich. 7, 101 N.W.2d 294 (1960).

81. This view of the case is further supported by the affirming opinion which noted that there was no claim of abuse of judicial discretion in denying the modification nor was there any claim that the modification was necessary "to prevent manifest injustice."

The interesting question yet remains, what will the Supreme Court do when the city attempts to revoke the license to build under the authority of Lansing v. Dawley, 247 Mich. 394, 225 N.W. 500 (1929)?

82. Bowman v. Coleman, 356 Mich. 390, 97 N.W.2d 118 (1959).

83. 359 Mich. 180, 101 N.W.2d 358 (1960), also discussed supra under the topic "Jurisdiction."

84. Supra note 82.

ceed to find the true facts. However, the trial court did not attempt to do this in *Young v. Morrall.*

The proposed court rule with respect to stipulations is substantially the same as current Court Rule 11.[85]

Statutes of Limitations: In two cases decided during the Survey period the court ruled that the three year tort statute of limitations[86] applies to an action by the state and an action against a city. In the first case, *People v. Clement,*[87] the State of Michigan was prevented from bringing a trespass action more than three years after the acts took place even though the state was acting in its sovereign capacity.[88] In the second case, *Marks v. City of Battle Creek,*[89] the court struck down city charter provisions which, by requiring notice to the city within sixty days after the injury, and by prohibiting the commencement of suit until the city had a reasonable opportunity to investigate the alleged claim, had the effect of shortening the three year statutory period. Similar provisions in city charters and ordinances of other Michigan cities will be nullified by the decision in this case.

Right to Jury Trial: In a certification of a will contest from probate to circuit court in a judicial circuit with a population greater than 500,000, the right to trial by jury will not be waived if demand for jury is filed *in the circuit court* by the party requesting the certification within fifteen days after the exemplification of the record is filed in that court. Thus the court, in *In re Miller's Estate,*[90] resolved a conflict between various court rules. In that case contestant filed a demand for jury trial in the circuit court on the same day that the exemplification and probate appeal were filed. Before trial, proponent asked for, and got, a ruling from the circuit judge to the effect that contestant had, by virtue of Court Rule 75, sections 7(a) and (b), waived its right to jury trial. These rules provide, in effect, that jury trial is waived unless a demand for same is filed *in the probate court* with the circuit court's order allowing the appeal, and the suggested practice has been to file the demand with the claim of appeal,[91] or, in this case, with the application for certification. In reversing for a jury trial, the court relied on Court Rule 33, section 2, and Rule 75, section 21, rather than on Rule 75, sections 7(a) and (b). Rule 75, section 21, provides that parties desiring certification of a will con-

85. Proposed rule 50.7.9.
86. C.L. § 609.13, M.S.A. § 27.605.
87. 356 Mich. 314, 96 N.W.2d 804 (1959).
88. C.L. § 609.28, M.S.A. § 27.620 made the limitations applicable to the state.
89. 358 Mich. 114, 99 N.W.2d 587 (1959).
90. 359 Mich. 167, 101 N.W.2d 381 (1960).
91. See Honigman, Mich. Court Rules Annot. 235, 242 (Supp. 1959).

test under the statute[92] must file their application and bond in the same fashion and subject to the same provisions as in an appeal from the probate court to circuit court. Rule 33, section 2, referring expressly to Rule 75, section 21, provides that in a certification of a will contest demand for jury may be filed by the applicant *in the circuit court* within fifteen days after filing the exemplification of the will contest. Thus, reading the rules *in pari materia,* the fifteen day rule for claiming jury trial becomes effective.

