CIVIL PROCEDURE

RICHARD S. MILLER† AND ERNEST C. WUNSCH‡

THE passage of the Revised Judicature Act, a major revision and reordering of the oft-amended and maze like provisions of the time-worn Judicature Act of 1915, was clearly the event of greatest moment to the Michigan Bar during the past year. This important new set of laws does not become effective until January 1, 1963. In the meantime, the Michigan Supreme Court is hard at work examining and redrafting the rules recommendations of the Joint Committee on Michigan Procedural Revision in order to formulate a body of court rules which will become effective at the same time.[1]

Because of limitations of space, this article is not the place for an extended examination of the new act and all its procedural ramifications. This can better be left to subsequent articles, symposia and treatises, some of which are already in progress. Suffice it, then, merely to mention the major procedural changes: (1) The RJA is worded to accomodate a procedural merger of law and equity should the Supreme Court see fit to take this step in the revised Rules;[2] (2) Jurisdiction over non-residents has been expanded to the due process limits of the Fourteenth Amendment to the United States Constitution;[3] (3) Formerly wide-spread provisions relating to the selection of jurors have been drawn together into one chapter;[4] (4) Traditional limitations on the place of service of process in circuit court actions have been eliminated and venue provisions have been changed;[5] (5) The writ of capias ad respondendum has been abolished and civil actions may not be commenced by arrest;[6] (6) A suit is to be commenced "by filing a complaint with the court" as in the Federal Rules of Civil Procedure;[7] (7) Service of process requirements have been simplified;[8] (8) Actions for trespass, for injunctions

† Associate Professor of Law, Wayne State University, member of the Michigan and Massachusetts Bars.

‡ Lecturer in Law, Wayne State University, President of the State Bar of Michigan, member of the Bar of the Supreme Court of the United States.

1. The foundation of the new rules will undoubtedly be the proposed court rules set forth in 3 Final Report, Joint Committee on Michigan Procedural Revision (1960).

2. If law and equity are to be merged, the merger must be effectuated through the new court rules. The Revised Judicature Act (RJA) merely lays the groundwork by eliminating separate references to "Law" and "Chancery" and by providing that all civil actions are commenced by filing a complaint. (RJA, § 1901.)

3. RJA, ch. 7.

4. RJA, ch. 12.

5. RJA, ch. 16.

6. RJA, § 1815.

7. RJA, § 1901.

8. RJA, ch. 19. It is interesting to note that this chapter in the Revised Judica-

against trespass, for waste and for injunctions against waste have been consolidated into one statutory action;[9] (9) A simplified action for claim and delivery has been substituted for the present action of replevin;[10] (10) The actions of ejectment, to remove a cloud on title, to quiet title and the action for restitution of land have been consolidated into one action;[11] (11) Jurisdiction has been expressly granted to the circuit court to foreclose land contracts as well as mortgages;[12] (12) The statutes pertaining to attachment and garnishment have been reorganized;[13] (13) Provisions dealing with habeas corpus,[14] mandamus,[15] and quo warranto[16] have been extensively revised; (14) Confusing sections dealing with collection of penalties, fines and forfeited recognizances have been completely rewritten and condensed;[17] (15) There has been a major revision of the rules relating to limitations of actions, including changes in the tolling provision;[18] (16) Many sections relating to enforcement of judgments have been consolidated, with minor changes;[19] (17) Provisions for civil arrest have been narrowly limited;[20] (18) Proceedings supplementary to judgment have been improved and expanded, making it easier to collect from recalcitrant judgment debtors.[21]

OTHER STATUTES

During the Survey period the legislature also passed a few isolated acts dealing with practice and procedure. While these pale into insignificance along side the RJA, the more important ones are worth passing mention, since some of them are not repealed by the

ture Act was intended by the Joint Committee on Michigan Procedural Revision to be incorporated in the court rules, not the RJA. In its original form it included provision for substituted service on absent resident defendants, but in its journey from the proposed court rules into the RJA the substituted service provisions were lost by the wayside. The unfortunate result is that individual residents must be personally served with process, while in some cases substituted service will suffice to acquire personal jurisdiction over non-residents. The resulting discrimination against non-residents may create constitutional problems. It is hoped that this portion of the RJA will be amended to codify the Committee's final recommendations unchanged.

9. RJA, § 2919.
10. RJA, § 2920.
11. RJA, § 2932.
12. RJA, § 3101.
13. RJA, ch. 40.
14. RJA, ch. 43.
15. RJA, ch. 44.
16. RJA, ch. 45.
17. RJA, ch. 48.
18. RJA, ch. 58.
19. RJA, ch. 60.
20. RJA, §§ 6075-6086.
21. RJA, ch. 61.

new act, and those that are will remain in effect until January 1, 1963.

A recent amendment to the section of the garnishment statute which sets down the garnishee's liability limits that liability to double the amount stated in the plaintiff's affidavit to be owing him from the principal defendant.[22] This salutary provision, in effect, permits the garnishee to pay the principal defendant all debts in excess of twice the stated amount without fear of incurring liability to the plaintiff. Thus, a plaintiff will find it difficult to tie up a very large bank account for a very small debt.

A new act has been passed defining the jurisdiction, powers and procedures of justice courts or municipal courts in cities with populations of 20,000 to 30,000 persons which lie in two or more counties. Such courts are given jurisdiction to hear causes arising in any such county as if the city were located entirely in that county. Civil appeals from these courts may be taken to the circuit court of any county in which the city lies, "and the return . . . on such appeal shall be filed in the office of the clerk of the county to which appeal is taken." For the purpose of determining venue in civil actions before such courts, for the service of process out of such courts and for service on juries in any such court, residents of these cities shall be deemed also to reside in all counties in which their city is located.[23]

An important provision has been added to two acts relating to justice courts and common pleas courts which should go a long way to protect small debtors from being sued at inconvenient locations away from their homes. The new statutes grant to these courts exclusive jurisdiction of all civil cases where the defendant resides in the city where the court is located at the time the action is commenced unless the defendant is actually served with process issuing out of another justice court or municipal court while he is in the city where such other court is established, or unless the case is brought in a court of record (such as the circuit court) with concurrent jurisdiction.[24]

In appeals from justice courts to circuit courts, it is no longer necessary for the appellant to file a bond unless he desires a stay of proceedings. This would appear to liberalize the former practice and thus make it easier for losing parties, especially impecunious defendants, to appeal. On the other hand, it removes the appellee's

