> rantless search involves the greater sacrifice of Fourth Amendment values.
>
> The Fourth Amendment proscribes, to be sure, unreasonable "seizures" as well as "searches." However, in the circumstances in which this problem is likely to occur, the lesser intrusion will almost always be the simple seizure of the car for the period—perhaps a day —necessary to enable the officers to obtain a search warrant.[128]

The Court's majority, however, refused to make the potentially valuable distinction between search and seizure, stating: "For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment."[129] Nevertheless, Justice Harlan's logic appears irrefutable.

V. Conclusion

Probable cause is a requisite element which dominates the complex law of search and seizure. Since a suspicious object is often an important factor in determining the presence or absence of probable cause, a clear understanding of the nature and function of the suspicious object will assist greatly in assessing the validity of a given search or seizure. Proper application to search and seizure cases of the elementary principles governing the legal effect of suspicious objects could introduce a modicum of order into an otherwise chaotic area of jurisprudence.

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[128] *Id.* at 63.
[129] *Id.* at 52.

SURVEY OF IOWA LAW

CIVIL PROCEDURE

Jeff H. Jeffries†

Included in this broad Survey of Civil Procedure are cases decided by the Iowa supreme court during the year following September 1, 1970. Since procedure on the appellate level was exhaustively covered in a relatively recent article,[1] that area, with minor exceptions, will not be discussed. In addition, a prior Survey amply dealt with procedural considerations in the preservation of the trial record for purposes of appeal[2] and, again with minor exceptions, that aspect will not be considered. Rather, it is hoped that the following will provide an overview of the recent decisions, in conjunction with the Iowa Rules of Civil Procedure and recent amendments thereto, as each effects the instigation of lawsuits and their pre-trial pleading stage. In fact, those two stages, although practicably inseparable, provide convenient divisions for purposes of this Survey. A final division acts as a catch-all for those sundry decisions and rule changes which, although significant, are not conducive to being pigeon-holed.

I. Pre-Pleading Considerations—Who and When to Sue

In Iowa, a civil action is commenced by serving the defendant with an original notice.[3] Inaccurate drafting, particularly in original notices of suit, has been the basis of recent appeals in Iowa. Under the Iowa rules, the caption of an original notice must name the parties, and the notice must be "directed to the defendant."[4] Fatal defects are, of course, jurisdictional. *Engelson v. Mallea*[5] involved an action brought in Iowa by the mother of an illegitimate child under the Uniform Support of Dependents Act. The defendant was sued in a paternity suit in Minnesota under the name of Mallea. Although his name was Millea, he appeared in the Minnesota action, pursued it and was ordered to pay child support in the amount of $10.00 per week. He then moved to Iowa where he was named defendant in the instant suit for his failure to pay the support. The defendant was served personally under the name of Mallea and his special appearance, alleging misnomer, was overruled. The issue was whether the mistake in spelling of his last name was fatal as a procedural matter.

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† Member, Hopkins, Bump & Huebner, Des Moines, Iowa. B.A. Morningside College, J.D. Drake University, 1970. Member, Iowa State and American Bar Associations. —Ed.

1 Rendleman & Pfeffer, *Appellate Procedure and Practice*, 19 Drake L. Rev. 74 (1969).

2 Blackburn, *Civil Procedure*, 19 Drake L. Rev. 129 (1969).

3 Iowa R. Civ. P. 48.

4 Iowa R. Civ. P. 50.

5 180 N.W.2d 127 (Iowa 1970).

In Iowa, one who is sued under a misspelled name, but appears and defends, waives the defect.[6] Here, however, the defendant did specially appear. The Iowa court held that misnomers in constructive notice cases must be distinguished from those in actual notice cases. In the former, more strict compliance with the spelling of names is required. In the latter, the rule is that "where the real defendant is identifiable from the record before the court, or where it appears that the real defendant has actually been personally served, some variation in the name or error in an initial is not fatal."[7] In *Engelson* the court felt that the misspelling was not fatal and the special appearance was properly overruled.