Aside from its practical consequences, what makes this case interesting is the manner in which the court applied to court rules the maxim "that all acts relating to the same subject, or having the same general purpose, shall be read . . . as together constituting one law."[93] This it did in the face of the first paragraph of Rule 75, which provides: "In each judicial circuit with a population of 500,000 or upwards, appeals to the circuit court from any probate court shall, in all civil cases (except condemnation cases) be *exclusively* governed by the *following sections,* unless otherwise provided in *this* rule, any present or future inconsistent or additional statutory requirements to the contrary notwithstanding." (Emphasis added.) If Rule 33, section 2, had been ignored in compliance with this clear direction, the case could not have been reversed for new trial. Likewise, this same result would also obtain under the proposed court rules, which provide that claim for jury trial by the applicant for certification of a will contest must be included in his claim of appeal filed *in the probate court.*[94]

Voir Dire: The important rule announced during the 1959 Survey period by Justice Black in *Darr v. Buckley,*[95] to the effect that in an action to recover for personal injuries or death resulting from an automobile accident, jurors may not be questioned on *voir dire* as to their affiliation or connection with defendant's insurer,[96] was approved and followed in *Rouse v. Gross*[97] and *DeGroff v. Clark.*[98] The problem of how best to get at information relating to a juror's membership or other relationship to defendant's insurance company, also discussed in *Darr v. Buckley,* is simply and effectively solved by the proposed court rules.[99] They require a personal history questionnaire

92. C.L. § 701.36, M.S.A. § 27.3178(36). See also C.L. § 701.42, M.S.A. § 27.3178(42).

93. Supra note 90, at 172, 101 N.W.2d at 384.

94. Proposed rule 50.8.2(2). See also proposed rule 70.3.

95. 355 Mich. 292, 94 N.W.2d 837 (1959).

96. This is a result of C.L. § 500.3030, M.S.A. § 24.13030 (Cum. Supp. 1959) which, by virtue of M.C.R. 1, § 3, is adopted by the court as a rule of practice. See the discussion of court rules supra, this article.

97. 357 Mich. 475, 98 N.W.2d 562 (1959).

98. 358 Mich. 274, 100 N.W.2d 214 (1960).

99. Proposed rule 50.10.1.

to be filled out by all jurors disclosing a wide variety of information, including key questions to reveal insurance affiliation, which will enable counsel to intelligently and effectively exercise their challenges without at the same time casting undue emphasis on the possibility that defendant may be insured.

Peremptory challenges are not permitted in condemnation cases and challenges for cause are limited to enumerated standards.[100] In *Strech v. Blissfield Community Schools Dist.*,[101] the court held that these limitations do not effect the constitutional validity of the condemnation statutes. Peremptory challenges are not required by due process, and the "standards for disqualifications for cause are set up in the statute sufficiently to justify determination as to whether a proposed juror is in a position to enter a fair and just verdict."[102]

Trial: Opening Statement to Jury: Court Rule 37, section 2, provides that it is plaintiff's "duty . . . before offering evidence . . . to make a full and fair statement of his case and of facts which he expects to prove." Is the court under any duty to advise the plaintiff to amplify his opening statement before ordering a directed verdict on the ground that the statement did not contain sufficient facts to establish, if proved, plaintiff's right to recovery? In *Jones v. Hicks*[103] the court held that, where defendant's motion for directed verdict apprised the plaintiff of the insufficiencies of his statement and where plaintiff did not move to amplify it or correct it, no such duty arises.[104]

The proposed court rules restate Rule 37, section 2, in milder language, eliminating the word "duty" and providing for waiver of opening statements with the consent of the court and opposing counsel.[105] They would not seem to change the result of the instant case.

Trial: Comment by Judge During Trial: In recognition of the fact, sometimes disputed, that judges are human, the Supreme Court has continued its rule of reprimanding, but not reversing, for unjudicial remarks made by the judge during the course of trial unless there is a fairly clear showing of bias and prejudice. Thus, the occasional use of sharp language in overruling defense objections, while of du-

100. See P.A. 1955, 269 § 711 et seq.; C.L. § 602.139, M.S.A. § 27.264 (Cum. Supp. 1959).

101. 357 Mich. 620, 99 N.W.2d 545 (1959), also discussed supra under the topic "Res Judicata: Merger."

102. Id. at 624, 99 N.W.2d at 546.

103. 358 Mich. 474, 100 N.W.2d 243 (1960).

104. This holding is not inconsistent with earlier cases which have held that a verdict should not be directed on the opening statement unless counsel has had an opportunity to correct the insufficiency. See discussion in Vida v. Miller Allied Indus., 347 Mich. 257, 79 N.W.2d 493 (1956).