---

22. Mich. Pub. Acts 1960, No. 59, Mich. Stat. Ann. § 27.1856.

23. Mich. Pub. Acts 1961, No. 42, Mich. Stat. Ann. §§ 27.3825(1)-.3825(5).

24. Mich. Pub. Acts 1961, No. 98, Mich. Stat. Ann. § 27.3651(1) (Common Pleas); Mich. Pub. Acts 1961, No. 99, Mich. Stat. Ann. § 27.3188, § 7.

assurance that, should he be forced to defend an appeal and then win, his judgment and costs will be covered.[25]

The fee schedule of justices of the peace in civil cases has been changed so that the justice gets a lump sum for each case—four dollars if no trial takes place, six dollars if there is a trial, and an additional two dollars for issuance of a writ of garnishment—instead of a few cents for each petty operation in which he engages. If this does not save litigants money it will at least simplify bookkeeping requirements.[26]

A recent statutory amendment permits substituted service on individuals operating under an assumed name and individuals operating as a partnership by leaving process during regular office hours at the office of such individual with any person in charge or by serving an officer or agent.[27] Formerly, the Judicature Act did not authorize substituted service on such individuals or on co-partnerships.[28]

Lastly, the jurisdiction of municipal courts has been changed to make the jurisdictional amount which formerly was merely optional the new standard for all such courts. Thus, these courts now have concurrent jurisdiction in all civil actions where the debt or damages does not exceed $1,000 and in all replevin actions where the value of the property does not exceed $1,000.[29]

RECENT DECISIONS

During the Survey period procedural matters were discussed in more than ninety opinions of the Michigan Supreme Court. Many of these, however, were merely reaffirmations of accepted principles. The cases which are discussed in the remainder of this article, therefore, have been selected because they appear to be fairly significant or interesting.

Jurisdiction and Service of Process:[30] In 1958 the Michigan Supreme Court held that the court of chancery has inherent power even without an applicable statute to decide questions of the custody of children.[31] During the year past the same case returned to the Su-

25. Mich. Pub. Acts 1961, No. 103, Mich. Stat. Ann. § 27.3483.
26. Mich. Pub. Acts 1961, No. 134, Mich. Stat. Ann. § 27.3431.
27. Mich. Pub. Acts 1961, No. 157, Mich. Stat. Ann. § 27.759.
28. See Defoe v. Wayne Circuit Judge, 252 Mich. 337, 233 N.W. 335 (1930).
29. Mich. Pub. Acts 1961, No. 196, Mich. Stat. Ann. § 27.3937 (22).
30. Schoener v. Continental Motors Corp., 362 Mich. 303, 106 N.W.2d 774 (1961), an important case dealing with jurisdiction over intangible property for purposes of escheat is discussed in the Conflict of Laws article, this Survey. Couyoumjian v. Anspach, 360 Mich. 371, 103 N.W.2d 587 (1960), which involves residence requirements for divorce, is treated in the Family Law article, this Survey.
31. Sovereign v. Sovereign, 354 Mich. 65, 92 N.W.2d 585 (1958).

preme Court raising the question of the court's authority, absent a statute, to award allowances and attorney's fees to the mother in such a custody hearing. The court held that the power to award reasonable expenses and attorney's fees is incidental to its jurisdiction to decide the matter of custody.[32]

Two labor law cases raised the interesting question whether a mere conclusionary allegation of lack of subject matter jurisdiction in defendant's answer, unaccompanied by supporting facts or evidence at the trial, throws a burden on the court to independently decide this jurisdictional question. In both cases the defendants alleged in their answers that the state courts were without jurisdiction to hear the matter because of federal preemption. In the first case, *Haenlein v. Saginaw Bldg. Trades Council*,[33] the defendant did not appear to defend after answering. In the second, *Andrus v. Local 69*,[34] a trial took place but the appendix contained no proofs on the matter of preemption. In both cases the court refused to consider the jurisdictional question, affirming plaintiff's decree in *Haenlein* and dismissing the defendant's appeal in *Andrus*. Perhaps the court is correct in refusing to take upon itself the task of determining whether the particular suit is one exclusively within the jurisdiction of the NLRB, particularly where the defendant offers no assistance in making the determination. However, such a refusal leaves in its wake a question of the effect of the affirmative decree. Lack of jurisdiction over the subject matter ordinarily means lack of power. Unlike the similar problem of personal jurisdiction, failure to directly attack a decree rendered without subject matter jurisdiction will not necessarily estop the defendant from subsequently attacking the decree collaterally, especially where there is a strong policy against taking jurisdiction.[35] If defendant ignores the decree, he may again be able to raise the jurisdictional question when he is attached for contempt, or enforcement of the decree may be enjoined by a federal court.[36] Perhaps, then, it would be better for the court to decide the jurisdictional issue once and for all in the first proceeding in which the question is raised,[37] even though it is not raised in a manner entirely satisfactory to the court, since to do so might prevent the "yo-yo" effect of dismissing one appeal and having the same question raised, to the great inconvenience of the court and the winning litigant, in a subsequent proceeding.

32. Sovereign v. Sovereign, 361 Mich. 528, 106 N.W.2d 146 (1960).
33. 361 Mich. 263, 105 N.W.2d 166 (1960).
34. 362 Mich. 635, 108 N.W.2d 31 (1961).
35. Restatement, Judgments § 10 (1942).
36. See 62 Stat. 968 (1948), 28 U.S.C. 2283 (1948).
37. Cf. Fed. R. Civ. P. 12(h).