The Iowa court was less sympathetic in *Hickman v. Hygrade Packing Co.*[8] Hygrade Food Products Corporation was a foreign corporation, qualified to do business in Iowa, with a process agent in Des Moines. It operated an establishment in Postville, Iowa under its corporate name. A truck mishap occurred on July 18, 1964, giving rise to the plaintiff's personal injury claim. On July 16, 1966, an original notice was served on the defendant's office manager in Postville, naming as defendant "Hygrade Packing company, Postville, Iowa." Defendant specially appeared on the ground that it had not been sued. Without serving another original notice, the plaintiff attempted to amend his original notice by changing the name of the defendant to Hygrade Food Products Corporation. The corporation then specially appeared as to the attempted amendment. A trial on the merits resulted in a verdict for the plaintiff and the defendant appealed. The issues presented were whether the misnomer was fatal, and, if so, whether the defect could be cured by an amendment. The court compared those cases in which the misnomer was "trivial" and not fatal and those where the misnomer was "so substantial as to void the notice" and opined that the instant case fell into the latter category.[9]

Faced with a situation where more than two years had passed since the accident, Hickman was forced to attempt to cure the defect by amending the initial notice rather than serving a subsequent notice. Since the original notice was void, the trial court did not have jurisdiction over the defendant. An amendment does not validate an otherwise void notice.[10] In reaching this conclusion, the court had to distinguish the *Hickman* case from *Thune v. Hokah Cheese Co.*[11] wherein the plaintiff was allowed to correct the misnomer.

In the *Thune* case, an individual did business as "Hokah Cheese Co." and the vehicle involved in the collision was registered in that name. The court there held that the defendant could not claim misnomer when he was sued under the very name by which he chose to call himself. The plaintiff was estopped from asserting a misnomer. Under such circumstances, the court does have

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6 Iowa R. Civ. P. 66, 104(a).
7 Engelson v. Mallea, 180 N.W.2d 127, 130 (Iowa 1970).
8 185 N.W.2d 801 (Iowa 1971).
9 *Id.* at 803.
10 Evans v. Ober, 256 Iowa 708, 129 N.W.2d 78 (1964).
11 260 Iowa 347, 149 N.W.2d 176 (1967).

jurisdiction of the defendant and an amendment is allowable to correct the defect.

The unfortunate element of the *Hickman* case is that the fatal misnomer deprived the plaintiff of his recovery. The obvious solution is for the plaintiff's attorney not to wait until the statute of limitations has almost expired before commencing his action so that possible defects can be corrected and, if necessary, a new notice can be served within the statutory period. Certainly this is not always possible, but where exigencies exist, the plaintiff's attorney is well advised to exhaust all avenues to ascertain the proper name under which the defendant can be sued.

The tort of interference with business relationships, as a distinct wrong, is fairly new in the law but is recognized in most jurisdictions, including Iowa.[12] Which statute of limitations applies to this particular tort was the salient issue in *Clark v. Figge*.[13] The dispute was whether or not the claim was founded on an injury "to relative rights," maintainable within two years,[14] or one founded on an injury "to property," maintainable within five years[15] after the cause accrues. The court held that the right to pursue a lawful business is a proprietary right and that the applicable period is five years.

The Iowa supreme court has also been called upon to construe and apply the limitation and notification section of the Iowa law subjecting municipalities to tort liability. Iowa Code § 613A.5 provides in pertinent part as follows:

> Every person who claims damages from any municipality for or on account of any wrongful death, loss or injury within the scope of section 613A.2 shall commence an action therefor within three months, unless said person shall cause to be presented to the governing body of the municipality within sixty days after the alleged wrongful death, loss or injury a written notice stating the time, place, and circumstances thereof and the amount of compensation or other relief demanded. . . . The time for giving such notice shall include a reasonable length of time, not to exceed ninety days, during which the person injured is incapacitated by his injury from giving such notice.[16]

Sprung v. Rasmussen[17] was an action by a minor student in the Riceville Community School District for injuries arising out of the performance, under the school teacher's supervision, of a tumbling exercise on February 14, 1968. The action was brought by the minor's father as next friend. The minor plaintiff was allegedly incapacitated as a result of the injuries until May 11, 1968, 87 days after the accident. On June 29, 1968, 136 days after the accident, notice of the injuries was directed to the President of the Board of Education of Riceville Community School District and on October 15, 1969, a petition was filed on the student's behalf. The School District moved to dismiss for failure of either the

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12 Clark v. Figge, 181 N.W.2d 211 (Iowa 1970).
13 *Id.*
14 IOWA CODE § 614.1(2) (1971).
15 *Id.* § 614.1(4).
16 *Id.* § 613A.5. *See* Vermeer v. Sneller, 190 N.W.2d 389 (Iowa 1971) which held that the notice requirement does not apply to an employee of a municipality when sued individually for his negligent acts; and that notice to the municipality's insurance agent was "substantial compliance" with § 613A.5.
17 180 N.W.2d 430 (Iowa 1970).

minor or his next friend to give timely notice in compliance with the above statute.