105. Proposed rule 50.7.1.

bious taste, does not constitute reversible error.[106] Even a remark which could have led the jury to believe that the judge thought plaintiff guilty of contributory negligence will not be deemed prejudicial in the absence of any indication of how it was said, *i.e.*, the judge's attitude and tone of voice.[107] Furthermore, it is within the judge's prerogative to interrupt cross-examination to make comments designed to protect the witness from improper or misleading questions and statements.[108]

Trial: Closing Arguments: Attorneys are entitled to wide latitude in their closing arguments. Thus, the Supreme Court labels much that is said reprehensible, but not reversible. In *Elliott v. A. J. Smith Contracting Co.*,[109] for example, a suit to recover for the negligently caused death of a young child, plaintiff's counsel, on the first day of Holy Week, made extensive references to the Bible in his argument with respect to the value of the decedent's life. In ruling that counsel's argument was not prejudicial, the court considered whether it was an improper appeal to passion. Admitting that the line between an argument which is skillful but fair and one that is inflammatory and improper is a hard line to draw, the court upheld the argument on the ground that it was relevant to the key issue, *i.e.*, damages, and was not designed to arouse the jury's ire against any religious group. The case is especially important because the court refused to overturn a finding for plaintiff in the face of this argument plus four other questionable practices. This reflects an important consideration which seems to influence the court's reaction to appeals from jury trials in negligence cases: The court noted that unless it ceases to tamper with the trial and decision of these cases, but instead throws law books full of technical impediments in front of parties seeking "simple justice" for "pressing social problems," the transfer of these cases to an administrative agency is inevitable.[110]

In other cases dealing with closing argument, the court held that the incorrect statement of law of only indirect importance to the case is not reversible error where, after timely objection, no further reference to the point was made and where no request to charge on the point was made;[111] that it was error for the court to refuse to permit plaintiff's counsel, in his summation, to comment on a variance between pleading and proof where the allegation in the

106. Patrick v. Carrier-Stevens Co., 358 Mich. 94, 99 N.W.2d 518 (1959).
107. Britten v. Updyke, 357 Mich. 466, 98 N.W.2d 660 (1959).
108. Nowicki v. Podgorski, 359 Mich. 18, 101 N.W.2d 371 (1960).
109. 358 Mich. 398, 100 N.W.2d 257 (1960).
110. Id. at 422, 100 N.W. 2d at 265. See also Smith v. Hensch, 358 Mich. 334, 337-8, 100 N.W.2d 287, 288 (1960).
111. Linaberry v. LaVasseur, 359 Mich. 122, 101 N.W.2d 388 (1960).

answer which was contradicted on the stand by the defendant himself, was an admission under Court Rule 17, section 10;[112] that the use of the word "steal" in plaintiff's summation of a case charging defendants with fraud, while improper, was not grounds for reversal where no objection was made by defendant's counsel;[113] and, lastly, the court suggested that the failure of plaintiff to call an available witness, not proved to be within his control, may be the subject of comment in defendant's summation, even though defendant is *not* entitled to have the jury charged that they are entitled to presume that, had the witness testified, her testimony would have been unfavorable to plaintiff.[114]

Trial: Instructions to the Jury: Cases decided during the Survey period reflect the court's reluctance to overturn jury verdicts on the ground of error in the instruction to the jury unless, on viewing the entire charge, it is fairly obvious (1) that the error was not cleared up,[115] and (2) that it resulted in prejudice tantamount to a miscarriage of justice.[116] Thus, the trial court's charge or refusal to charge was sustained, though sometimes criticized, in the following situations: Where the jury was instructed that plaintiff could recover under the death act *or* for negligence, although the correct charge should have indicated that recovery could be had for negligence *by virtue of* the Death Act;[117] where the jury was instructed on the "assured clear distance" rule although the evidence did not support its applicability to the case;[118] where the trial judge instructed that plaintiff could not recover unless defendant's negligence was *the* proximate cause of the deceased's death, when he should have said *a* proximate clause and where plaintiff was not dead;[119] where the instructions did not refer

112. Vachon v. Todorovich, 356 Mich. 182, 97 N.W.2d 122 (1959), also discussed infra in connection with the topic "Instructions to the Jury."