The ghost-like statute of limitations which, having been laid to rest by timely commencement of suit, reappears to haunt litigants when they later seek alias summonses, prankishly caused the dismissal of at least two apparently valid causes of action in *Lacney v. Wells*[38] and *Hammel v. Bettison*.[39] In both cases the statute of limitations would have expired prior to the return date of the summons if the suit had not already been commenced.[40] In *Lacney* the sheriff did not return the unserved summons until sixty-five days after the return date, and then only after the court suggested to counsel that an alias summons would not be issued until the original was returned. In *Hammel* the sheriff promptly returned the summonses endorsed "not found" the day after the last day for service. Counsel found them on his desk when he returned from a tour of active duty in the Army Reserve ten days later but waited about three more weeks before filing petitions for aliases. In both cases the court held that the failure to exercise diligence to secure aliases immediately after the return dates constituted a break in the continuity of the suits which, therefore, were barred by the statute of limitations.[41]

The RJA should remove at least some of the uncertainty which has caused the unhappy results in *Lacney* and *Hammel*. It provides for a flat ninety days after process is "placed in the hands of an officer for immediate service" during which the statute of limitations will be tolled. After this period expires the time will again commence to run.[42]

Pleadings, Amendments and Remedies: That there is vitality in the rules which require declarations to contain a statement "of the facts on which the pleader relies"[43] and "such specific allegations as will reasonably inform the defendant of the nature of the cause he is called upon to defend"[44] was illustrated in the case of *Scott v. Cleveland*.[45] Plaintiff's declaration alleged in subtance that one defendant had negligently run into the rear end of the cab in which plaintiff was riding and that defendant cab driver had also been negligent in stopping too suddenly. This view of the accident was

38. 362 Mich. 605, 107 N.W.2d 883 (1961).

39. 362 Mich. 396, 107 N.W.2d 887 (1961).

40. In Lacney v. Wells the court remanded the case to determine whether the statute of limitations had been sufficiently tolled by defendant's absence from the state to overcome the late application for an alias.

41. See the leading case of Yeager v. Mellus, 328 Mich. 243, 43 N.W.2d 836 (1950), and Home Savings Bank v. Young, 295 Mich. 725, 295 N.W. 474 (1940). Also see M.C.R. 13, §§ 1 & 2 and comment in Honigman, Mich. Court Rules Annot. 20 (Supp. 1959).

42. RJA, § 5856(3).

43. M.C.R. 17, § 1.

44. M.C.R. 19, § 1.

45. 360 Mich. 322, 103 N.W.2d 631 (1960).

also incorporated in the pre-trial statement of plaintiff's claim. At the trial, however, plaintiff attempted in his opening statement to state that the accident occurred when defendant cab driver swerved sharply from one lane into another in front of the second defendant. Over defendants' objections the trial court permitted the plaintiff to amend his pleadings to conform to his new theory, but gave the defendants no opportunity either to formally deny the amended declaration or to prepare a defense thereto. On appeal from a judgment for the plaintiff the Supreme Court reversed and remanded for a new trial, holding that general allegations of negligence or recklessness contained in plaintiff's original declaration would not support proof of the sudden swerving, and that the trial court abused its discretion by permitting plaintiff to change from one theory to another without giving defendants a reasonable opportunity to prepare a defense to the new theory.[46]

In the important case of *Wells v. Detroit News, Inc.*[47] plaintiff sued The Detroit News, Inc. to recover retirement benefits only to discover to his dismay after the statute of limitations had expired that he should have sued The Detroit News or The Evening News Association, a different corporation. He then sought leave to amend by changing the name of the defendant, but his motion was denied by the trial judge. On appeal, the Supreme Court reversed, treating the case not as a substitution of parties, which would be beyond the court's power, but merely as a case of misnomer where amendment is permitted "for the furtherance of justice."[48] The court based its decision on the fact that the substituted defendant had from the outset actual notice of the claim, so that the policy of the statute of limitiations—to prevent the bringing of stale claims—was not violated; that service was made upon a person who represented both corporations at the address of both corporations; and that both corporations were engaged in "the same general business, have most of the same officers, and are represented by the same law firm." Justices Black and Kelley dissented, arguing that this was not merely a case of misnomer, but that the wrong defendant had in fact been sued and the right defendant was no longer suable. Perhaps the

46. Compare Parker v. Port Huron Hosp., 361 Mich. 1, 105 N.W.2d 1 (1960), where amendment was held to be proper where it creates no new cause of action, no surprise is claimed and no prejudice to the defendant appears, and Waltanen v. Wiitala, 361 Mich. 504, 105 N.W.2d 400 (1960) where the Supreme Court sustained the direction of a verdict for the defendant on the grounds of assumption of risk even though the defendant did not plead it and no mention of it appears in the pre-trial statement. Apparently, however, the plaintiff failed to object to the directed verdict on this ground. If he had, the principal case and Waltanen would be irreconcilable.

47. 360 Mich. 634, 104 N.W.2d 767 (1960).

48. On authority of Mich. Comp. Laws § 616.1 (1948), Mich. Stat. Ann. § 27.838 (1938) and M.C.R. 25.

dissenters are technically correct, but one's heart, if not one's head, goes out to the majority who must have tacitly recognized that in a complex society which provides a variety of tantalizing benefits for multiple incorporation of activities which might otherwise be carried on by a single entity, it sometimes takes a Houdini to figure out which corporation is doing what to whom.

For those who doubt that defective pleadings can result in dismissal with prejudice, a glance at *Stann v. Ford Motor Co.*[49] should prove illuminating. There the plaintiff alleged in general terms that the defendant hospital failed to exercise reasonable prudence in caring for the plaintiff and that the failure resulted in his injuries. "The only specific breach of duty the hospital was charged with having violated was: 'To employ competently trained nurses, physicians, surgeons, interns and other employees.'" No other facts alleging a breach of duty were alleged. The trial court sustained a motion to dismiss and the Supreme Court affirmed. While there is no question that these pleadings could not have sustained a judgment for the plaintiff, the better view, suggested by Mr. Justice Black in his dissent, would have been to order more definite pleadings, rather than to dismiss. As the case now stands, one cannot tell whether the result followed from inadequate facts or from inadequate draftsmanship of the pleadings. In this enlightened era, more than one hundred years after Dickens' *Bleak House*, loss of rights for purely technical reasons should be avoided whenever strong policy does not compel dismissal.

Other cases dealing with pleading, amendments and remedies held (1) that notwithstanding Court Rule 17, section 10,[50] defendant is not bound by apparent admissions in his first sworn answer to plaintiff's bill where his amended sworn answer refutes such admissions;[51] (2) that in a suit against two former partners based on a written lease signed by one, the plaintiff may not establish liability under the common counts against the other;[52] (3) that vendors in a land contract who earlier commenced proceedings before a circuit court commissioner to recover possession by virtue of a forfeiture had elected their remedy and, therefore, would not be permitted to file a cross-bill seeking the inconsistent remedy of foreclosure to vendee's suit to rescind the land contract for fraud;[53] and (4) that it is an

49. 361 Mich. 225, 105 N.W.2d 20 (1960).

50. "Any statement of facts set forth in any pleading shall be treated as an admission by the pleader and need not be proved by the opposite party."