The court first held that the requirement for notice did not rest with the father as next friend of the minor since the court has said on occasion that a next friend is not a party in interest but is merely one who advances the minor's cause in the absence of a guardian.[18] However, the court did say that such notice, if given by the next friend, would be sufficient to comply with the statute. The salient issue was whether the 90-day incapacitation period merely merged with and extended the 60-day period to 90 days overall or whether the 90-day period is provided in addition to the 60-day period.

The court held that:

> A literal reading of the questioned sentence leads us to the conclusion that it was the intent of the legislature to permit an injured party to defer the service of the 60 day notice of loss or injury for a period of 90 days or such shorter period as the injured party might be incapacitated by his injury from giving such notice. This interpretation would afford a person claiming damages from any municipality for or on account of loss or injury if incapacitated 90 days a maximum period of 150 days before service of notice would be required.[19]

Thus, an injured person has 60 days for the service of notice upon a municipality of his loss or injury following the termination of his incapacity. However, that period of incapacity cannot exceed 90 days and the longest period within which an injured party has to serve notice is 150 days regardless of the length of the incapacitation.

What happens if the possible claim against the municipality is contingent upon another matter which is not initiated within the 60-day period? In *Boyle v. Burt*,[20] a plaintiff administrator brought action against the defendant for damages resulting from the automobile accident death of his decedent on May 23, 1968. The defendants impleaded and by cross-petition sought contribution or indemnity from the City of Iowa City. Defendant Iowa City moved to dismiss the cross-petition on the ground that no claim notice was given to the municipality within 60 days after the accident as required in Iowa Code § 613A.5. The motion was overruled and the City took interlocutory appeal. A divided supreme court reversed, holding that the failure of the defendant, Burt, to give claim notice to the municipality within 60 days after the accident precluded recovery of contribution or indemnity from the City. This is so even though the one seeking contribution was not sued within 60 days after the accident. The *Boyle* decision requires individuals, insurance companies, their agents and attorneys to exercise a good deal of foresight when an incident under consideration may give rise to municipal liability, either direct or contingent. The notice requirement is not onerous and can be easily complied with.

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18 In re Estate of Beghtel, 236 Iowa 953, 20 N.W.2d 421 (1945).
19 Sprung v. Rasmussen, 180 N.W.2d 430, 433 (Iowa 1971).
20 179 N.W.2d 513 (Iowa 1970).

Despite the ease of compliance, the Iowa supreme court in *American States Insurance Co. v. City of Dubuque*[21] held insufficient notices of two insurance companies entitled "Notice of Subrogation Interest and Lien" for their failure to specify the circumstances of the loss. The notices did nothing more than alert the municipality to the subrogation interests of some insurance companies. The form notices of subrogation interests, accepted between various insurance companies, should not be thought of as panaceas outside the confines of the industry.

II. Pleading Stage

The function of a pleading is to put the other party on notice of what the pleader intends to prove and define the issues to be ultimately decided.[22] Too often attorneys, recognizing the liberal attitude of the courts in allowing amendments, do not exercise sufficient care in drafting their pleadings. Certainly, it is inadvisable to summarily admit and deny allegations in the pleadings which may possibly raise issues of fact at a later period. *Welter v. Heer*[23] was an action in equity to enforce a mechanics lien for work peformed in remodeling the defendant's residence. In their petition, the plaintiffs alleged that an oral contract for the performance of the remodeling work was entered into by the parties. The defendants admitted this allegation, although the overall agreement left undecided many of the terms under which the work was to be performed, including the specifications and plaintiff's compensation for work admittedly done. The existence of the contract being admitted, and the parties being bound by their pleadings, the court merely found that the law implies a promise to pay a reasonable value of the services rendered and affirmed the trial court's finding of the amount of the compensation.