113. Nowicki v. Podgorski, 359 Mich. 18, 101 N.W.2d 371 (1960), also discussed supra in connection with the topic "Comment by the Judge During Trial."

114. Barringer v. Arnold, 358 Mich. 594, 101 N.W.2d 365 (1960), also discussed infra under the topic "Instructions to the Jury."

115. See generally 6 Callaghan's Mich. Pleading & Practice 166-189 (1947), and see cases cited id. at 168, n.12.

116. C.L. § 650.28, M.S.A. § 27.2618.

117. Elliott v. A. J. Smith Contracting Co., 358 Mich. 398, 100 N.W.2d 257 (1960) (subsequent paragraphs cleared up the ambiguity).

118. Ibid. Cf. Duncan v. Strating, 357 Mich. 654, 99 N.W.2d 559 (1959) (where trial judge correctly refused to charge as to the "assured clear distance" rule); Linaberry v. LaVasseur, 359 Mich. 122, 101 N.W.2d 388 (1960) (where trial judge correctly refused to charge that defendant-driver's striking of rear end of plaintiff's vehicle constituted a prima facie case of negligence. Justice Black dissented on the ground that the question whether or not the presumption had been rebutted should have been sent to the jury).

119. Rouse v. Gross, 357 Mich. 475, 98 N.W.2d 562 (1959). Cf. Barringer v. Arnold, 358 Mich. 594, 101 N.W.2d 365 (1960). In the Rouse case the court's claim that the erroneous use of "the proximate cause" instead of "a proximate cause" was

to applicable statutes included in plaintiff's requests, which, if violated, would have made defendant guilty of negligence per se;[120] where the court refused to charge on the presumption of due care on the part of decedent, a proper instruction under the circumstances;[121] and where the court refused to give a proper request that a rear end collision gives rise to a prima facie case of negligence.[122]

Other decisions reaffirmed the rule that the judge is not required to instruct the jury as to the presumption arising from a party's failure to call an available witness if the witness was not under the control of that party and if he was also available to subpoena by the other party.[123] In fact, giving such an instruction under these circumstances constitutes reversible error.[124]

In addition to the last cited case, improper instructions contributed to reversal in *Vachon v. Todorovich*[125] and *Holbert v. Staniak*.[126] Both were negligence cases. In *Vachon* defendant offered no proof of plaintiff's contributory negligence. Plaintiff requested the court to charge the jury that defendant had failed to prove contributory negligence. The court erroneously refused this proper instruction. In *Holbert* the Supreme Court held that where evidence of defendant's exceeding the speed limit was undisputed, requiring a finding of negligence per se, a proper charge to this effect, when requested by plaintiff, must be given. The court said: "Where all of the evidence on both sides tends clearly to prove a fact, such fact may, and generally should be assumed as proved; and in such case a charge to the jury indicating that it is competent for them to find either way is error."[127]

The proposed court rule dealing with instructions to the jury

later cleared up by an instruction that the negligence of the plaintiff's driver could not be imputed to the plaintiff, is open to serious question, since the jury's capacity to relate the one statement in the charge to the other is over-optimistically estimated.

120. Britten v. Updyke, 357 Mich. 466, 98 N.W.2d 660 (1959) (the court here felt that the charge, in its entirety, was satisfactory "although it would have been improved by reference to the statutes cited by appellants and to the fact that violation of them was negligence per se").

121. Ibid. (Reversal refused because the jury found that defendant was not negligent).

122. Linaberry v. LaVasseur, 359 Mich. 122, 101 N.W.2d 388 (1960) (the statute calling for this instruction was C.L.S. 1956 § 257.402, M.S.A. § 9.2102. The court refused the instruction on the grounds that enough evidence of plaintiff's own negligence had been introduced to cause the presumption to disappear. See prior discussion in note 118, supra).

123. DeGroff v. Clark, 358 Mich. 274, 100 N.W.2d 214 (1960); Barringer v. Arnold, 358 Mich. 594, 101 N.W.2d 365 (1960).

124. Barringer v. Arnold, supra note 123.

125. 356 Mich. 182, 97 N.W.2d 122 (1959).