51. Jackson Broadcast & Tel. Corp. v. State Bd. of Agric., 360 Mich. 481, 104 N.W.2d 350 (1960). Accord, Honigman, Mich. Court Rules Annot. 112 (1949).

52. LaHood v. Wieladt, 361 Mich. 99, 105 N.W.2d 39 (1960). See Geistert v. Scheffler, 316 Mich. 325, 25 N.W.2d 241 (1946).

53. Welling v. Dave's Cut Rate Drugs, Inc., 362 Mich. 389, 107 N.W.2d 798 (1961).

abuse of the trial judge's discretion to permit plaintiffs to amend their declaration after proofs are closed to conform to a theory never raised or argued at the trial, and on which the judge intends to ground his decision for the plaintiff, without first offering the defendants an opportunity to "answer, reopen proofs, and brief and argue the issue prior to decision."[54]

Res Judicata and Estoppel: Two recent cases unearthed a booby trap for attorneys: The winning facts in the main action may become the basis of defeat in subsequent garnishment proceedings. In *Rodgers v. Mikolajczak*[55] plaintiff, suing to recover for personal injuries suffered while a passenger in a truck, was held in the original action to be an "acting employee" of the defendant driver and not a "guest passenger." He recovered judgment and did not appeal from this determination. In this garnishment suit against the principal defendant's insurer, however, the former determination was held binding on the plaintiff, with the result that the garnishee insurance company was exempted from liability to the principal defendant's estate since the policy did not cover the death of insured's employees. A similar result was reached in *Burgess v. Holder*[56] where the plaintiff successfully established that she was a passenger for hire in the first action, but lost to the garnishee insurer in the second on the ground that the policy excluded liability for injury to paying passengers. The application of estoppel in such a situation is fraught with dangers, particularly where the winning determination in the principal suit is not exactly the same as the losing determination in the garnishment action. The facts which suffice to avoid the guest passenger statute may differ both in quality and in amount from the facts necessary to activate the exclusionary clause of the insurance policy. Furthermore, even assuming that the issues in the two actions are the same, it does not follow that all the issues decided in the first action are binding on the parties to the second. Collateral estoppel only applies where the two actions are between the same parties or their privies. In strict theory, the insurance company is not a privy of the defendant.[57] Nor does the fact that the garnishment action is only ancillary to the main suit,[58] in the sense that it depends upon the judgment in the main suit and serves only to help enforce that judgment, help to answer the question whether the parties to

54. Peoples Savings Bank v. Stoddard, 359 Mich. 297, 102 N.W.2d 777, 791 (1960). Strictly speaking, however, this part of the decision was dictum, since the decision for the plaintiff was affirmed on other grounds.

55. 361 Mich. 61, 105 N.W.2d 25 (1960).

56. 362 Mich. 53, 106 N.W.2d 379 (1960).

57. See Restatement, Judgments § 84, comment d, illustration 17 (1942).

58. Rodgers v. Mikolajczak, 361 Mich. 61, 67, 105 N.W.2d 25, 28 (1960).

the garnishment suit should be bound by all the issues decided in the principal suit. This characterization sheds no light on the application of the doctrine of res judicata because it does not involve the policies underlying that doctrine. It is respectfully suggested, therefore, that unless the insurance company actually controls the defense of the main suit and the plaintiff has notice of such control, the court should not rely on res judicata to prevent the plaintiff from taking inconsistent positions in the two suits.[59] Rather, the plaintiff's attempt to change horses in mid stream can be discouraged merely by admitting his allegations and testimony in suit one as admissions in suit two.

City of Madison Heights v. Drainage Board[60] also involved an interesting application of res judicata. In an earlier proceeding the City of Madison Heights intervened as a defendant on the side of the Drainage Board in a suit brought by other towns and cities to enjoin the financing and construction of the Twelve Town Drain System. In that suit the court had approved the formula for the apportionment of costs among the towns involved. Subsequently, plaintiff City brought suit, this time as an adversary of the Drainage Board, objecting to the application of the earlier approved formula. The court held that the plaintiff, as an intervenor in the earlier suit, albeit an inactive one, was bound by that formula. The fact that it had filed no formal pleadings in the earlier suit was held to be irrelevant. The interesting question, decided but not fully discussed in the opinion, is whether one defendant in an action is bound by facts determined in that action in a subsequent suit brought by it against its former codefendant. It may be suggested that in such a case it should make a difference whether the parties were in fact adversaries, even though co-parties, in the first action.[61] When, as in the case at bar, they were not contesting the validity of the formula as between themselves, they should not necessarily be bound by collateral estoppel as to the validity of the formula in a subsequent suit between themselves. That the court will focus a jaundiced eye on parties who take inconsistent positions in successive suits is understandable; and they are certainly free to take note of admissions made in the first suit. But to hold that it is res judicata which *binds* the parties as to matters which were never litigated *between* them or their privies and which they had no reasonable opportunity to litigate, extends undue

59. This is the position of the Restatement of Judgments, supra note 57. Of course, even if the insurance company does control the principal suit and the plaintiff does have notice of its control, the plaintiff should not be estopped unless the issues in the two suits are the same.

60. 361 Mich. 522, 106 N.W.2d 126 (1960).

61. See Restatement, Judgments § 82 (1942), and also see, by way of analogy, Id., § 106, comments b, c and f at pages 505, 506, 509, respectively.

dignity to non-adversary proceedings. In fairness to the court, however, it must be noted that the result could have been justified on the ground that, being a proceeding in equity, the City of Madison Heights had the opportunity in the first proceeding to seek to uphold the validity of the drain system on other grounds and at the same time contest the apportionment formula. Having had this chance to litigate this issue as against the Drainage Board, it is now bound by res judicata.

In *Henry v. Henry*[62] the court agreed with a trial judge who treated his denial of a pre-trial motion to dismiss plaintiff's bill for a declaratory judgment on the grounds that there was no actual controversy as res judicata at the trial which followed. This usage of the term res judicata is most unfortunate; the court's order denying the motion should not conclusively bind the parties at the same trial.[63] Compare, for example, the ordinary denial of a motion to dismiss for failure to state a cause of action. Traditionally, the defendant has had the right to reassert his objection to the declaration at or after the trial.[64] The most that can be said for such a ruling is that it is the law of the case unless and until the judge is persuaded to change his mind. If we are not to prevent judges from correcting their own errors prior to judgment, the losing party should not be estopped from again raising the issue at the trial. This is especially true where, as here, the point is jurisdictional.