Roth v. Bluffs City Motors, Inc.[24] was a suit to recover money allegedly owed for materials furnished and services performed. The plaintiff's verified petition alleged an open account and attached a bill of particulars. The defendant admitted that the plaintiff performed services and furnished certain materials but denied that the bill of particulars was a true and correct statement thereof and, further, stated that "there are a number of items remaining to be done and performed by plaintiff as part of his agreement, which he has not performed or supplied."[25] The defendant further denied that the prices fixed were reasonable and that no part of the balance had been paid. At the trial, the plaintiff moved for a judgment on the pleadings, which motion was overruled. Upon appeal, the Iowa supreme court held that although the defendant admitted that goods and services were furnished, its answer sufficiently raised other issues to be resolved by the evidence.

Modern rules of pleading and discovery encourage full disclosure of legal

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21 186 N.W.2d 601 (Iowa 1971).
22 Hanson v. Lassek, 261 Iowa 707, 154 N.W.2d 871 (1967).
23 181 N.W.2d 134 (Iowa 1970).
24 186 N.W.2d 634 (Iowa 1971).
25 *Id.* at 635.

and factual issues prior to trial and militate against the element of surprise. The pleadings are intended to provide a cursory preview of what can be expected at trial. On occasion, there are variances between pleadings and proof. *Thomas v. Blecker*[26] involved a contention that there was a fatal variance between the pleading and the proof under rule 106. This was an action to recover money loaned on an oral agreement. The defendant objected to the plaintiff's testimony that the money was to be repaid in monthly amounts, arguing that this was not pled and, therefore, the evidence to that effect was inadmissible for the reason that it varied from the pleadings. Courts are not inclined to look with favor upon a contention of a fatal variance under rule 106 unless the complaining party establishes convincingly that he was misled to his prejudice in maintaining his cause of action or defense.[27]

In the *Thomas* case, the court tacitly acknowledged some variance between plaintiff's allegations and proof. However, the court reasoned, since a reasonable time for repayment of the loan must be implied and the action was brought more than three years after the loan was made, reasonable time had expired and the testimony concerning the monthly repayment was not prejudicial to the defendant. This would seem to be an indication that the court will look hard to find that a variance is not prejudicial. Nonetheless, trial counsel is well-advised to voice an objection when there is a variance between the pleading and proof. It is generally held that where the parties proceed, without objection, to try an issue not specifically pled, it amounts to consent to try such issue and same is then rightfully in the case.[28]

As earlier expressed, the Iowa courts take a liberal attitude towards the allowance of amendments to pleadings. It is often said that to allow an amendment is the rule and to disallow same is the exception.[29] In *Lewis v. Buena Vista Mutual Insurance Association*,[30] the Iowa supreme court had a recent opportunity to reiterate this attitude as well as to consider the frequently utilized motion in limine. The *Lewis* case involved an action by an insured against her insurance company for the payment under the policy for the destruction by fire of her house and its contents. The defendant intended to rely upon the defense of arson but its pleadings up until the time of trial only alluded generally to that defense. At the time of trial, plaintiff moved in limine to prohibit defendant from referring to arson at the trial and moved to strike a second amendment to defendant's answer filed on that same day alleging that the fire was "of incendiary origin and that arson was committed by the plaintiff or others working in concert with her, and that her right to recover under said policy is thereby barred."[31] The trial court sustained the motion in limine and struck the defendant's second amendment.

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26 181 N.W.2d 129 (Iowa 1970).
27 Sanford v. Luce, 245 Iowa 74, 60 N.W.2d 885 (1953).
28 Reed v. Harvey, 253 Iowa 10, 110 N.W.2d 442 (1961).
29 Townsend v. Mid-America Pipeline Co., 168 N.W.2d 30 (Iowa 1969).
30 183 N.W.2d 198 (Iowa 1971).
31 *Id.* at 200.

one party maintains a claim controverted by an adverse party."[46] Since a special appearance is not a pleading under rule 68, no issues were yet raised by the pleadings upon which a trial could be had, and, therefore, the plaintiff's dismissal came "before trial has begun."[47] The import of the court's holding would seem to be that once responsive pleadings have been filed, any dismissal thereafter would be governed by rule 217 and would operate as an adjudication on the merits unless otherwise specified.

The 61st General Assembly amended rule 215.1 by providing that the trial court has the discretion to reinstate any action which has been dismissed by the Clerk of Court upon an application, filed within six months from the date of the dismissal, showing that the dismissal was the result of "oversight, mistake or other reasonable cause."[48] Without a proper continuance, it has been held that the dismissal of a case that has been noted for trial or dismissal is mandatory and automatic.