126. 359 Mich. 283, 102 N.W.2d 186 (1960).

127. Id. at 295, 102 N.W.2d at 189.

consolidates most of the current practice into one four-part rule.[128] It adds a requirement that objections to the charge must be made before the jury retires to consider the verdict,[129] and provides for preliminary instructions during the course of trial to enhance the jury's understanding of the case,[130] and for further instructions while the jury is deliberating.[131]

Trial: Fact and Law. Motions for Directed Verdict and New Trial: In a series of cases decided during the Survey period the court could not reach complete agreement on the boundaries of the domain of the trier of fact as compared with the judge of law. In general, it may be said that the majority of the court is not averse to clouding the distinction between the two domains in cases tried without jury, but the distinction is entitled to more careful preservation in jury cases. The first such case, *Galea v. Detroit Wabeek Bank & Trust Co.*,[132] was a negligence case tried before a judge sitting alone. Two defendants, an owner and a lessee of a building from which an awning fell on the plaintiff, were connected to the accident with little or no evidence. Defendant-owner was found to be free of liability after trial on the merits. Defendant-lessee, who might have been liable under the "Michigan doctrine of res ipsa loquitur"[133] moved to dismiss after the plaintiff concluded his proofs. The judge, examining the evidence in the light most favorable to the plaintiff, granted his motion. On appeal, the Supreme Court affirmed. Justice Voelker, however, vigorously dissented on the ground that plaintiff had made out a prima facie case sufficient to send the case to the trier of fact,[134] and that, since "non-jury cases are to be tried 'as near as may be' as cases tried with a jury"[135] it was improper to decide the case on a defense motion for judgment. The majority opinion noted that the judge, by using the "most favorable" test, applied a stricter standard than the "clear preponderance" test which would have been applicable if tried on the facts, and that this stricter standard worked in plaintiff's favor, not against him. In essence, the court said, the lower court by ruling on the motion made "a finding of fact which was in accord with the clear preponderance of the evidence."[136] The upshot of this decision is that, in a case tried without jury, the motion for

128. Current practice is contained in M.C.R. 37, § 9 and C.L. §§ 691.431-.434, M.S.A. §§ 27.1091-.1093. The proposed rule is 50.16.

129. Proposed rule 50.16.2.

130. Id. 50.16.3.

131. Id. 50.16.4.

132. 357 Mich. 333, 98 N.W.2d 503 (1959).

133. Id. at 337, 98 N.W.2d at 507 (Dissent).

134. See Mitcham v. City of Detroit, 355 Mich. 182, 94 N.W.2d 388 (1959).

135. C.L. § 618.14, M.S.A § 27.994.

136. Supra note 132, at 343, 98 N.W.2d at 505.

directed verdict may become a vehicle for trying the facts.[137] Contrast, however, *DeLuca v. Wonnacott*,[138] a jury case, where the Supreme Court reversed a judgment entered on a verdict directed for defendant. This time Justice Voelker spoke for the majority. Looking at the record in a light most favorable to the plaintiff, he found that there were questions of fact raised upon which reasonable people could disagree. Therefore, it was improper for the trial judge to decide the case on motion for directed verdict. In his opinion, Justice Voelker quoted from his dissent in *Galea:* "We do not seek to destroy the motion [for directed verdict], but simply to restore it to the proper and relatively modest place it once enjoyed in our law."[139] By these two cases, a double standard has been established for jury and non-jury cases.

This double standard for jury and non-jury cases, whereby a mid-trial motion for verdict can be based upon both the law and facts in the latter case, but only on the law in the former, would be codified under the proposed rules.[140] However, the danger which presents itself in *Galea,* that a judge in a non-jury case would confuse the standards for quantum and quality of proof required for findings of fact, as compared with rulings of law, is eliminated by requiring the judge, when he makes both types of rulings in deciding a single motion, to separately report his findings of fact and conclusions of law.[141] Only in this way can the Supreme Court determine, on appeal, whether the trial judge correctly performed his dual function.