In another important decision the court held that where the dismissal of an action is based on several possible grounds, only one of which would bar a subsequent suit, and it is not clear from the judge's opinion which of these grounds caused the dismissal, in a later suit for the same cause of action between the same parties the burden is on the defendant who asserts the defense of res judicata to prove that the original suit was dismissed for *the* reason which would bar the second suit.[65]

Motions: It is a well accepted principle that disputed material questions of fact are not to be decided by the judge on motion for summary judgment, especially where a jury trial has rightfully been

62. 362 Mich. 85, 106 N.W.2d 570 (1960).

63. The so-called res judicata effect of the dismissal of the motion may have been based on an alleged stipulation between the parties that the dismissal should be with prejudice in order that a judge different from the one who decided the motion might be eligible to hear the case under local rule 7, § 1 of the Wayne County Court Rules. See Appellee's Brief, pp. 1-4.

64. See Scott, Fundamentals of Procedure in Actions at Law, 149 ff. (1922).

65. E & G Finance Co. v. Simms, 362 Mich. 592, 107 N.W.2d 911 (1961). Accord, Restatement, Judgments § 49, comment c (1942). The court rejected the view which presumes in such a case that all issues were decided in favor of the defendant.

claimed.[66] The application of this salutary rule, however, occasionally brings the justices to loggerheads. Thus, in *City of Detroit v. Eisele*[67] the majority affirmed the granting of a summary judgment for defendant on the ground that plaintiff's declaration and counteraffidavit to defendant's motion were insufficient as a matter of law to raise a factual issue. Justices Dethmers, Kavanagh and Black, however, would have reversed on the ground that the defendant's affidavit in support of summary judgment was "no more than an allegation of mixed fact and law . . ." and was, therefore, insufficient to sustain the judgment. Thus, the majority places the burden of establishing the existence of a material issue of fact on the party against whom the motion is brought, while the dissenters would cast this burden on the movant.

Jackson Broadcasting and Tel. Corp. v. State Board of Agric.[68] is an indication of how far the modern motion to dismiss differs from the common law demurrer. Defendant in its answer moved to dismiss plaintiff's bill for an injunction on the ground that it did not state a cause of action. An affidavit was filed in support of the motion. In granting the motion, the circuit judge considered not only the bill of complaint, which on its face set forth a cause of action, but also defendant's answer and affidavit. The Supreme Court affirmed, holding that the motion to dismiss could be treated as a motion for judgment on the pleadings—*i.e.*, all the pleadings could be considered to determine whether the movant was entitled to judgment as a matter of law. It should also be noted that the affidavit was held to be properly considered even though, as dissenting Justices Black and Kavanagh point out, this motion is not one of those enumerated in Court Rule 18, section 1, wherein it is expressly provided that supporting affidavits may be used.

At common law a plaintiff who sensed impending defeat during the course of trial could voluntarily nonsuit himself at any time before verdict without relinquishing his right to sue again on the same cause of action. That this privilege has been substantially modified by Court Rule 38 was reaffirmed in *Danziger v. Village of Bingham Farms*.[69] At the trial plaintiff orally requested and got a nonsuit after he had rested his case when the trial judge indicated he was about to grant defendant's motion to dismiss. On appeal the Supreme Court reversed, holding that Court Rule 38 applies to nonsuits as well as

66. M.C.R. 30. See Honigman, Mich. Court Rules Annot. 301 (1949).
67. 362 Mich. 684, 108 N.W.2d 763 (1961).
68. 360 Mich. 481, 104 N.W.2d 350 (1960).
69. 362 Mich. 629, 107 N.W.2d 786 (1961). See Pear v. Graham, 258 Mich. 161, 241 N.W. 865 (1932).

to discontinuances and that, if the motion is filed after the answer, it must be in writing supported by an affidavit.[70]

Limitations of Actions: Several important cases concerning limitations of actions were handed down during the Survey period.

In *Hammel v. Bettison*,[71] a case of first impression, the Supreme Court unanimously adopted the rule that the absence of the defendant from the state shall not suspend the running of the statute of limitations where the defendant was amenable to substituted service during the period of his absence.[72]

In *Baatz v. Smith*[73] the court, Justices Smith, Kavanagh and Souris vigorously dissenting, held that an action in assumpsit against a hotel to recover for personal injuries suffered while a paying guest was to be treated as an action for "injuries to person" and not for breach of contract. Therefore, the three year rather than the six year statute of limitations applies. While recognizing that the plaintiff may well be basing his claim on the breach of a contractual relationship between guest and hotel, one is nonetheless constrained to agree with the majority if the policy behind the statute of limitations is taken into account: The prosecution of stale claims, long out of mind, is to be avoided; personal injury facts are legislatively presumed to be more susceptible to the caprices of memory and time than evidence of contract. Thus, in this action a contract must be proven but so must the claim of injury to the person, with all its difficulties of proof. Therefore, the shorter, not the longer, limitation period should apply. Furthermore, the advent of "fact pleading" has made the form of action irrelevant so far as the statute of limitations is concerned.

A Michigan statute[74] provides for a one year extension of the period of limitation if process is not served within that period by virtue of "any default or neglect of the officer to whom it is committed." In *Lacney v. Wells*[75] plaintiff's hopes of utilizing this section were dashed by his failure to establish by affidavit or otherwise why it took the sheriff sixty-five days after the return date to return the unserved summons or to take the steps available to him under Court

70. By statute a discontinuance or nonsuit may not be entered after the defendant enters upon his defense unless the defendant consents. Mich. Comp. Laws § 615.8 (1948), Mich. Stat. Ann. § 27.833 (1938). The language of the principal case seems to imply that the fact that the plaintiff has rested his case does not mean that the defendant has entered upon his defense. Cf. Honigman, Mich. Court Rules Annot. 426 (1949).

71. 362 Mich. 396, 107 N.W.2d 887 (1961).

72. Accord, R.J.A., § 5853.

73. 361 Mich. 68, 104 N.W.2d 787 (1960). See Coates v. Milner Hotel, Inc., 311 Mich. 233, 18 N.W.2d 389 (1945).

74. Mich. Comp. Laws § 609.19 (1948), Mich. Stat. Ann. § 27.611 (1938).

75. 362 Mich. 605, 107 N.W.2d 883 (1961).