The Iowa supreme court had its first opportunity to discuss the trial court's discretion in reinstating a dismissed action in *Johnson v. Linquist.*[49] Following notice to the parties under rule 215.1, a continuance was granted and a trial date certain was set for February 11, 1969. On that date, a judge was unavailable and it was decided that a later date would be fixed. On May 13, 1969, the defendant filed a motion to dismiss the cause under rule 215.1. The plaintiff, who did not immediately receive a notice of the defendant's motion to dismiss, nevertheless filed a timely motion to reopen the case and to reinstate the action. The trial court overruled both motions stating that " 'the Rule is mandatory and automatic, entitling the defendants to a dismissal without prejudice as a matter of right, and the court is without discretion as to the matter of dismissal.' . . . It is, *therefore* ordered by the Court that the Motion to Reopen and *Application to Reinstate Action* filed herein by the plaintiff be and the same are hereby *overruled.*"[50] This statement, plus the absence in the trial court's order of any reasons given for rejecting the grounds for reinstatement urged by the plaintiff, led the supreme court to believe that the trial court had "jumped in its reasoning from the valid premise that dismissal is mandatory to the erroneous conclusion that there is no discretion in the court to reinstate."[51] The case was reversed and remanded for the reason that the trial court erred in not exercising the discretion which rule 215.1 requires when there is a timely application to reinstate.

Rule 236 of the Iowa Rules of Civil Procedure allows a party to move for the setting aside of a default judgment not more than 60 days after the entry of a judgment and grants the court the power to set aside a default "for mistake,

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46 Iowa R. Civ. P. 176.
47 Trenery v. Winberg, 186 N.W.2d 636, 638 (Iowa 1971).
48 Iowa R. Civ. P. 215.1.
49 184 N.W.2d 681 (Iowa 1971).
50 *Id.* at 683.
51 *Id.*

inadvertence, surprise, excusable neglect or unavoidable casualty."[52] In *Hannan v. Bowles Watch Band Co.*,[53] suit was filed under the nonresident motorist statute against the defendant foreign corporation. Notice was received by certified mail on September 30, 1969, and was sent by the defendant to the claims supervisor of its insurer on October 6, 1969. The supervisor failed to complete what is known as a set-up sheet and thus no action was started on the defendant's defense. On December 3, 1969, 64 days after service of notice was perfected, a default was entered against the defendant. The defendant was notified thereof on December 31, 1969, at which time it promptly asked its attorney to move to set the default aside and the same was set aside on January 5, 1970. The trial court found that the insurance carrier was guilty of "inexcusable negligence" but not "gross neglect or willful procrastination" and, therefore, set the default judgment aside.

The Iowa supreme court affirmed but disagreed with the trial court that large organizations, including insurance companies, are entitled to special treatment which requires the finding of gross neglect or willful procrastination as opposed to inexcusable negligence. Nevertheless, the court felt that the evidence supported only a finding of negligence and not a finding of inexcusable neglect. Permeating this decision is the professed principal that the purpose of rule 236 "is to allow determination of a controversy on its merits, rather than on the basis of non-prejudicial inadvertence or mistake."[54] Thus, absent a finding of inexcusable neglect, and with "at least a prima facie showing of meritorious defense,"[55] the default judgment should be set aside and the case heard on its merits.

Another plaintiff was successful in convincing the court that a default should be set aside in *Theis v. James*,[56] an action at law on a check given by the defendant and payable to the plaintiff. After some preliminary motions, the plaintiff amended his petition on September 30, 1969. On October 7, 1969 (the last date to move or plead), the court received a telephone call from the defendant, an Illinois attorney licensed to practice in Iowa. The defendant was advised that if a motion or pleading were placed in the mail that same day, a default would not be entered. Rather than mailing a pleading or motion at that time, the defendant decided to wait the two days it would take same to reach the Wayne County Court House by mail and drive to the court house on the third day, personally filing the motion or pleading. Finding the court house closed on that third day, the defendant placed a motion for cost bond in the mail in Corydon, Iowa. On October 14, 1969, the plaintiff filed a combined motion to strike defendant's motion and for default, which defendant resisted. On December 24, 1969, the court sustained the motion to strike and entered the default.

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52 IOWA R. CIV. P. 236.
53 180 N.W.2d 221 (Iowa 1970).
54 *Id.* at 222.
55 *Id.* at 224.
56 184 N.W.2d 708 (Iowa 1971).