Two other decisions reported during the period point up another area where the courts ignore the distinction between law and fact: Where, on a view most favorable to the plaintiff, he is entitled at best to nominal damages, it is not reversible error to direct a verdict for defendant, even in a jury case.[142]

One other case in this area merits passing comment. In *Bonner v. Ames*[143] the trial court entered a directed verdict at the close of plaintiff's proofs without first allowing the plaintiff to reopen his proofs to clear up a relevant point, the establishment of certain dis-

137. Accord, Emons v. Shiraef, 359 Mich. 526, 102 N.W.2d 490 (1960) (See dissent of Justice Black at 538, 102 N.W.2d at 496).

138. 358 Mich. 319, 100 N.W.2d 288 (1960).

139. Id. at 325, 100 N.W.2d at 291.

140. Proposed rules 50.4.2 and 50.15.

141. Id. 50.17, 50.4.2.

142. Kolton v. Nassar, 358 Mich. 154, 99 N.W.2d 362 (1959); Vachon v. Todorovich, 356 Mich. 182, 97 N.W.2d 122 (1959). Cf. 6 Callaghan's Mich. Pleading & Practice 132 (1947).

Another area in which the court has caused confusion is illustrated in Linaberry v. LaVasseur, 359 Mich. 122, 101 N.W.2d 388 (1960) (Dissent). See note 118, supra.

143. 356 Mich. 537, 97 N.W.2d 87 (1959).

tances in feet instead of "blocks." Defendant did not show that surprise, inconvenience, deception or prejudice would have resulted from a reopening of proofs. Therefore, the court held that the trial court, in refusing to allow plaintiff leave to reopen, abused its discretion.

Relief from Judgment or Decree: The question whether a judgment entered against a garnishee defendant who had filed a disclosure but no answer denying liability, was a default judgment, was raised in *Crew v. Zabowsky*.[144] Defendant moved to vacate the judgment more than five months after it was entered. If it were a default judgment Court Rule 28 would control and defendant's motion would have been filed too late. The court held that the judgment entered on defendant's disclosure was not entered by default, and upheld the court's order vacating the judgment. The court in this case carefully limited the definition of a judgment by default.

Some doubt was cast on the important recent case of *White v. Sadler*[145] in *Moody v. Carnegie*.[146] There, the Supreme Court, in a four to four decision, affirmed the granting of a motion for a rehearing in an equity action. The motion was filed more than four months after entry of the decree[147] and was based mainly on the failure of plaintiff's attorney to apprise her of the imminence of trial, so that she was not present when the trial took place. The decision calling for affirmance ruled that the neglect of plaintiff's attorney worked a fraud upon plaintiff and upon the court by depriving plaintiff "of her rights to have her cause of action properly presented to the court through her own testimony." In the dissent, Justice Black vigorously argued that this motion should not have been granted on this ground, for two reasons: (1) Absent fraud on the part of the opposite party, the misdeeds of plaintiff's own attorney should not be grounds for upsetting a decree in defendant's favor, and (2) nothing that amounted to fraud was shown. Plaintiff's remedy, if any, he asserted, was against her attorney; the decree itself should not have been disturbed.

This decision, insofar as it rests on the alleged fraud of plaintiff's own attorney (and not on an additional ground, the failure of defendants to observe certain notice requirements), is open to question. In addition to the unfairness of finding an attorney guilty of

144. 357 Mich. 606, 99 N.W.2d 542 (1959).

145. 350 Mich. 511, 87 N.W.2d 192 (1957), discussed in King & Wunsch, Civil Procedure, 1958 Survey of Mich. Law, 5 Wayne L. Rev. 184 (1958). Accord Melvin v. Reading, 351 Mich. 332, 88 N.W.2d 620 (1958).

146. 356 Mich. 434, 97 N.W.2d 46 (1959).