Rule 15, section 2, to force the sheriff to return it. Thus, counsel are again warned[76] that the foregoing statute will only operate in their favor when they are not themselves chargeable with any of the neglect leading to the failure to make timely service.

One other case is worthy of note[77]: In *Klosky v. Dick*[78] the court held that the disability of a minor to sue is not removed when a guardian or next friend is appointed to sue on his behalf, but only when he reaches the age of twenty-one. Thus, a suit on a judgment which was rendered in his favor more than ten years before is not barred by the ten year statute of limitations which begins to run after the disability is removed, where less than ten years have elapsed since his twenty-first birthday.

Trial: Instructions to the Jury: In *Wright v. Delray Connecting R.R.*[79] a very large jury verdict for plaintiff was sustained when the court held it was not error for the judge to charge the jury that plaintiff, suing to recover for personal injuries, had already received workmen's compensation payments in a stated amount and would have to repay to the insurer the amounts so received out of any recovery from the defendant. By virtue of an agreement between them, both plaintiff's and defendant's counsel had, without objection, referred to the workmen's compensation payments in their statements to the jury, and the trial judge had instructed the jury that the receipt of such payments should not be considered in fixing liability. In view of the special circumstances just mentioned, this case should not be taken to support the proposition that it is proper in a personal injury case to mention in opening or closing arguments or otherwise that the workmen's compensation insurer has made payments to the plaintiff.

The opinion in *Martiniano v. Booth*[80] contains an excellent exposition of the duty of the judge presiding at a jury trial with respect to his instructions to the jury. Nothwithstanding Court Rule 37, section 9, which provides that "failure to instruct on any point of law shall not be ground for setting aside the verdict of the jury unless such instruction is requested," the judge must charge the jury as to the law governing the "substantial issues" even though no request is made. However, as to specific points and details the court rule applies; it is not error to exclude such details unless they are requested. Going one step further, even if a detailed charge is requested,

---

76. See Home Savings Bank v. Fuller, 299 Mich. 9, 299 N.W. 787 (1941).
77. See also Wells v. Detroit News, Inc., 360 Mich. 634, 104 N.W.2d 767 (1960) discussed supra, this article.
78. 359 Mich. 615, 103 N.W.2d 618 (1960).
79. 361 Mich. 619, 106 N.W.2d 247 (1960).
80. 359 Mich. 680, 103 N.W.2d 502 (1960).

the failure to give such charge will not constitute error if the attorney acquiesces by silence in the instruction actually given, especially where, as in this case, the attorney did not complain of the failure when the trial judge asked him if the instructions were satisfactory. Other, more familiar, points are also reviewed in the opinion, which should prove a useful reference for trial attornies and judges.

Another important ruling was handed down in *Bishop v. Plumb.*[81] There the plaintiff wife was suing to recover for injuries suffered while riding in a car driven by her husband which collided with defendant's automobile. By consent of the parties her suit was consolidated for trial with that of her husband. In his instructions to the jury the judge charged that the negligence of the husband could not be imputed to the wife. A subsequent jury verdict of $1,000 for the wife was overturned on her appeal on the ground that the judge should *also* have instructed the jury that the plaintiff wife was entitled to her full damages even if her husband was contributorily negligent. The failure to separate the question of the wife's damages, as well as her right to recover, from the husband's negligence constituted reversible error *even in the absence of a request to charge.*

The recurring question of when the rebuttable presumption of negligence raised by the "assured clear distance" rule is rebutted was raised again in *Garrigan v. LaSalle Coca-Cola Bottling Co.*[82] The majority held that the presumption can only be taken from the jury's consideration when there is, "at the very least, clear, positive and credible evidence opposing the presumption." Otherwise, the jury is to be "instructed to apply the presumption unless it finds from the evidence that the presumptioin has been rebutted." Mr. Justice Black concurred in reversing plaintiff's judgment arguing, as is his wont, that the court did not go far enough; that the presumption is only rebutted *as a matter of law* when reasonable minds can not fail to be convinced that there is no negligence. Otherwise, he would leave it to the jury to decide if the presumption has been rebutted. Dissenting Justices Carr, Kelly and Dethmers, however, urged that the presumption should fall as soon as credible evidence is introduced to explain the actual circumstances.[83]

Trial: Directed Verdicts and New Trials: The somewhat unusual procedure of directing a verdict for the party who has the burden of proving the decisive issue appeared in *Nabozny v. Hamil.*[84] There,

81. 363 Mich. 87, 108 N.W.2d 813 (1961).

82. 362 Mich. 262, 106 N.W.2d 807 (1961).

83. For a discussion of the ramifications of the principal case see Professor Quick's article on Evidence in this Survey.

84. 361 Mich. 544, 106 N.W.2d 230 (1960). See also Waltanen v. Wiitala, 361 Mich. 504, 105 N.W.2d 400 (1960) and Whitby v. Wiedeman, 362 Mich. 383, 107 N.W.2d 779 (1961).

the court, for the first time in its history,[85] upheld the directing of a verdict for the plaintiff on the facts in a negligence action. In Michigan the traditional rule, expressed by Mr. Justice Cooley in the leading case of *Wooden v. Durfee*,[86] has been that "evidence is for the jury, and the trial judge cannot draw conclusions from them. . . . A jury may disbelieve the most positive evidence, even when it stands uncontradicted; and the judge cannot take from them their right of judgment." *Nabozny* now substitutes a new rule: In all cases where the trial judge would have the power to set aside a verdict rendered against the party having the burden of proof and order a new trial on the ground that reasonable men could not disagree that the opposite verdict was called for, he may now direct a verdict. Thus, the jury never gets the opportunity to render the "unreasonable" verdict. This new rule has its good and bad aspects: On the one hand, the existence of insurance coverage in most negligence cases opens the door to possible collusion between the plaintiff and a defendant who may not himself have to pay the verdict. If the judge directs a verdict for the plaintiff he takes from the "hidden defendant" —the insurance company—the protection afforded by having the jury exercise its own opinion whether the evidence was contrived. It should be noted that the court made special mention in *Nabozny* of the fact that there was no issue of credibility in the case, thereby implying that if such an issue were raised the jury should still have the opportunity to pass on the evidence.[87] But, isn't the credibility of witnesses automatically an issue in every case where the verdict is grounded on the evidence and not the lack of it? On the other hand, the new rule recognizes that in the vast majority of the cases where a judge decides that a verdict is against the great weight of evidence, a new trial is just a waste of time; the retrial is a luxury which cannot be afforded if today's congested dockets are considered. Regardless of which aspect is deemed the more important, the fact remains that the new rule modifies the traditional right to trial by jury.