Of course, an order finding defendant in default is erroneous and must be set aside when there are pending motions on file.[57] In the *Theis* case, the trial court sustained the motion to strike and entered a default on the same day. The supreme court held that "[w]here the action taken leaves a party with no papers on file and judicially recognized, the party must be afforded 7 days (or less if specifically ordered by the court under Rule 85(e)) to move or plead as required by rules 85 and 86, Rules of Civil Procedure."[58] Thus, the entry of a default judgment within seven days following the sustaining of the motion to dismiss was erroneous and the default judgment should have been set aside.

Recent changes by the 63rd General Assembly in two rules of civil procedure affect the trial and possible appeal of relatively small claims. When the pleadings show that the amount in controversy is less than $1,000, no court reporter is provided unless the party who desires one pays in advance of trial the taxable fee of the reporter for one day.[59] Previously, the amount in controversy had only to exceed $300.[60] Of course, a reporter is necessary to preserve the record should either party anticipate appealing from an adverse judgment. Further, the amount in controversy directly affects the jurisdiction of the Iowa supreme court. Except where an interest in real estate is involved, no appeal can be taken unless the amount in controversy, as shown by the pleadings, is $1,000 or more or unless the trial judge certifies within 30 days after the judgment or order is entered that the cause warrants an appeal.[61] Again, this amount was raised from $300.[62] Assuming that the heavy appellate caseload precipitated these changes, it is submitted that, absent novel legal issues, trial court certification would be the exception and not the rule.[63]

In two recent cases, the Iowa supreme court has relied upon rule 333 in dismissing the appeals for want of jurisdiction. *Liberty Loan Corp. v. Fassbinder*[64] was an action on a promissory note for $962.46 plus interest. Although the court did not have to reach the issue of whether the interest requested is added in determining the amount in controversy,[65] the court did hold that costs are not to be considered and dismissed the appeal.

Benttine v. Jenkins Truck Lines, Inc.[66] presented a more difficult set of facts. Plaintiff had leased a truck to the defendant. The truck was damaged through the negligence of a third party. Plaintiff sued the defendant for $974.69

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[57] Pedersen v. Thorn, 258 Iowa 250, 137 N.W.2d 588 (1961).
[58] Theis v. James, 184 N.W.2d 708, 710 (Iowa 1971).
[59] IOWA R. CIV. P. 178.1.
[60] IOWA R. CIV. P. 178.1 (1966). Rule 196 was also changed to increase from $300 to $1,000, the amount below which the court's instructions to the jury need only be oral. IOWA R. CIV. P. 196.
[61] IOWA R. CIV. P. 333.
[62] IOWA R. CIV. P. 333 (1966).
[63] *But see* Farm Service Co. v. Askeland, 169 N.W.2d 559 (Iowa 1969).
[64] 176 N.W.2d 158 (Iowa 1970).
[65] The consideration of interest is discussed in *Yost v. Gadd*, 227 Iowa 621, 288 N.W. 667 (1939).
[66] 182 N.W.2d 374 (Iowa 1970).

due under the lease and the defendant counterclaimed for $6,920.79 under the hold harmless clause in the lease. Prior to trial the defendant stipulated that it owed the $974.69 and that all claims comprising the $6,920.79 counterclaim had been paid by the third party except a disputed item for attorney's fees in the amount of $892.15. Following the trial, the court allowed the entire amount of the requested attorney's fees as a set-off against the amount due under the lease and entered a judgment in favor of the plaintiff for the difference, $82.54. Plaintiff, unhappy with the amount of attorney's fees allowed the defendant, appealed without certification of the trial court.

In dismissing the appeal the court noted that, although the face of the pleadings indicated an amount in excess of $1,000, in light of the stipulation, no amount in excess thereof was actually in controversy. "The real test, as we have said several times, is this: could the trial court enter judgment against any party for more than the jurisdictional minimum? If not, the appeal must fail."[67]

A procedural short-cut in the litigation process is provided by rule 237 of the Iowa Rules of Civil Procedure. Motions for summary judgment made thereunder are appearing more frequently. Either party may move for summary judgment, with or without supporting affidavits, at any time in the case of the defending party,[68] or after the appearance day in the case of the claimant.[69] Summary judgment may be granted on one or more elements of the case, leaving the remaining elements to the trier of fact. In considering a motion for summary judgment, it is the obligation of the trial court to "examine the entire record before it, including the pleadings, admissions, depositions, answers to interrogatories, and affidavits, if any, to determine for itself"[70] whether there is a genuine issue of material fact. The court is not at liberty to anticipate what the evidence may show at time of trial. Thus, the parties in their motion or resistance should consider the use of factual affidavits or discovery to support their position that a genuine issue of fact exists or does not exist. A material fact that may escape the attention of counsel is the credibility of an opposing witness. If this issue exists it must be brought to the court's attention.[71]