147. See M.C.R. 48, which limits the time within which a rehearing may be applied for to a maximum of four months. Fraud is one of the five exceptions to this rule. See Honigman, Mich. Court Rules Annot. 503 (1949).

negligence or fraud when he is not present to defend himself,[148] it opens Michigan decrees and judgments to attack on questionable grounds long after the established time for direct attack has expired. Thus, in a suit on a judgment the defendant is encouraged to hunt into every corner to find (if not to fabricate) something tantamount to the affirming judges' loose definition of "fraud" on the part of his own attorney as a means of resisting the judgment. The holder of the judgment is then required to defend his rights by refuting matters which are not within his competence to know.[149]

Appellate Review: In *Kennedy v. Kennedy*,[150] a four to three decision, the Supreme Court excavated a potential pitfall for attorneys. Defendant entered a special appearance in a divorce action and filed a motion to quash service. When the chancellor denied his motion he did not enter a general appearance, but instead sought leave to appeal from the order denying his motion. Before the Supreme Court ruled on his petition for leave to appeal he was defaulted by the plaintiff. The Supreme Court then denied the appeal, and defendant filed a general appearance in the lower court and a motion to set aside the default. This motion was denied and an absolute divorce, pro confesso, was entered for the plaintiff. On appeal from the decree the defendant argued, and a majority of the justices agreed, that the chancellor had abused his discretion by refusing to set aside the default. They reasoned that defendant was only exercising his right to contest the court's jurisdiction before going to a trial on the merits in order to save time and money; he was not trying improperly to evade the court's jurisdiction. The minority, relying on Court Rule 62, sections 5 and 6, pointed out that only the *granting* of leave to appeal from an interlocutory order stays proceedings in the court below; here, the defendant had been defaulted before the Supreme Court had acted on his petition to appeal. Furthermore, it was open to the defendant to have requested, under Court Rule 18, section 4, an extension of the time within which to file a general appearance. This he did not do. Because three of the justices (Black, Edwards and Voelker) joined in the minority, and because Justice Smith was not sitting, the minority opinion may control in some future case. Thus, a wise course of action will be to secure an extension of the

148. See King & Wunsch, supra note 145.

149. One section of the proposed rules would seem to allow relief from a judgment for fraud only when it is the fraud of an "adverse party." Proposed rule 50.28.3(3). Another section, however, would permit relief from a decree for "any other reason justifying relief from the operation of the judgment." Proposed rule 50.28.3(6). This last section would seem to permit the courts to apply the broad rule of Moody v. Carnegie.

150. 358 Mich. 542, 100 N.W.2d 481 (1960).

time within which to enter a general appearance before seeking leave to appeal from an appealable interlocutory order.[151]

Klopfenstein v. Rohlfing[152] resolved a conflict between two inconsistent statutes. The first provides that ". . . all causes in which no action has been taken or progress made for more than 1 year . . . shall be dismissed by the court for want of prosecution."[153] The second allows a longer period prior to dismissal: "If an appeal shall have been or shall be on the no progress docket of the circuit court for a period of two years, on motion the appeal shall be dismissed. . . ."[154] The question was, which of these two statutes governed an appeal from the Municipal Court of Grand Rapids to the circuit court which had been on the docket for more than one year but less than two. The court noted that if the first statute governed, no appeal could remain on the no progress docket for two years. Therefore, it held that the longer statute is to apply to appeals from the lower court to the circuit court; the shorter statute, to cases originally commenced in the circuit court.

In a few decisions during the Survey period the court laid down some preferences as to the contents of the appendix filed on appeal:[155] In light of the specific requirement of the court rules that appellant include an unbiased statement of facts in his appendix, the court, in *City of Madison Heights v. Manto*,[156] served notice that it looks with jaundiced eye on parties who file competing statements which require the court laboriously to pick out the inaccuracies and supply the insufficiencies by comparing the appendices of both parties and the record. Perhaps the adversary system is too far ingrained ever to permit such desired objectivity on the part of counsel, but wise lawyers will not ignore the court's admonition. In *Karvonen v. Stankovich*[157] testimony which was taken before appellant became a party to the workmen's compensation proceeding was included in the appendix to appellee's brief. While not grounds for reversal, the Supreme Court expressly disapproved "the practice of including in an appendix . . . " such testimony.[158]

151. Under the proposed rules, whether or not proceedings are stayed hinges on the filing of an appeal bond, not on the granting of leave to appeal. See proposed rule 80.8.