The impressive sum of $125,000 awarded to a fifty-two-year-old man completely disabled by the injury for which he sought recovery was held not to be excessive in *Wright v. Delray Connecting R.R.*[88] And in *Wycko v. Gnodtke*[89] the court refused to overturn a verdict of approximately $15,000 to parents for the negligently

85. See dissent of Mr. Justice Black, 361 Mich. at 545, 106 N.W.2d at 236, 237.

86. 46 Mich. 424, 9 N.W. 457 (1881).

87. The court has recently reaffirmed the rule that credibility of witnesses is a matter for the jury. Bridwell v. Segel, 362 Mich. 102, 106 N.W.2d 386 (1960).

88. 361 Mich. 619, 106 N.W.2d 247 (1960).

89. 361 Mich. 331, 105 N.W.2d 118 (1960).

caused death of their minor son.[90] In *Turner v. Cotham*,[91] however, the Supreme Court agreed with the trial judge that a verdict for plaintiff in the exact amount requested by the plaintiff's attorney, rendered after only four minutes of deliberation on the question of damages, should be set aside on the ground that it was obvious that the jury did not determine damages in accordance with the judge's charge.

Trial: Verdicts: At common law the jury, in order to protect itself from an attaint, could elect to return a special verdict, merely finding the facts, rather than a general verdict in which they applied the law to the facts. This election fell into desuetude, however, when the harsh remedy of attainder was abolished. Today, therefore, the jury must ordinarily return a general verdict unless specifically instructed to return a special verdict or to answer special questions. A recent case,[92] however, indicates that if the jury should return a special verdict along with its general verdict, *and if the losing party does not object*, the entire verdict will be effective. The jury's verdict was worded thusly: "Well, after due and careful consideration of all the facts we have gathered from the testimony on the witness stand, and court data furnished, we find no evidence of neglect on the part of the defendant . . . . Therefore, no cause for action." The Supreme Court held that since it was clear that the verdict was based on the absence of negligence, and not contributory negligence, an erroneous charge on the issue of contributory negligence could not have prejudiced the plaintiff. Thus, this hybrid verdict effectively limited the grounds on which plaintiff could appeal.

Relief from Judgment or Decree: In *Haenlein v. Saginaw Bldg. Trades Council*[93] the Supreme Court held that a defendant against whom a default decree has been rendered is not entitled to a rehearing on the grounds of lack of subject matter jurisdiction[94] when it is requested more than four months after the entry of the default. Defendants in their answer had alleged by way of conclusion and without supporting facts that exclusive jurisdiction of the cause was vested in the N.L.R.B. The trial court ordered the answer stricken unless an

90. Other cases in which the court refused to disturb the verdict because of excessiveness or inadequacy were Teller v. George, 361 Mich. 118, 104 N.W.2d 918 (1960) ($1,500 not inadequate); Parker v. Port Huron Hospital, 361 Mich. 1, 105 N.W.2d 1 (1960) ($20,000 not excessive) and Scho v. Socony Mobil Oil Co., 360 Mich. 353, 103 N.W.2d 469 (1960) ($50,000 not excessive).

91. 361 Mich. 198, 105 N.W.2d 237 (1960).

92. Termaat v. Bohn Aluminum & Brass Co., 362 Mich. 598, 107 N.W.2d 783 (1961).

93. 361 Mich. 263, 105 N.W.2d 166 (1960).

94. See discussion of the same case under the heading "Jurisdiction," supra this article.

amendment was filed, but defendants did not amend. Subsequently, after a hearing, a default decree was endered against the defendants. In refusing to grant the rehearing the court distinguished last year's case of *Moody v. Carnegie*,[95] where a decree was reopened after the four month period had expired, on the ground that the defendants in *Haenlein*, unlike the plaintiff in *Moody*, were not improperly deprived of their rights to appear and testify. Taken together these two cases leave the law in a curious posture: A perfectly valid decree may be reopened after the prescribed time for requesting a rehearing has passed if the aggrieved party can show that his own attorney has negligently or fraudulently permitted the entry of an unfavorable decree, but a decree which may actually be void for lack of subject matter jurisdiction cannot be reopened after the rule-prescribed period has elapsed if the aggrieved party had opportunity to contest jurisdiction at the original hearing.

Appellate Review: The court rules relating to appeals[96] optimistically require appellant to file an unbiased and non-argumentative statement of the facts of the case, "*both favorable and unfavorable*." (Emphasis added.) In addition, an appendix must be filed containing, among other things, "*all parts of the record which should be considered by the court in order to fairly judge the issues on appeal from the standpoint of both appellant and appellee*." (Emphasis added.) Whether out of penury, forced habit or ignorance, the files in an inordinate number of cases brought to the Supreme Court during the Survey period have not fulfilled these and other relatively simple requirements. The court's reaction has been swift and sure: summary dismissal or remand of the appeal and/or the imposition of heavy costs.[97]

---

95. 356 Mich. 434, 97 N.W.2d 46 (1959). Also see White v. Sadler, 350 Mich. 511, 87 N.W.2d 192 (1957); Miller & Wunsch, Civil Procedure, 1960 Survey of Mich. Law, 7 Wayne L. Rev. 7 at 28 (1960) and King & Wunsch, 1958 Survey of Mich. Law, 5 Wayne L. Rev. 175 at 184 (1958).