While the Iowa supreme court seems to encourage summary judgments, the most recent decisions indicate an inclination towards finding that an issue of fact exists. In *Northwestern National Bank v. Steinbeck*,[72] the court set aside a summary judgment because defendant's answer to an interrogatory, if found to be true, would void her signature and constitute a valid defense to the cause

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67 *Id.* at 376.
68 IOWA R. CIV. P. 237(b).
69 IOWA R. CIV. P. 237(a).
70 Northwestern Nat'l Bank v. Steinbeck, 179 N.W.2d 471, 476 (Iowa 1970).
71 "With credibility a vital factor, plaintiff is entitled to a trial where the jury can observe the witnesses while testifying. Plaintiff must not be deprived of the invaluable privilege of cross-examining the defendant—the 'crucial test of credibility'—in the presence of the jury." Arnstein v. Porter, 154 F.2d 464, 469 (2nd Cir. 1946).
72 179 N.W.2d 471 (Iowa 1970).

of action. Likewise, in *Sherwood v. Nissen*,[73] an action on an oral contract for conservation work done on a farm, the court found that the defendant's affidavit, although of a conclusory nature, raised issues as to the authority of the person who engaged plaintiff's services and the reasonable value of the work done. It should be emphasized that supporting affidavits must contain facts based upon personal knowledge and not mere conclusions.

The Iowa supreme court again set aside a summary judgment in *Continental Illinois National Bank & Trust Co. v. Security State Bank*.[74] There, plaintiff bank sued on a note and guarantee of a loan, its participation in which was claimed to have been fradulently procured. Summary judgment was granted over defendant's resistance. In reversing, the appellate court held that there was a genuine issue as to the plaintiff's status as a holder in due course. This was so even though that issue was not specifically pled. "[W]here an action upon a negotiable instrument is brought and defendant effectively asserts any recognized legal defense thereto it is generally understood the determination as to whether plaintiff qualifies as a holder in due course is then ordinarily a fact issue."[75]

Finally, in *Bass v. Iowa Public Service Co.*,[76] the Iowa court held that motions for summary judgment are not automatically set for hearing by the procedural rule relating to disposition of motions.[77] Rather, such motions must be specifically set for a time not less than 10 days from date of filing.

III. Bits 'N Pieces

Several other decisions dealing with various procedural problems have been handed down by the Iowa supreme court. Chapter 516 of the Iowa Code requires that all liability policies issued in the State of Iowa must contain a provision allowing a judgment creditor, with an unsatisfied judgment against an insured, to have the same right of action against the insurer as its insured would have had had the insured paid the judgment.[78] This statute is commonly referred to as the "direct action" statute,[79] and requires the judgment creditor to bring the action within 180 days after the judgment is entered.[80]

The exclusivity of the direct action statute was the central issue in *Steffens v. American Standard Insurance Co.*[81] There, a passenger initially brought an action against his host driver as an individual. A judgment was recovered against the defendant, but was unsatisfied. The judgment debtor's cause of action against his insurance company was levied on and sold to the plaintiff at a sheriff's sale. The plaintiff, in turn, then brought this action against the in-

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73 179 N.W.2d 336 (Iowa 1970).
74 182 N.W.2d 116 (Iowa 1970).
75 *Id.* at 118.
76 184 N.W.2d 691 (Iowa 1971).
77 Iowa R. Civ. P. 117(a).
78 Iowa Code § 516.1 (1971).
79 Steffens v. American Standard Ins. Co., 181 N.W.2d 174, 175 (Iowa 1970).
80 Iowa Code § 516.3 (1971).
81 181 N.W.2d 174 (Iowa 1970).

surer of the original judgment debtor. The trial court sustained the defendant's motion to dismiss on the grounds that the Iowa direct action statute was plaintiff's exclusive remedy and plaintiff did not sue the defendants within the 180 days required by that statute.[82]