152. 356 Mich. 197, 96 N.W.2d 782 (1959).

153. C.L. § 618.2, M.S.A. § 27.982.

154. C.L. § 678.21a, M.S.A. § 27.3501(1).

155. See generally M.C.R. 67, 68.

156. 359 Mich. 244, 102 N.W.2d 182 (1960). Cf. Masella v. Bisson, 359 Mich. 512, 102 N.W.2d 468 (1960) (The court refused to strike irrelevancies and other improper matter from the statement of facts, but merely disregarded them).

157. 357 Mich. 96, 97 N.W.2d 715 (1959).

158. Id. at 102, 97 N.W.2d at 719.

Miscellany: In *In re Ziegler's Petition*[159] the court warned "that a pre-trial brief should never be presented to the tribunal who makes the final decision unless under supervision and with the consent of the presiding judicial officer."[160] Nonetheless, it was not grounds for reversal for claimant, in an eminent domain proceeding, to mail a brief to the commissioners before the hearing without presenting a copy to the petitioner on the same day (a few days before the hearing), where the brief did not misstate the law, where its "tone" was not prejudicial, and where the opposite party had a full opportunity to state its position.

An amendment to the garnishment statute which permits the court to discontinue proceedings against the garnishee at any time prior to judgment for good cause shown,[161] was upheld as constitutional against plaintiff's claim that the amendment constituted an improper delegation of legislative power to the judiciary, in *Johnson v. Kramer Bros. Freight Lines, Inc.*[162] In this case the court had dismissed the garnishment action when the original defendant established, by affidavits and financial statements, that its assets were sufficient to satisfy any judgment. The decision is a sound one, since it effectively permits the court to restrict the use of garnishment to cases where it will protect the plaintiff against a defendant tottering on the brink of financial disaster, or whose liquidity is subject to question, but prevents it from being used as a method of harassing or embarrassing an otherwise solvent defendant.[163]

A judgment in a replevin suit may not be overturned simply because the plaintiff, who secured a bond, gave it to the deputy sheriff, and sent notice of the amount of the bond and the names of the sureties to the clerk of court and defendant's attorney, did not also file the bond with the court. In the same case, *Van Dyk v. Utter,*[164] the court also held that replevin will lie even though the defendant has turned over a portion of the plaintiff's property to another. Plaintiff is not required to bring a separate assumpsit action at law in order to secure his money judgment for the transferred property.[165]

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159. 357 Mich. 20, 97 N.W.2d 748 (1959).

160. Id. at 25, 26, 97 N.W.2d at 750, 751.

161. C.L. § 628.41, M.S.A. § 27.1895.

162. 357 Mich. 254, 98 N.W.2d 586 (1959).

163. The proposed rules with respect to garnishment "are derived from existing law" but contain "[s]ubstantial changes in form and organization . . . and a logical rearrangement of location in rules and statutes." See proposed rules, p. 223 ff.

164. 357 Mich. 329, 98 N.W.2d 540 (1959).

165. Cf. Multiplex Concrete Mach. Co. v. Saxer, 310 Mich. 243, 17 N.W.2d 169 (1945); Brewster Loud Lumber Co. v. General Builders' Supply Co., 233 Mich. 633, 208 N.W. 28 (1926).

CONCLUSION

Even the foregoing brief discussion of cases decided just within the period of one year reveals several areas where the proposed court rules would have a profound effect on Michigan practice and procedure. Without repeating in detail each such area, it may be concluded that these rules might achieve the following general objectives: First, they would tend to make it more difficult for a lawyer to waive his client's rights by inadvertence, or even outright stupidity. Secondly, related rules and statutes now spread throughout the rule and statute books would in many areas be consolidated into concise, almost comprehensible, statements located in easy-to-find sections. Thirdly, they would eliminate from the statutes matters which are inherently and by constitutional mandate the prerogative of the judiciary, and relocate them in the rules. Fourthly, they would provide satisfactory and simple solutions to problems which have been troubling our courts and the bar for years. And lastly, they would eliminate many procedural niceties which serve no useful purpose in the orderly administration of justice. A responsible bar cannot afford to ignore these reforms.