96. M.C.R. 67 and 68.

97. Harvey v. Lewis, 363 Mich. 232, 109 N.W.2d 143 (1961) (Briefs and appendices of appellants "stricken for gross violations" of M.C.R. 67. Appeal dismissed unless appellant complies with court rules.); Daley v. Gruber, 362 Mich. 366, 107 N.W.2d 209 (1961) (Insufficient testimony to enable court to determine whether findings were against the weight of evidence. Appellee awarded minimum bar rate for office work for 35½ hours spent augmenting appellant's appendix.); Templin v. Township of Nottawa, 362 Mich. 257, 106 N.W.2d 825 (1961) (Appellant's appendix omitted testimony. Appellee denied costs because he failed to object to appellant's appendix and to comply with appendix requirements of M.C.R. 68, § 6.); Dalenko v. Tucker, 362 Mich. 218, 106 N.W.2d 741 (1961) (Failure to include pleadings and too little testimony. Appeal dismissed.); Thomson v. City of Dearborn, 362 Mich. 1, 106 N.W.2d 129 (1960) (Failure to include answer and ordinances in appendix. Case remanded for investigation under M.C.R. 70, § 5.); Harden v. Widovich, 361 Mich. 422, 105 N.W.2d 224 (1960) (Insufficient testimony from record, brief omitted page reference to ap-

The statute[98] provides for the issuance of writs of error "of course" in certain cases involving more than $500 and for discretionary issuance of the writ in all other cases. In addition, it states: Provided, however, That if said case (ordinarily calling for discretionary issuance) involves a construction of the constitution or of any statute of this state, or any matters of great public importance or involves the contest of a will, such application need only show such fact and, when filed, the writ of error shall issue of course." However, Court Rule 60, which provides for appeals by leave and of course, makes no special provision for appeals of right in the four situations enumerated in the statute. In the interesting and noteworthy case of *American Eutectic Welding Alloys Sales Co. v. Grier*[99] the question was raised whether, under the terms of the statute, plaintiff was entitled as a matter of right to claim an appeal without leave from an interlocutory order denying his motion for summary judgment in a case of public importance involving the Constitution of the United States, to wit: Whether a judgment entered on an arbitration award in New York is entitled to full faith and credit in Michigan where defendant was not personally served with process but, under New York law, was deemed to have consented to jurisdiction by entering into a contract providing for arbitration in New York. The Michigan Supreme Court held that the denial of plaintiff's motion was not final and, therefore, that he was not entitled to appeal as of right. In dicta, however, the majority, through Mr. Justice Black, indicated that the court should not recognize the statutory grounds, enumerated above, as separate reasons for granting appeals as of right, for to do so would open the floodgate to appeals in which the raising of the statutory grounds might only be a device to secure automatic review. Furthermore, the court indicated that the word "application" in the statute requires that even if the statute is followed, the appellant must file an application (request leave) before the appeal will be granted.[100] Justices Edwards, Smith and Souris would have held that the court is required by the statute to grant the appeal as of right.

The troublesome question of what constitutes a final, as opposed to an interlocutory, decree was also raised in *Detroit Trust Co. v. Blakely*.[101] There a petition for an order requiring repayment of certain attorney's fees paid out of the corpus of a trust was brought

---

pendix and insufficient statement of facts. Appellee awarded minimum bar rate for 40 hours work.).

98. Mich. Comp. Laws § 650.1 (Supp. 1956), Mich. Stat. Ann. § 27.2591 (1943).

99. 363 Mich. 175, 108 N.W.2d 831 (1961).

100. See Honigman, Mich. Court Rules Annot. 165, 166 (Supp. 1959).

101. 359 Mich. 621, 103 N.W.2d 413 (1960).

in chancery on behalf of one beneficiary. The trial court held the payment to be proper and petitioner claimed an appeal as of right. The court held that the trial court's order upholding the validity of the payment was final and, therefore, appealable, and indicated that the matter may not be raised again when the trustees seek allowance of their accounts. As pointed out by the dissenters, Justices Black, Kavanagh and Souris, this decision seems to open the door to piecemeal litigation and appeal of the myriad minor questions which can arise in the enforcement of trusts under circumstances which do not conveniently afford opportunity for all interested parties to join in the proceedings.

In other cases touching on the matter of appellate review the court held (1) that the refusal of a judge in a divorce case to permit appellant to make a separate record of excluded testimony[102] was not error where the record did not show what was material was excluded and where counsel did not indicate what he expected to find or prove by such material;[103] (2) that a circuit court motion for a nunc pro tunc certificate of the trial judge that the controversy involves more than $500[104] was properly granted under the correcting power of the circuit court[105] where it was clear from the record that more than $500 was involved and where appellee did not object to appellant's failure to secure leave to appeal or file the certificate until appellant's brief had been filed in the Supreme Court; failure to file the certificate strictly in accordance with Court Rule 60, section 1(d) did not affect the Supreme Court's jurisdiction of the appeal;[106] (3) that the Supreme Court should not on appellant's motion add items to the record on appeal which were not before the trial judge and then reverse on the basis of these items[107] and (4) that the time limited for taking an appeal to the Supreme Court under Court Rule 57 does not commence to run until the order, judgment or decree to be appealed, whether it be separately prepared for filing or written into the journal, is actually signed by the judge "and that unless the circuit court journal entry clearly indicates the date of signature or unless a separate order of dismissal is signed and filed, it will not be presumed that the judge signed the journal entry on the date of decision."[108]

---

102. See Mich. Comp. Laws § 617.5 (1948), Mich. Stat. Ann. § 27.853 (1938).
103. Lazerow v. Lazerow, 362 Mich. 27, 106 N.W.2d 542 (1960).
104. See M.C.R. 60, § 1(d).
105. See M.C.R. 56, § 2.
106. Sweet v. Ringwelski, 362 Mich. 138, 106 N.W.2d 742 (1961).
107. Rene J. DeLorme, Inc. v. Union Square Agency, Inc., 362 Mich. 192, 106 N.W.2d 754 (1961) (By an equally divided court).
108. Grist v. Upjohn Co., 362 Mich. 470, 107 N.W.2d 763 (1961).

Declaratory Judgments: In a case of first impression in Michigan the Supreme Court held that a wife's suit to have her husband's Nevada divorce decree declared invalid constitutes an "actual controversy" and is, therefore, a proper subject for declaratory judgment.[109]

In *Taylor v. State*[110] the court decided that the declaratory judgment act[111] applies only to courts of general jurisdiction. Specifically, the Court of Claims has no jurisdiction to grant a declaration of rights, even if it be a court of record.[112] The decision was based on the somewhat tenuous theory that section two of the act provides that petitions for declarations of rights may be brought on either the law or equity side of the court, that the court of claims is a legislative court of limited jurisdiction which has no equity side and, therefore, that the act was not intended to apply to the court of claims.

---

109. Henry v. Henry, 362 Mich. 85, 106 N.W.2d 570 (1960).

110. 360 Mich. 146, 103 N.W.2d 769 (1960).

111. Mich. Comp. Laws § 691.501 et seq. (1948), Mich. Stat. Ann. § 27.501 (1938).

112. The act provides that "No action or proceeding in any court of record shall be open to objection on the ground that a merely declaratory judgment, decree or order is sought thereby."