The Iowa supreme court reversed. In doing so, it distinguished between indemnity policies and liability policies. In the former, the insurer promises to make payment after the insured has paid the injured third person. In the latter the insurer promises to make payment when the insured becomes legally liable to its insured upon a judgment being rendered in favor of a third person and against the insured. Since this is a debt owed to the insured, a cause of action against the insurer arises and a third person (judgment creditor) is entitled to execute upon this cause of action pursuant to Iowa Code § 626.21.[83]

The Iowa supreme court went on to hold that the enactment of the direct action statute was not intended "to cut down the rights of third persons," nor was it enacted "because third persons were without a remedy in the liability insurance situation, for they could reach the insurer by use of the procedural tools already enumerated [Iowa Code § 626.21]."[84] Rather, it was enacted to provide relief to the third person in the indemnity insurance situation, and thus it was not an exclusive remedy in an instance, such as the *Steffens* case, where the policy was clearly of the liability type.

The 63rd General Assembly made a significant change in rule 123 of the Iowa Rules of Civil Procedure relating to interrogatories. Previously the party to whom the interrogatories were directed was required to file answers or objections within seven days after they were filed.[85] Theoretically, failure to comply is grounds for dismissal.[86] As a result of the 1970 amendment, the time within which to answer has been enlarged to fourteen days, "unless the court for good cause, but not ex parte, shall enlarge the time."[87]

IV. Conclusion

Procedure exists primarily to implement substantive rights. It should give all the parties to a dispute the feeling that they are being fairly dealt with, and that each is given a reasonable chance to present his side before an impartial and not too inconvenient forum. Procedure must serve the cause of administrative efficiency and yield a final and lasting adjudication so that people may enjoy the optimum of security and repose after their respective victories or losses. Finally, lawyers have a duty, within the boundaries of professional courtesy, to insure that those objectives are attained through strict compliance with procedural mandates.

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82 *Id.* at 175.
83 "Judgments, money, bank bills, and other things in action may be levied upon, and sold or appropriated thereunder . . . ." Iowa Code § 626.21 (1971).
84 Steffens v. American Standard Ins. Co., 181 N.W.2d 174, 177 (Iowa 1971).
85 Iowa R. Civ. P. 123 (1966).
86 Iowa R. Civ. P. 216.
87 Iowa R. Civ. P. 123.

IOWA TAX LAW AND PROCEDURE—1971

Edward R. Hayes†

One major concern of the 1971 Iowa legislature was the financing of the several public school systems of the state. This resulted in a so-called "property-tax freeze," an attempt to prescribe a ceiling for increases in school costs, combined with an increase in income tax rates to finance additional state aid to schools and other state expenditures, and the authorization of a local income tax for some school financing. Many other changes in tax laws were adopted, among the more important being significant changes in inheritance tax procedures. The supreme court decided four tax cases in the period covered by this Survey (October 1970 through September 1971); several others are pending. A number of opinions from the Attorney General round out current developments in this area.

I. Preparation and Confidentiality of Returns

Concern that information gleaned while preparing tax returns for others might improperly be disclosed led to subjecting that conduct to criminal penalties. Although the chapter heading in the session laws is "Income Tax Returns Prepared—Confidential," the statute is not limited to income tax returns; it penalizes disclosure of information obtained while in the business of preparing or assisting in preparing "a tax return" of another.[1] A "return" includes "any federal, state, or local form required to be filled out, by or for a taxpayer, incident to the collection or refund of a tax."[2] The act defines "in the business of preparing income tax returns" and also "assisting in preparing of returns"; both include advertising or publicizing, preparing or assisting in preparing, or in doing so for compensation.[3] Disclosure may be made without violating the act if authorized by law or by court order, if necessary to the preparation of the return, or if authorized by the taxpayer in writing in a separate document.[4]

The confidentiality provisions of the Motor Fuel Tax[5] were amended to enlarge the category of state officers to whom disclosure of information in returns may be made by Revenue Department personnel. Added were legislators, legislative committees, and representatives of the state having responsibilities in collecting the tax involved or in proceedings brought under the Fuel Tax Act.[6]

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† Professor of Law, Drake University Law School—Ed.

1 Ch. 214 [1971] Iowa Acts 431.

2 *Id.* § 1(2).

3 *Id.* § 3.

4 *Id.* § 2. The penalty for violation may be a fine of not more than $10,000, or imprisonment in the county jail for not more than one year, or both. *Id.* § 4.

5 Iowa Code § 324.62 (1971).

6 Ch. 192 [1971] Iowa Acts 406.